DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-307
Vide 12-63
Title: United States, Petitioner
v.
Edith Schlain Windsor, in Her Capacity as Executor of the Estate of Thea Clara Spyer, et al.
Docketed: September 11, 2012
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (12-2335, 12-2435)
Decision Date: October 18, 2012
Rule 11

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Sep 11 2012	Petition for a writ of certiorari before judgment filed. (Response due October 11, 2012)
Sep 18 2012	Order extending time to file response to petition to and including October 19, 2012, for all respondents.
Oct 10 2012	Brief of respondent Edith Schlain Windsor, in Her Capacity as Executor of the Estate of Thea Clara Spyer in opposition filed.
Oct 18 2012	Judgment entered by the United States Court of Appeals for the Second Circuit.
Oct 19 2012	Brief of respondent Bipartisan Legal Advisory Group of the United States House of Representatives in opposition filed.
Oct 26 2012	Supplemental brief of petitioner United States filed.
Oct 29 2012	DISTRIBUTED for Conference of November 20, 2012.
Oct 29 2012	Supplemental brief of respondent Edith Schlain Windsor, in Her Capacity as Executor of the Estate of Thea Clara Spyer filed. (Distributed)
Nov 1 2012	Supplemental brief of respondent Bipartisan Legal Advisory Group of the United States House of Representatives filed. VIDED. (Distributed)
Nov 8 2012	Reply of petitioner United States filed. (Distributed)
Nov 13 2012	DISTRIBUTED for Conference of November 30, 2012.
Dec 3 2012	DISTRIBUTED for Conference of December 7, 2012.
Dec 7 2012	Petition for a writ of certiorari GRANTED. In addition to the question presented by the petition, the parties are directed to brief and argue the following questions: Whether the Executive Branch□s agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case; and whether the Bipartisan Legal Advisory Group of the United States

	House of Representatives has Article III standing in this case.
Dec 11 2012	Vicki C. Jackson, Esq., of Cambridge, Massachusetts, is invited to brief and argue this case, as amicus curiae, in support of the positions that the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case, and that the Bipartisan Legal Advisory Group of the United States House of Representatives lacks Article III standing in this case.
Dec 13 2012	Briefing proposal of the parties and Court-appointed amicus curiae filed.
Dec 14 2012	Upon consideration of the letter of December 13, 2012, from the Solicitor General on behalf of the litigants and the amicus curiae invited to brief and argue this case, the following briefing schedule is adopted. On the merits, the brief of the Bipartisan Legal Advisory Group of the United States House of Representatives, not to exceed 15,000 words, is to be filed on or before Tuesday, January 22, 2013. The brief of the Solicitor General, not to exceed 15,000 words, is to be filed on or before Friday, February 22, 2013. The brief of Edith Windsor, not to exceed 15,000 words, is to be filed on or before Tuesday, February 26, 2013. The reply brief of the Bipartisan Legal Advisory Group of the United States House of Representatives, not to exceed 6,000 words, is to be filed in accordance with Rule 25.3 of the Rules of this Court. On the jurisdictional questions, the brief of the Court-appointed amicus curiae, not to exceed 10,000 words, is to be filed on or before January 22, 2013. The briefs of the Solicitor General, the Bipartisan Legal Advisory Group of the United States House of Representatives, and Edith Windsor, not to exceed 10,000 words each, are to be filed on or before Wednesday, February 20, 2013. Reply briefs of the litigants and the Court-appointed amicus curiae, not to exceed 4,000 words, are to be filed in accordance with Rule 25.3 of the Rules of this Court.
Dec 14 2012	Other amici curiae briefs shall be filed within the time allowed under Rule 37.3 (a) of the Rules of this Court, except that amici curiae briefs on the merits in support of the positions of the Solicitor General and/or Edith Windsor shall be filed within 7 days after the brief of the Solicitor General on the merits is filed. The litigants, Court-appointed amicus curiae, and other amici curiae shall indicate on the cover of each brief filed which issue or issues are addressed in that particular brief in addition to the information required by Rule 37.3 of the Rules of this Court.
Jan 2 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent Bipartisan Legal Advisory Group of the U.S. House of Representatives.
Jan 7 2013	SET FOR ARGUMENT ON Wednesday, March 27, 2013
Jan 8 2013	The time to file the brief, on the jurisdictional questions, of the Court-appointed amicus curiae is extended to and including January 24, 2013.
Jan 8 2013	The time to file the briefs, on the jurisdictional questions, of the Solicitor General, the Bipartisan Legal Advisory Group of the United States House of Representatives, and Edith Windsor, is extended to and including February 22, 2013.
Jan 10 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jan 22 2013	Joint appendix filed. (Distributed) (Statement of costs received.)
Jan 22 2013	Brief of respondent Bipartisan Legal Advisory Group of the United States House of Representatives (Merits) filed. (Distributed)

Jan 23 2013	CIRCULATED.
Jan 24 2013	Brief amicus curiae of Court-appointed amicus curiae (Jurisdiction) filed. (Distributed)
Jan 24 2013	Brief amicus curiae of Family Research Council (Merits) filed. (Distributed)
Jan 24 2013	Brief amicus curiae of Dr. Paul McHugh (Merits) filed. VIDED. (Distributed)
Jan 24 2013	Brief amici curiae of Law Professors (Merits) filed. (Distributed)
Jan 24 2013	Brief amicus curiae of National Organization for Marriage (Merits) filed. (Distributed)
Jan 25 2013	Brief amicus curiae of Westboro Baptist Church in support of neither party (Merits) filed. (Distributed)
Jan 25 2013	Brief amici curiae of Liberty, Life and Law Foundation, et al. (Merits) filed. VIDED. (Distributed)
Jan 28 2013	Brief amicus curiae of International jurists and academics (Merits) filed. VIDED. (Distributed)
Jan 28 2013	Brief amicus curiae of Manhattan Declaration (Merits) filed. (Distributed)
Jan 28 2013	Brief amicus curiae of The Becket Fund for Religious Liberty (Merits) filed. VIDED. (Distributed)
Jan 29 2013	Brief amicus curiae of Coalition for the Protection of Marriage (Merits) filed. VIDED. (Distributed)
Jan 29 2013	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund, Inc. (Merits) filed. (Distributed)
Jan 29 2013	Brief amici curiae of Citizens United's National Committee for Family, Faith and Prayer, et al. (Merits) filed. (Distributed)
Jan 29 2013	Brief amicus curiae of United States Conference of Catholic Bishops (Merits) filed. (Distributed)
Jan 29 2013	Brief amici curiae of Chaplain Alliance for Religious Liberty, et al. (Merits) filed. (Distributed)
Jan 29 2013	Brief amici curiae of Robert P. George, et al. (Merits) filed. VIDED. (Distributed)
Jan 29 2013	Brief amicus curiae of Parents and Friends of Ex-Gays & Gays (Merits) filed. VIDED. (Distributed)
Jan 29 2013	Brief amici curiae of Indiana and 16 other states (Merits) filed. (Distributed)
Jan 29 2013	Brief amicus curiae of Liberty Counsel (Merits) filed. (Distributed)
Jan 29 2013	Brief amici curiae of Catholic Answers, et al. (Merits) filed. VIDED. (Distributed)
Jan 29 2013	Brief amicus curiae of Matthew B. O'Brien (Merits) filed. VIDED. (Distributed)
Jan 29 2013	Brief amicus curiae of Dovid Z. Schwartz (Merits) filed. (Distributed)
Jan 29 2013	Brief amici curiae of United States Senators Orrin G. Hatch, et al. (Merits) filed. (Distributed)
Jan 29 2013	Brief amicus curiae of Concerned Women for America (Merits) filed. (Distributed)
Jan 29 2013	Brief amicus curiae of Helen M. Alvare filed. (Merits) VIDED. (Distributed)
Jan 29 2013	Brief amicus curiae of Foundation for Moral Law filed. (Distributed)
Jan 29 2013	Brief amici curiae of Social Science Professors (Merits) filed. VIDED. (Distributed)
Jan 29 2013	Brief amicus curiae of David Boyle filed. (Merits) (Distributed)
Jan 29 2013	Brief amici curiae of National Association of Evangelicals (Merits) filed. (Distributed)

Jan 29 2013	Brief amici curiae of The Beverly LaHaye Institute, et al. (Merits) filed. (Distributed)
Jan 29 2013	Brief amicus curiae of American Civil Rights Union (Merits) filed. VIDED. (Distributed)
Feb 6 2013	Record from U.S.C.A. for 2nd Circuit is electronic.
Feb 13 2013	Record from U.S.D.C. for Southern District of New York is electronic.
Feb 13 2013	Brief amicus curiae of Citizens for Responsibility and Ethics in Washington (Merits) filed. (Distributed)
Feb 22 2013	Brief of respondent Edith Schlain Windsor (Jurisdiction) filed. (Distributed)
Feb 22 2013	Brief of petitioner United States (Jurisdiction) filed. (Distributed)
Feb 22 2013	Brief of petitioner United States (Merits) filed. (Distributed)
Feb 22 2013	Brief of respondent Bipartisan Legal Advisory Group of the United States House of Representatives (Jurisdiction) filed. (Distributed)
Feb 26 2013	Brief of respondent Edith Schlain Windsor, in Her Capacity as Executor of the Estate of Thea Clara Spyer (Merits) filed. (Distributed)
Feb 26 2013	Motion for enlargement of time and divided argument filed by the parties and Court-appointed amici curiae.
Feb 26 2013	Brief amicus curiae of GLMA: Health Professionals Advancing LBGT Equality (Gay and Lesbian Medical Association) concerning the immutability of sexual orientation (Merits) filed. (Distributed)
Feb 27 2013	Brief amici curiae of 278 Employers and Organizations Representing Employers (Merits) filed. (Distributed)
Feb 27 2013	Brief amici curiae of Utah Pride Center, et al. (Merits) filed. VIDED. (Distributed)
Feb 27 2013	Brief amici curiae of American Humanist Association and American Atheists, Inc., et al. filed. (Distributed)
Feb 27 2013	Brief amici curiae of Professors Nan D. Hunter, et al. filed. (Distributed)
Feb 27 2013	Motion for leave to file amici brief filed by former Attorneys General Edwin Meese III and John Ashcroft in support of neither party (Jurisdiction) out of time.
Feb 28 2013	Brief amici curiae of Leadership Conference on Civil and Human Rights, et al. (Merits) filed. (Distributed)
Feb 28 2013	Brief amici curiae of Political Science Professors filed. (Distributed).
Feb 28 2013	Brief amici curiae of Constitutional Law Scholars Bruce Ackerman, et al. (Merits) filed. VIDED. (Distributed)
Feb 28 2013	Brief amicus curiae of American Sociological Association (Merits) filed. VIDED. (Distributed)
Feb 28 2013	Brief amici curiae of Bishops of the Episcopal Church in the States of California, et al. filed. (Distributed)
Feb 28 2013	Brief amici curiae of Family Equality Council, et al. (Merits) filed. VIDED. (Distributed)
Feb 28 2013	Brief amici curiae of Organization of American Historians, et al. filed. (Distributed)
Feb 28 2013	Brief amici curiae of Empire State Pride Agenda, et al. filed. (Distributed)
Feb 28 2013	Brief amicus curiae of American Jewish Committee (Merits) filed. VIDED. (Distributed)
Mar 1 2013	Brief amicus curiae of Former Federal Intelligence Officer (Merits) filed. (Distributed)

Mar 1 2013	Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. (Merits) filed. (Distributed)
Mar 1 2013	Brief amicus curiae of OutServe-SLDN Inc. filed. (Distributed)
Mar 1 2013	Brief amicus curiae of Center for Constitutional Jurisprudence (Jurisdiction) filed. (Distributed)
Mar 1 2013	Brief amici curiae of Cato Institute and Constitutional Accountability Center (Merits) filed. (Distributed)
Mar 1 2013	Brief amici curiae of National Women's Law Center, et al. (Merits) filed. (Distributed)
Mar 1 2013	Brief amici curiae of Family and Child Welfare Law Professors (Merits) filed. (Distributed)
Mar 1 2013	Brief amici curiae of Anti-Defamation League, et al. (Merits) filed. (Distributed)
Mar 1 2013	Brief amici curiae of Family Law Professors, et al. (Merits) filed. (Distributed)
Mar 1 2013	Brief amici curiae of Gay & Lesbian Advocates & Defenders, et al. (Merits) filed. (Distributed)
Mar 1 2013	Brief amicus curiae of Gary J. Gates (Merits) filed. (Distributed)
Mar 1 2013	Brief amici curiae of Dr. Donna E. Shalala, et al. (Merits) filed. (Distributed)
Mar 1 2013	Brief amici curiae of Former Senior Justice Department Officials, et al. (Jurisdiction) filed. (Distributed)
Mar 1 2013	Brief amici curiae of Former Senators Bill Bradley, et al. filed. (Distributed)
Mar 1 2013	Brief amicus curiae of Partnership for New York City (Merits) filed. (Distributed)
Mar 1 2013	Brief amici curiae of Citizens United's National Committee for Family, Faith and Prayer, et al. (Jurisdiction) filed. (Distributed)
Mar 1 2013	Brief amicus curiae of Survivors of Sexual Orientation Change Therapies filed. (Distributed)
Mar 1 2013	Brief amici curiae of 172 Members of the U.S. House of Representatives and 40 U.S. Senators filed. (Distributed)
Mar 1 2013	Brief amici curiae of Los Angeles County Bar Association, et al. filed. (Distributed)
Mar 1 2013	Brief amicus curiae of Honorable John K. Olson (Merits) filed. (Distributed)
Mar 1 2013	Brief amici curiae of New York, et al. (Merits) filed. (Distributed)
Mar 1 2013	Brief amici curiae of Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders, et al. (Merits) filed. (Distributed)
Mar 1 2013	Brief amici curiae of Scholars of the Constitutional Rights of Children (Merits) filed. (Distributed)
Mar 1 2013	Brief amici curiae of Historians, American Historical Association, et al. filed. (Distributed)
Mar 1 2013	Brief amicus curiae of Institute for Justice (Merits) filed. (Distributed)
Mar 1 2013	Brief amicus curiae of Honorable John K. Olson (Jurisdiction) filed. (Distributed)
Mar 1 2013	Brief amici curiae of American Federation of Labor and Congress of Industrial Organizations, et al. (Merits) filed. (Distributed)
Mar 1 2013	Brief amici curiae of Constitutional Law Scholars (Jurisdiction) filed. (Distributed)
Mar 1 2013	Brief amici curiae of Federalism Scholars (Merits) filed. (Distributed)
Mar 1 2013	Brief amici curiae of Hon. Lawrence J. Korb, et al. (Merits) filed. (Distributed)
Mar 1 2013	Brief amicus curiae of American Bar Association (Merits) filed. (Distributed)

Mar 1 2013	Brief amicus curiae of Center for Fair Administration of Taxes (Merits) filed. (Distributed)
Mar 1 2013	Brief amici curiae of American Psychological Association, et al. (Merits) filed. (Distributed)
Mar 1 2013	Brief of Former Federal Election Commission Officials (Merits) filed. (Distributed)
Mar 4 2013	Motion for enlargement of time and divided argument GRANTED and the time is to be divided as follows: on the jurisdiction issues, the Court-appointed amicus curiae is allotted 20 minutes, the Solicitor General is allotted 15 minutes, and respondent Bipartisan Legal Advisory Group of the U.S. House of Representatives is allotted 15 minutes. On the merits, respondent Bipartisan Legal Advisory Group of the U.S. House of Representatives is allotted 30 minutes, the Solicitor General is allotted 15 minutes, and respondent Windsor is allotted 15 minutes.
Mar 15 2013	Motion for leave to file amici brief out of time filed by former Attorneys General Edwin Meese III and John Ashcroft GRANTED.
Mar 19 2013	Reply of respondent Bipartisan Legal Advisory Group of the United States House of Representatives (Jurisdiction) filed. (Distributed)
Mar 19 2013	Reply of respondent Bipartisan Legal Advisory Group of the United States House of Representatives (Merits) filed. (Distributed)
Mar 20 2013	Reply of Court-appointed amicus curiae (Jurisdiction) filed. (Distributed)
Mar 20 2013	Reply of respondent Edith Schlain Windsor, in Her Capacity as Executor of the Estate of Thea Clara Spyer (Jurisdiction) filed. (Distributed)
Mar 20 2013	Reply of petitioner United States (Jurisdiction) filed. (Distributed)
Mar 27 2013	Argued. (Juridsiction) - For Court-appointed amicus curiae: Vicki C. Jackson, Cambridge, Mass. For petitioner in support of affirmance: Sri Srinivaasan, Deputy Solicitor General, Department of Justice, Washington, D. C. For respondent Bipartisan Legal Advisory Group of the United States House of Representataives: Paul D. Clement, Washington, D. C. (Merits) - For respondent Bipartisan Legal Advisory Group of the United States House of Representatives: Paul D. Clement, Washington, D. C. For petitioner in support of affirmance: Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D. C. For respondent Windsor: Roberta A. Kaplan, New York, N. Y.

PETITION
FOR
WRIT OF
CERTIORARI

No. 12-307

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH SCHLAIN WINDSOR

ON PETITION FOR A WRIT OF CERTIORARI
BEFORE JUDGMENT TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTION PRESENTED

Section 3 of the Defense of Marriage Act (DOMA) defines the term "marriage" for all purposes under federal law, including the provision of federal benefits, as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. 7. It similarly defines the term "spouse" as "a person of the opposite sex who is a husband or a wife." *Ibid.* The question presented is:

Whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

PARTIES TO THE PROCEEDING

Petitioner, who was a defendant in the district court and is an appellant in the court of appeals, is the United States of America.

Respondent, who was plaintiff in the district court and is an appellee in the court of appeals, is Edith Schlain Windsor.

The Bipartisan Legal Advisory Group of the United States House of Representatives intervened to present arguments in defense of the constitutionality of Section 3 of DOMA.

TABLE OF CONTENTS

Page
Opinion below 1
Jurisdiction 1
Constitutional and statutory provisions involved 2
Statement 2
Reasons for granting the petition 10
Conclusion 13
Appendix A – Order (June 6, 2012) 1a
Appendix B – Judgment (June 7, 2012) 23a
Appendix C – Gov't notice of appeal (June 14, 2012) 25a
Appendix D – Intervenor's notice of appeal (June 8, 2012) 27a
Appendix E – Constitutional and statutory provisions 30a

TABLE OF AUTHORITIES

Cases:

Baehr v. *Lewin*, 852 P.2d 44 (Haw. 1993) 2
Baker v. *Nelson*:
  409 U.S. 810 (1972) 7
  191 N.W.2d 185 (Minn. 1971) 7
Camreta v. *Greene*, 131 S. Ct. 2020 (2011) 11
Hernandez v. *Robles*, 855 N.E.2d 1 (N.Y. 2006) 7
INS v. *Chadha*, 462 U.S. 919 (1983) 11, 12
Lawrence v. *Texas*, 539 U.S. 558 (2003) 8

Cases—Continued: Page

Massachusetts v. *United States Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), petitions for cert. pending, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012), and 12-97 (filed July 20, 2012) 3

Plyler v. *Doe*, 457 U.S. 202 (1982) 9

Constitution and statutes:

U.S. Const.:

- Art. III 6
- Amend. V 4, 6, 10

Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 2

- § 2, 110 Stat. 2419 (28 U.S.C. 1738C) 2
- § 3, 110 Stat. 2419 (1 U.S.C. 7) .... *passim*

26 U.S.C. 2056(a) 3, 4

28 U.S.C. 530D 4

28 U.S.C. 1254 9

28 U.S.C. 1291 9

Marriage Equality Act, 2011 N.Y. Sess. Laws ch. 95 (A.8354) (McKinney) (N.Y. Dom. Rel. Law § 10-a (McKinney Supp. 2012) 7

Miscellaneous:

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 9

H.R. Rep. No. 664, 104th Cong., 2d Sess. (1996) 3, 8

Miscellaneous—Continued: Page

Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, House of Representatives (Feb. 23, 2011) 4, 5

U.S. Gen. Accounting Office, Report No. GAO-04-353R, *Defense of Marriage Act: Update to Prior Report* (2004), http://www.gao.gov/assets/100/92441.pdf 3

In the Supreme Court of the United States

No. 12-307

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH SCHLAIN WINDSOR

ON PETITION FOR A WRIT OF CERTIORARI
BEFORE JUDGMENT TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari before judgment to the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-22a) is reported at 833 F. Supp. 2d 394.

JURISDICTION

The judgment of the district court was entered on June 6, 2012. Notices of appeal were filed on June 8, 2012, and June 14, 2012 (App., *infra*, 25a-26a, 27a-29a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this petition. App., *infra*, 30a.

STATEMENT

1. a. Congress enacted the Defense of Marriage Act (DOMA or Act) in 1996. Pub. L. No. 104-199, 110 Stat. 2419. DOMA contains two principal provisions. The first, Section 2 of the Act, provides that no State is required to give effect to any public act, record, or judicial proceeding of another State that treats a relationship between two persons of the same sex as a marriage under its laws. DOMA § 2, 110 Stat. 2419 (28 U.S.C. 1738C).

The second provision, Section 3, which is at issue in this case, defines "marriage" and "spouse" for all purposes under federal law to exclude marriages between persons of the same sex, including marriages recognized under state law. Section 3 provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

DOMA § 3, 110 Stat. 2419 (1 U.S.C. 7).

b. Congress enacted DOMA in response to the Hawaii Supreme Court's decision in *Baehr* v. *Lewin*, 852 P.2d 44 (1993), which held that the denial of marriage licenses to same-sex couples was presumptively invalid under the Hawaii Constitution. H.R. Rep. No. 664, 104th Cong., 2d Sess. 2 (1996) (*1996 House Report*). Although Hawaii ultimately did not permit same-sex marriage, other States later recognized such marriages under their respective laws. See *Massachusetts* v. *United States Dep't of Health & Human Servs.*, 682 F.3d 1, 6 nn.1 & 2 (1st Cir. 2012), petitions for cert. pending, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012), and 12-97 (filed July 20, 2012).

Although Section 3 of DOMA does not purport to invalidate same-sex marriages in those States that permit them, it excludes such marriages from recognition for purposes of more than 1000 federal statutes and programs whose administration turns in part on individuals' marital status. See U.S. Gen. Accounting Office, Report No. GAO-04-353R, *Defense of Marriage Act: Update to Prior Report* 1 (2004), http://www.gao.gov/assets/100/92441.pdf (GAO Report) (identifying 1138 federal laws that are contingent on marital status or in which marital status is a factor). Section 3 of DOMA thus denies to legally married same-sex couples many substantial benefits otherwise available to legally married opposite-sex couples under federal employment, immigration, public health and welfare, tax, and other laws. See *id.* at 16-18.

2. In 2007, plaintiff married Thea Spyer, her same-sex partner of more than 40 years, in Canada. The couple resided in New York. When Spyer died in 2009, she left her estate for plaintiff's benefit. App., *infra*, 3a; Am. Compl. ¶¶ 10, 11.

In her capacity as executor of Spyer's estate, plaintiff paid approximately $363,000 in federal estate taxes. She thereafter filed a refund claim under 26 U.S.C. 2056(a), which provides that property that passes from a decedent to a surviving spouse may generally pass free of federal estate taxes. The Internal Revenue Service (IRS) denied the refund claim on the ground that plaintiff is not a "spouse" within the meaning of DOMA Section 3 and thus not a "surviving spouse" within the meaning of Section 2056(a). App., *infra*, 3a-4a; Am. Compl. ¶¶ 72-78.

Plaintiff filed this suit challenging the constitutionality of DOMA Section 3 in the United States District Court for the Southern District of New York. She contended that, by treating married same-sex couples in New York differently from opposite-sex couples, Section 3, as applied by the IRS, violates the equal protection component of the Fifth Amendment. She sought declaratory and injunctive relief, as well as recovery of the $363,053 in federal estate taxes paid by Spyer's estate. App., *infra*, 4a; Am. Compl. ¶¶ 82-85.

3. After plaintiff filed her complaint, the Attorney General sent a notification to Congress under 28 U.S.C. 530D that he and the President had determined that Section 3 of DOMA is unconstitutional as applied to same-sex couples who are legally married under state law. Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, House of Representatives (Feb. 23, 2011) (Attorney General Letter).[1] The letter explained that, while the Department of Justice had previously defended Section 3 if binding precedent in the circuit required application of rational basis review to classifications based on sexual orientation, the President and the Department of Justice had conducted a new examination of the issue after two lawsuits (this one and

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[1] 1:10-cv-08435 Docket entry No. 10 (S.D.N.Y. Feb. 25, 2011). Text also available at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

Pedersen v. *Office of Personnel Management*, petition for cert. before judgment pending, No. 12-231 (filed Aug. 21, 2012)) had been filed in a circuit that had yet to address the appropriate standard of review. Attorney General Letter 1-2. The Attorney General explained that, after examining factors this Court has identified as relevant to the applicable level of scrutiny, including the history of discrimination against gay and lesbian individuals and the relevance of sexual orientation to legitimate policy objectives, he and the President had concluded that Section 3 warrants application of heightened scrutiny rather than rational basis review. *Id.* at 2-4. The Attorney General further explained that both he and the President had concluded that Section 3 fails that standard of review and is therefore unconstitutional. *Id.* at 4-5.

The Attorney General's letter reported that, notwithstanding this determination, the President had "instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality." Attorney General Letter 5. The Attorney General explained that "[t]his course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised." *Ibid.* In the interim, the Attorney General instructed the Department's lawyers to cease defense of Section 3. *Id.* at 5-6. Finally, the Attorney General noted that the Department's lawyers would take appropriate steps to "provid[e] Congress a full and fair opportunity to participate" in litigation concerning the constitutionality of Section 3. *Id.* at 6.

Following the Attorney General's announcement, respondent Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG), a five-member bipartisan leadership group, moved to intervene to present arguments in defense of the constitutionality of Section 3.[2] The district court granted the motion. 6/2/11 Mem. & Order 1; see App., *infra*, 4a.

Both BLAG and the government moved to dismiss plaintiff's challenge to the constitutionality of Section 3. While BLAG presented arguments in support of Section 3's constitutionality, the government explained that it was filing a motion to dismiss plaintiff's constitutional claim solely for purposes of ensuring that the court had Article III jurisdiction to enter judgment for or against the federal officials tasked with enforcing Section 3. The government's brief on the merits set forth its view that heightened scrutiny applies to Section 3 of DOMA and that, under that standard of review, Section 3 violates the equal protection guarantee of the Fifth Amendment. Gov't Resp. to Pl. Mot. for Summ. J. and Intervenor's Mot. to Dismiss 4-27 (Aug. 19, 2011).

4. The district court denied the motions to dismiss and granted summary judgment in favor of plaintiff, concluding that Section 3 of DOMA violates the equal protection guarantee of the Fifth Amendment. App., *infra*, 1a-22a.

As a preliminary matter, the district court rejected BLAG's argument that plaintiff lacks Article III standing because she had failed to prove that New York recognized her marriage in 2009, the relevant tax year, and thus had failed to establish that her injuries were traceable to Section 3 of DOMA. App., *infra*, 6a-8a. The court acknowledged the New York Court of Appeals' decision in *Hernandez* v. *Robles*, 855 N.E.2d 1, 6 (2006), which held that New York statutory law "clearly limit[ing] marriage to opposite-sex couples" was not invalid under the New York Constitution. See App., *infra*, 6a.[3] The district court noted, however, that all three statewide elected officials and every state court to address the issue had concluded that principles of comity require recognition of same-sex marriages performed in other jurisdictions. *Id.* at 6a-7a.

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[2] Two of the group's five members declined to support intervention. BLAG Mot. to Intervene 1 n.1 (Apr. 18, 2011).

The district court also rejected BLAG's threshold argument that plaintiff's equal protection challenge is foreclosed by this Court's summary dismissal of the appeal in *Baker* v. *Nelson*, 409 U.S. 810 (1972), which sought review of the Minnesota Supreme Court's decision upholding the constitutionality of a state statute interpreted to limit marriage to persons of the opposite sex, see *Baker* v. *Nelson*, 191 N.W.2d 185, 185-187 (1971). The district court explained that Section 3, unlike the statute at issue in *Baker*, "does not preclude or otherwise inhibit a state from authorizing same-sex marriage (or issuing marriage licenses)," but instead "defines marriage for federal purposes, with the effect of allocating federal rights and benefits." App., *infra*, 9a. The court concluded that *Baker* therefore did not "'necessarily decide[]' the question of whether DOMA violates the Fifth Amendment's Equal Protection Clause." *Ibid.*

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[3] In 2011, New York passed legislation permitting individuals of the same sex to marry in the State. Marriage Equality Act, 2011 N.Y. Sess. Laws ch. 95 (A.8354) (McKinney) (N.Y. Dom. Rel. Law § 10-a (McKinney Supp. 2012)).

The district court assumed without deciding that laws that draw distinctions on the basis of sexual orientation are subject to rational basis review. App., *infra*, 13a. The court also expressed the view that the nature of such review "can vary by context": while "[l]aws such as economic or tax legislation that are scrutinized under rational basis review" will "normally pass constitutional muster," laws that "exhibit[] . . . a desire to harm a politically unpopular group" receive "a more searching form of rational basis review." *Ibid.* (quoting *Lawrence* v. *Texas*, 539 U.S. 558, 579-580 (2003) (O'Connor, J., concurring)).

Without deciding whether "a more 'searching' form of rational basis scrutiny is required," the district court held that Section 3 is invalid under rational basis review. App., *infra*, 14a.[4] The court concluded that neither the legislative purposes articulated in support of Section 3 at the time of its enactment (see *1996 House Report* 12) nor additional interests offered by BLAG bear a rational relationship to a legitimate governmental objective. App., *infra*, 15a-22a.

The district court first determined that Section 3 does not advance a federal governmental interest in "maintain[ing] the definition of marriage that was universally accepted in American law," App., *infra*, 16a (brackets in original; citation omitted), whether provisionally or otherwise, because it "does not affect the state laws that govern marriage," *ibid.* Nor could the court "discern a logical relationship" between Section 3 and a governmental interest in "[p]romoting the ideal family structure for raising children," *id.* at 18a, since Section 3 has "no effect at all on the types of family structures in which children in this country are raised," *id.* at 19a.

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[4] In its response to plaintiff's certiorari petition in this case, BLAG contends that "the district court adopted a novel standard of constitutional review involving 'intensified scrutiny,' a level of scrutiny between ordinary rational-basis and intermediate scrutiny." BLAG No. 12-63 Br. in Opp. 8-9. That is incorrect. As noted above, the district court held Section 3 invalid under rational-basis review "*[r]egardless* whether a more 'searching' form of rational basis scrutiny is required." App., *infra*, 14a (emphasis added).

The district court also rejected BLAG's argument that Congress might have enacted Section 3 "to ensure that federal benefits are distributed consistently," without regard to differences between state marriage laws. App., *infra*, 19a-20a. The court reasoned that, although Section 3 is "link[ed]" to that goal, "the means used in this instance intrude upon the states' business of regulating domestic relations" and "therefore cannot be legitimate." *Id.* at 20a.

Finally, the district court concluded that the government's interest in "conserving government resources" alone is insufficient to "'justify the classification used in allocating those resources.'" App., *infra*, 21a-22a (quoting *Plyler* v. *Doe*, 457 U.S. 202, 227 (1982)).

5. Both BLAG and the government filed timely notices of appeal to the United States Court of Appeals for the Second Circuit. App., *infra*, 25a-26a (government notice of appeal); *id.* at 27a-29a (BLAG notice of appeal). The court of appeals has jurisdiction pursuant to 28 U.S.C. 1291. The appeals were docketed as Nos. 12-2335 and 12-2435 and remain pending before that court. The case is therefore "in the court[] of appeals" within the meaning of 28 U.S.C. 1254. See Eugene Gressman et al., *Supreme Court Practice* § 2.4, at 83-84 (9th ed. 2007).

6. Plaintiff filed a petition for a writ of certiorari before judgment in this case on July 16, 2012 (No. 12-63), and the government and BLAG filed responses to that petition on August 31, 2012.

REASONS FOR GRANTING THE PETITION

The question of whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection as applied to same-sex couples legally married under state law is presented in the government's petition for a writ of certiorari in *United States Department of Health & Human Services* v. *Massachusetts*, No. 12-15 (filed July 3, 2012),[5] and in the government's petition for a writ of certiorari before judgment in *Office of Personnel Management* v. *Golinski*, No. 12-16 (filed July 3, 2012). For the reasons explained in those pending petitions, that question warrants this Court's review now.

The Court should hold this petition pending its consideration and disposition of the petitions in *Massachusetts* and *Golinski*. Should the Court grant review in either of those cases, it need not grant review in this case. If the Court concludes that neither *Massachusetts* nor *Golinski* provides an appropriate vehicle for resolving the question presented, it should grant the government's petition for a writ of certiorari before judgment in *Office of Personnel Management* v. *Pedersen* (filed concurrently with this petition). If the Court also concludes that *Pedersen* is not an appropriate vehicle, it should grant this petition to ensure a timely and definitive ruling on Section 3's constitutionality.

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[5] Two other petitions for a writ of certiorari have been filed in the *Massachusetts* case, one by BLAG (No. 12-13) and a conditional cross-petition by the Commonwealth of Massachusetts (No. 12-97).

As noted above, the plaintiff in this case has also filed a petition for a writ of certiorari before judgment on Section 3's constitutionality (No. 12-63, filed July 16, 2012), and the plaintiffs in *Pedersen* v. *Office of Personnel Management*, No. 12-231 (filed Aug. 21, 2012), have done so as well. As explained in the government's response to plaintiff's petition in this case (at 15-19), however, her petition raises two threshold questions potentially posing obstacles to this Court's review: (1) whether plaintiff, who obtained a district court judgment and decision entirely in her favor, has appellate standing to seek certiorari before judgment, and (2) whether New York law recognized her Canadian marriage at the time of Thea Spyer's death. As further explained in that response (at 19-20), the government, which plainly is a proper party to invoke this Court's jurisdiction to review the district court's judgment in this case, has filed this petition (as well as one in *Pedersen*) to obviate the Court's need to resolve the first issue if it is inclined to grant review in this case or in *Pedersen*.[6]

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[6] BLAG contends that plaintiff in this case potentially lacks appellate standing by referring to its argument that the government lacks standing to seek this Court's review of the First Circuit's judgment in *Massachusetts*. See BLAG No. 12-63 Br. in Opp. 12 ("What is more, as explained more fully in the House's opposition in No. 12-15, it is not clear that [plaintiff Windsor], who prevailed in the district court, even has appellate standing to petition."). But one critical fact materially distinguishes the government from plaintiff in this case (and from the plaintiffs in the other DOMA cases): the district court's judgment was entered *against* the government, such that the government is *not* a "prevailing party" in the relevant sense. See *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028-2029 (2011). As the Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983), makes clear, "[w]hen an agency of the United States is a party to a case in which the Act of Congress it administers

The second potential obstacle in this case is not present in *Massachusetts*, *Golinski*, or *Pedersen*. As the government noted in its response to plaintiff's petition (at 16), "BLAG has identified no reason to believe that the State's highest court would reach a conclusion different from the uniform decisions of its intermediate appellate courts" recognizing foreign same-sex marriages. And as the government further noted (*ibid.*), the Court may conclude that the issue in fact goes to the merits of plaintiff's tax-refund claim rather than to her standing. BLAG itself appears to acknowledge that possibility. See BLAG No. 12-63 Br. in Opp. 19 n.9 (suggesting that validity of plaintiff's foreign marriage is a vehicle problem "whether or not it is critical to [her] standing"). But the Court would at least have to address whether the foreign-marriage issue implicates plaintiff's standing before reaching the merits of Section 3's constitutionality. For that reason, and because the district court in *Pedersen* (unlike the district court in this case) examined the applicability of heightened scrutiny (see *Pedersen* Pet. App. 27a-75a), *Pedersen* would be preferable to this case as a vehicle for resolving the constitutionality of Section 3 in the event the Court does not grant review in *Massachusetts* or *Golinski*.

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is held unconstitutional," it may seek this Court's review of that decision, even though "the Executive may agree with the holding that the statute in question is unconstitutional." *Id.* at 930-931. Although BLAG points out in its response to the government's petition in *Massachusetts* that Section 3 (unlike the statute at issue in *Chadha*) is not administered by a single agency, that is a distinction without a difference. Indeed, BLAG makes no effort to explain why that distinction could matter. See BLAG No. 12-15 Br. in Opp. 18-19.

CONCLUSION

This petition for a writ of certiorari before judgment should be held pending the Court's consideration and disposition of the petitions in *United States Department of Health and Human Services* v. *Massachusetts*, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012), and 12-97 (filed July 20, 2012), and *Office of Personnel Management* v. *Golinski*, No. 12-16 (filed July 3, 2012). If the Court determines that neither *Massachusetts* nor *Golinski* provides an appropriate opportunity to decide the question presented, the Court should grant the government's petition for a writ of certiorari before judgment in *Office of Personnel Management* v. *Pedersen* (filed concurrently with this petition). If the Court determines that *Pedersen* is not an appropriate vehicle, the Court should grant this petition.

Respectfully submitted.

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SEPTEMBER 2012

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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10 Civ. 8435 (BSJ)

EDITH SCHLAIN WINDSOR, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed: June 6, 2012]

ORDER

BARBARA S. JONES, United States District Judge

This case arises from Plaintiff's constitutional challenge to section 3 of the Defense of Marriage Act ("DOMA"), the operation of which required Plaintiff to pay federal estate tax on her same-sex spouse's estate, a tax from which similarly situated heterosexual couples are exempt. Plaintiff claims that section 3 deprives her of the equal protection of the laws, as guaranteed by the Fifth Amendment to the United States Constitution. For the following reasons, Defendant-Intervenor's motion to dismiss is DENIED and Plaintiff's motion for summary judgment is GRANTED.

I. BACKGROUND

A. DOMA

DOMA was enacted and signed into law in 1996. The challenged provision, section 3, defines the terms "marriage" and "spouse" under federal law. It provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7.

In large part, DOMA was a reaction to the possibility that states would begin to recognize legally same-sex marriages. Specifically, Congress was spurred to action by a 1993 decision by the Hawaii Supreme Court, which suggested that same-sex couples might be entitled to marry. *Baehr v. Lewin*, 852 P. 2d 44 (Haw. 1993). The House Judiciary Committee's Report on DOMA ("House Report") discussed *Baehr* at length, describing it as a "legal assault . . . against traditional heterosexual marriage." H.R. Rep. No. 104-664, at 3 (1996). The Report noted that, if homosexuals were permitted to marry, "that development could have profound practical implications for federal law," including making homosexual couples "eligible for a whole range of federal rights and benefits." *Id.* at 10. A federal definition of marriage was seen as necessary because, the Committee reasoned, never before had the words "marriage" (which, at the time, appeared in 800 sections of federal statutes and regulations) or "spouse" (appearing more than 3,100 times) meant anything other than a union between a man and a woman—an implicit assumption upon which Congress had relied in enacting these statutes and regulations. *Id.* at 10.

In addition to this notion of "mak[ing] explicit what has always been implicit," *id.* at 10, the House Report justified DOMA as advancing government interests in: "(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance;[1] and (4) preserving scarce government resources." *Id.* at 12.

B. The Parties

In 1963, Plaintiff in this action, Edie Windsor, met her late-spouse, Thea Spyer, in New York City. Shortly thereafter, Windsor and Spyer entered into a committed relationship and lived together in New York. In 1993, Windsor and Spyer registered as domestic partners in New York City, as soon as that option became available. In 2007, as Spyer's health began to deteriorate due to her multiple sclerosis and heart condition, Windsor and Speyer decided to get married in another jurisdiction that permitted gays and lesbians to marry. They were married in Canada that year.

Spyer died in February 2009. According to her last will and testament, Spyer's estate passed for Windsor's benefit. Because of the operation of DOMA, Windsor did not qualify for the unlimited marital deduction, 26

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[1] This interest was not addressed to section 3, therefore the Court does not consider it. *See Massachusetts v. U.S. Dep't of Health & Human Servs., et al.*, Nos. 10-2207 & 10-2214, slip op. at 25 (1st Cir. May 31, 2012).

U.S.C. § 2056(a), and was required to pay $363,053 in federal estate tax on Spyer's estate, which Windsor paid in her capacity as executor of the estate.

On November 9, 2010, Windsor commenced this suit, seeking a refund of the federal estate tax levied on Spyer's estate and a declaration that section 3 of DOMA violates the Equal Protection Clause of the Fifth Amendment.

In February 2011, Attorney General Holder announced that the Department of Justice would no longer defend DOMA's constitutionality because the Attorney General and the President believed that a heightened standard of scrutiny should apply to classifications based on sexual orientation, and that section 3 is unconstitutional under that standard. Letter from Eric H. Holder, Jr., Attorney Gen., to John A. Boehner, Speaker, U.S. House of Rep., at 5 (Feb. 23, 2011). Given the Executive Branch's decision not to enforce DOMA, the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG") moved to intervene to defend the constitutionality of the statute. BLAG's motion was granted on June 2, 2011.

On June 24, 2011, Windsor moved for summary judgment, arguing that DOMA is subject to strict constitutional scrutiny because homosexuals are a suspect class. She contends that DOMA fails under that standard of constitutional review because the government cannot establish that DOMA is narrowly tailored to serve a compelling or legitimate government interest. In the alternative, she argues that DOMA has no rational basis.

On August 1, 2011, BLAG moved to dismiss Plaintiff's complaint. It argues that the weight of the precedent compels the Court to review DOMA only for a rational basis and, under that standard, there are ample reasons that justify the legislation. Because the motion to dismiss turns on the same legal question as the motion for summary judgment, the Court will address the two motions simultaneously.

II. DISCUSSION

A. Legal Standard

Rule 56 of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Bessemer Trust Co., N.A. v. Branin*, 618 F.3d 76, 86 (2d Cir. 2010) (quoting Fed. R. Civ. P. 56 (c)). "The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish her right to judgment as a matter of law." *Rodriguez v. City of New York*, 72 F.3d 1051, 1060-61 (2d Cir. 1995).

To survive a motion to dismiss pursuant to Rule 12(b)(6), "the operative standard requires the plaintiff [to] provide the grounds upon which [her] claim rests through factual allegations sufficient to raise a right to relief above the speculative level." *Goldstein v. Pataki*, 516 F.3d 50, 56 (2d Cir. 2008) (citation and internal quotation marks omitted). That is, a plaintiff must assert "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

B. Windsor's Standing to Pursue this Suit

As a threshold matter, the Court addresses whether Windsor has standing to pursue this action. "[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotation marks omitted). Second, the plaintiff must present a "causal connection between the injury and the conduct complained of—the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court." *Id.* (internal quotation marks and alterations omitted). Finally, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561.

There is no question that Windsor meets the first and third requirements. BLAG seeks to undermine the second factor by arguing that Windsor has not proved that her marriage was recognized under New York law in 2009, the relevant tax year. In support of this argument, it points to a 2006 case where the New York Court of Appeals held that the "New York Constitution does not compel recognition of marriages between members of the same sex." *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006).

While the Court acknowledges the Court of Appeals' decision in *Hernandez*, in light of subsequent state executive action and case law, the Court ultimately finds BLAG's argument unpersuasive. In 2009, all three statewide elected executive officials—the Governor, the Attorney General, and the Comptroller—had endorsed the recognition of Windsor's marriage. *See Godfrey v. Spano*, 13 N.Y.3d 358, 368 n.3 (N.Y. 2009) (describing 2004 informal opinion letters of the Attorney General and the State Comptroller which respectively concluded that "New York law presumptively requires that parties to such [same sex] unions must be treated as spouses for purposes of New York law" and "[t]he Retirement System will recognize a same-sex Canadian marriage in the same manner as an opposite-sex New York marriage, under the principle of comity"); *Dickerson v. Thompson*, 73 A.D.3d 52, 54-55 (N.Y. App. Div. 2010) (citing a 2008 directive by the Governor to recognize same-sex marriages from other jurisdictions).

In addition, every New York State appellate court to have addressed the issue in the years following *Hernandez* has upheld the recognition of same-sex marriages from other jurisdictions. *See In re Estate of Ranftle*, 917 N.Y.S.2d 195 (N.Y. App. Div. 2011) (holding that a Canadian same-sex marriage is valid in New York); *Lewis v. N.Y. State Dep't of Civil Serv.*, 60 A.D.3d 216 (N.Y. App. Div. 2009), *aff'd on other grounds sub nom. Godfrey*, 13 N.Y.3d 358 (affirming the lower court's holding that New York's marriage recognition rule requires the recognition of out-of-state same-sex marriages); *Martinez v. Cnty. of Monroe*, 850 N.Y.S.2d 740 (N.Y. App. Div. 2008) (holding that plaintiff's same-sex Canadian marriage is entitled to recognition in New York).

Finally, although the Court of Appeals has yet to readdress the question of same-sex marriage recognition directly, its 2009 opinion in *Godfrey v. Spano* said nothing to cast doubt on the uniform lower-court authority recognizing the validity of same-sex marriages. 13 N.Y.3d at 377.

For all of these reasons, since the State, through its executive agencies and appellate courts, uniformly recognized Windsor's same sex marriage in the year that she paid the federal estate taxes, the Court finds that she has standing.

C. The Effect of *Baker v. Nelson*

The Court next considers BLAG's argument that the Supreme Court's holding in *Baker v. Nelson*, 409 U.S. 810 (1972), requires it to dismiss Windsor's case. There, the Supreme Court summarily affirmed a challenge to a Minnesota state law that denied a marriage license to a same-sex couple. The plaintiffs challenged the law in state court on equal protection grounds, arguing that "the right to marry without regard to the sex of the parties is a fundamental right," and that "restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory." *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971). The Supreme Court dismissed the challenge for "want of a substantial federal question." *Baker*, 409 U.S. 810. BLAG now argues that *Baker* is dispositive of the issue before this Court and, as binding precedent, compels the Court to find that "defining marriage as between one man and one woman comports with equal protection." (BLAG Mot. to Dismiss at 12.)

Summary judgments from the Supreme Court are binding on the lower courts only with regard to the precise legal questions and facts presented in the jurisdictional statement. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182 (1979). The case before the Court does not present the same issue as that presented in *Baker*. DOMA defines marriage for federal purposes, with the effect of allocating federal rights and benefits. It does not preclude or otherwise inhibit a state from authorizing same-sex marriage (or issuing marriage licenses), as did the Minnesota statute in *Baker*. Indeed, BLAG agrees that DOMA does not preclude or inhibit same sex-marriage and Windsor does not argue that DOMA affects the fundamental right to marry.

Accordingly, after comparing the issues in *Baker* and those in the instant case, the Court does not believe that *Baker* "necessarily decided" the question of whether DOMA violates the Fifth Amendment's Equal Protection Clause. *Accord, e.g., Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 872-73 (C.D. Cal. 2005), *aff'd in part, rev'd in part on other grounds*, 447 F. 3d 673 (2006) (declining to find that *Baker* controlled in an equal protection challenge to DOMA), *see also In re Kandu*, 315 B.R. 123, 137 (Bankr. W.D. Wash. 2004) (same). The Court will not rest its decision on such a "slender reed" of support. *Morse v. Republican Party of Va.*, 517 U.S. 186, 203 n.21 (1996).

Having decided that *Baker* does not require a decision in BLAG's favor as a matter of law, the Court turns to the parties' equal protection arguments.

D. Equal Protection

Equal protection requires the government to treat all similarly situated persons alike. *City of Cleburne v. Cleburne Living Ctr.*, 476 U.S. 432, 439 (1985). It prohibits the government from drawing "distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." *Lehr v. Robertson*, 463 U.S. 248, 265 (1983).

Of course, not all legislative classifications violate equal protection. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The "promise [of] equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996). With that reality in view, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 440. That general rule, embodied in the "rational basis" test, applies in the mine-run of cases involving "commercial, tax and like regulation." *Massachusetts v. U.S. Dep't of Health & Human Servs., et al.*, Nos. 10-2207 & 10-2214, slip op. at 13 (1st Cir. May 31, 2012).

Rational basis review is the "paradigm of judicial restraint." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993). The burden of proving a statute unconstitutional falls on the party attacking the legislation. *Heller v. Doe*, 509 U.S. 312, 321 (1993); *Baker v. Carr*, 369 U.S. 186, 266 (1962) (Stewart, J., concurring). "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). Accordingly, courts must accept as constitutional those legislative classifications that bear a rational relationship to a legitimate government interest.

Courts review with greater scrutiny classifications that disadvantage a suspect class or impinge upon the exercise of a fundamental right. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). Pursuant to a court's "strict scrutiny," a classification violates equal protection unless it is "precisely tailored to serve a compelling governmental interest." *Id.* at 217; *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Classifications that disadvantage a quasi-suspect class are also subject to a heightened standard of constitutional review. Courts review those classifications with an intermediate level of scrutiny. Under "heightened" or "intermediate scrutiny," the classification must be "substantially related to a legitimate state interest" to survive constitutional attack. *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982).

There are few classifications that trigger strict or heightened scrutiny. *See, e.g., Clark v. Jeter*, 486 U.S. 456, 461 (1988) (illegitimacy subject to intermediate scrutiny); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982) (gender subject to intermediate scrutiny); *Loving v. Virginia*, 388 U.S. 1, 11 (1967 (race subject to strict scrutiny); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (national ancestry and ethnic origin subject to strict scrutiny). "And because heightened scrutiny requires an exacting investigation of legislative choices, the Supreme Court has made clear that 'respect for the separation of powers' should make courts reluctant to establish new suspect classes." *Thomasson v. Perry*, 80 F.3d 915, 928 (1996) (quoting *City of Cleburne*, 473 U.S. at 441); *see also Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (declining to extend strict scrutiny to "[c]lose relatives"); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam) (declining to extend strict scrutiny to the elderly).

Windsor now argues that DOMA should be subject to strict (or at least intermediate) scrutiny because homosexuals as a class present the traditional indicia that characterize a suspect class: a history of discrimination, an immutable characteristic upon which the classification is drawn, political powerlessness, and a lack of any relationship between the characteristic in question and the class's ability to perform in or contribute to society.

In making this claim, Windsor asks the Court to distinguish the precedent in eleven Courts of Appeals that have applied the rational basis test to legislation that classifies on the basis of sexual orientation. *See Massachusetts v. HHS*, Nos. 10-2207 & 10-2214; *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F. 3d 804 (11th Cir. 2004); *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004); *Equality Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Thomasson*, 80 F.3d 915; *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989); *Woodard v. United States*, 871 F.2d 1068 (Fed. Cir. 1989); *Nat'l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270 (10th Cir. 1984). She invites this Court to decide, as a matter of first impression in the Second Circuit, whether homosexuals are a suspect class.

Though there is no case law in the Second Circuit binding the Court to the rational basis standard in this context, the Court is not without guidance on the matter. For one, as the Supreme Court has observed, "courts have been very reluctant, as they should be in our federal system," to create new suspect classes. *City of*

Cleburne, 473 U.S. at 442. Moreover, the Supreme Court "conspicuously" has not designated homosexuals as a suspect class, even though it has had the opportunity to do so. *See Massachusetts v. HHS*, Nos. 10-2207 & 10-2214, slip op. at 15 (noting that "[n]othing indicates that the Supreme Court is about to adopt this new suspect classification when it conspicuously failed to do so in *Romer*"). Against this backdrop, this district court is not inclined to do so now. In any event, because the Court believes that the constitutional question presented here may be disposed of under a rational basis review, it need not decide today whether homosexuals are a suspect class.

The Court will, however, elaborate on an aspect of the equal protection case law that it believes affects the nature of the rational basis analysis required here. The Supreme Court's equal protection decisions have increasingly distinguished between "[l]aws such as economic or tax legislation that are scrutinized under rational basis review[, which] normally pass constitutional muster," and "law[s that] exhibit[] . . . a desire to harm a politically unpopular group," which receive "a more searching form of rational basis review . . . under the Equal Protection Clause . . . ." *Lawrence v. Texas*, 539 U.S. 558, 579-80 (2003) (O'Connor, J., concurring); *see Romer*, 517 U.S. 620; *City of Cleburne*, 473 U.S. 432; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973). It is difficult to ignore this pattern, which suggests that the rational basis analysis can vary by context.

At least one Court of Appeals has considered this pattern as well. As the First Circuit explains, "Without relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications." *See Massachusetts v. HHS*, Nos. 10-2207 & 10-2214, slip op. at 15. And, "in areas where state regulation has traditionally governed, the Court may require that the federal government interest in intervention be shown with special clarity." *Id.*

Regardless whether a more "searching" form of rational basis scrutiny is required where a classification burdens homosexuals as a class and the states' prerogatives are concerned, at a minimum, this Court must "insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. "The search for the link between classification and objective gives substance to the [equal protection analysis]." *Id.* Additionally, as has always been required under the rational basis test, irrespective of the context, the Court must consider whether the government's asserted interests are legitimate. Pursuant to these established principles, and mindful of the Supreme Court's jurisprudential cues, the Court finds that DOMA's section 3 does not pass constitutional muster.[2]

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[2] Any additional discussion of heightened or intermediate scrutiny would be "wholly superfluous to the decision" and contrary to settled principles of constitutional avoidance. *City of Cleburne*, 473 U.S. at 456 (Marshall, J., concurring in part, dissenting in part); *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); *see also Miss. Univ. for Women*, 458 U.S. at 724 n.9 (declining to address strict scrutiny when heightened scrutiny was sufficient to invalidate the challenged action); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 618 (1985) (declining to reach heightened scrutiny in reviewing classifications that failed the rational basis test).

E. Congress's Justifications

Contemporaneous with its enactment, Congress justified DOMA as: defending and nurturing the traditional institution of marriage; promoting heterosexuality; encouraging responsible procreation and childrearing; preserving scarce government resources; and defending traditional notions of morality. In its motion to dismiss and memorandum in opposition to summary judgment, BLAG advances some, but not all of these interests as rational bases for DOMA. It additionally asserts that Congress passed DOMA in the interests of caution, maintaining consistency in citizens' eligibility for federal benefits, promoting a social understanding that marriage is related to childrearing, and providing children with two parents of the opposite sex. The Court considers all of these interests to determine whether Windsor has "negative[d] every conceivable basis which might support [the statute]." *Heller*, 509 U.S. at 320-21 (citation and internal quotation marks omitted).

1. Caution and The Traditional Institution of Marriage

BLAG submits that "caution" was a rational basis for DOMA insofar as Congress wanted time to consider whether it should embrace (some of) the states' "novel redefinition" of marriage. As BLAG describes it, caution justified DOMA because altering the social concept of marriage would undermine Congress's goal of nurturing the foundational institution of marriage. (BLAG Mot. to Dismiss at 29–31.) By that account, Congress's putative interest in "caution" seems, in substance, no different than an interest in nurturing the traditional institution of marriage. *See* H.R. Rep. No. 104–664, at

12. The Court therefore considers both of these interests together.

With respect to traditional marriage, BLAG argues that Congress believed DOMA would promote it by "maintain[ing] the definition of marriage that was universally accepted in American law." (BLAG Mot. to Dismiss at 28). That interest may be legitimate.[3] However, it is unclear how DOMA advances it.

DOMA does not affect the state laws that govern marriage. (BLAG Mot. to Dismiss at 20 (noting that DOMA does not "directly and substantially interfere with the ability of same-sex couples to marry").) Precisely because the decision of whether same-sex couples can marry is left to the states, DOMA does not, strictly speaking, "preserve" the institution of marriage as one between a man and a woman. The statute creates a federal definition of marriage. But that definition does not give content to the fundamental right to marry—and it is the substance of that right, not its facial definition, that actually shapes the institution of marriage. *Cf. De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (noting that "[t]he scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law, [which] is especially true where a statute deals with a familial relationship [because] there is no federal law of domestic relations").

---

[3] While tradition as an end in itself may not be a legitimate state interest in this case, *see Heller*, 509 U.S. at 326 (noting that the "[a]ncient lineage" of a tradition does not necessarily make its preservation a legitimate government goal), the Court acknowledges that an interest in maintaining the traditional institution of marriage, when coupled with other legitimate interests, could be a sound reason for a legislative classification, *see Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring) (stating that "preserving the traditional institution of marriage" would be a legitimate state interest in an equal protection analysis). To the extent Congress had an interest in defending traditional notions of morality in furtherance of an interest in traditional marriage, H.R. Rep. No. 104–664, at 16, the Court agrees that "[p]reserving th[e] institution [of traditional marriage] is not the same as mere moral disapproval of an excluded group, and that is singularly so in this case given the range of bipartisan support for [DOMA]." *Massachusetts v. HHS*, Nos. 10–2207 & 10–2214, slip op. at 29, 30 (citation and internal quotation marks omitted).

To the extent Congress had any other independent interest in approaching same-sex marriage with caution, for much the same reason, DOMA does not further it. A number of states now permit same-sex marriages. DOMA did not compel those states to "wait[ ] for evidence spanning a longer term before engaging in . . . a major redefinition of a foundational social institution." (BLAG Mot. to Dismiss at 29.) Thus, whatever the "social consequences" of this legal development ultimately may be, DOMA has not, and cannot, forestall them.[4]

---

[4] Congress also expressed "a corresponding interest in promoting heterosexuality" as "closely related to the interest in protecting traditional marriage." H.R. Rep. No. 104-664, at 15 n.53. BLAG does not contend that this is a rational basis for DOMA's classification; nonetheless, the Court briefly considers it, as a "conceivable" basis that "might" support it. *Heller*, 509 U.S. at 320.

A permissible classification must at least "find some footing in the realities of the subject addressed by the legislation." *Id.* at 321. Here, such footing is lacking. DOMA affects only those individuals who are already married. The Court finds it implausible that section 3 does anything to persuade those married persons (who are homosexuals) to abandon their current marriages in favor of heterosexual relationships. Thus, the stated goal of promoting heterosexuality is so attenuated from DOMA's classification that it "render[s] the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446.

2. Childrearing and Procreation

Promoting the ideal family structure for raising children is another reason Congress might have enacted DOMA. Again, the Court does not disagree that promoting family values and responsible parenting are legitimate governmental goals. The Court cannot, however, discern a logical relationship between DOMA and those goals.

BLAG argues that Congress enacted DOMA to avoid a social perception that marriage is not linked to childrearing. In furtherance of that interest, it argues, Congress might have passed DOMA to deter heterosexual couples from having children out of wedlock, or to incentivize couples who are pregnant to get married. (BLAG Mot. to Dismiss at 36.) BLAG also claims that Congress had an interest in promoting the optimal social (family) structure for raising children—that is, households with one mother and one father. (BLAG Mot. to Dismiss at 38.) These concerns appear related to Congress's contemporaneously stated interest in "responsible procreation." H.R. Rep. No. 104–664, at 12–13.

These are interests in the choices that heterosexual couples make: whether to get married, and whether and when to have children. Yet DOMA has no direct impact on heterosexual couples at all; therefore, its ability to deter those couples from having children outside of marriage, or to incentivize couples that are pregnant to get married, is remote, at best. It does not follow from the exclusion of one group from federal benefits (same-sex married persons) that another group of people (opposite-sex married couples) will be incentivized to take any action, whether that is marriage or procreation. *See In re Levenson*, 587 F.3d 925, 934 (9th Cir. 2009).

Conceivably, Congress could have been interested more generally in maintaining the societal perception that a primary purpose of marriage is procreation. However, even formulated as such, the Court cannot see a link between DOMA and childrearing. DOMA does not determine who may adopt and raise children. Nor could it, as these matters of family structure and relations "belong[ ] to the laws of the States and not to the laws of the United States." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004).

At most, then, DOMA has an indirect effect on popular perceptions of what a family "is" and should be, and no effect at all on the types of family structures in which children in this country are raised. And so, although this Court must "accept a legislature's generalizations even when there is an imperfect fit between means and ends," *Heller*, 509 U.S. at 320, here, Congress's goal is "so far removed" from the classification, it is impossible to credit its justification. *Romer*, 517 U.S. at 635; *see Lewis v. Thompson*, 252 F.3d 567, 584 n.27 (2d Cir. 2001) (noting that the justification for the law cannot rely on factual assumptions that are beyond the "limits of 'rational speculation'" (quoting *Heller*, 509 U.S. at 320)).

3. Consistency and Uniformity of Federal Benefits

Additionally, BLAG explains that Congress was motivated to define marriage at the federal level to ensure that federal benefits are distributed consistently. In other words, Congress might have enacted DOMA to avoid a scenario in which "people in different States . . . have different eligibility to receive Federal benefits," depending on the state's marriage laws. (BLAG Mot. to Dismiss at 34 (quoting 142 Cong. Rec. S10121 (daily ed. Sept. 10, 1996) (statement of Sen. Ashcroft)).)

Here, the Court does discern a link between the means and the end. It is problematic, though, that the means used in this instance intrude upon the states' business of regulating domestic relations. That incursion skirts important principles of federalism and therefore cannot be legitimate, in this Court's view.

In the first instance, it bears mention that this notion of "consistency," as BLAG presents it, is misleading. Historically the states—not the federal government—have defined "marriage." *Cf. United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (noting that the states have enjoyed the latitude to "experiment[ ] and exercis[e] their own judgment in an area to which [they] lay claim by right of history and expertise"). For that reason, before DOMA, any uniformity at the federal level with respect to citizens' eligibility for marital benefits was merely a byproduct of the states' shared definition of marriage. The federal government neither sponsored nor promoted that uniformity. *See In re Levenson*, 587 F.3d at 933 (noting that the relevant status quo prior to DOMA was the federal government's recognition of any marriage declared valid according to state law); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 393 (D. Mass. 2010) (same).

Yet even if Congress had developed a newfound interest in promoting or maintaining consistency in the marital benefits that the federal government provides, DOMA is not a legitimate method for doing so. To accomplish that consistency, DOMA operates to reexamine the states' decisions concerning same-sex marriage. It sanctions some of those decisions and rejects others. But such a sweeping federal review in this arena does not square with our federalist system of government, which places matters at the "core" of the domestic relations law exclusively within the province of the states. *See Ankenbrandt v. Richards*, 504 U.S. 689, 716 (1992) (Blackmun, J., concurring); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *see also Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 249-50 (D. Mass. 2010) (discussing the history of marital status determinations as an attribute of state sovereignty).

The states may choose, through their legislative or constitutional processes, to preserve traditional marriage or to redefine it. *See Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 988 (N.D. Cal. 2012) (noting that thirty states have passed constitutional amendments banning same-sex marriage). But generally speaking, barring a state's inability to assume its role in regulating domestic relations, the federal government has not attempted to manage those processes and affairs. *See id.* at 1000 n.10 (observing that, historically, the federal government has only legislated in this area where there has been a failure or absence of state government). BLAG has conceded this historical fact. *See* Transcript of Oral Argument at 10:15–20, 18:2-5, *Golinski*, 824 F. Supp. 2d 968 (No. 10–257) (conceding that BLAG's "research hasn't shown that there are historical examples which [sic] Congress has legislated on behalf of the federal government in the area of domestic relations"). This is the "virtue of federalism." *Massachusetts v. HHS*, Nos. 10–2207 & 10–2214, slip op. at 30.

4. Conserving the Public Fisc

Lastly, Congress also justified DOMA as a means of conserving government resources. (BLAG Mot. to Dismiss at 32.) An interest in conserving the public fisc alone, however, "can hardly justify the classification used in allocating those resources." *Plyler*, 457 U.S. at 227. After all, excluding any "arbitrarily chosen group of individuals from a government program" conserves government resources. *Dragovich v. U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178, 1190 (N.D. Cal. 2011). With no other rational basis to support it, Congress's interest in economy does not suffice. *Accord, e.g.*, *Dragovich v. U.S. Dep't of the Treasury*, No. C 10-01564, slip op. at 26 (N.D. Cal. May 24, 2012); *Golinski*, 824 F. Supp. 2d at 994–95.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for summary judgment is GRANTED and Defendant–Intervenor's motion to dismiss is DENIED. The Court declares that section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, is unconstitutional as applied to Plaintiff. Plaintiff is awarded judgment in the amount of $353,053.00, plus interest and costs allowed by law. Each party shall bear their own costs and fees.

This case is CLOSED. The clerk of the court is directed to terminate the motions at docket numbers 28, 49, and 52.

SO ORDERED:

/s/ BARBARA S. JONES
BARBARA S. JONES
United States District Judge

Dated: New York, New York
June 6, 2012

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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10 CIVIL 8435 (BSJ)

EDITH SCHLAIN WINDSOR, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed: June 7, 2012]

JUDGMENT

Plaintiff having moved for summary judgment; Defendant-Intervenor having moved to dismiss, and the matter having come before the Honorable Barbara S. Jones, United States District Judge, and the Court, on June 6, 2012, having rendered its Order granting Plaintiffs motion for summary judgment, denying Defendant-Intervenor's motion to dismiss, declaring that section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, is unconstitutional as applied to Plaintiff, awarding Plaintiff judgment in the amount of $363,053.00, plus interest and costs allowed by law with each party to bear their own costs and fees, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated June 6, 2012, Plaintiff's motion for summary judgment is granted and Defendant-Intervenor's motion to dismiss is denied; the Court declares that section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, is unconstitutional as applied to Plaintiff; Plaintiff is awarded judgment in the amount of $363,053.00, plus interest and costs allowed by law; each party shall bear their own costs and fees; accordingly, the case is closed.

Dated: New York, New York
June 7, 2012

RUBY J. KRAJICK
Clerk of Court

BY: /s/ ILLEGIBLE
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 10-CV-8435 (BSJ)(JCF)
ECF CASE

EDITH SCHLAIN WINDSOR, ET AL., PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Filed: June 14, 2012

NOTICE OF APPEAL

TO THE CLERK OF THIS COURT AND ALL PARTIES OF RECORD:

NOTICE IS HEREBY GIVEN that Defendant the United States of America hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment dated June 7, 2012 [ECF No. 94] and the underlying Order dated June 6, 2012 [ECF No. 93]

Dated this 14th day of June, 2012.

Dated: June 14, 2012

Respectfully Submitted,

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APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 10-CV-8435 (BSJ)(JCF)

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Filed: June 8, 2012

NOTICE OF APPEAL OF INTERVENOR-DEFENDANT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES

Intervenor-Defendant the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("House") hereby appeals to the U.S. Court of Appeals for the Second Circuit the District Court's Order (June 6, 2012) (ECF No. 93), and Judgment (June 7, 2012) (ECF No. 94), both insofar as they grant plaintiff's [. . .] Motion for Summary Judgment (June 24, 2011) (ECF No. 28) and deny the [House]'s Motion to Dismiss (Aug. 1, 2011) (ECF No. 52). Copies of the Order and Judgment are attached as Exhibits A and B, respectively.

The statutory basis for this appeal is 28 U.S.C. § 1291. The House is exempt from the filing fee requirement for this appeal. *See* 28 U.S.C. § 1913; Judicial Conference of the United States, Court of Appeals Miscellaneous Fee Schedule, *available at*

http://www.uscourts.gov/FormsAndFees/Fees/CourtOfAppealsMiscellaneousFeeSchedule.aspx.

Respectfully submitted,

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---

[1] Kerry W. Kircher, as the ECF filer of this document, attests that concurrence in the filing of the document has been obtained from signatory Paul D. Clement.

[2] The Bipartisan Legal Advisory Group, which speaks for the House in litigation matters, is currently comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. The Democratic Leader and

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June 8, 2012

Democratic Whip decline to support the filing of this Notice of Appeal.

APPENDIX E

1. U.S. Const. Amend. V provides, in pertinent part:

No person shall * * * be deprived of life, liberty, or property, without due process of law * * * .

2. 1 U.S.C. 7 provides:

Definition of "marriage" and "spouse"

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
OCT 19 2012
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 12-307

In The
Supreme Court of the United States

THE UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR
and
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

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QUESTIONS PRESENTED

Section 3 of the Defense of Marriage Act ("DOMA") provides that for purposes of federal law "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife." 1 U.S.C. § 7.

The questions presented are:

(1) Does Section 3 of DOMA violate the equal protection component of the Due Process Clause of the Fifth Amendment?

(2) Does Plaintiff-Respondent have standing to challenge DOMA given that her standing is premised on a Canadian marriage certificate obtained at a time when New York law did not recognize same-sex marriage?

(3) Petitioner was sued because of the handling of a tax return by a federal agency that does not have general responsibility for administering DOMA. Under those circumstances, when the executive branch argues that a federal statute is unconstitutional and prevails in the lower courts, and where the House of Representatives has intervened to defend the statute, does the executive branch have prudential standing to seek this Court's review of the judgment it requested?

PARTIES TO THE PROCEEDING

Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("House") was the intervenor-defendant in the district court and an appellant in the Second Circuit.* The statement by the Department of Justice ("Department") in its Petition that the House intervened merely "to present arguments" in favor of DOMA, *see* Pet. (II), is inaccurate. Although the Department argued in the district court that the House's intervention should be limited to those terms, the district court granted the House intervention as a party-defendant to fully litigate DOMA's constitutionality under equal protection principles.

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* The United States House of Representatives has articulated its institutional position in litigation matters through a five-member bipartisan leadership group since at least the early 1980's (although the formulation of the group's name has changed somewhat over time). Since 1993, the House rules have formally acknowledged and referred to the Bipartisan Legal Advisory Group, as such, in connection with its function of providing direction to the Office of the General Counsel. *See, e.g.*, Rule I.11, Rules of the House of Representatives, 103rd Cong. (1993); Rule II.8, Rules of the House of Representatives, 112th Cong. (2011). While the group seeks consensus whenever possible, it, like the institution it represents, functions on a majoritarian basis when consensus cannot be achieved. The Bipartisan Legal Advisory Group currently is comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. The Democratic Leader and the Democratic Whip have declined to support the position taken by the Group on the merits of DOMA Section 3's constitutionality in this and other cases.

Petitioner the United States, as represented by the Department of Justice, was a defendant in the district court and an appellant in the Second Circuit.

Respondent Edith Schlain Windsor was the plaintiff in the district court and the appellee in the Second Circuit.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING........................... ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 2

1. The Defense of Marriage Act 2

2. The Justice Department's About-Face and the House's Intervention 6

3. History of This Case.. 8

   a. *Procedural History* 8

   b. *The District Court's Decision* 10

   c. *Subsequent Proceedings* 12

4. Other Pending Petitions Involving DOMA Section 3 13

REASONS FOR DENYING THE WRIT 14

I. *Gill* Presents Exactly the Same Question Regarding DOMA's Constitutionality. 16

II. Petitioner's Article III Standing Turns on a Question of State Law That Has Been Expressly Reserved by the New York Court of Appeals, and Presents a Vehicle Problem Unique to This Case. 18

III. Because Petitioner Prevailed Below, Granting the Petition Would Create Unnecessary Procedural and Substantive Complications. 21

IV. The Department Operates as a De Facto *Amicus* in This Case and That Status Is Best Accommodated by Granting the House's *Gill* Petition Alone................................ 25

CONCLUSION... 26

TABLE OF AUTHORITIES

Cases

Adams v. Howerton,
486 F. Supp. 1119 (C.D. Cal. 1980),
aff'd, 673 F.2d 1036 (9th Cir. 1982),
cert. denied, 458 U.S. 1111 (1982) 5

Baehr v. Lewin,
852 P.2d 44 (Haw. 1993) 4

Baker v. Nelson,
409 U.S. 810 (1972) 10

Camreta v. Greene,
131 S. Ct. 2020 (2011) 21, 22

Coleman v. Paccar, Inc.,
424 U.S. 1301 (1976) 14

Dean v. District of Columbia,
653 A.2d 307 (D.C. 1995) 5

Deposit Guar. Nat'l Bank v. Roper,
445 U.S. 326 (1980) 21

Dixon v. Duffy,
344 U.S. 143 (1952) 18

Godfrey v. Spano,
920 N.E.2d 328 (N.Y. 2009) 20

Golinski v. OPM,
781 F. Supp. 2d 967 (N.D. Cal. 2012)............... 13

Hernandez v. Robles,
855 N.E.2d 1 (N.Y. 2006) 8, 20

Hunt v. Ake,
No. 04-cv-1852 (M.D. Fla. Jan. 20, 2005)........... 6

INS v. Chadha,
462 U.S. 919 (1983)................................... 21, 22

In re Kandu,
315 B.R. 123 (Bankr. W.D. Wash. 2004) 6

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 19

Massachusetts v. U.S. Dep't of HHS,
682 F.3d 1 (1st Cir. 2012) 2, 13

Murphy v. Ramsey,
114 U.S. 15 (1885) 5

Pedersen v. OPM,
No. 10-cv-1750, 2012 WL 3113883
(D. Conn. July 31, 2012) 13

Smelt v. Cnty. of Orange,
374 F. Supp. 2d 861 (C.D. Cal. 2005),
aff'd in part and vacated in part for lack of standing, 447 F.3d 673 (9th Cir. 2006),
cert. denied, 549 U.S. 959 (2006) 6, 19

Sullivan v. Bush,
No. 04-cv-21118 (S.D. Fla. Mar. 16, 2005) 6

Wilson v. Ake,
354 F. Supp. 2d 1298 (M.D. Fla. 2005) 6

Constitutional Provisions

U.S. Const. art. II, § 3 6

Statutes

1 U.S.C. § 7 .... i, 2

5 U.S.C. § 8101 4

5 U.S.C. § 8341(a) 4

8 U.S.C. § 1186a(b)(1) 4

I.R.C. § 2(b)(2) 4

I.R.C. § 7703(b) 4

42 U.S.C. § 1382c(d)(2) 4

42 U.S.C. § 416 4

Revenue Act of 1921, § 223(b), 42 Stat. 227 5

Veterans and Survivors Pension Interim
Adjustment Act of 1975,
Pub. L. No. 94-169, Title I, § 101(31),
89 Stat. 1013, *codified at* 38 U.S.C. § 101(31) 4, 5

Rules

U.S. Dep't of Labor, Final Rule,
The Family And Medical Leave Act of 1993,
60 Fed. Reg. 2,180, 2,190-91 (Jan. 6, 1995) 5

Rule I.11, Rules of the House of Representatives,
103rd Cong. (1993) ii

Rule II.8, Rules of the House of Representatives,
112th Cong. (2011) ii

Other Authorities

142 Cong. Rec. 16969 (1996) 5

142 Cong. Rec. 17094 (1996) 2

Defense of Marriage Act: Hearing on H.R. 3396
Before the Subcomm. On the Constitution
of the H. Comm. On the Judiciary,
104th Cong. (1996) 3

Defense of Marriage Act: Hearing on S. 1740
Before the S. Comm. on the Judiciary,
104th Cong. (1996) 3

H.R. Rep. No. 104-664 (1996),
reprinted in 1996 U.S.C.C.A.N. 2905 .... 3, 5

Letter from Andrew Fois, Asst. Att'y Gen., to
Rep. Canady (May 29, 1996), *reprinted in*
H.R. Rep. No. 104-664, 34 (1996), *reprinted in*
1996 U.S.C.C.A.N. 2905 3

Letter from Andrew Fois, Asst. Att'y Gen., to Rep. Hyde (May 14, 1996), *reprinted in* H.R. Rep. No. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N 2905 3

Letter from Andrew Fois, Asst. Att'y Gen., to Sen. Hatch (July 9, 1996), *reprinted in* *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. (1996) 3

Letter from Att'y Gen. Eric H. Holder, Jr., to the Hon. John A. Boehner, Speaker of the House (Feb. 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-ag-223.html..... 6, 7

Thomas Kaplan, *After Long Wait, Gay Couples Marry in New York*, N.Y. Times (July 23, 2011) http://www.nytimes.com/2011/07/24/nyregion/across-new-york-hundreds-of-gay-couples-to-marry-on-sunday.html 18

INTRODUCTION

The Petition in this case is the latest in a series of extraordinary Petitions for a Writ of Certiorari Before Judgment that the Department has filed seeking review of DOMA's constitutionality. The Petitions are extraordinary both because they sought certiorari before judgment, and because they are totally unnecessary. The important issue of the constitutionality of Section 3 of DOMA is squarely presented to this Court in the House's earlier-filed Petition for Certiorari after judgment in No. 12-13, *Bipartisan Legal Advisory Group of the U.S. House of Representatives v. Gill*. That Petition was filed by the party whose arguments did not prevail in court and comes in the ordinary course following the judgment and opinion of the Court of Appeals for the First Circuit. There is no reason to take the extraordinary step of granting a petition for certiorari filed by a prevailing party before judgment in the court of appeals, when the exact same issue is better presented in a pending petition for certiorari after judgment filed by the party genuinely aggrieved by the lower court's judgment.

Granting this Petition would accomplish nothing beyond needlessly complicating this Court's review on the merits. Plaintiff-Respondent's standing to challenge DOMA depends on a sensitive question of New York law regarding the recognition of foreign same-sex marriage certificates—a question which the New York Court of Appeals has expressly reserved. Moreover, Petitioner prevailed in the courts below. Having prevailed below, there is certainly no reason for the Department to get the benefit of an opening and reply brief. Indeed, there is a substantial question whether the Department even has appellate standing to file a Petition here. But at a minimum, to preserve the proper alignment of the parties, if the Court were to grant the Department's Petition, it would have to undo the effect of its decision to grant certiorari to the Department by realigning the parties and setting a unique briefing schedule that properly provides an opening and reply brief to the House and realigns the Department with the plaintiff whose arguments it fully embraces. There is no need for any of that. The straightforward course here is also the correct one: This Court should grant the House's Petition in No. 12-13 to review the decision and judgment of the First Circuit and deny this Petition.[1]

STATEMENT OF THE CASE

1. The Defense of Marriage Act

The Defense of Marriage Act of 1996 "was enacted with strong majorities in both Houses [of Congress] and signed into law by President Clinton." *Massachusetts v. U.S. Dep't of HHS*, 682 F.3d 1, 6 (1st Cir. 2012). The House of Representatives voted 342-67 to enact DOMA, and the Senate voted 85-14 to do so. *See* 142 Cong. Rec. 17094-95 (1996) (House); *id.* at 22467 (Senate).

Section 3 of the Act defines "marriage" as the legal union of one man and one woman and "spouse" as a person of the opposite sex who is a husband or wife. 1 U.S.C. § 7. These definitions apply for purposes of federal law only. DOMA does not bar or invalidate any state-law marriage, but leaves states free to decide whether they will recognize same-sex marriage. DOMA simply asserts the federal government's right as a separate sovereign to provide its own definition for purposes of federal programs and funding.

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[1] For the same and additional reasons, the Court should also deny the other premature petitions, *see infra* pp. 13-14, and the Department's unnecessary Petition in No. 12-15. *See* the House's Br. in Opp., No. 12-15 (Aug. 31, 2012).

While Congress was considering DOMA, it requested the opinion of the Department of Justice on the bill's constitutionality, and the Department three times reassured Congress by letter that DOMA was constitutional. *See* Letters from Andrew Fois, Asst. Att'y Gen., to Rep. Canady (May 29, 1996), *reprinted in* H.R. Rep. No. 104-664, 34 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905 ("House Rep."); to Rep. Hyde (May 14, 1996), *reprinted in* House Rep. 33-34; and to Sen. Hatch (July 9, 1996), *reprinted in The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. at 2 (1996) ("Senate Hrg."). Congress also received and considered other expert advice on DOMA's constitutionality and concluded that DOMA is constitutional. *E.g.*, House Rep. 33 (DOMA "plainly constitutional"); *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. On the Constitution of the H. Comm. On the Judiciary*, 104th Cong. 87-117 (1996) (testimony of Professor Hadley Arkes); Senate Hrg. 1, 2 (Sen. Hatch) (DOMA "is a constitutional piece of legislation" and "a legitimate exercise of Congress' power"); *id.* at 23-41 (testimony of Professor Lynn D. Wardle); *id.* at 56-59 (letter from Professor Michael W. McConnell).

Congress, of course, did not invent the meanings of the words "marriage" and "spouse" when it enacted

DOMA in 1996. Instead, it adopted the traditional definitions of those terms. Nor was the timing of Congress' decision a fortuity. Instead, Congress acted to ensure that Hawaii's novel and then-recent decision to take steps toward redefining marriage, *see Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), did not automatically dictate the definition in other jurisdictions. Thus, Section 2 of DOMA allowed each state to decide whether to retain the traditional definition without having another jurisdiction's decision imposed via full faith and credit principles, and Section 3 preserved the federal government's ability to retain the traditional definition for federal law purposes. Although Congress often has made eligibility for federal marital benefits or duties turn on a couple's state-law marital status, it also has a long history of supplying federal marital definitions in various contexts—definitions that always have been controlling for purposes of federal law, without regard to the couple's status under state law.[2] In enacting DOMA, Congress merely reaffirmed what it has always meant when using the words "marriage" and "spouse" in federal law—and what courts and the Executive Branch have always understood it to mean: A traditional male-female couple.[3] It further clarified its understanding that these terms would have that meaning for purposes of federal law regardless of how states might choose to redefine marriage for purposes of their own law.[4]

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[2] *See, e.g.*, I.R.C. § 2(b)(2) (deeming persons unmarried who are separated from their spouse or whose spouse is a nonresident alien); I.R.C. § 7703(b) (excluding some couples "living apart" from federal marriage definition for tax purposes); Veterans and Survivors Pension Interim Adjustment Act of 1975, Pub. L. No. 94-169, Title I, § 101(31), 89 Stat. 1013, *codified at* 38 U.S.C. § 101(31) (for purposes of veterans' benefits, "'spouse' means a person of the opposite sex"); 42 U.S.C. § 416 (defining "spouse," "wife," "husband," "widow," "widower," and "divorce," for social-security purposes); 42 U.S.C. § 1382c(d)(2) (recognizing common-law marriage for purposes of social security benefits without regard to state recognition); 5 U.S.C. §§ 8101 (6), (11), 8341(a)(1)(A)-(a)(2)(A) (federal employee-benefits statutes); 8 U.S.C. § 1186a(b)(1) (anti-fraud criteria regarding marriage in immigration law context).

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[3] *See, e.g.*, Revenue Act of 1921, § 223(b), 42 Stat. 227 (permitting "a husband and wife living together" to file a joint tax return; *cf.* I.R.C. § 6013(a) ("A husband and wife may make a single return jointly of income taxes")); 38 U.S.C. § 101(31) ("The term 'spouse' means a person of the opposite sex"); U.S. Dep't of Labor, Final Rule, *The Family And Medical Leave Act of 1993*, 60 Fed. Reg. 2,180, 2,190-91 (Jan. 6, 1995) (rejecting, as inconsistent with congressional intent, proposed definition of "spouse" that would have included "same-sex relationships"); *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) ("Congress, as a matter of federal law, did not intend that a person of one sex could be a 'spouse' to a person of the same sex for immigration law purposes"), *aff'd*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982); *Dean v. District of Columbia*, 653 A.2d 307, 314 (D.C. 1995) (Congress, in enacting the District of Columbia's marriage statute of 1901, intended "that 'marriage' is limited to opposite-sex couples"); *see also Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (referring to "the union for life of one man and one woman in the holy estate of matrimony" as "the sure foundation of all that is stable and noble in our civilization").

[4] *See* House Rep. 10 ("[I]t can be stated with certainty that none of the federal statutes or regulations that use the words 'marriage' or 'spouse' were thought by even a single Member of Congress to refer to same-sex couples."); *id.* at 30 ("Section 3 merely restates the current understanding of what those terms mean for purposes of federal law."); 142 Cong. Rec. 16969 (1996) (Rep. Canady) ("Section 3 changes nothing; it simply reaffirms existing law.").

2. The Justice Department's About-Face and the House's Intervention

After DOMA's enactment, discharging the Executive's constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, the Department of Justice during the Bush Administration successfully defended DOMA against several constitutional challenges, prevailing in every case to reach final judgment.[5] The Department continued to defend DOMA during the first two years of the current Administration.

In February 2011, however, the Administration abruptly announced its intent to refuse to defend DOMA's constitutionality. Letter from Att'y Gen. Eric H. Holder, Jr., to the Hon. John A. Boehner, Speaker of the House (Feb. 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. Attorney General Holder stated that he and President Obama were of the view "that a heightened standard [of review] should apply [to DOMA], that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3." *Id.*

The Attorney General acknowledged that, in light of "the respect appropriately due to a coequal branch of government," the Department "has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense." *Id.* He did not, however, apply that standard to DOMA. On the contrary, he conceded that every Circuit to consider the issue (*i.e.*, eleven Circuits) had held that sexual orientation classifications are subject only to rational basis review, and he acknowledged that "a reasonable argument for Section 3's constitutionality may be proffered under [the rational basis] standard." *Id.*

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[5] *See Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part and vacated in part for lack of standing*, 447 F.3d 673 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006); *Sullivan v. Bush*, No. 04-cv-21118 (S.D. Fla. Mar. 16, 2005) (granting voluntary dismissal after the Department moved to dismiss); *Hunt v. Ake*, No. 04-cv-1852 (M.D. Fla. Jan. 20, 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

In response, the House intervened as a party-defendant in the various cases nationwide involving equal-protection challenges to DOMA's constitutionality. Notwithstanding that the Holder Letter said only that the Department would *not defend* DOMA Section 3, the Department went further and *affirmatively attacked Section 3* in court and accused the Congress that enacted DOMA—many of whose Members still serve—of doing so out of "animus."[6] The Department took this position even though DOMA was the very same statute (i) that the Department had defended a few short months before, and (ii) that the Department acknowledges is constitutional under the equal protection standard that applies in the great majority of Circuits.

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[6] *See* Br. for the United States, *Windsor*, Nos. 12-2335 & 12-2435 (2d Cir. Aug. 10, 2012). The Department has filed substantive briefs in numerous other DOMA cases making this same argument. *See* briefs in *Golinski v. OPM*, Nos. 12-15388 & 12-15409 (9th Cir. July 3, 2012); *Massachusetts v. U.S. Dep't of HHS*, Nos. 10-2204, 10-2207, & 10-2214 (1st Cir. Sept. 22, 2011); *Revelis v. Napolitano*, No. 1:11-cv-1991 (N.D. Ill. Apr. 23, 2012); *Dragovich v. U.S. Dep't of Treasury*, No. 4:10-cv-1564 (N.D. Cal. Jan. 19, 2012); *Cozen O'Connor, P.C. v. Tobits*, No. 2:11-cv-45 (E.D. Pa. Dec. 30, 2011); *Bishop v. United States*, No. 4:04-cv-848 (N.D. Okla. Nov. 18, 2011); *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn. Sept. 14, 2011); *Lui v. Holder*, No. 2:11-cv-1267 (C.D. Cal. Sept. 2, 2011).

3. History of This Case

a. *Procedural History*

Plaintiff-Respondent obtained a marriage certificate with the late Thea Clara Spyer in Ontario, Canada in 2007. At that time, New York did not issue marriage certificates to same-sex couples. *See Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006). Plaintiff-Respondent and Ms. Spyer were domiciled in the State of New York at all relevant times. Ms. Spyer passed away in 2009, naming Plaintiff-Respondent the executor and sole beneficiary of her estate. After paying more than $363,000 in federal estate taxes, Plaintiff-Respondent, as executor, sought a refund of that amount on the theory that the estate was entitled to the marital deduction. Recognizing that federal law offers this deduction only when the beneficiary of the estate is a "spouse" within the meaning of federal tax law and DOMA, Plaintiff-Respondent claimed that the failure to extend this favorable treatment to her violates the equal protection requirements of the Fifth Amendment. The IRS denied the refund, and Plaintiff-Respondent filed this suit in her capacity as executor of the estate. Her suit is premised on the notion that New York would have recognized the 2007 Canadian marriage certificate, even though New York did not issue marriage certificates to same-sex couples until after Ms. Spyer's passing.

This suit was filed before the Department ceased defending DOMA, and the district court allowed Petitioner a period of four months to move to dismiss. Order & Revised Sched. Order, *Windsor*, No. 10-cv-8435 (S.D.N.Y. Dec. 3, 2010 & Jan. 28, 2011). Instead of filing such a motion, however, the Department ultimately notified the court that it would not defend DOMA's constitutionality against equal-protection attack, Notice to Ct., *Windsor* (S.D.N.Y. Feb. 25, 2011), and the House sought and was granted leave to intervene. Mem. & Order, *id.* (S.D.N.Y. June 2, 2011). The district court entered an unusual scheduling order under which Plaintiff-Respondent would move for summary judgment before the House could move to dismiss the complaint. Revised Sched. Order, *id.* (S.D.N.Y. May 11, 2011). Proceedings were delayed, however, by a prolonged dispute over the extent to which the court could consider scholarly publications, articles, or books in connection with Plaintiff-Respondent's motion for summary judgment.[7] The district court ultimately denied Plaintiff-Respondent's motion to strike these materials from the House's briefing. Order, *Windsor* (S.D.N.Y. Aug. 29, 2011).

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[7] *See* Mem. of Law in Supp. of Mot. to Strike, *id.* ; Letters to the Court from Roberta A. Kaplan, dated Aug 11, 2011 (S.D.N.Y. ECF No. 120), Aug. 12, 2011 (two letters; ECF Nos. 118 & 119), Sept. 21, 2011 (ECF No. 112), and Sept. 23, 2011 (ECF No. 115); Letters to Court from H. Christopher Bartolomucci, dated Aug. 11, 2011 (ECF No. 117), Aug. 12, 2011 (ECF No. 116), and Sept. 23, 2011 (ECF No. 111); House's Mem. of Law in Supp. of Mot. for Leave to File Sur-Reply, *id.* (S.D.N.Y. Sept. 2, 2011); Mem. in Supp. of Renewed Mot. for Leave to File Sur-Reply, *id.* (S.D.N.Y. Sept. 20, 2011). The district court ordered that substantial portions of these matters be litigated by letter brief.

b. *The District Court's Decision*

The dispositive motions were fully briefed and pending before the district court for nearly nine months before the district court's decision. Ultimately, without hearing oral argument, the district court granted Plaintiff-Respondent's motion for summary judgment and denied the House's motion to dismiss. The district court first relied on decisions from New York's lower courts to infer that New York would have recognized foreign same-sex marriages before New York itself allowed such marriages, even though New York's highest court had expressly reserved the question in November 2009, after Ms. Spyer's passing. App. 6a-8a. It found, therefore, that Plaintiff-Respondent had standing. *Id.* The district court then found this Court's decision upholding traditional marriage laws in *Baker v. Nelson*, 409 U.S. 810 (1972), to be inapplicable. App. 8a-9a. Turning to the question of the proper level of constitutional scrutiny for classifications based on sexual orientation—an issue that the Second Circuit had not yet addressed—the district court adopted a novel standard of constitutional review involving "intensified scrutiny," a level of scrutiny between ordinary rational-basis and intermediate scrutiny. App. 12a-14a. The district court based this hybrid level of review on the First Circuit's decision in *Gill*, which had issued six days earlier.[8]

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[8] Petitioner claims that it is "incorrect" to say that "the district court adopted a novel standard of constitutional review

The district court then considered the government interests that the House advanced to support DOMA's constitutionality. The court acknowledged that several of these interests—such as preserving the traditional institution of marriage and promoting responsible childrearing—are weighty enough to justify DOMA, but concluded that DOMA does not adequately further any of these interests. App. 16a-19a. By contrast, the district court recognized that DOMA *is* sufficiently related to a government interest in ensuring the uniform nationwide distribution of federal benefits, but deemed this interest illegitimate because, in the district court's view, the Constitution gives states and not Congress the prerogative to define "marriage" even for federal-law purposes. App. 19a-21a. The district court also held that conserving government resources is not a sufficient government interest to support DOMA without some further justification for how the savings are achieved. App. 21a-22a.

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involving 'intensified scrutiny,'" apparently on the theory that the district court's statements in this regard were dicta. Pet. 8 n.4 (citation marks omitted). But before opining that "a more searching form of rational basis review" applies in some cases, the district court expressly stated that it was "elaborat[ing] on an aspect of the equal protection case law that it believes affects the nature of the rational basis analysis required here." App. 13a. At a minimum, this demonstrates that there is significant ambiguity in the record, and disagreement among the parties, about what level of scrutiny the district court applied.

c. *Subsequent Proceedings*

The House appealed this judgment to the Second Circuit. Although the district court had adopted the result advocated by the Department, Petitioner nevertheless filed its own Notice of Appeal.

Three days later, on June 11, Plaintiff-Respondent filed a "motion to expedite appeal" in the Second Circuit, proposing a highly expedited schedule. Mem. of Law in Supp. of Mot. for Expedited Appeal, *Windsor*, Nos. 12-2335 & 12-2435 (2d Cir. June 11, 2012). The Second Circuit granted Petitioner's motion while adopting the House's alternative schedule for expedition, Order, *id.* (2d Cir. June 22, 2012), holding oral argument on September 27, 2012. The Second Circuit denied the House's motion to postpone oral argument pending the outcome of Plaintiff-Respondent's petition for certiorari before judgment. Order, *id.* (2d Cir. Aug. 23, 2012).

On July 16, 2012, nearly a month after the Second Circuit granted her expedition motion and 17 days after the House filed its own petition after judgment in *Gill*, Plaintiff-Respondent filed in this Court a petition for certiorari before judgment in the Second Circuit. *See* Pet. for Cert. Before Judgment, *Windsor v. United States*, No. 12-63 ("Windsor Pet."). The House has opposed that Petition. Br. in Opp'n, *id.* (Aug. 31, 2012). The instant Petition was filed 57 days later, on September 11.

On October 18, the day before this Brief was filed, a divided panel of the Second Circuit affirmed the district court's judgment. Given the timing of the court of appeals' decision, the House intends to address the Second Circuit's opinion and its ramifications for this case in a forthcoming supplemental filing in this Court.

4. Other Pending Petitions Involving DOMA Section 3

The question of DOMA's constitutionality is also presented by seven other petitions for certiorari pending before this Court. Three petitions arise out of the First Circuit's decision and judgment in *Massachusetts v. U.S. Department of Health and Human Services,* 682 F.3d 1 (1st Cir. 2012). The others are petitions for certiorari before judgment following appeals of district court judgments striking down DOMA on equal protection grounds—one petition by the plaintiff in this case, one by the Department in *Golinski v. OPM*, 781 F. Supp. 2d 967 (N.D. Cal. 2012), and petitions by both the plaintiffs and the Department in *Pedersen v. OPM*, No. 10-cv-1750, 2012 WL 3113883 (D. Conn. July 31, 2012).

The House filed a Petition for Certiorari in the First Circuit case on June 29, 2012. *See* Pet. for Cert., No. 12-13, *Bipartisan Legal Advisory Group of the U.S. House of Representatives v. Gill*. No party opposes the House's *Gill* Petition. A few days later, the Department filed its own Petition in that case, No. 12-15 (July 3, 2012), despite having its bottom-line position on DOMA adopted in that case. On July 20, Massachusetts filed a Conditional Cross-Petition for Certiorari in the First Circuit case, No. 12-97; both Massachusetts and the individual *Gill* plaintiffs support this Court's review in *Gill*. Resp. of the Commonwealth of Mass. in Supp. of Cert., Nos. 12-13 & 12-15 (July 20, 2012); Br. in Resp. of Nancy Gill et al., Nos. 12-13 & 12-15 (Aug. 2, 2012).

Similarly, the Department filed a Petition for a Writ of Certiorari Before Judgment in *Golinski*, No. 12-16 (July 3, 2012), despite prevailing below—an action subsequently duplicated by the Plaintiffs-Petitioners in *Pedersen*, *see* No. 12-231, and here. The Department filed its own Petition in *Pedersen* as well. *See* No. 12-302. The Department does not unequivocally support plenary review in either this case or *Pedersen*, but merely requests that the Court hold those Petitions for review in the event it denies the writ in the other DOMA cases.

REASONS FOR DENYING THE WRIT

A grant of a petition for certiorari filed before judgment in the Court of Appeals "is an extremely rare occurrence." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers). This Court's Rule 11 provides that such a writ "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court."

This case does not remotely satisfy that standard. Although the issue of DOMA's constitutionality is indeed a matter of great public importance, particularly given the confrontation between the House and executive branch engendered by the Department's actions in this litigation, that issue has already been brought before this Court by "normal appellate practice"—in the form of the House's petition after decision and judgment in *Gill*, a case in which the House, Department, Massachusetts, and the individual plaintiffs all agree that certiorari is appropriate. There is thus nothing "to justify deviation from normal appellate practice" in this case.

Instead, granting the writ here would result only in unnecessary multiplication and confusion of the issues. Not only is there no justification for taking the extraordinary step of granting certiorari before judgment when the exact same issue is squarely presented in an earlier-filed petition for certiorari after judgment, but even the Department acknowledges that this case features unique vehicle problems not present in *Gill*. To determine whether Plaintiff-Respondent even has standing to pursue her claims (an issue this Court would need to consider to confirm its own jurisdiction), this Court would be forced to consider a sensitive question of New York law—whether New York would have recognized foreign same-sex marriages at a time when it forbade them to be entered into in-state—that the New York Court of Appeals thus far has expressly reserved. What is more, as explained more fully in the House's opposition in No. 12-15, it is not clear that Petitioner, whose arguments prevailed in district court and have now prevailed in the court of appeals as well, even has appellate standing to petition. There is certainly no reason to confront that issue when the same underlying constitutional question is squarely presented in a Petition filed and briefed after the First Circuit had already issued its opinion and entered judgment.

The Department's effort to file a petition for certiorari before judgment in this case is truly extraordinary. If the Department were really eager to seek this Court's review of DOMA's constitutionality and thought petitioning for certiorari before judgment was appropriate, it could have done so years ago. It makes little sense for the Department to make that extraordinary request only after a case—*Gill*—is properly before this Court in the ordinary course of appellate proceedings. This case would add nothing except procedural complications to this Court's consideration of DOMA's constitutionality in *Gill*. The proper course here is also the straightforward one: There is no reason for the Department or this Court to search through the dockets of the courts of appeals for cases implicating DOMA's constitutionality when the First Circuit has ruled. The First Circuit rejected the House's arguments, and the House alone seeks to have the First Circuit's judgment overturned.

Under these circumstances, the House's *Gill* Petition is the superior vehicle for review of DOMA's constitutionality by this Court. The Court can avoid all of the side issues presented by this case and focus on the important question of DOMA's constitutionality by granting the House's Petition in No. 12-13, and denying the Petition in this case.

I. *Gill* Presents Exactly the Same Question Regarding DOMA's Constitutionality.

As Petitioner acknowledges, Pet. 13, the question presented in this case regarding DOMA is identical to the House's Question 1 in *Gill*. *Compare* Pet. (I) *with* Pet. No. 12-13 at i.[9] In its *Gill* opinion, the First Circuit passed on exactly the same question as the district court and court of appeals here: Whether DOMA is compatible with the Fifth Amendment's implicit guarantee of equal protection. Thus, there is no aspect of the issues that would be presented in this case as to DOMA's constitutionality that the Court could not address as easily (or more easily) in *Gill* instead.[10]

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[9] The Department's Petition in *Gill* also presents that same question. *See* Pet. No. 12-15 (I).

Recognizing that this case adds nothing to *Gill*, Petitioner suggests that the Court hold it pending the disposition of the *Gill* petitions, and grant this petition filed before judgment if it denies the writ in that case. Pet. 13. But as is explained *infra*, this case is inferior to *Gill* in multiple ways as a vehicle for reviewing DOMA's constitutionality. Indeed, even Petitioner recognizes that this case is an inferior vehicle not only to *Gill*, but even to the before-judgment *Pedersen* petitions. Pet. 12. If the Court somehow deems that issue not to warrant certiorari after judgment in *Gill*, then *a fortiori* it will not warrant certiorari here.

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[10] Ms. Windsor argues, in support of certiorari, that "the record in this case could not be clearer or cleaner" because "it is undisputed by the parties" that her injury arose "solely because she * * * was married to a woman (instead of a man)." Resp. 10. Leaving aside the threshold question whether Ms. Windsor even was recognized as "married" under the law of New York, *see infra* Pt. II, this contention does nothing to distinguish this case from *Gill*, or indeed from any of the other DOMA petitions before the Court: All of them involve one or more claims that undisputedly are predicated solely on the fact that the respective plaintiffs' same-sex relationships leave them ineligible for federal benefits available to married couples.

II. Petitioner's Article III Standing Turns on a Question of State Law That Has Been Expressly Reserved by the New York Court of Appeals, and Presents a Vehicle Problem Unique to This Case.

"This Court, of course, does not sit to determine matters of state law * * * ." *Dixon v. Duffy*, 344 U.S. 143, 144 (1952). And *Gill*, like many DOMA cases, presents no questions of state law. But as Petitioner acknowledges, this case does present an important state-law question.

Petitioner presents the question whether DOMA Section 3 denies equal protection to "persons of the same sex who are legally married under the laws of their State." Pet. I, Question Presented. To have standing to assert this claim, Plaintiff-Respondent obviously must have been "legally married" to another woman "under the law[] of their State." But that is a state law question, the answer to which remains uncertain.

New York has permitted same-sex marriages only since mid-2011. *See* Thomas Kaplan, *After Long Wait, Gay Couples Marry in New York*, N.Y. Times (July 23, 2011) http://www.nytimes.com/2011/07/24/nyregion/across-new-york-hundreds-of-gay-couples-to-marry-on-sunday.html. Plaintiff-Respondent obtained her marriage certificate with Ms. Spyer in Ontario long before marriage certificates were available to same-sex couples in New York. *See id.*; Windsor Pet. 5. Ms. Spyer passed away on February 5, 2009, again long before New York issued same-sex marriage certificates of its own. Windsor Pet. 5. As the district court recognized, *see* App. 6a, Plaintiff-Respondent's standing thus depends on whether New York law would have recognized her Ontario marriage before the time that New York began to permit same-sex marriages in-state. *See also Smelt v. Cnty. of Orange*, 447 F.3d 673 (9th Cir. 2006) (unmarried same-sex couple lacked standing to challenge DOMA), *cert. denied*, 549 U.S. 959 (2006). If the Windsor-Spyer same-sex foreign marriage certificate was not valid under New York law, then the premise for Plaintiff-Respondent's claim fails because she can trace no injury to DOMA, and DOMA's invalidation would provide no redress. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).[11]

The New York Court of Appeals has not resolved the critical question of whether foreign, same-sex marriage certificates were valid under New York law in 2009, when Ms. Spyer died. Just three years earlier, in rejecting an effort to compel New York to recognize same-sex marriage generally, the court held that the "New York Constitution does not compel recognition of marriages between members of the same sex." *Hernandez v. Robles*, 855 N.E.2d 1, 5

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[11] The Department suggests, without explaining why, that the validity in New York of Plaintiff-Respondent's Ontario marriage certificate might go to the merits of her claim rather than her standing to pursue it. Pet. 12. But since, on Petitioner's own account, Plaintiff-Respondent must have been a member of a state-recognized marriage in order to bring her within the class of persons whose equal-protection rights DOMA violates, it is not clear how this could be anything other than a standing issue. In any event, Petitioner acknowledges that the uncertainty over the validity of a foreign marriage certificate obtained while New York itself did not allow same-sex marriages creates a serious vehicle problem whether or not it is critical to Plaintiff-Respondent's standing. *Id.*

(N.Y. 2006). Then, in November 2009, *after* Ms. Spyer's passing, it expressly reserved the question whether New York law recognizes foreign, same-sex marriage certificates. *Godfrey v. Spano*, 920 N.E.2d 328, 337 (N.Y. 2009) (declining to decide whether "New York's common-law marriage recognition rule is a proper basis for the challenged recognition of out-of-state same-sex marriages," and instead resting the court's decision on its conclusion that the statutory benefits in question were not limited to spouses).

Thus, even establishing federal jurisdiction in this case required the courts below to consider the sensitive state-law question of whether Plaintiff-Respondent's and Ms. Spyer's Canadian marriage certificate would have been recognized under New York law at the time relevant for this case. *See* App. 6a-8a. Because Plaintiff-Respondent's standing turns on the answer to this question, the House requested that the Second Circuit certify it to the New York Court of Appeals. *See* Br. for Def.-Appellant at 13-14, 17-19, *Windsor*, Nos. 12-2335 & 12-2435 (2d Cir. Aug. 16, 2012). The Second Circuit declined to do so, but because the question goes to the plaintiff's standing, that does not end the matter. This Court retains an obligation to ensure that the Article III prerequisites are satisfied, and plaintiff's standing clearly depends on a state law question. This standing issue is unique to this case and the underlying foreign marriage certificate. In light of the alternative vehicles, most notably the House's Petition in *Gill*, that do not present this vehicle problem, there is no reason to grant the Department's Petition here.

III. Because Petitioner Prevailed Below, Granting the Petition Would Create Unnecessary Procedural and Substantive Complications.

Additionally, because the Department prevailed below, granting its Petition here would only introduce unnecessary procedural and substantive complications to this Court's consideration of DOMA. Procedurally, because the Department prevailed in the district court and has now prevailed in the court of appeals, it would make no sense to give the Department the benefit of an opening and reply brief in this Court. Thus, if the Court were to grant certiorari here, it would have to engage in a series of procedural machinations to align the parties properly. There is no reason to go through those steps when the parties are already properly aligned in the House's Petition in *Gill*.

The complications flowing from the Department's success in the district court go well beyond scheduling. As explained more fully in the House opposition in No. 12-15, it is not clear that the Department even has appellate standing to petition. One of the basic rules of federal procedure is that "a party who receives all that he has sought generally is not aggrieved by the judgment affording [the] relief and cannot appeal from it." *INS v. Chadha*, 462 U.S. 919, 930 (1983) (quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980) (brackets omitted)).

Two Terms ago this Court made clear that the same principle applies to its certiorari jurisdiction. *Camreta v. Greene*, 131 S. Ct. 2020, 2030-33 (2011). As a result, "[a]s a matter of practice and prudence, [this Court has] generally declined to consider cases at the request of a prevailing party." *Id.* at 2030.

Indeed, in a footnote in the instant Petition, the Department acknowledges that granting certiorari here would require the Court to expand the existing executive-branch appellate-standing rule in cases like this one—from a rule allowing "an agency of the United States" to appeal a judgment striking down "the Act of Congress it administers" even where it agrees with that outcome, *INS v. Chadha*, 462 U.S. 919 (1983), to one allowing *any* executive-branch defendant to obtain review of *any* judgment striking down a statute that the executive branch maintains is unconstitutional. *See* Pet. 11-12 n.6.

Petitioner maintains that this "is a distinction without a difference," *id.*, but that of course is the precise question that the Court would be required to consider if it granted any of the Department's pending petitions. And there are significant arguments why the difference may be material. This rule of *Chadha* is already in the nature of an exception to the general rule that a party cannot appeal from a judgment it requested. The *Chadha* Court indicated that an agency's special relationship with "the Act of Congress it administers" is a reason for permitting such an exception when the agency believes the statute to be invalid. 462 U.S. at 931. That is very different from giving the Department an open-ended mandate to seek this Court's affirmance of the invalidation of any statute the Department chooses, in cases where a Congressional party has intervened to defend the statute. Certainly, there is no compelling reason to make it costless for the Department to abandon its traditional obligation to defend the constitutionality of duly-enacted statutes. Moreover, *Chadha* involved the executive branch resisting what it regarded as an encroachment on its own constitutional power by the legislative veto at issue there. For both these reasons, the agency in *Chadha* had a considerably more concrete and particularized interest at stake than the Department here has in DOMA's invalidity. Granting one of the Department's petitions would needlessly force this Court to decide whether to extend the rule of *Chadha* to this situation.

Additionally, the events of the DOMA litigation suggest that this Court should not be over-eager to reaffirm *Chadha*'s holding regarding executive-branch standing in cases where a Congressional body has taken on the Department's normal role of defending a statute's validity. In *Chadha*, Congress' involvement was essentially limited to the proceedings before this Court, and the Executive Branch and Legislative Branch agreed that Chadha's case was the proper one for this Court's review. It was relatively uncomplicated, therefore, to permit both of them to seek that review. The procedural circumstances here are very different and cast the question in a significantly different light.

When the Executive Branch opines that a major federal statute is unconstitutional and drops its legal defense of that statute in the lower courts, any Congressional body that intervenes will instantly become the sole operative defendant in what is likely to be (or become) sprawling, nationwide litigation—and one that will be prolonged even further by the delays necessarily caused by the intervention process and the re-setting of dispositive briefing deadlines. That is exactly what happened here: The House has been defending DOMA for well over a year, and has intervened in 15 lawsuits challenging DOMA's validity. Many of these cases involved discovery, including the depositions of numerous expert witnesses; nearly all of them involved briefing multiple dispositive motions and/or appeals. And in all of the cases, the House has been required to defend the statute's validity against the attacks not only of private plaintiffs, but of the Department as well.

But, when it came time to appeal in these cases, the House found itself in an extended tug-of-war with the Department—which opposes the relief the House seeks—over which cases should receive further review, and when, and how. In such circumstances, there is at least a serious question whether it is more appropriate for the Congressional body, as the real party in interest aggrieved by the lower-court judgment, to have the normal right accorded any multi-case defendant of determining its own appellate strategy, rather than being forced to deal with whatever appeals the Department, an opposing and prevailing party, chooses to file.

The Court need not decide this matter in the DOMA litigation. Since the House's standing to seek this Court's review of a judgment striking down DOMA is clear, granting the House's *Gill* petition would avoid the question entirely. But granting the Department's petition not only would lend fresh credence to, but would affirmatively expand, the *Chadha* rule in a manner that is at best premature and inappropriate without plenary consideration of the issue. The far simpler route is to avoid unnecessarily considering whether to extend this aspect of *Chadha*, by granting the House's unopposed *Gill* petition and denying the Department's petitions.

In short, there is no reason for this Court to get sidetracked by questions concerning appellate standing and the scope of *Chadha*. To the contrary, the Court can avoid all of these side issues and focus on the important question of DOMA's constitutionality simply by granting the House's Petition in No. 12-13.

IV. The Department Operates as a De Facto *Amicus* in This Case and That Status Is Best Accommodated by Granting the House's *Gill* Petition Alone.

Ever since the Department abandoned its traditional responsibility of defending the constitutionality of DOMA, it has operated as a de facto *amicus* supporting the arguments of plaintiffs attacking DOMA's constitutionality. As such, the Department is not entitled to any special consideration of its views as to the appropriate vehicle for this Court's review. Thus, where the only party defending DOMA (the House) and the plaintiffs who have attacked DOMA all agree that *Gill* is an appropriate vehicle for this Court's review, the Department's suggestion that this Court should accept its petition in these extraordinary procedural circumstances, even if it rejects the House's *Gill* Petition, should be viewed with deep skepticism.

Moreover, given the Department's role as a de facto *amicus* supporting the plaintiff, granting this Petition would lead to procedural complications and require the Court to realign the parties for purposes of briefing and argument. There is no need to scramble the parties by granting this Petition only to undo the effect by granting later procedural motions.

* * *

The House agrees with the Department and with Plaintiff-Respondent that this Court should review DOMA's constitutionality. But there clearly is no need to deviate from normal appellate practice to do so—especially when this case presents unique vehicle problems which could only distract this Court from the central issues concerning DOMA. DOMA's constitutionality can be fully resolved by granting the House's petition in *Gill*, and this Court should take that path. In all events, it should decline to take the extraordinary step of granting certiorari in this case at the request, filed before judgment in the court of appeals, of the parties who prevailed in the courts below.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari Before Judgment should be denied. The House's Petition for Certiorari in No. 12-13 should be granted.

Respectfully submitted,

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OPPOSITION BRIEF

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IN THE

Supreme Court of the United States

THE UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the estate of THEA CLARA SPYER,

Respondent,

On Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Second Circuit

RESPONSE IN SUPPORT OF WRIT OF CERTIORARI BEFORE JUDGMENT

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TABLE OF CONTENTS

Table of Authorities ii

I. Ms. Windsor Has Standing to Challenge DOMA 2

II. This Case Provides a Vehicle for the Court to Determine the Appropriate Level of Scrutiny for Sexual Orientation Discrimination 7

III. This Case Presents an Excellent Vehicle for the Review of Section 3 of DOMA 9

Conclusion 11

Appendix A – Transcript of Second Circuit Oral Argument (Sep. 27, 2012) a1

Appendix B – Intervenor-Defendant's Response to Plaintiff's First Requests for Admission (Aug. 1, 2011) a46

TABLE OF AUTHORITIES

Page(s)

CASES

Braschi v. *Stahl Assocs. Co.*,
74 N.Y.2d 201 (1989) 5

Brockett v. *Spokane Arcades, Inc.*,
472 U.S. 491 (1985) 6

Dickerson v. *Thompson*,
73 A.D.3d 52 (3d Dep't 2010) 3

In re Estate of Ranftle,
81 A.D.3d 566 (1st Dep't 2011) 3

Godfrey v. *Spano*,
13 N.Y.3d 358 (2009) 3, 6, 7

Hernandez v. *Robles*,
7 N.Y.3d 338 (2006) 4

Huddleston v. *Dwyer*,
322 U.S. 232 (1944) 6

Matter of Jacob,
86 N.Y.2d 651 (1995) 5

Lewis v. *N.Y. State Dep't of Civil Serv.*,
60 A.D.3d 216 (3d Dep't 2009) 3, 4

Martinez v. *Cnty. of Monroe*,
50 A.D.3d 189 (4th Dep't 2008) 3

Romer v. *Evans*,
517 U.S. 620 (1996) 8

Page(s)

Rosenberg v. *MetLife, Inc.*,
453 F.3d 122 (2d Cir. 2006) 6

State Farm Mut. Auto Ins. Co. v. *Mallela*,
372 F.3d 500 (2d Cir. 2004) 6

Wharf (Holdings) Ltd. v. *United Int'l Holdings, Inc.*,
532 U.S. 588 (2001) 6

STATUTES

9 N.Y.C.R.R. § 2204.6(d) 5

18 N.Y.C.R.R. § 421.16(h)(2) 5

N.Y. Banking Law § 451(d)(1) 5

N.Y. Civ. Rights Law § 40-c(2) (McKinney 2003) 5

N.Y. Dom. Rel. Law §10-a (McKinney 2011) 6

N.Y. Educ. Law § 313(l)(a) (McKinney 2003) 5

N.Y. Exec. Law § 296 (McKinney 2010) 5

N.Y. Ins. Law § 2701(a) (McKinney 1998) 5

N.Y. Penal Law § 240.30(3) (McKinney 2008) 5

N.Y. Penal Law § 240.31 (McKinney 2008) 5

N.Y. Penal Law § 485.05(1) (McKinney 2010) 5

N.Y. Pub. Health Law § 2805-q(2)(a) (McKinney 2004) 4

Page(s)

N.Y. Pub. Health Law § 4201 (McKinney 2006) 5

OTHER AUTHORITIES

2004 Ops. N.Y. Atty. Gen. No. 2004-1, at 16 (Mar. 3, 2004), *available at* http://www.ag.ny.gov/sites/default/files/opinion/I%202004-1%20pw.pdf 3

An Act to Amend the Domestic Relations Law, in Relation to the Ability to Marry, Assemb. B. 8590, 230th Legis. Sess., Reg. Sess. (N.Y. 2007) 5

An Act to Amend the Domestic Relations Law, in Relation to the Ability to Marry, Assemb. B. 7732, 232nd Legis. Sess., Reg. Sess. (N.Y. 2009) 5

Respondent Edith Windsor respectfully submits this brief in response to the petition for certiorari filed by the United States of America. Ms. Windsor, the United States, and Intervenor the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") all agree that this case presents an issue of exceptional importance that justifies the Court's immediate review—the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"). *See* Pet. at 10; Brief in Opposition at 11-12, *Windsor* v. *United States* (No. 12-63) (Aug. 31, 2012).

Nonetheless, in its petition, the United States suggests that the Court should grant certiorari in this case only if it determines that *United States Department of Health and Human Services* v. *Massachusetts*, Nos. 12-13, 12-15, and 12-97 ("*Massachusetts*"), *Office of Personnel Management* v. *Golinski*, No. 12-16 ("*Golinski*"), and *Office of Personnel Management* v. *Pedersen*, No. 12-231 ("*Pedersen*") are not appropriate vehicles to decide the constitutionality of Section 3 of DOMA. The United States contends that this "tiered" approach is appropriate because of potential questions about Ms. Windsor's standing and because the District Court in this case applied rational basis scrutiny to hold Section 3 unconstitutional.

As discussed below, neither of the government's concerns warrants either delaying consideration of or denying the petitions for certiorari relating to Ms. Windsor. The only thing that truly distinguishes this case from the two other cases in which petitions for certiorari before judgment have been filed (*Golinski* and *Pedersen*) is that, consistent with "settled principles of constitutional avoidance," the District Court did not reach the question of whether some form of heightened scrutiny should apply to statutes that discriminate on the basis of sexual orientation. Pet. App. at 13a n.2. But that difference in no way prevents this Court from addressing the heightened scrutiny issue if it concludes that reaching that question is necessary. This case thus remains an excellent vehicle for reviewing DOMA's constitutionality.[1]

I. Ms. Windsor Has Standing to Challenge DOMA

Any individual whose marriage is valid under state law, but not recognized because of DOMA, has standing to challenge the statute. Ms. Windsor is such a person. The District Court squarely held that New York recognized Ms. Windsor's marriage and therefore that she has standing to challenge DOMA's discriminatory effects. *See* Pet. App. at 6a-8a. Although the United States notes BLAG's concern that New York might not have considered Ms. Windsor's Canadian marriage to be valid, it both acknowledges "the uniform decisions of [New York's] intermediate appellate courts recognizing foreign same-sex marriages," Pet. at 12 (internal quotation marks omitted), and emphasizes that "BLAG has identified no reason to believe that the State's highest court would reach a [different] conclusion." *Id.* (internal quotation marks omitted).

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[1] The Second Circuit heard oral argument in this case on September 27, 2012, and it is possible that there will be a decision from the Court of Appeals before this Court takes any action on this or any of the other DOMA-related petitions.

Any concern about whether New York recognized Ms. Windsor's out-of-state marriage is misplaced. Well before the passage of New York's marriage statute in 2011, three of the state's four intermediate appellate courts (including the First Department, where Ms. Windsor and her late spouse lived at the time of her spouse's death) had addressed the question of whether New York recognized out-of-state marriages of same-sex couples. All of them concluded that it did. *See In re Estate of Ranftle*, 81 A.D.3d 566 (1st Dep't 2011) (2008 Canadian marriage); *Martinez* v. *Cnty. of Monroe*, 50 A.D.3d 189 (4th Dep't 2008) (2004 Canadian marriage); *see also Lewis* v. *N.Y. State Dep't of Civil Serv.*, 60 A.D.3d 216 (3d Dep't 2009), *aff'd on other grounds sub nom. Godfrey* v. *Spano*, 13 N.Y.3d 358 (2009). New York's Attorney General had also concluded in a written opinion that New York would recognize same-sex marriages performed in other jurisdictions as early as 2004. *See* 2004 Ops. N.Y. Atty. Gen. No. 2004-1, at 16 (Mar. 3, 2004), *available at* http://www.ag.ny.gov/sites/default/files/opinion/I%20 2004-1%20pw.pdf; *see also Godfrey*, 13 N.Y.3d at 368 n.3 (discussing views of New York's Governor and Comptroller); *Dickerson* v. *Thompson*, 73 A.D.3d 52, 54-55 (3d Dep't 2010). As the District Court noted, while the New York Court of Appeals has not itself squarely addressed the question, "its 2009 opinion in *Godfrey* v. *Spano* said nothing to cast doubt on the uniform lower-court authority recognizing the validity of same-sex marriages." Pet. App. at 7a-8a (citing 13 N.Y.3d at 377).

Moreover, because New York had no statute in place which had the purpose or effect of voiding same-sex couples' marriages, it could have refused to recognize Ms. Windsor's marriage only if it concluded that such marriages were "*abhorrent* to New York public policy." *Lewis*, 60 A.D.3d at 219 (emphasis added). Even in *Hernandez* v. *Robles*, a 2006 decision in which the New York Court of Appeals held in a plurality opinion that the New York Constitution did not guarantee the right to marry to same-sex couples, the New York Court of Appeals hardly suggested that marriages between same-sex couples were "abhorrent" to New York public policy. 7 N.Y.3d 338 (2006). To the contrary, the Court of Appeals stated that while it would not "say whether same-sex marriage is right or wrong," it suggested that "of course the Legislature may . . . extend marriage or some or all of its benefits to same-sex couples." *Id.* at 366; *see also id.* at 358-59; *id.* at 379 (Graffeo, J., concurring) ("It may well be that the time has come for the Legislature to address the needs of same-sex couples and their families, and to consider granting these individuals additional benefits through marriage . . . ").

Given that marriages and domestic unions between same-sex couples were given widespread social acceptance and legal respect in New York well prior to 2009, such marriages were clearly not "abhorrent" to New York public policy. After all, it was New York's public policy to recognize out-of-state same-sex marriages well prior to 2009, as discussed above. And by 2006, the New York Legislature had passed legislation giving hospital visitation rights and the ability to make decisions about a spouse's remains to out-of-state same-sex marriages entered into by New York couples. *See* N.Y. Pub. Health Law § 2805-q(2)(a) (McKinney

2004); N.Y. Pub. Health Law § 4201 (McKinney 2006).[3] Additionally, in a clear statement that marriages between same-sex couples were not "abhorrent," the New York Assembly twice passed Governor-sponsored bills granting same-sex couples the right to marry in New York in 2007 and 2009. *See* An Act to Amend the Domestic Relations Law, in Relation to the Ability to Marry, Assemb. B. 8590, 230th Legis. Sess., Reg. Sess. (N.Y. 2007); An Act to Amend the Domestic Relations Law, in Relation to the Ability to Marry, Assemb. B. 7732, 232nd Legis. Sess., Reg. Sess. (N.Y. 2009).

In short, there is no reason to believe that the same New York Court of Appeals that invited the New York Legislature to enact marriages for same-sex couples in 2006 would have concluded in 2009 (when her spouse died), or even in 2007 (when Edie Windsor was married), that such marriages were "abhorrent" to New York public policy. In fact, the New York Legislature accepted the New York Court of Appeals' invitation a mere five years later, when it made marriage for same-sex couples the law in New

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[3] New York law also provided a variety of other protections to same-sex couples, including prohibitions against discrimination based on sexual orientation, N.Y. Civ. Rights Law § 40-c(2) (McKinney 2003); N.Y. Exec. Law § 296 (McKinney 2010); N.Y. Educ. Law § 313(1)(a) (McKinney 2003); N.Y. Ins. Law § 2701(a) (McKinney 1998), increased criminal penalties for offenses involving animus based on sexual orientation, N.Y. Penal Law §§ 240.30(3) (McKinney 2008), 240.31 (McKinney 2008), 485.05(1) (McKinney 2010), eligibility for a partner's credit union services, N.Y. Banking Law § 451(d)(1), protection from eviction, 9 N.Y.C.R.R. § 2204.6(d) (McKinney 2012); *Braschi* v. *Stahl Assocs. Co.*, 74 N.Y.2d 201, 211-13 (1989), and adoption of a partner's biological child, 18 N.Y.C.R.R. § 421.16(h)(2); *Matter of Jacob*, 86 N.Y.2d 651, 656 (1995).

York. *See* N.Y. Dom. Rel. Law §10-a (McKinney 2011).[3]

At the recent oral argument in this case before the Second Circuit on September 27, 2012, the judges had the following observations:[4]

> JACOBS, C.J.: But the New York Court of Appeals [in *Godfrey* v. *Spano*, 13 N.Y.3d 358 (2009)] was presented with that and they declined to decide it. They said it ought to be a matter for the legislature, as I recall. . . . We can't force them to decide anything they don't want to decide, it is purely discretionary on their part and it looks like they have

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[3] Nor would this issue qualify for certification to the New York Court of Appeals, particularly since it is now unlikely to recur. *See, e.g.*, *Rosenberg* v. *MetLife, Inc.*, 453 F.3d 122, 125 (2d Cir. 2006) (in the absence of a New York Court of Appeals decision on an issue of state law, the Second Circuit looks "to the decisions of the Appellate Division of the New York Supreme Court"); *State Farm Mut. Auto Ins. Co.* v. *Mallela*, 372 F.3d 500, 505 (2d Cir. 2004) (certification appropriate where "question is likely to recur").

[4] A transcript that was prepared based on the official CD recording from the Second Circuit of the oral argument on September 27, 2012 is included as part of the Appendix to this Response. *See* App., *infra*, a1-a36. The Second Circuit's determination of this question of purely New York law is not one that is likely to be reconsidered by this Court. *See Wharf (Holdings) Ltd.* v. *United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001) (refusing, in opinion on merits, to review determination of state law by federal court of appeals, because "we ordinarily will not consider such a state-law issue"); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).

> already exercised that discretion. (App., *infra*, a4.)
>
> . . . .
>
> STRAUB, J.: [T]he simple fact is that the New York legislature has acted and that there is appellate division [case law] regarding that, from which we might believe what the Court of Appeals might say today. (App., *infra*, a5.)
>
> . . . .
>
> DRONEY, J.: The Court [in *Godfrey* v. *Spano*, 13 N.Y.3d 358 (2009)] said it was unnecessary to resolve the issue because the administrators had the authority to treat same sex marriages as other marriages, it was unnecessary, that was the Court of Appeals decision. . . . The [standard for determining whether an] out of state marriage violates an expressed statutory intent to void such a marriage or an aspect of the out of state marriage is abhorrent to New York public policy. How could you conclude that the New York Court of Appeals should decide that? (App., *infra*, a5-a6.)

II. This Case Provides a Vehicle for the Court to Determine the Appropriate Level of Scrutiny for Sexual Orientation Discrimination

The second reason for the United States' "tiered" preference that the Court decide other petitions before considering those filed in this case is that the District Court in this case applied traditional rational basis scrutiny to hold section 3 of DOMA unconstitutional. Pet. at 12.[5] Unlike the First Circuit in *Massachusetts* and the district courts in *Golinski* and *Pedersen*, the District Court in this case applied only rational basis analysis to evaluate Section 3 and concluded that, because the statute failed to withstand even that standard, it was unnecessary to inquire into whether heightened scrutiny or some form of intensified rational basis scrutiny would be appropriate.

Contrary to the Government's suggestion, the District Court did not "assume[] without deciding that laws that draw distinctions on the basis of sexual orientation are subject to rational basis review." *See* Pet. at 8. Instead, it made it clear that because "the constitutional question presented here may be disposed of under a rational basis review, it need not decide . . . whether homosexuals are a suspect class." Pet. App. at 13a.[6] Thus, rather than making any assumptions about the level of scrutiny that should be applied, the District Court concluded that "[a]ny additional discussion of heightened or intermediate scrutiny would be 'wholly superfluous to the decision' and contrary to settled principles of constitutional avoidance." *Id.* at 14a n.2 (quoting *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 456 (1985) (Marshall, J., concurring in part and dissenting in part), and citing *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944); *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 n.9 (1982); *Hooper* v. *Bernadillo Cnty. Assessor*, 472 U.S. 612, 618 (1985)).

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[5] The United States also mentions that, had it not filed a petition for certiorari in this case, the Court might be called on to decide whether Ms. Windsor, as a prevailing party in the District Court, has standing to seek certiorari before judgment. Pet. at 11. While Ms. Windsor explained in the reply brief in support of her petition that she does have such standing, Reply in Support of Petition for Certiorari Before Judgment at 7-11, *Windsor* v. *United States* (No. 12-63) (Sept. 5, 2012), the Government's petition renders this issue academic.

[6] This is similar to what this Court did in *Romer* v. *Evans*, 517 U.S. 620, 632 (1996) ("Amendment 2 fails, indeed defies, even this conventional [rational basis] inquiry.").

Ultimately, of course, the level of scrutiny used to evaluate DOMA is a question of law that this Court can determine on its own. Ms. Windsor argued in both the District Court and before the Second Circuit that heightened scrutiny is the most appropriate standard, and she would continue to advance that argument before this Court, which will have the benefit of all lower court decisions on DOMA regardless of which petition(s) for certiorari it chooses to grant. As Ms. Windsor explained in her petition for certiorari before judgment, this case presents a full and clear record which the District Court found to support the conclusion that DOMA could not survive even traditional rational basis scrutiny.

III. This Case Presents an Excellent Vehicle for the Review of Section 3 of DOMA

Finally, it bears repeating that Ms. Windsor's own life experiences compellingly reflect the history of lesbians and gay men in our nation over the past decades and illustrate why, under any standard of review, DOMA cannot survive this Court's review.

For example, when Ms. Windsor, as a mathematics graduate student at New York University in the late 1950's, worked on a computer for the Atomic Energy Commission, she justifiably feared that she would lose her job if she were asked whether she was a lesbian when she was called into an FBI interview relating to her security clearance. Supplemental Affidavit of Edith Schlain Windsor ¶¶ 19-23, *Windsor* v. *United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No 10-cv-8435), ECF No. 83. Similarly, when Ms. Windsor became engaged to her late spouse Thea Spyer in 1967 (when the possibility of their ever getting married seemed virtually impossible), Thea was forced to propose to Edie with a circular diamond brooch (rather than a ring) so that Ms. Windsor could avoid questions about who her fiancé was when she went to her job as a computer programmer at IBM. Affidavit of Edith Schlain Windsor ¶ 10, *Windsor*, 833 F. Supp. 2d 394 (No 10-cv-8435), ECF No. 81.

Moreover, the record in this case could not be clearer or cleaner—it is undisputed by the parties that solely because she is a lesbian, and was married to a woman (instead of a man), Ms. Windsor had to pay an enormous ($363,000) estate tax bill. *See* App., *infra*, a47-a48. While DOMA causes harm to lesbian and gay married couples in innumerable ways (both concrete and dignitary), a $363,000 federal estate tax bill is surely among the most consequential examples of the type of inequitable and unconstitutional injury caused by DOMA. This case therefore presents an excellent vehicle for this Court's review of DOMA's constitutionality.

Conclusion

For the foregoing reasons, the petition for certiorari before judgment filed in this case by the United States of America should be considered alongside other petitions concerning the constitutionality of Section 3 of DOMA and should be granted.

Respectfully submitted,

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October 10, 2012

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN THE MATTER OF:
EDITH SCHLAIN WINDSOR,

Plaintiff/Appellee,

vs.

UNITED STATES OF AMERICA,

Defendant/Appellant.

- and -

BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES

Intervenor-
Defendant-
Appellant

Docket No.:
12-2335[L]
12-2435[Con]

September 27, 2012

HELD AT: Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, NY 10007

BEFORE: Hon. Dennis Jacobs
[Chief Judge]
Hon. Christopher F. Droney
Hon. Chester J. Straub

APPEARANCES: ROBERTA A. KAPLAN

[For Windsor]

PAUL D. CLEMENT
[For BLAG]

STUART DELERY
[For U.S.]

TRANSCRIBER: Ann Arundel

			RE	RE	V.
WITNESS	DIRECT	CROSS	DIRECT	CROSS	D. J.

EXHIBITS

		For	In
PETITIONER	DESCRIPTION	I.D.	Ev.

[START RECORDING]

THE COURT: At this time we will hear Windsor versus the United States and the Bipartisan Legal Advisory Group. Good morning, Mr. Clement.

MR. PAUL D. CLEMENT: Good morning, Your Honors and may it please The Court. Congress in 1996 confronted a unique and unprecedented dynamic. While previously every jurisdiction had adopted the traditional definition of marriage, Hawaii appeared to be on the verge of changing the traditional definition to include same sex couples.

In response, Congress did not deem Hawaii's choice irrational or in any way attempt to override Hawaii's decision. Instead, Congress acted to ensure that each sovereign jurisdiction could decide this important issue for itself without having Hawaii's decision govern for them either by the full faith and credit principles or by federal law simply picking up Hawaii's definition.

Thus in Section 2 of DOMA Congress essentially made clear that states could rationally decide to follow Hawaii's lead or rationally decide not to, but each state could decide the matter for itself. And in Section 3, which is principally at issue here, Congress made clear that federal law would not simply pick up Hawaii's definition for U.S. citizens residing in Hawaii, but rather Congress would retain the traditional definition as the federal definition for federal law purposes only.

Now Ms. Windsor attacks DOMA as irrational and violating the equal protection guarantee. Needless to say Ms. Windsor's standing to raise that objection depends on whether New York law would recognize a same sex couple's foreign marriage at a time when New York State itself had not yet decided to recognize same sex marriages.

JACOBS, C.J.: You are suggesting that we certify that question in the New York Court of Appeals?

MR. CLEMENT: That's correct, Your Honor.

JACOBS, C.J.: But the New York Court of Appeals was presented with that and they declined to decide it. They said it ought to be a matter for the legislature, as I recall.

MR. CLEMENT: Well, that's right, Your Honor, but I mean they didn't say we are not going to decide this and we are never going to decide it. They said--

JACOBS, C.J.: We can't force them to decide anything they don't want to decide, it is purely discretionary on their part and it looks like they have already exercised that discretion.

MR. CLEMENT: Well, I do think that--you are obviously referring to the Godfrey against Spano case, Your Honor, and I think there is a difference there. There, they had two alternative grounds for their decision and they said as a matter of constitutional avoidance, judicial you know minimalism, judicial restraint, we are going to decide on this less controversial ground rather than this more controversial ground. But that doesn't mean to suggest that in a case where that was the critical question they wouldn't decide the issue at all. And, indeed, I think in a sense the fact that they had that issue up there and they had three judges who were ready to decide that issue, but the court itself said you know that's a difficult issue, let's hold off on that. That's an argument for certification, not against certification.

STRAUB, J.: Well, the simple fact is that the New York legislature has acted and that there is appellate division regarding that, from which we might believe what the Court of Appeals might say today. We have that right, why shouldn't we simply end it there?

MR. CLEMENT: Well, obviously, Judge Straub, you have the right to decide that. It is a discretionary question for this Court and I am not trying to suggest otherwise. What I am trying to suggest though is the critical question is not 2012, the critical question is February 2009. And in circumstances where in November 2009 the New York Court of Appeals, notwithstanding the fact that the you know appellate divisions at that point are all of one view, decides to exercise jurisdiction over the case, so it obviously thought it was an important and close question. It takes the appeal on and then it decides you know nine months after the relevant period here that the question is essentially close enough that it is going to avoid the issue and decide it on an alternative ground. That seems to me to suggest that the standard for certification is satisfied. It is a difficult question. It is a sensitive question of New York law.

DRONEY, J.: The Court said it was unnecessary to resolve the issue because the administrators had the authority to treat same sex marriages as other marriages, it was unnecessary, that was the Court of Appeals decision.

MR. CLEMENT: Oh, absolutely, and it is to my point, didn't say we will never decide this, they didn't say we are scared to decide this. They said in this case it is not necessary for us to decide it. But it—

DRONEY, J.: Would you agree that is correct that they are not recognizing out of state marriages. The out of state marriage violates an expressed statutory intent to void such a marriage or an aspect of the out of state marriage is abhorrent to New York public policy. How could you conclude that in the New York Court of Appeals should decide that?

MR. CLEMENT: Well, I just think, again I think the critical question is is it a question they should decide or is it a question that this court should decide for them. And it seems to me that the question is again not now. I mean you know it's--obviously right now it's a question that the New York legislature has determined prospectively. But we have a situation here where the question is in 2009 what's the question and whatever the right standard is under New York law, it hasn't changed since 2009 and you know the court may apply that standard sort of two prong test, they may say actually this is a different situation, we are going to apply a slightly different test. You know I am not here to predict how they would handle that.

I just think--and I don't mean to belabor this point either, but I do want to get the point that you know this is a rather extraordinary case. I mean usually you have to speculate, is this sort of a close question. Here you don't really have to speculate.

I mean the New York Court of Appeals in November of 2009 after taking this case, the issue up, says you know we are not going to decide that issue. They've expressly reserved it. And it wasn't just one of those you know drop a footnote here, it is not a big deal, we will reserve it. I mean they had three judges of the court saying you know there are affirmative reasons why we should go further and decide that issue and they declined to do it. So that in a nutshell is the argument for certification, is the argument for standing. But I do want to turn to the merits as well.

And on the merits, of course, Ms. Windsor attacks the statute both as irrational and as failing the strict scrutiny test that she suggests should deal with the classifications based on sexual orientation.

Now the first obstacle to her argument is the Supreme Court's summary disposition in Baker against Nelson. Now to be sure a lot has happened since the Supreme Court issued its summary decision, its dismissal for want of a substantial federal question in Baker. But the one thing that hasn't changed is this Court's obligation to follow Supreme Court precedent, including precedent that is the holdings of summary dispositions.

JACOBS, C.J.: Yeah, but it is limited to the precise facts presented by that case.

MR. CLEMENT: Well, it is not limited to its facts; it is limited to the holding essentially necessary to decide that case.

JACOBS, C.J.: Well, the holding is a rule of law that is based upon the circumstances presented.

MR. CLEMENT: Sure, but you know you could say you know sometimes a case is limited to its facts and then it doesn't apply if the plaintiff's name isn't Baker. I don't think that's the test. I think the test is--

JACOBS, C.J.: I absolutely agree with you.

MR. CLEMENT: So the test is just the same legal issue and the legal issue there obviously involve the state statute and that's a difference, but it was an equal protection claim based on both sex and sexual orientation and we would say that that--

JACOBS, C.J.: And the test is the same for federal or state.

MR. CLEMENT: Exactly. The Supreme Court has made that crystal clear. And so we think that really decides the case for a lower court. At a minimum, as the First Circuit recognized, even if you don't think that absolutely decides the case, it certainly affects the analysis because it certainly means at a minimum that the case has to be decided on the premise that the state laws that do not recognize same sex marriage but maintain the traditional definition are free from constitutional infirmity and then the question really becomes why can't the federal government do the same thing when it comes to federal benefit statutes. And that's why I think you know the appellees have a section in their brief about you know kind of what DOMA does and what DOMA doesn't do. And I think it is important to focus on that because as I say this would be a different case if Congress tried to interfere with state laws that recognized same sex marriage as a matter of state law. They tried to use its preemptive authority to override those state decisions, but that's not what Congress did here. Congress operated exclusively in an area that I would have thought was unquestionably an area of exclusive federal prerogative which is federal benefits laws and it said for purposes of those federal benefit statutes we are going to apply a uniform federal definition and we are going to maintain the traditional definition, the definition that was the then governing law in all fifty states continues to be the majority rule.

I see that my time has expired.

STRAUB, J.: You have observed that the traditional definition as that being the law. Where would I find that in a Supreme Court opinion?

MR. CLEMENT: Well, I mean, I am happy to try to reference you to some Supreme Court opinions that in referring to marriage have referred to it in sort of gender specific or sex specific terms that would suggest that that was their understanding of it. But I was making a slightly different point, which was simply--

STRAUB, J.: I understand that. I was taking you to the point that you were about to speak to. Are there Supreme Court cases that are not defined or at least described or somehow referred to this traditional understanding of marriage?

MR. CLEMENT: Yes, there are, Your Honor. We cited some of them in the briefs. I know there is an old, I think Murphy is an old Supreme Court case.

But I think if you look at you know virtually every one of the Supreme Court's cases that talks about marriage including Loving, for example, it is always talked about in terms of I think would have to be understood as referring to the traditional definition, either there is references to husband and wife or there are references to the unique link between marriage and procreation, that's some of the language in Loving for example. So I think they are thinking about it in terms of the traditional definition.

STRAUB, J.: The Supreme Court has written in 1885 a rather definitive statement and then point out they are having some reference to it over the years. Has the Supreme Court said anything to the contrary?

MR. CLEMENT: Not that I am aware of. As far as I know every reference to marriage is you know at a minimum it would be neutral, so there would be nothing to the contrary and I think most of the references would be made in ways that make clear that what the Court has in mind when it is talking about marriage were in places suggesting there is a fundamental right to marriage, they are talking about the traditional definition. And, of course, that's not surprising because they are talking about it at a time like when Congress acted in 1996, that everybody understands that the traditional definition is the definition. And I would say one thing too, which is you know the one time where the court talks about marriage in a context where they might have had a real reason to distinguish is, of course, in Lawrence, but when they talk about marriage in Lawrence they are talking about it to make clear in the majority opinion, we are not saying anything that affects the question of same sex marriage. You have Justice O'Connor, who is saying that there in fact is a legitimate government interest in preserving the traditional definition and then you have, of course, the dissenting opinion which is I think you know takes it even further and would say that you know expresses concerns about the logic of the majority but says and it is indeed in response to that dissent that the majority is essentially saying. That's not what this opinion is about. We are not going there. So there is certainly nothing in the Supreme Court's cases that suggest that anything but the traditional definition is the definition that they've had in mind in their cases.

JACOBS, C.J.: Some of the amicus briefs and the other side is arguing that this is a matter that ought to be gauged under intermediate standards of scrutiny and one of the criteria there is immutability, identifiability and so on. Putting aside the issue of immutability, because that is just argued all over the place amongst psychologists and geneticists and everyone else, why is sexual preference not something that is manifested when people apply for this government benefit, like illegitimacy. I mean people don't know that people are illegitimate, people don't walk around with a sign, but when they apply for you know to probate an estate or to get Social Security or whatever it is and they fill out a form and they say well you know my folks are not married, then that raises the issue of illegitimacy. And why is it not the same thing when a same sex couple shows up at the registrar's office and gives their names or their manifesting of the same sex?

MR. CLEMENT: Well, in that sense it may be similar in that one respect, illegitimacy, but I think that's what would take you to the other relevant factors in the analysis with things like political powerlessness for example, where I think there is a radical difference between illegitimacy on the one hand and homosexuality on the other and then you look at some of the other factors as well and I think that's where the distinction would be drawn. But I do think in that sense you do have a dynamic where it would you know to the extent that two people of the same sex want to make a claim for benefits based on marital status, as you say, at that point it is going to be clear.

JACOBS, C.J.: In terms of political power is the test whether they have political power at all or is it whether such political power as they may have is diminished by the fact that it is harder to publicly associate or it is unknown how many people have varied sexual preferences.

MR. CLEMENT: Oh, I think it is the former, Your Honor, and I don't think it is an overly demanding test. I think it is a test that doesn't-- you know it doesn't guarantee successful outcomes. It guarantees--it is a question of whether you can get the attention of legislators.

JACOBS, C.J.: But women can and there is intermediate scrutiny for sex?

MR. CLEMENT: Sure, but I think you know obviously we are talking about one of those classic four factor tests and you can point to, okay, this factor is like sex and this factor is like illegitimacy, but when you take them together I don't think there is anything like this and I think there is an important difference.

JACOBS, C.J.: There isn't any classification that correlates with sexual preference across the four criteria?

MR. CLEMENT: I think that's right and I do think that you know in a context like sex for example, I mean, you know the political powerlessness probably you could check that box. But on the other hand you have something there which I think is you know in my view there are probably two things that you would really look for in looking for why a classification would qualify for heightened scrutiny. And to me the two things that would make the most sense is one, political powerlessness because if they have access to the legislative process it is not clear why they really need the courts to intervene, why you can't leave this issue for the democratic process. But the other thing which was true of sex and was true of race, but is not true of sexual orientation is if there is a discrimination that takes the form of denying the franchise. I mean if you can't vote precisely because of your sex or precisely because of your race, well then that's like a structural impediment to use the democratic process to get your way and whatever the history of discrimination on the basis of sexual orientation and obviously there is a debate on that in the briefs in the Supreme Court and in Lawrence itself suggested that you know it is a relatively recent phenomenon where it has taken that specific form. But the point is you know we have never had a situation that I am aware of where sexual orientation was a basis for disenfranchisement.

JACOBS, C.J.: Well, the minority members of the Bipartisan Legal Advisory Group, they argue if lesbians and gay men had political power how would DOMA have passed overwhelmingly, you have a neat bit Judo, I guess, but I mean, what's your answer to that?

MR. CLEMENT: Well, I would somewhat rhetorically come back and say if they had no political power how would they get 137 members of Congress or whatever the final tally is to file an amicus brief now. And to be sure, you know I think that I could have made in 1996 an argument that the political power factor argued against recognizing homosexuality as a heightened class, but whatever the strength of my argument in 1996, I think my argument on that is much stronger in 2012 and that fact alone seems to me to speak strongly to the idea that this is an issue that can be left to the democratic process. I mean you know one need look no further than the State of New York where you know the Court of Appeals in Hernandez had this question as a judicial matter, they said we are not going to find a fundamental right to same sex marriage but they wrote in their opinion you know this is--you know they almost you know had implored the legislature, please you know address this issue. And in the same way if this Court applies rational basis, recognizes there is a rational basis for this 1996 statute, then a process can play out where the members of Congress, some of whom voted for DOMA themselves and now are on the other side, that process can continue and the political process can resolve it. And I am not predicting how that will get resolved and when it will get resolved, but the question is in an area like this where there seems so much reason to think that the legislative process is available to continue to address this issue as people's opinions evolve and the like, why the courts would want to sort of take it off the table, with heightened scrutiny I think is strongly counsels on not applying heightened scrutiny, as does of course the fact that this Court of Appeals would then be the first to do that, notwithstanding this kind of uniform wall of precedent.

DRONEY, J.: A few more questions.

MR. CLEMENT: Sure.

DRONEY, J.: First is has the Supreme Court ever recognized this kind of rational basis review that was applied in the First Circuit and second is, if we were to conclude that DOMA is subject to intermediate scrutiny, what's your position on whether it would survive?

MR. CLEMENT: Well, I will take them both in turn. I mean we would take the position that no, the Supreme Court, you know sort of three levels of scrutiny is enough. There is rational basis, there is intermediate scrutiny and there is strict scrutiny. And so we don't think that there is any support for this notion of kind of rational basis plus or intermediate scrutiny minus. And you know there obviously are some cases you could read where the courts write something down on rational basis, like Cleburne for example and you can think well that must be something other than rational basis. But I don't think the Court's decisions allow us to do that, to recognize that.

And the one thing I would say is, there is no support for a sort of rational basis plus where the plus comes from federalism principles and I think you know it is just a misfit from an equal protection standpoint. I mean most of our equal protection cases or 14th amendment cases were worried about state action. We are not particularly solicitous in the equal protection realm for states in any particular way.

To answer the second part of your question, you know I do think it is a much more difficult argument to try to say that DOMA passes something other than rational basis. I think that's in part because you know you are talking about a definition. I mean a definition by its very nature it's a little hard to say that having drawn a definitional line one place rather than another is really you know important for a government interest. But that said, I will try it, which is to say I think you know I think the answer then becomes kind of the analysis of Justice O'Connor in her concurrence in Lawrence. She is not applying intermediate scrutiny as such, but you know she says look there is an important government interest in--she uses the word I think legitimate, but I would say important, important government interest in preserving the traditional definition.

There is no other way to preserve the traditional definition than to preserve the traditional definition, it becomes somewhat circular but it gets to the problem that we are talking about a definition.

And so I would say that even if you get out of the basis of rational basis, you know there still is this idea that there is something important about letting each sovereign decide for themselves whether they want to make this important decision. You know I don't think anybody on either side of this case minimizes what's at stake here and the importance of what is at stake here.

DRONEY, J.: But did she say in her concurrence though, the two that applied rational basis that's what started this, isn't that right?

MR. CLEMENT: Well it--

DRONEY, J.: The rational basis - - would – towards – politically oppressed people she mentions that in her concurrence?

MR. CLEMENT: She mentions that in her concurrence, you know, I agree, that's one vote for that sort of principle. I don't really see that emerging as a majority view in any of these cases. You know as I read and obviously people can read these cases differently, but as I read Romer and as I read Lawrence, I mean, I think Romer is really the most important one here, you know the Court is saying this is rational basis review and you know it is the dissent that is saying this must be something more and they are saying "no", you know and obviously as a component of rational basis they do say that you know--and this is what they said about amendment 2 in Romer, if you go through the analysis and there is no other explanation left than hostility to a group, well that's not a rational basis.

But I don't think you could reach the same conclusion with respect to DOMA as we you know exhaustively cover in the briefs. There are a number of rational bases that would satisfy traditional rational basis review and as I say even the First Circuit recognized that if you were just you know applying plain vanilla rational basis the justifications the House has offered would be sufficient.

If there are no further questions, thank you.

JACOBS, C.J.: You reserve rebuttal. Ms. Kaplan?

MS. ROBERTA KAPLAN: Thank you, Your Honor.

JACOBS, C.J.: Good morning.

MS. KAPLAN: Good morning. This case presents a single question, is Section 3 of the Defense of Marriage Act or DOMA unconstitutional as applied to Edith Windsor, an eighty-three year old lesbian widow who had to pay a $363,000 estate tax bill and wants her money back. Judge Jones held that it was. The policy underlying the marital exemptions to the federal estate tax as set forth in our brief was to eliminate the so-called widow's tax on surviving spouses so that they could keep all the property accumulated during the marriage after a spouse had died. To quote Barbara, and on this Mr. Clement and I agree, to quote Barbara Underwood's Amicus brief at page 2, "This case does not present the question whether the Constitution requires states to follow the path of New York, Vermont and Connecticut. Instead this case presents a different question, whether when states have chosen to authorize same sex marriage for purposes of state law. There is a sufficient federal interest to justify Congress in disregarding that choice."

Ms. Windsor contends that Section 3 of DOMA should be subject to some form, as I heard you just discussing, some form of heightened or more searching review for a number of reasons.

First, application of the traditional test under Cleburne, the four point test and second, because like the First Circuit, because of federalism concerns and because like the Colorado statute at issue in Romer, DOMA targets a narrowly defined group and then imposes upon that group, and I am using the language of Romer, a change in legal status that is so sweeping and comprehensive as to bear no discernible relationship to any legitimate governmental interest.

We respectfully submit that if there ever were a statute that fits within the holding of DOMA this is it.

Because Mr. Delery, who is speaking next, will principally address the heightened scrutiny arguments, I am going to focus today on rational basis review and the rationales.

When it passed DOMA in 1996, Congress created an unprecedented, one-time, permanent exception for the marriages of gay people that excluded gay married couples from both the protections and the burdens of federal law across the board. I think Mr. Clement conceded it was definitional.

Federal law still depends on state law to determine the existence of a valid marriage for any other purpose except with respect to gay people. Anything other than the most fleeting examination of either the justifications offered by Congress at the time or those being offered by BLAG today, demonstrates that Congress' rationales are not constitutionally legitimate, are not rational in the sense that they are fairly related to excluding gay married couples or both.

JACOBS, C.J.: Well, what about the justification offered that this does involve money? I mean as you pointed out this case involves a third of a million dollars and no doubt its ramifications if you were to prevail would involve a lot more money than that.

MS. KAPLAN: Sure.

JACOBS, C.J.: And why can't Congress make decisions that involve money?

MS. KAPLAN: Yes. As Judge Jones concluded below, Your Honor, saving money alone is not a sufficient justification unless it is coupled with some other independent reason. And this is particularly true when the classification is drawn against a historically disfavored group.

STRAUB, J.: Can you contest it is your position as well that saving money wouldn't be an appropriate interest if it was also some other interest?

MS. KAPLAN: The cases say, but the cases say that saving money standing alone--

STRAUB, J.: Is it your position—

MS. KAPLAN: Yes, Your Honor.

STRAUB, J.: --that saving money plus another interest would be sufficient?

MS. KAPLAN: Correct, plus another rational interest, yes.

DRONEY, J.: - -

MS. KAPLAN: Yes, correct. So it is actually a very unique situation here. In 1996, this actually was one of the rationales that Congress articulated. They said this. At the very same time though which is pretty extraordinary, they admitted in the record that they didn't know whether DOMA would save money, so they say, "we want to save money, but we don't know whether it going to save money." That's what Senator Byrd said, cited in our brief, who was an expert on these issues.

JACOBS, C.J.: Well, why can't Congress guess about these things? I mean it is not like Congress has never before made an error as to what the cost is in legislation?

MS. KAPLAN: I believe that if Congress at one time is saying we are going to save money and then says at the same time we don't know whether we are going to save money, I think that's very close to the kind of irrational speculation that would offend even the lowest form of rational basis review. It certainly wouldn't satisfy any other form of review.

JACOBS, C.J.: What if one coupled Congress' idea, which may or may not be defective, that this would save money with the idea that it is necessary or useful for the federal government to approach this issue on a uniform basis so that U.S. citizens are not treated differently by the federal government in Missouri as opposed to Vermont?

MS. KAPLAN: A couple of answers to that, Your Honor. First of all, the true uniformity with respect to marriage, as we have described, was allowing states to define marriage and create it. So this was not uniform with respect to federal law, it was creating a fundamental difference.

Number two, there is no uniformity, it did not promote uniformity because obviously at the time of 1996, there were no states that permitted marriage between same sex couples, today there are six with another two with referenda, which actually is very relevant to political powerlessness, and then DC. So the uniformity here that had always existed for our entire nation's history had been Congress deferring to federal definitions of marriage and this created a radical change to that. Moreover, the federal government has always had a way of dealing with situations for marriages are different in one state than another. In fact, even at the time of Loving, before Loving was decided, in states that did not permit marriages between interracial couples, Congress deferred to those.

The problem that was supposedly going to be solved by uniformity is a problem that our federalist principles already deal with. Let me give you a hypothetical. If Ms. Windsor today--I don't want to use Ms. Windsor, because unfortunately, her spouse is already dead, but if a couple married in New York today moved to North Carolina and the spouse died and they sought the marital exemption, they would not get it. Under this Court's decision in Goldwater, the determination of marriage is based on the domicile of the decedent at the time of death. And I would implore you to look at that case because you actually reject--not you, the Second Circuit, of course, rejected a uniformity rational proffered in that case, with respect to treating marital deductions for the estate tax the same.

JACOBS, C.J.: So you are saying it would be in every instance it would be known categorically whether a person who is a surviving spouse of the same sex marriage should or should not be able to get the federal benefit?

MS. KAPLAN: Yes, I think it is quite clear today. In fact, again contrary to something that Mr. Clement said, we have I think it is over thirty states today that have passed laws essentially either by statute or by constitution prohibiting same-sex marriage within their jurisdictions. Obviously, those states are crystal clear as to where they stand and where they would stand on this issue. And I think that also goes and I understood there were a lot of arguments about the incredible political power, but I think that certainly goes to the political powerlessness, relative political powerlessness of gay men and lesbians, not only in 1996, but today as well.

JACOBS, C.J.: To jump back to sort of a threshold issue, which is what is the freedom of action of any intermediate federal court in view of Baker, would you concede as Mr. Clement argued that the standard is the same for equal protection by the federal government or the states and that if state action of the kind of issue in Baker did not offend equal protection then the same should be true with respect to the federal government, in which case all of your arguments would be merely interests.

MS. KAPLAN: No, Your Honor, I wouldn't concede that. Specifically with respect to DOMA and specifically because states control who can get married, who can have children, and as Mr. Clement conceded, DOMA didn't seek to change that. The disconnect between the rationales offered with respect to this statute are very different and have to be conducted under a different analysis than the disconnect in connection with a federal right to marry.

This case is not about the federal right to marry. It is about in circumstances where states define marriage, and were DOMA explicitly said we are going to leave that to the states, and let's take parenting as an example, parenting is actually a good example of this.

With respect to, let's take heterosexual couples first, with respect to heterosexual couples as Judge Jones said, there is nothing, there is absolutely no rational connection to assume that any heterosexual couple is going to change their behavior with respect to either children or getting married because DOMA exists, because my client couldn't get an estate tax exemption.

With respect to gay couples, if somehow there is some interest in discouraging gay couples from getting married, DOMA doesn't do that, didn't do that and it also can't discourage them from having children because those again as Judge Boudin said in the First Circuit, are matters of state law.

So whatever interest a state may have in those issues and that's again not this case, here the disconnect is so attenuated that this is a far different question. I don't think Baker controls for that reason and for a bunch of additional reasons that I would be happy to discuss as well.

Let me move on with respect to uniformity because I heard the Court talking about that. It is very interesting. We talk in our brief about how under uniformity, you would have the same problem with first cousin marriages. In response, the response says "yes", but first cousin marriages don't"--I think the words were-"don't invoke the same feelings" as marriage between gay couples.

Your Honors, I would submit that precisely because we are talking about strong feelings, if that's the rationale, that's why we fit within Romer.

Let me go to saving money.

DRONEY, J.: - -

MS. KAPLAN: Sure, Judge Droney.

DRONEY, J.: You've often - - in your brief say it should be strict scrutiny.

MS. KAPLAN: Yes.

DRONEY, J.: - as I indicated just said enhanced scrutiny - - . Why do you think strict scrutiny rather than intermediate scrutiny applies, how do you make that call?

MS. KAPLAN: Sure, I will be frank with you, it obviously doesn't matter to the result, I don't think it matters to the result, I don't think--Mr. Clement didn't try to defend it under intermediate scrutiny below. I heard him trying to do it today. I don't think it works. But we believe that being gay and lesbian, being gay or lesbian is closest to being an African American than it is to being--I hate to get so personal about this, than being a woman, because there is nothing about being gay or lesbian that has anything to do with an individual's ability to perform in society and that's essentially what I believe the courts are looking at, that's the first factor, I believe it is the most important factor. Whereas, for women, and I'm obviously a member of that class, there are obviously things, we get pregnant, we are not as strong, there is the firemen cases, things like that, where there could be some kind of differentiation by the legislature that would make sense. With respect to gay and lesbian people, it is very hard if not impossible to conceive of any such differentiation. I can see that my time is up.

DRONEY, J.: - - involved with illegitimacy - -

MS. KAPLAN: Yes.

DRONEY, J.: - - that's not an obvious characteristic - -

MS. KAPLAN: I agree with that and I also agree that the different factors come out differently as you compare them to different groups, which is natural when you think about it. I don't think for sure--we personally believe, our view is that for strict scrutiny, it should be based on whether the group has, if there is anything about being a member of that group that has anything to do with that group's ability to perform or to contribute to society. So we think strict scrutiny is more appropriate for that reason, but again it makes no difference in the result and obviously, we would be very happy with intermediate scrutiny as well.

JACOBS, C.J.: On that subject, there is a submerged dispute in the briefs as to whether that consideration and say capability means, refers generally to one's capability of functioning in society and making a contribution to society or whether it has to do with the capability to enter, you know in this instance, to enter into marriage, to procreate and so on.

MS. KAPLAN: Yes.

JACOBS, C.J.: Where would we look to find out which of these two really inconsi-- incommensurable rules is the proper test?

MS. KAPLAN: Yes, I think that what you see in the brief from BLAG is an attempt to bootstrap the responsible procreation, the biological procreation argument to the rational basis inquiry and so the connection. I don't think there is any such connection in the case law whatsoever. I don't think you will find any Supreme Court case that has a connection between the rationale and whether a group gets heightened scrutiny, those are divorced inquiries.

And I think while there are no cases that talk about procreation being a factor for getting intermediate or heightened scrutiny. I think that's for a very good reason that there is no analysis of that. And the reason is because obviously people, straight people as well as gay people who don't have a biological ability to procreate, certainly have the ability to succeed and perform and contribute to society in every way and that there is no difference whatsoever and they shouldn't be treated any differently based on that difference.

JACOBS, C.J.: In your federalism argument, I mean I understand what it is, but I mean, your adversaries really turn it around and they say that you know the states do decide who is married, but why is it not the role of Congress to say what federal statutes say and mean and why is that not a completely appropriate role for the federal government and if not even a necessary one. I mean all courts find it helpful to find a definition.

MS. KAPLAN: Yes, I think the federalism concerns come up two ways. First is the way I have already talked about, Judge, which has to do with because these issues are state issues, when you get to comparing the classification and the objective, and seeing whether, I think the word you used at one point was a fair, there has to be a fair connection. There is no fair connection for that reason.

On top of that, I think you have to look at a 200 year federalist tradition in which Congress had constantly, consistently, uniformly deferred to state definitions even for marriages that I think we all in this room today would find, or laws today that we find odious, like the anti-miscegenation laws prior to Loving. Even in those circumstances, Congress always deferred. So I think what Judge Boudin was saying is that there is the Romer sense, although I acknowledge this isn't in Romer, there is a sense of queasiness or a sense of suspicion that should require the courts even if applying rational basis to look at the link, the way that Justice Kennedy described in Kennedy, the link between the classification and the objective.

STRAUB, J.: - - is it part of your position or your argument that those 30 odd states that you referred to that define marriage by statute or constitution as the traditional union of a man and a woman, that they too are unconstitutional to the extent that they prevent the participants from state benefits?

MS. KAPLAN: No, it is absolutely not our argument. I'm not--we are not arguing here. And this case would not--an affirmance to this case, would not result in an argument in any way.

STRAUB, J.: Explain to me why there is a difference in this instance is the federal benefits that are at least arguably sought to be protected by the definition of marriage? You argue that that is unconstitutional? There are some thirty states which may well be precisely the same circumstance and yet you say those are constitutionally--

MS. KAPLAN: No, no, I am not saying they are constitutional.

STRAUB, J.: - -

MS. KAPLAN: Please don't. Yes.

STRAUB, J.: But have the same principles that would apply in those instances, is that correct?

MS. KAPLAN: I think parenting again is the perfect example and I think if you look at what Judge Boudin--

STRAUB, J.: That are the same principles would apply to - - an analysis of those states?

MS. KAPLAN: The same principles apply, but the connection between the objective and the classification might be different in those states, because those are the states that determine, for example, who can marry and who can adopt. So if you were to look at the impact on behavior it could well be different.

I, of course, as a personal matter, I am not arguing that case, might disagree and I am sure there are arguments that are being raised. There is a case before the Supreme Court that makes those arguments right now. But this case is far narrower than that because as Judge Boudin said, the connection between what states do and what the federal government does is different and you don't have to go to deciding those issues that you might have to decide, for example, the science of parenting in those cases.

STRAUB, J.: So arguable at least, an affirmance here - - issued by the Supreme Court in your favor - - would probably bring in stuff that is - -

MS. KAPLAN: I am quite certain that other people would litigate that issue and continue to litigate that issue as to whether even those rationales wouldn't work for those states. I can't tell you how that would come out again, that's arguably an issue in the Perry case, that's not this case. But I

certainly--I think people will take this case, argue either side. I certainly don't think this case would control that issue.

STRAUB, J.: Am I correct that however we decide this case would have no bearing whatsoever on issues of adoption which would still be governed by state law and the best interest of the child?

MS. KAPLAN: Correct.

STRAUB, J.: And one final thing, Ms. Kaplan. I chatted with your friend here about this earlier decision back in 1885. Well, I am not quite sure I see - - in any event, which was rather definitive in its description of a traditional marriage. Do you know of a Supreme Court case that has stated issue with what Murphy said--

MS. KAPLAN: From a definitional perspective?

STRAUB, J.: Yes.

MS. KAPLAN: No, I am not aware of any. I was laughing because I was hoping I wouldn't get that question, Judge Straub, but having gotten it, I am not aware of any case that from a definitional perspective, as opposed to a rationale, would take issue with that definition. Obviously, in the 1880's it is almost impossible. In 1967, when my client got engaged, it was almost unforeseeable whether marriage would be permitted.

JACOBS, C.J.: Thank you.

MS. KAPLAN: Thank you.

JACOBS, C.J.: We will hear from the United States.

MR. DELERY: May it please the Court. Stuart Delery on behalf of the United States. This Circuit has not decided what level of scrutiny applies.

JACOBS, C.J.: Let's step back a second and ascertain--there is an undecided motion as to whether your notice of appeal should be stricken and whether you are an appellant or an appellee, and you know I am just a lawyer. In my day when you won, you didn't appeal.

MR. DELERY: Right. So here, Your Honor, although the United States agrees with the rationale and the ultimate decision of the District Court—

JACOBS, C.J.: Well, why did you file a notice of appeal?

MR. DELERY: So it is consistent with the pattern that was followed in the Chadha case, for example, because here, the judgment runs against the executive branch. The executive branch is ordered to pay $363,000. The determination has been made by the President and the Attorney General that the law will be enforced, Section 3 of DOMA will be enforced pending final judicial resolution of this matter.

JACOBS, C.J.: Well, that would certainly make the United States a defendant and I am not sure I know why it would make it an appellant, if it's satisfied with the adoption of its arguments in the court below it.

MR. DELERY: So, I think again here while that is true as to the rationale of the decision, the Chadha case and the Lovett case, for example both by the Supreme Court, indicated that where the executive branch agrees with an underlying judgment of unconstitutionality of a federal statute, but is nevertheless enforcing it, as was the case in Chadha, then it has both appropriate Article 3 standing for continuing to appeal and is the proper party to invoke the Appellate Court's further review of this matter. And so we think that that's the basis for being on the side of the appellant here in this case.

JACOBS, C.J.: Basically your role is to stimulate decision making in the appellate court. That's what you are saying?

MR. DELERY: In part, but it is also the case that the government actually is, the executive branch is the entity against whom the judgment is running and given the determination by the president and the attorney general to enforce Section 3 pending final resolution, you know as was the case in Chadha, you know, the government is not taking the action that it is ordered to by the District Court judgment and, therefore, that's the basis for appeal.

But moving to the standard of scrutiny, this is a question that this Court has not decided. We submit that the Court should consider the Supreme Court's established factors and hold the classifications based on sexual orientation are inherently suspect and warrant heightened scrutiny. Gay and lesbian people have been subject to a long and deep history of discrimination which continues to this day. Sexual orientation is a fundamental aspect of a person's identity and it says nothing about an individual's ability to contribute productively to society.

So while other appellate courts have applied rational basis review they did so--

JACOBS, C.J.: I'm sorry, but when you refer to fundamental aspect of a person's identity, that doesn't seem to be part of any test other than in the asylum area as to whether somebody is being persecuted for something that they can't change or shouldn't be expected to alter.

MR. DELERY: Right, I think here--

JACOBS, C.J.: That's coming from another county.

MR. DELERY: I think here it bears on what has been called immutability or a distinguishing characteristic, that aspect of the Supreme Court's test. As the Supreme Court indicated in Lawrence, sexual orientation is deeply ingrained, whatever the debate about its precise origins and is a fundamental aspect of identity, its expression is an integral part of human freedom. So by rejecting for example the status/conduct distinction in Lawrence and the later Christian Legal Society case, the Court has acknowledged that even beyond the overwhelming consensus of the scientific community and the leading organizations on this question, however you parse the origins, it is a deeply engrained aspect of one's identity.

So the other--

DRONEY, J.: I have a question - -

MR. DELERY: Certainly.

DRONEY, J.: What is your position on - - what the level of enhanced scrutiny should be intermediate, strict, and how you make that distinction.

MR. DELERY: I think what we have said in our brief, I believe it is a footnote on page 36, is that we think that the heightened scrutiny factors suggest greater than rational basis review and given that it is not necessary to distinguish in this case for resolving it, we haven't taken a position on whether it is strict or intermediate. Intermediate would be sufficient here, and the factors point at least that far.

And I think if the Court looks at, which no federal Court of Appeals has done in approximately twenty years, the established heightened scrutiny factors, they all point in favor of recognizing sexual orientation as a classification that deserves heightened scrutiny. History of discrimination has been common ground from the courts that have looked at this question. As far as I know no court has concluded that there isn't a sufficient history of discrimination here. It starts with the proposition that sexual intimacy between same sex partners was criminalized until recently with far reaching consequences. As the Supreme Court in Lawrence indicated, that was an invitation to public and private discrimination in a whole range of ways.

As a result, gay and lesbian people were deemed unfit for federal employment, security clearances military service. There was employment discrimination at state and local government levels and in the private sector, child custody and visitation rights over time have been denied and this history of discrimination continues to today. But it is also a consideration that has no bearing on an individual's ability to perform or contribute to society.

Gay and lesbian people contribute in all walks of life and even and did.

JACOBS, C.J.: Look, I mean, that's you know you are pressing on an open door, but do we look at that in terms of the ability for people to function productively generally in life or do we look at it in terms of whether people can in this instance procreate as a married couple?

MR. DELERY: I think what the Supreme Court has done is looked to whether a particular characteristic says anything about whether it is-- whether it is usually a sensible ground for differentiating among people in government action. So the court in Fontiero and Cleburne for example—

JACOBS, C.J.: Your argument is you weren't looking at the particular disability essentially that the government is trying to impose in a given case, you look at people's general capacity to make a contribution.

MR. DELERY: Right. On the suspect class or heightened scrutiny inquiry, the second would be potentially relevant when you are looking at the means and split of the particular statute, but in terms of deciding whether heightened scrutiny is appropriate, it is a more general inquiry as the Supreme Court has said because the purpose of heightened scrutiny is, in effect, where there is some reason to be suspicious of government action that targets a historically disadvantaged group, for example. Heightened scrutiny has the effect of smoking out improper rationales and insuring that the reasons given for a particular government action are significant and proper purposes.

And so at the level of examining whether heightened scrutiny is appropriate it is a more general inquiry.

And then on political powerlessness, which was discussed earlier--

JACOBS, C.J.: Yes, it is hard--isn't it hard for you to argue political powerlessness when you know the administration declines to argue the other side of this, which is why you are here?

MR. DELERY: That is true, the President and the Attorney General have made a constitutional judgment as to heightened scrutiny.

JACOBS, C.J.: Well, there is substantial power; they put that power behind this point of view.

MR. DELERY: So a couple of points on this, Your Honor.

JACOBS, C.J.: So your presence here is like an argument against your argument.

MR. DELERY: Perhaps. But I think if you look to the gender context, for example, in the 1970's when the Supreme Court recognized gender as appropriate for intermediate scrutiny, women had made substantial gains in a range of anti-discrimination efforts. So, for example, the 19th Amendment had provided the right to vote, Title VII had already banned discrimination at that point. So the court hasn't viewed this as an all or nothing factor, but if you look at where things currently stand, it is still the case that the rights of gay and lesbian people usually lose when they are put up for a vote. Efforts to combat discrimination against gay and lesbian people including very recently have often led to significant political backlash including in Tennessee just last year when efforts to include anti-discrimination protections in state law were repealed.

So it's sort of, it is a question of the baseline and where you start and certainly while progress has been made that was the case at the time of gender in the 1970's and the court did not view that as dispositive.

So for those reasons we think heightened scrutiny is appropriate, sexual orientation serves a-- should be viewed as a suspect classification and therefore a law like Section 3 of DOMA, which targets them must be substantially related to an important governmental objective.

And under heightened scrutiny the court looks not to a rationale that might be invented during the course of litigation, but to the actual reasons that the legislature gave for the action and also looks closely, as I indicated before, at the fit between the means chosen and the supposed ends to make sure that the law is based on reasoned analysis, significant and proper purpose and not disapproval of a particular group.

I think here Section 3 is not as BLAG would have it an ordinary exercise in line drawing for economic or tax legislation, one that just happens to disadvantage some people, and not others. On the contrary, if you look at the legislative history, I think it is crystal clear that it was motivated in significant part by disapproval of gay and lesbian people in their intimate and family relationships and so--

STRAUB, J.: Can you tell that to the Congress in 1996--

MR. DELERY: Did the government say that?

STRAUB, J.: - - tell that to the Congress in 1996, that which you just now told us?

MR. DELERY: No, Your Honor, the Department at the time said in a couple of different letters to members of Congress during the legislative process that at the time it predicted that the courts would uphold section 3 of DOMA.

STRAUB, J.: And you thereafter argued in favor of the constitutionality of the statute - - is that right?

MR. DELERY: That is true, over the years.

STRAUB, J.: As late as 2010, is that correct?

MR. DELERY: Yes. That's correct.

STRAUB, J.: What is it that changed your view of this?

MR. DELERY: What changed were two things. One was an evaluation of the appropriate level of scrutiny that applies to claims based on sexual orientation. The defense of the law had been mounted under a rational basis standard and as indicated the government has concluded that the appropriate standard here is heightened scrutiny. And second, at a basic level this is now a decision that has been made by the Attorney General and by the President in the constitutional judgment and so the position in the cases are now dictated by the Chief Executive here.

STRAUB, J.: And now finally you concede that if rational basis was used, is utilized here, a reasonable argument can be made to uphold the constitutionality of the statute? Within that context, which are the interests advanced, are you referring to the other table, that would make its argument reasonable for constitutionality?

MR. DELERY: Okay, so just to clarify on that point, Your Honor, we have said as indicated in the Attorney General's letter to Congress that I do think a reasonable argument can be proffered under rational basis. That's not the same as saying that we think it should prevail. On that, the government has not taken a position.

STRAUB, J.: In the context of that statement, tell me which interests advanced the constitutionality would make the argument reasonable?

MR. DELERY: I think the answer to that, probably the best place to look is in the first superseded brief that the government filed in the First Circuit case. And so those briefly, I think, the arguments there were that maintaining the status quo and a degree of uniformity for federal benefits, coupled with preserving room for state policy development on this question could provide a reasonable argument.

STRAUB, J.: Did you advance any other - -

MR. DELERY: Those were the--that's my summary of the arguments that were in the brief.

STRAUB, J.: Are there other issues advanced by the United States government?

MR. DELERY: Over time in cases, not in that case.

STRAUB, J.: That you just told me about.

MR. DELERY: No, not in that case. Thank you.

DRONEY, J.: Let me just ask about Baker versus Nelson. The attorney general in his letter to the speaker didn't say anything about Baker versus Nelson. What's your view on how Baker versus Nelson applies to the work of this Court?

MR. DELERY: So I think we don't think Baker controls the outcome of this case. I think the proper analysis is that summary dispositions like Baker should be narrowly construed. As the Court has indicated they are precedential, but they are binding only on the precise issues presented and necessarily decided. The reason being because you know a one sentence summary decision it is usually not apparent what the underlying rationales might or might not have been. So here the precise claim that we have before the Court was not presented or necessarily decided. It is not the same equal protection claim because here we are dealing with a denial of federal benefits to couples who are already validly married under state law. There, it was whether states had to give a marriage license. And neither the jurisdictional statement presented to the Supreme Court or the State Supreme Court decision from which the party was appealing, presented the suspect class or heightened scrutiny issue for sexual orientation. There is no indication that the Supreme Court decided it, they didn't have to decide it and we'd submit it would over read Baker given later developments in the law to give it binding effect. In fact, it is not even clear what the classification was that the plaintiff was advocating in that case. In the jurisdictional statement, this is at page 702 of the appendix the statement is made that the discrimination in this case is one of gender. It was a different time, it was a different conception of the legal claim and like the First Circuit and like other courts that have considered this question, we don't think it is preclusive on this effect.

JACOBS, C.J.: Thank you.

MR. DELERY: Okay, thank you.

JACOBS, C.J.: We'll hear rebuttal.

MR. CLEMENT: Thank you, Your Honors, just a few points in rebuttal. First, just on what was just discussed about Baker, I would invite you to read the jurisdictional statement. I think it is clear that the appellant there was arguing both gender discrimination and sexual orientation. So I think that Baker would be binding on both. Also, as I read the jurisdictional statement, I thought that they were arguing for heightened scrutiny, but as I said, you could read that for yourself and make your own judgment on that. Just a few other points, one Ms. Kaplan mentioned the issue of whether saving money alone is enough. Well, obviously we think we have more than saving money here standing alone. But I would emphasize that I do think actually saving money enough is a rational basis. I think you know one of the things that cite for the proposition that's not is a dissenting opinion in the recent Armour against Indianapolis case. Now the majority didn't say saving money alone is enough. As I understand the law here, saving money is a rational basis. You can't go about that rational basis in an utterly irrational way. So if you say you are going to save money by giving--you know not giving some benefits to people with blue eyes or something, that might be irrational government action, but it is not because saving money isn't a rational basis for government action. Of course, as I say, it is a little bit of an academic point because the saving money rationale is combined with other things, not just the other rationales we offer, but this is a situation where Congress is acting to do here is to preserve the scope of the benefit programs the way they had always been. They had always been that way based on the uniform state law as opposed to a federal definition, but the federal definition had the basis of not opening these programs up to new individuals.

And certainly, as I understand the law, a decision by the government not to expand a class of beneficiaries based on a rationale of saving money is the kind of decision Congress makes every day and is sufficiently rational to withstand rational basis review. Obviously, one of the other bases that supports this as a rational bases that I think has been discussed the most so I will focus on it, is uniformity. Now a couple of things were said about uniformity. First there is this point about the couple moving to North Carolina and losing their tax status. Well, that's precisely the kind of thing that Congress can decide, well that doesn't make any sense. We want to treat people in New York and North Carolina exactly the same way. So we are going to have a uniform definition. Now the next response is, but Congress has never done this with respect to marital status before. Well, first that's not true. Congress does this with respect to it overrides marital decisions in specific context based on concerns about fraud. Back in the 19th century, it conditioned the admission of territories to statehood on overriding their decisions about what the definition of marriage was going to be. So if you want to go way back there are precedents as well, but most importantly, Congress never confronted a situation like it did in 1996, where they were going form a situation where they could have uniformity and deference to the states at once because every state had the same rule and they recognized that that was going to change. They had to choose between deferring to the state definition and maintaining a policy of uniformity, I think the decision to choose uniformity over deference is certainly within the realm of rational basis.

Thank you, Your Honors.

JACOBS, C.J.: Thank you. Thank you all. We will reserve decision.

[END RECORDING]

CERTIFICATE

I, Ann Arundel, certify that the foregoing transcript is a true record of said proceedings, that I am not connected by blood or marriage with any of the parties herein nor interested directly or indirectly in the matter in controversy, nor am I in the employ of the counsel.

/s/ Ann Arundel

Date 10/2/12

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 10 Civ. 8435 (BSJ) (JCF)

EDITH SCHLAIN WINDSOR, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, *ET AL.*,
DEFENDANTS

THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES' AMENDED RESPONSE TO PLAINTIFF'S FIRST REQUESTS FOR ADMISSION

Pursuant to the Court's order of July 28, 2011, in this case, and to Rules 26 and 36 of the Federal Rules of Civil Procedure, Interventor-Defendant The Bipartisan Legal Advisory Group of the U.S. House of Representatives ("Defendant") makes the following supplemental response to Plaintiff's First Requests for Admission.

> **Request for Admission** 1. Admit that if, at the time of her, death, Thea Spyer had been married to a man instead of a woman, who was a U.S. citizen and who survived Thea Spyer's death, her estate would have qualified for the estate tax marital deduction, 26 U.S.C.

§ 2056(a), and would not have been liable for any federal estate tax.

Response: Defendant admits that Plaintiff has submitted documents that, if accurate, establish the eligibility of Spyer's estate for the estate tax marital deduction and that the estate would not have been liable for federal estate tax, if Spyer had been married to a surviving male U.S. citizen at the time of her death.

/s/ H. Christopher Bartolomucci
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H. Christopher Bartolomucci
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House of Representatives

Dated: August 1, 2011

REPLY
BRIEF

No. 12-307

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

Page

A. The Second Circuit's interpretation of New York law eliminates any concern about plaintiff's standing 2

B. The United States, as a defendant against which judgment was entered, has standing to seek certiorari 5

C. The timing of the government's certiorari petition poses no obstacle to the Court's review of this case 6

TABLE OF AUTHORITIES

Cases:

Bishop v. *Wood*, 426 U.S. 341 (1976) 3

Elk Grove Unified Sch. Dist. v. *Newdow*, 542 U.S. 1 (2004) 4

Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000) 3

General Elect. Co. v. *Gilbert*, 429 U.S. 125 (1976) 6

INS v. *Chadha*, 462 U.S. 919 (1983) 2, 5

Massachusetts v. *Department of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), petitions for cert. pending, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012) and 12-97 (filed July 20, 2012) 2, 7

Constitution and statute:

U.S. Const. Amend. V 1

Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1 U.S.C. 7) 1, 2, 5, 7

In the Supreme Court of the United States

No. 12-307

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent Edith Windsor agrees that the Court should grant the government's petition for a writ of certiorari in this case, and the Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) agrees that the question presented by this petition—whether Section 3 of the Defense of Marriage Act (DOMA) violates the Fifth Amendment's guarantee of equal protection as applied to persons of the same sex who are legally married under state law—warrants this Court's immediate review. To this point, BLAG has repeatedly objected to the petitions in this case and in *Office of Personnel Management* v. *Golinski*, No. 12-16, and *Office of Personnel Management* v. *Pedersen*, No. 12-302, on the ground (*inter alia*) that these cases lacked a court of appeals judgment and that BLAG's petition for a writ of certiorari (No. 12-13) in *Massachu-*

setts v. *Department of Health & Human Services*, 682 F.3d 1 (1st Cir. 2012), thus presented the preferred vehicle. The Second Circuit has now issued a decision in this case, however, changing the landscape materially.

BLAG nevertheless adheres to the view that the Court should deny review in this case and grant only its petition in *Massachusetts*, based on three reasons: (1) the status under New York law of Ms. Windsor's foreign marriage creates a potential "distraction[]" notwithstanding the Second Circuit's unanimous holding that New York law recognized her same-sex marriage (Supp. Br. 9); (2) the decision below "exacerbates" problems with the government's appellate standing notwithstanding the Second Circuit's express rejection of that objection under *INS* v. *Chadha*, 462 U.S. 919, 930-931 (1983) (Supp. Br. 9); and (3) the Second Circuit decision introduces a "procedural wrinkle" because the government's certiorari petition was filed before that decision was rendered (*id.* at 10). As explained in the government's supplemental brief in this case, and further below, none of those asserted grounds warrants denial of the present petition. To the contrary, in light of the Second Circuit's decision, this case now presents the optimal vehicle for this Court's resolution of the constitutionality of Section 3 of DOMA.

A. The Second Circuit's Interpretation Of New York Law Eliminates Any Concern About Plaintiff's Standing

BLAG finds "mystifying" that the government, which had previously suggested that the state-law status of plaintiff's foreign marriage was a cause for hesitation, no longer thinks so. BLAG Supp. Br. 11. But the government explained precisely why in its own supplemental brief: the Second Circuit unanimously held, consistent with the conclusion of the federal district court and the "useful and unanimous" rulings of New York's intermediate appellate courts, that New York law recognized plaintiff's marriage at the relevant time. Gov't Supp. App. 5a-7a; *id.* at 31a (Straub, J., dissenting). And as this Court has repeatedly explained, the Court generally "accept[s] the interpretation of state law in which the District Court and the Court of Appeals have concurred," and indeed, does so "even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Bishop* v. *Wood*, 426 U.S. 341, 346 (1976); see also Gov't Supp. Br. 8 n.2 (collecting similar cases). The case for deference to the Second Circuit on New York law is particularly strong here, where BLAG—despite asserting without elaboration that the state-law question "seems close" (Supp. Br. 8)—has yet to come forward with a single reason why New York's highest court would reach a different conclusion or why this Court should disturb the consistent state-law interpretation reached by every other court to have decided the issue.

BLAG nevertheless suggests that this long established principle of deference, which if applied here would indisputably eliminate BLAG's purported concern about plaintiff's standing, does not apply to questions of state law implicating standing. Putting aside whether the New York law marriage-recognition issue in fact implicates plaintiff's standing rather than the merits of her tax-refund claim,[1] there is no support for BLAG's suggestion that this Court's longstanding practice of accepting a uniform interpretation of state law held by the court of appeals and district court is inapplicable to questions of standing. To the contrary, in *Elk Grove Unified School District* v. *Newdow*, 542 U.S. 1 (2004), every member of this Court invoked that settled practice in the context of a question of standing. *See id.* at 16-17; *id.* at 23 (Rehnquist, C.J., concurring in the judgment). To be sure, the majority ultimately concluded that the court of appeals' interpretation of state law "sp[oke] not at all" to the relevant issue for standing purposes. *Id.* at 17. But there was no dispute that, if the court of appeals' interpretation *had* spoken to the relevant issue, this Court's longstanding practice of deferring to the court of appeals' understanding of state law would have governed. And here, there is no dispute that the court of appeals' and district court's interpretation of state law speaks directly to the relevant question—whether New York law recognized petitioner's marriage at the pertinent time. Consequently, there is no basis for declining to apply this Court's customary deference on state-law questions here, where it is undisputed that the Second Circuit's and district court's common understanding of New York law fully resolves any conceivable standing concerns.[2]

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[1] Before the Second Circuit's decision, the government had presumed that the Court would have to address the threshold question whether BLAG's objection goes to plaintiff's standing or instead goes to the merits. See No. 12-63 Gov't Resp. 16-17 (citing *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000)). That is no longer the case. Because BLAG concedes that

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plaintiff possesses standing under the Second Circuit's interpretation of New York law (*i.e.*, that New York recognized her marriage at the time of Thea Spyer's death), and because there is no reason for this Court to disturb the state-law conclusion, it does not matter whether the marriage-recognition issue implicates standing.

[2] BLAG also cites certain decisions outside the standing context in which the Court has not deferred to a court of appeals' interpretation of state law. See BLAG Supp. Br. 8 n.2. That the Court on occasion might decline to defer to a court of appeals' resolution of state law casts no doubt on the applicability of the ordinary practice where, as

B. The United States, As A Defendant Against Which Judgment Was Entered, Has Standing to Seek Certiorari

In light of the Second Circuit's decision affirming the district court's decision holding Section 3 unconstitutional, BLAG raises (Supp. Br. 9-10) the same standing objection that it makes to the government's petition for a writ of certiorari in *Massachusetts*. As explained more fully in the government's reply brief in *Massachusetts*, No. 12-15 (at 2-6), this Court's precedents make clear that the United States, as a defendant against which judgment was entered by the district court and affirmed by the court of appeals, is a proper party to invoke this Court's jurisdiction to review the judgment in this case. See *Chadha*, 462 U.S. at 930-931 ("When an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional," it may seek review of that decision, even though "the Executive may agree with the holding that the statute in question is unconstitutional.").

As explained in the government's supplemental brief, the Second Circuit below, citing *Chadha*, *supra*, unanimously rejected BLAG's contention that the government lacked standing to appeal the district court's judgment holding that Section 3 violates equal protection. The decision below thus reinforces the government's reliance on *Chadha*—which similarly arose after a court of appeals' decision accepting the Executive Branch's merits argument against the constitutionality of a federal law—in seeking the Court's review in this case. Gov't Supp Br. 9. BLAG's appellate-standing objection continues to lack merit.

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here, there is no reason—and BLAG offers none—to question the correctness of the court of appeals' and district court's uniform understanding.

C. The Timing Of The Government's Certiorari Petition Poses No Obstacle To The Court's Review Of This Case

The government's supplemental brief explains why the issuance of the court of appeals' decision after the filing of the government's petition for a writ of certiorari does not deprive the Court of the authority to grant it. And the government points to clear precedent of the Court exercising such authority. See Gov't Supp. Br. 9-10 (discussing *General Elec. Co.* v. *Gilbert*, 429 U.S. 125 (1976)). BLAG nevertheless characterizes the intervening Second Circuit decision as creating a "procedural wrinkle." BLAG Supp. Br. 10.

That is no impediment to granting review in this case. Notably, BLAG provides no affirmative reason why this Court would lack authority to consider the government's petition, nor does it contend that the Court is foreclosed from doing so. Rather, BLAG relies on the fact that the government cites only one prior example (*General Elec.*, *supra*) of this procedural circumstance. But that is entirely unsurprising: the situation in which a party files a petition for certiorari before judgment, but the court of appeals issues a judgment before the Court has considered that petition, by nature arises exceedingly infrequently. The fact that at least one such prior instance exists, and the Court granted certiorari in that case to review the court of appeals' decision, should eliminate any doubt about the Court's authority to act here.

BLAG also suggests that the situation in *General Electric* is distinguishable because both parties jointly petitioned for certiorari in that case. BLAG Supp. Br. 10-11. But the fact that BLAG did not also petition in this case matters only if, as BLAG urges elsewhere, the government lacks appellate standing to seek this Court's review. For the reasons explained above (p. 5, *supra*), that objection lacks merit.

* * * * *

For the foregoing reasons, the petition for a writ of certiorari in this case should be granted. Although *Department of Health and Human Services* v. *Massachusetts*, petitions for cert. pending, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012), and 12-97 (filed July 20, 2012), is also a case in which a court of appeals has rendered a decision, this case now provides the most appropriate vehicle for this Court's resolution of the constitutionality of Section 3 of DOMA. In particular, the court of appeals in *Massachusetts* was constrained by binding circuit precedent as to the applicable level of scrutiny, No. 12-15 Pet. App. 10a, whereas the court of appeals here was not so constrained, and its analysis may be beneficial to this Court's consideration of that issue.

In the event the Court grants review in this case, it should hold the petitions in *Massachusetts* pending final resolution on the merits. In the event the Court decides that neither case in which the court of appeals has issued a decision provides an appropriate vehicle, it should grant the government's petition for a writ of certiorari before judgment in either *Office of Personnel Management* v. *Golinski*, No. 12-16 (filed July 3, 2012), or *Office of Personnel Management* v. *Pedersen*, No. 12-302 (filed Sept. 11, 2012).

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

NOVEMBER 2012

JOINT
APPENDIX

Supreme Court, U.S.
FILED
JAN 22 2013
OFFICE OF THE CLERK

No. 12-307

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: SEPT. 11, 2012
CERTIORARI GRANTED: DEC. 7, 2012

TABLE OF CONTENTS

Page

Court of appeals docket entries 1

District court docket entries 77

Amended complaint (Feb. 2, 2011) 149

Notice to the court by defendant United States of America (Feb. 25, 2011) 179

Unopposed motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives to intervene for a limited purpose (Apr. 18, 2011) 195

Memorandum of points and authorities in support of the unopposed motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives to intervene for a limited purpose (Apr. 18, 2011) 199

Defendant's response to the motion to intervene (May 5, 2011) 206

Reply of the Bipartisan Legal Advisory Group of the U.S. House of Representatives to defendant's response to the motion to intervene (May 5, 2011) 211

Memorandum and order (June 2, 2011) 218

Affidavit of Edith Schlain Windsor (June 23, 2011) 230

Affidavit of Edith Schlain Windsor, Exhibit K, Form 843 claim for refund and request for abatement and Form 8275 disclosure statement — Foldout 241

Affidavit of Edith Schlain Windsor, Exhibit L, letter from IRS disallowing claim for refund (May 26, 2010) claim for refund and request for abatement and Form 8275 245

Expert affidavit of Letitia Anne Peplau, Ph.D (June 24, 2011) 253

Table of Contents—Continued: Page

Expert affidavit of Nancy F. Cott, Ph.D (June 24, 2011) 278

Expert affidavit of Michael Lamb, Ph.D (June 24, 2011) 314

Expert affidavit of George Chauncey, Ph.D (May 9, 2011) 336

Expert affidavit of Gary Segura, Ph.D (May 17, 2011) 393

Defendant's motion to dismiss amended complaint (Aug. 1, 2011) 437

Intervenor-defendant's Local Rule 56.1 response to plaintiff's statement of material facts (Aug. 1, 2011) 440

The Bipartisan Legal Advisory Group of the U.S. House of Representatives' amended response to plaintiff's first requests for admission (Aug. 1, 2011) 464

Plantiff's statement pursuant to Local Rule 56.1 (June 24, 2011) 466

Defendant United States' memorandum of law in response to plaintiff's motion for summary judgment and intervenor's motion to dismiss (Aug. 19, 2011) 486

Declaration of Lisa M. Diamond (Aug. 20, 2011) 490

Supplemental affidavit of Edith Schlain Windsor (Sept. 15, 2011) 493

Supplemental expert affidavit of Letitia Anne Peplau, Ph.D. (Sept. 9, 2011) 500

Supplemental expert affidavit of Michael Lamb, Ph.D (Sept. 13, 2011) 503

Supplemental declaration of Lisa M. Diamond (Sept. 15, 2011) 516

Table of Contents—Continued: Page

Notice of appeal of intervenor-defendant the Bipartisan Legal Advisory Group of the U.S. House of Representatives (June 8, 2012) 522

Notice of appeal (June 14, 2012) 524

Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives to dismiss appeal No. 12-2435 526

Opposition of the United States to motion to dismiss appeal No. 12-2435 531

Reply in support of motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives to dismiss appeal No. 12-2435 (Aug. 14, 2012) 538

Transcript of proceedings, *Golinski* v. *OPM*, No. C 10-00257 JSW (N.D. Cal. Dec. 16, 2011) 542

Baker v. *Nelson* jurisdictional statement (Feb. 10, 1972) 553

Excerpts of U.S. House of Representatives Resolution 5 (Jan. 3, 2013) 578

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 12-2335

EDITH SCHLAIN WINDSOR, IN HER OFFICIAL CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, PLAINTIFF-APPELLEE

v.

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, DEFENDANT APPELLANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
6/11/12	1	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. [633699] [12-2335]
6/11/12	2	DISTRICT COURT ORDER, dated 06/06/2012, RECEIVED. [633706] [12-2335]
6/11/12	3	DISTRICT COURT JUDGMENT, dated 06/07/2012, RECEIVED. [633708] [12-2335]

DATE	DOCKET NUMBER	PROCEEDINGS
6/11/12	7	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellee Edith Schlain Windsor, FILED. Service date 06/11/2012 by CM/ECF, email. [633845] [12-2335]
6/11/12	8	MOTION, to expedite appeal, on behalf of Appellee Edith Schlain Windsor, FILED. Service date 06/11/2012 by email, CM/ECF. [633846] [12-2335]
6/12/12	10	ELECTRONIC INDEX, in lieu of record, FILED. [633894] [12-2335]
6/12/12	12	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. Service date 06/12/2012 by CM/ECF. [635010] [12-2335]
6/12/12	13	ATTORNEY, H. Christopher Bartolomucci for Bipartisan Legal Advisory Group of the United States House of Representatives, in case 12-2335, [12], ADDED. [635041] [12-2335]

DATE	DOCKET NUMBER	PROCEEDINGS
6/12/12	14	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. Service date 06/12/2012 by CM/ECF. [635088] [12-2335]
6/12/12	15	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. Service date 06/12/2012 by CM/ECF. [635102] [12-2335]
6/13/12	16	ATTORNEY, Kerry William Kircher for Bipartisan Legal Advisory Group of the United States House of Representatives, in case 12-2335, [14], ADDED. [635150] [12-2335]
6/13/12	17	DEFECTIVE DOCUMENT, NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, [15], on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. [635154] [12-2335]

DATE	DOCKET NUMBER	PROCEEDINGS
6/13/12	18	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. Service date 06/13/2012 by CM/ECF. [635399] [12-2335]
6/13/12	19	LETTER, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, RECEIVED. Service date 06/13/2012 by email, US mail, CM/ECF. [635434] [12-2335]
6/13/12	20	CURED DEFECTIVE, NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, [18], on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. [635581] [12-2335]
6/13/12	21	DEFECTIVE DOCUMENT, LETTER, [19], on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. [635597] [12-2335]—[Edited 08/16/2012 by KR]

DATE	DOCKET NUMBER	PROCEEDINGS
6/13/12	22	CURED DEFECTIVE, LETTER, [19], on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. [635612] [12-2335]
6/13/12	24	LETTER, on behalf of Appellee Edith Schlain Windsor, RECEIVED. Service date 06/13/2012 by CM/ECF. [635920] [12-2335]
6/13/12	25	MOTION, to expedite appeal, on behalf of Appellee Edith Schlain Windsor, FILED. Service date 06/13/2012 by CM/ECF, email. [635936] [12-2335]
6/14/12	29	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of United States of America, FILED. Service date 06/14/2012 by CM/ECF. [637164] [12-2335]
6/14/12	30	ATTORNEY, Michael Jay Singer for United States of America, in case 12-2335, [29], ADDED. [637180] [12-2335]

DATE	DOCKET NUMBER	PROCEEDINGS
6/15/12	31	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of State of New York, FILED. Service date 06/15/2012 by CM/ECF. [638408] [12-2335]—[Edited 06/15/2012 by KR]—[Edited 06/15/2012 by KR]
6/15/12	32	NEW PARTY, Amicus Curiae State of New York, ADDED. [638565] [12-2335]
6/15/12	35	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant United States of America in 12-2435, FILED. [640723] [12-2435, 12-2335]
6/15/12	36	DISTRICT COURT ORDER, dated 06/06/2012, RECEIVED. [640730] [12-2435, 12-2335]
6/15/12	38	ELECTRONIC INDEX, in lieu of record, FILED. [640733] [12-2435, 12-2335]
6/15/12	37	DISTRICT COURT JUDGMENT, dated 06/07/2012, RECEIVED. [640732] [12-2435, 12-2335]

DATE	DOCKET NUMBER	PROCEEDINGS
6/18/12	33	NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL, on behalf of United States of America, FILED. Service date 06/18/2012 by CM/ECF. [640188] [12-2335]
6/18/12	34	ATTORNEY, August E. Flentje, [33], in place of attorney Helen Gilbert, SUBSTITUTED. [640199] [12-2335]
6/19/12	42	SCHEDULING NOTIFICATION, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, informing Court of proposed due date 08/10/2012, RECEIVED. Service date 06/19/2012 by CM/ECF, email, US mail. [641373] [12-2335, 12-2435]
6/20/12	43	LETTER, on behalf of Appellee Edith Schlain Windsor, RECEIVED. Service date 06/20/2012 by CM/ECF. [642197] [12-2335]

DATE	DOCKET NUMBER	PROCEEDINGS
6/20/12	44	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee Edith Schlain Windsor, FILED. Service date 06/20/2012 by CM/ECF. [642211] [12-2335]
6/20/12	45	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee Edith Schlain Windsor, FILED. Service date 06/20/2012 by CM/ECF. [642226] [12-2335]
6/20/12	46	ATTORNEY, Andrew Ehrlich for Edith Schlain Windsor, in case 12-2335, [44], ADDED. [642297] [12-2335, 12-2435]
6/20/12	47	ATTORNEY, Jaren Janghorbani for Edith Schlain Windsor, in case 12-2335, [45], ADDED. [642300] [12-2335, 12-2435]
6/20/12	49	OPPOSITION TO MOTION to expedite appeal [25], on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. Service date 06/20/2012 by US mail, CM/ECF,

DATE	DOCKET NUMBER	PROCEEDINGS
		email. [642723] [49] [12-2335, 12-2435]
6/22/12	55	MOTION ORDER, granting motion to expedite appeal [25] filed by Appellee Edith Schlain Windsor in 12-2335, by GEL, FILED. [644501] [55] [12-2335, 12-2435]
6/22/12	56	EXPEDITED SCHEDULING ORDER re: Appellant Brief due date as 08/10/2012;. Appellee Brief due date as 08/31/2012,. Appellant reply brief due date as 09/14/2012;, FILED. [644538] [12-2335, 12-2435]
6/25/12	58	ORDER, dated 06/25/2012, appeal will be dismissed effective 07/09/2012, unless Forms C and D are submitted, FILED. [645899] [12-2335, 12-2435]
6/25/12	59	FORM C, on behalf of United States of America, FILED. Service date 06/25/2012 by CM/ECF. [646665] [12-2435, 12-2335]
6/25/12	60	FORM D, on behalf of United States of America, FILED. Service date 06/25/2012 by CM/ECF. [646667] [12-2435, 12-2335]

DATE	DOCKET NUMBER	PROCEEDINGS
6/26/12	63	FORM D, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. Service date 06/26/2012 by CM/ECF. [647135] [12-2335, 12-2435]
6/26/12	64	FORM C, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. Service date 06/26/2012 by CM/ECF. [647806] [12-2335, 12-2435]
6/27/12	67	NEW CASE MANAGER, Tynetta Wilder, ASSIGNED. [648247] [12-2335, 12-2435]
6/27/12	68	NEW CASE MANAGER, Tynetta Wilder, ASSIGNED. [648253] [12-2435, 12-2335]
6/28/12	70	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee Edith Schlain Windsor in 12-2335, 12-2435, FILED. Service date 06/28/2012 by CM/ECF. [650312] [12-2335, 12-2435]

DATE	DOCKET NUMBER	PROCEEDINGS
6/28/12	71	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee Edith Schlain Windsor in 12-2335, 12-2435, FILED. Service date 06/28/2012 by CM/ECF. [650322] [12-2335, 12-2435]
6/28/12	72	DEFECTIVE DOCUMENT, NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, [71], [70], on behalf of Appellee Edith Schlain Windsor in 12-2335, 12-2435, FILED. [650452] [12-2335, 12-2435]
7/3/12	74	CASE CALENDARING, for the week of 09/24/2012, PROPOSED. [653911] [12-2335, 12-2435]
7/3/12	75	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee Edith Schlain Windsor in 12-2335, 12-2435, FILED. Service date 07/03/2012 by CM/ECF. [654126] [12-2335, 12-2435]
7/3/12	76	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee Edith Schlain

DATE	DOCKET NUMBER	PROCEEDINGS
		Windsor in 12-2335, 12-2435, FILED. Service date 07/03/2012 by CM/ECF. [654135] [12-2335, 12-2435]
7/3/12	77	ATTORNEY, James D. Esseks for Edith Schlain Windsor, in case 12-2435 James D. Esseks for Edith Schlain Windsor, in case 12-2335, [75], ADDED. [654142] [12-2335, 12-2435]
7/3/12	78	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee Edith Schlain Windsor in 12-2335, 12-2435, FILED. Service date 07/03/2012 by CM/ECF. [654152] [12-2335, 12-2435]
7/3/12	80	ATTORNEY, Rose Ann Saxe for Edith Schlain Windsor, in case 12-2435 Rose Ann Saxe for Edith Schlain Windsor, in case 12-2335, [78], ADDED. [654160] [12-2335, 12-2435]
7/3/12	81	CURED DEFECTIVE NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL: FORM, [75], [78], on behalf of Appellee Edith

DATE	DOCKET NUMBER	PROCEEDINGS
		Schlain Windsor in 12-2335, 12-2435, FILED. [654166] [12-2335, 12-2435]
7/3/12	83	LETTER, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, RECEIVED. Service date 07/03/2012 by CM/ECF. [654674] [12-2335]
7/3/12	84	LETTER, on behalf of Appellee Edith Schlain Windsor, RECEIVED. Service date 07/03/2012 by CM/ECF. [654713] [12-2335]
7/6/12	87	LETTER, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, RECEIVED. Service date 07/06/2012 by CM/ECF. [656606] [12-2335]
7/16/12	89	LETTER, on behalf of Appellee Edith Schlain Windsor, RECEIVED. Service date 07/16/2012 by CM/ECF. [664836] [12-2335]
7/18/12	92	U.S. SUPREME COURT LETTER, dated 07/17/2012, RECEIVED. [667514] [12-2435, 12-2335] —[Edited 07/18/2012 by WD]

DATE	DOCKET NUMBER	PROCEEDINGS
7/19/12	94	MOTION, to dismiss, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. Service date 07/19/2012 by CM/ECF. [668933] [12-2335]
7/20/12	98	LETTER, on behalf of Appellee Edith Schlain Windsor, RECEIVED. Service date 07/20/2012 by CM/ECF. [669293] [12-2335]
8/2/12	104	OPPOSITION TO MOTION to dismiss [94], to dismiss [668779-2], on behalf of United States of America, FILED. Service date 08/02/2012 by CM/ECF. [681464] [104] [12-2335, 12-2435]
8/3/12	107	DEFECTIVE DOCUMENT, OPPOSITION TO MOTION , to dismiss, [104], on behalf of United States of America in 12-2335, FILED. [681507] [12-2335, 12-2435]

DATE	DOCKET NUMBER	PROCEEDINGS
8/3/12	108	OPPOSITION TO MOTION to dismiss [94], to dismiss [668779-2], on behalf of United States of America, FILED. Service date 08/02/2012 by CM/ECF. [681607] [108] [12-2335, 12-2435]
8/3/12	109	CURED DEFECTIVE OPPOSITION TO MOTION: [107], [108], on behalf of United States of America in 12-2335, FILED. [681629] [12-2335, 12-2435]
8/3/12	111	CASE CALENDARING, for argument on 09/27/2012, SET. [682153] [12-2335, 12-2435]
8/10/12	112	JOINT APPENDIX, volume 1 of 8, (pp. 1-206), on behalf of United States of America, FILED. Service date 08/10/2012 by 3rd party, CM/ECF. [689172] [12-2335]
8/10/12	113	JOINT APPENDIX, volume 2 of 8, (pp. 207-271), on behalf of United States of America, FILED. Service date 08/10/2012 by CM/ECF, 3rd party. [689174] [12-2335]

DATE	DOCKET NUMBER	PROCEEDINGS
8/10/12	114	JOINT APPENDIX, volume 3 of 8, (pp. 272-697), on behalf of United States of America, FILED. Service date 08/10/2012 by CM/ECF, 3rd party. [689177] [12-2335]
8/10/12	115	JOINT APPENDIX, volume 4 of 8, (pp. 698-736), on behalf of United States of America, FILED. Service date 08/10/2012 by CM/ECF, 3rd party. [689179] [12-2335]
8/10/12	116	JOINT APPENDIX, volume 5 of 8, (pp. 737-926), on behalf of United States of America, FILED. Service date 08/10/2012 by CM/ECF, 3rd party. [689180] [12-2335]
8/10/12	117	JOINT APPENDIX, volume 6 of 8, (pp. 927-1100), on behalf of United States of America, FILED. Service date 08/10/2012 by 3rd party, CM/ECF. [689181] [12-2335]
8/10/12	118	JOINT APPENDIX, volume 7 of 8, (pp. 1101-1213), on behalf of United States of America, FILED. Service date 08/10/2012 by CM/ECF, 3rd party. [689183] [12-2335]

DATE	DOCKET NUMBER	PROCEEDINGS
8/10/12	119	JOINT APPENDIX, volume 8 of 8, (pp. 1214-1397), on behalf of United States of America, FILED. Service date 08/10/2012 by CM/ECF, 3rd party. [689185] [12-2335]
8/10/12	120	BRIEF, on behalf of United States of America, FILED. Service date 08/10/2012 by CM/ECF. [689192] [12-2335]
8/10/12	121	BRIEF, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. Service date 08/10/2012 by CM/ECF. [689222] [12-2335]
8/13/12	122	MOTION TO, suspend oral argument, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives in 12-2335, 12-2435, FILED. Service date 08/13/2012 by CM/ECF. [690355] [12-2335, 12-2435] —[Edited 08/13/2012 by TW]—[Edited 08/16/2012 by TW]
8/13/12	124	REPLY TO OPPOSITION [108], on behalf of Appellant Bipartisan Legal Advisory Group of the United

DATE	DOCKET NUMBER	PROCEEDINGS
		States House of Representatives in 12-2335, 12-2435, FILED. Service date 08/13/2012 by CM/ECF. [690562] [124] [12-2335, 12-2435]
8/14/12	125	DEFECTIVE DOCUMENT, MOTION TO, suspend oral argument, [122], on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives in 12-2335, 12-2435, FILED. [690879] [12-2335, 12-2435]—[Edited 08/16/2012 by TW]
8/14/12	126	DEFECTIVE DOCUMENT, reply to opposition, [124], on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives in 12-2335, 12-2435, FILED. [690919] [12-2335, 12-2435]
8/14/12	127	REPLY TO OPPOSITION [108], on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives in 12-2335, 12-2435, FILED. Service date 08/14/2012 by CM/ECF. [691029] [127] [12-2335, 12-2435]

DATE	DOCKET NUMBER	PROCEEDINGS
8/14/12	128	CURED DEFECTIVE REPLY TO OPPOSITION, [127], on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives in 12-2335, 12-2435, FILED. [691126] [12-2335, 12-2435]—[Edited 08/16/2012 by TW]
8/14/12	130	LETTER, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, RECEIVED. Service date 08/14/2012 by CM/ECF. [691601] [12-2335]
8/14/12	132	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee Edith Schlain Windsor in 12-2335, 12-2435, FILED. Service date 08/14/2012 by CM/ECF. [691998] [12-2335, 12-2435]
8/15/12	133	ATTORNEY, Mariko Hirose for Edith Schlain Windsor, in case 12-2435 Mariko Hirose for Edith Schlain Windsor, in case 12-2335, [132], ADDED. [692352] [12-2335, 12-2435]

DATE	DOCKET NUMBER	PROCEEDINGS
8/15/12	135	MOTION, for—relief, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives in 12-2335, 12-2435, FILED. Service date 08/15/2012 by CM/ECF. [692562] [12-2335, 12-2435]
8/15/12	136	ARGUMENT NOTICE, to attorneys/parties, TRANSMITTED. [692628] [12-2335, 12-2435]
8/15/12	137	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellee Edith Schlain Windsor, FILED. Service date 08/15/2012 by CM/ECF. [692881] [12-2335]
8/15/12	138	DEFECTIVE DOCUMENT, MOTION, [135], on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives in 12-2335, 12-2435, FILED. [693006] [12-2335, 12-2435]
8/15/12	139	MOTION, to adjourn oral argument, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives in 12-2335, 12-2435, FILED.

DATE	DOCKET NUMBER	PROCEEDINGS
		Service date 08/15/2012 by CM/ECF. [693084] [12-2335, 12-2435]
8/15/12	140	CURED DEFECTIVE MOTION, [139], on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives in 12-2335, 12-2435, FILED. [693128] [12-2335, 12-2435]—[Edited 08/16/2012 by TW]
8/15/12	142	AMICUS BRIEF, on behalf of National Organization for Marriage, FILED. Service date 08/15/2012 by CM/ECF. [693738] [12-2335] —[Edited 08/17/2012 by TW]
8/16/12	144	CAPTION, designation corrected for party United States of America, AMENDED. [694464] [12-2335, 12-2435]
8/16/12	145	DEFECTIVE DOCUMENT, joint appendix, [119], [118], [117], [116], [115], [114], [113], [112], on behalf of Appellant United States of America in 12-2335, FILED. [694494] [12-2335, 12-2435]
8/16/12	146	DEFECTIVE DOCUMENT, brief, [121], on behalf of Appellant Bipartisan Legal Advisory Group of the

DATE	DOCKET NUMBER	PROCEEDINGS
		United States House of Representatives in 12-2335, FILED. [694526] [12-2335, 12-2435]
8/16/12	147	BRIEF, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. Service date 08/16/2012 by CM/ECF. [694774] [12-2335]
8/16/12	148	BRIEF, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. Service date 08/16/2012 by CM/ECF. [694816] [12-2335]
8/17/12	152	DEFECTIVE DOCUMENT, BRIEF, [147], on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives in 12-2335, 12-2435, FILED. [695128] [12-2335, 12-2435]
8/17/12	153	CURED DEFECTIVE BRIEF, [148], on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives in 12-2335, 12-2435,

DATE	DOCKET NUMBER	PROCEEDINGS
		FILED. [695136] [12-2335, 12-2435]
8/17/12	154	JOINT APPENDIX, volume 1 of 2, (pp. 1-736), on behalf of Appellant United States of America, FILED. Service date 08/17/2012 by CM/ECF. [695237] [12-2335]
8/17/12	155	JOINT APPENDIX, volume 2 of 2, (pp. 737-1397), on behalf of Appellant United States of America, FILED. Service date 08/17/2012 by CM/ECF. [695244] [12-2335]
8/17/12	156	CURED DEFECTIVE APPENDIX, [154], [155], on behalf of Appellant United States of America in 12-2335, 12-2435, FILED. [695278] [12-2335, 12-2435]
8/17/12	157	NOTICE, for the submission of additional paper copies of the appendix or joint appendix, SENT. [695283] [12-2335, 12-2435]
8/17/12	160	AMICUS BRIEF, on behalf of Concerned Women for America, FILED. Service date 08/17/2012 by CM/ECF. [695805] [12-2335]—[Edited 08/17/2012 by TW]—[Edited 08/20/2012 by TW]

DATE	DOCKET NUMBER	PROCEEDINGS
8/17/12	161	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of Former Attorneys General Edwin Meese III and John Ashcroft, FILED. Service date 08/17/2012 by CM/ECF. [695840] [12-2335, 12-2435]—[Edited 08/20/2012 by TW]—[Edited 08/20/2012 by TW]—[Edited 08/20/2012 by TW]—[Edited 08/20/2012 by TW]
8/17/12	162	AMICUS BRIEF, on behalf of Former Attorneys General Edwin Meese III and John Ashcroft FILED. Service date 08/17/2012 by CM/ECF. [695842] [12-2335]—[Edited 08/20/2012 by TW]—[Edited 08/20/2012 by TW]
8/17/12	163	AMICUS BRIEF, FILED. Service date 08/17/2012 by CM/ECF. [695861] [12-2335]—[Edited 08/20/2012 by TW]
8/17/12	164	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of The States of Indiana, Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Kansas, Michigan, Nebraska, Oklahoma, South Carolina, South Dakota, and Virginia FILED.

DATE	DOCKET NUMBER	PROCEEDINGS
		Service date 08/17/2012 by CM/ECF. [695971] [12-2335, 12-2435]—[Edited 08/20/2012 by TW]—[Edited 08/20/2012 by TW]—[Edited 08/20/2012 by TW]
8/17/12	165	AMICUS BRIEF, on behalf of the States of Indiana, Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Kansas, Michigan, Nebraska, Oklahoma, South Carolina, South Dakota, and Virginia, FILED. Service date 08/17/2012 by CM/ECF. [695974] [12-2335—[Edited 08/20/2012 by TW]
8/17/12	166	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of Frederick Douglass Foundation, FILED. Service date 08/17/2012 by CM/ECF. [696104] [12-2335, 12-2435]—[Edited 08/20/2012 by TW]—[Edited 08/20/2012 by TW]
8/17/12	167	AMICUS BRIEF, on behalf of Frederick Douglass Foundation, FILED. Service date 08/17/2012 by CM/ECF. [696113] [12-2335]—[Edited 08/20/2012 by TW]

DATE	DOCKET NUMBER	PROCEEDINGS
8/17/12	168	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of American College of Pediatricians, FILED. Service date 08/17/2012 by CM/ECF. [696365] [12-2335, 12-2435]—[Edited 08/20/2012 by TW] —[Edited 08/20/2012 by TW]
8/17/12	169	AMICUS BRIEF, on behalf of American College of Pediatricians, FILED. Service date 08/17/2012 by CM/ECF. [696375] [12-2335]—[Edited 08/20/2012 by TW]
8/20/12	170	DEFECTIVE DOCUMENT, BRIEF, [142], on behalf of Amicus Curiae National Organization for Marriage, Inc. in 12-2335, FILED. [696827] [12-2335, 12-2435]
8/20/12	171	DEFECTIVE DOCUMENT, BRIEF, [160], on behalf of Amicus Curiae Concerned Women For America in 12-2335, FILED. [696837] [12-2335, 12-2435]
8/20/12	172	DEFECTIVE DOCUMENT, BRIEF, [163], on behalf of Amicus Curiae Concerned Women For America in 12-2335, FILED. [696853] [12-2335, 12-2435]

DATE	DOCKET NUMBER	PROCEEDINGS
8/20/12	173	DEFECTIVE DOCUMENT, BRIEF, [162], on behalf of Amicus Curiae Former Attorneys General Edwin Meese III and John Ashcroft in 12-2335, FILED. [696873] [12-2335, 12-2435]
8/20/12	174	DEFECTIVE DOCUMENT, BRIEF, [165], on behalf of Amicus Curiae The States of Indiana, Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Kansas, Michigan, Nebraska, Oklahoma, South Carolina, South Dakota, and Virginia in 12-2335, FILED. [696894] [12-2335, 12-2435]
8/20/12	175	AMICUS BRIEF, on behalf of The States of Indiana, Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Kansas, Michigan, Nebraska, Oklahoma, South Carolina, South Dakota, and Virginia, FILED. Service date 08/17/2012 by CM/ECF. [696982] [12-2335]—[Edited 08/20/2012 by TW]
8/20/12	176	AMICUS BRIEF, on behalf of Former Attorney General Edwin Meese III and John Ashcroft FILED. Service date 08/17/2012 by CM/

DATE	DOCKET NUMBER	PROCEEDINGS
		ECF. [696992] [12-2335]—[Edited 08/20/2012 by TW]
8/20/12	177	DEFECTIVE DOCUMENT, BRIEF, [175], on behalf of Amicus Curiae The States of Indiana, Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Kansas, Michigan, Nebraska, Oklahoma, South Carolina, South Dakota, and Virginia in 12-2335, FILED. [697031] [12-2335, 12-2435]
8/20/12	178	AMICUS BRIEF, on behalf of The States of Indiana, Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Kansas, Michigan, Nebraska, Oklahoma, South Carolina, South Dakota, and Virginia FILED. Service date 08/17/2012 by CM/ECF. [697102] [12-2335]—[Edited 08/20/2012 by TW]
8/20/12	179	CURED DEFECTIVE BRIEF, [178], on behalf of Amicus Curiae The States of Indiana, Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Kansas, Michigan, Nebraska, Oklahoma, South Carolina, South Dakota, and Virginia in 12-2335,

DATE	DOCKET NUMBER	PROCEEDINGS
		FILED. [697115] [12-2335, 12-2435]
8/20/12	180	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Amicus Curiae National Organization for Marriage, Inc. in 12-2335, FILED. Service date 08/20/2012 by CM/ECF. [697199] [12-2335, 12-2435]
8/20/12	181	AMICUS BRIEF, National Organization for Marriage, FILED. Service date 08/20/2012 by CM/ECF. [697203] [12-2335]--[Edited 08/20/2012 by TW]
8/20/12	182	DEFECTIVE DOCUMENT, NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, [180], on behalf of Amicus Curiae National Organization for Marriage, Inc. in 12-2335, FILED. [697334] [12-2335, 12-2435]
8/20/12	183	CURED DEFECTIVE BRIEF, [181], on behalf of Amicus Curiae National Organization for Marriage, Inc. in 12-2335, FILED. [697373] [12-2335, 12-2435]

DATE	DOCKET NUMBER	PROCEEDINGS
8/20/12	184	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of National Organization for Marriage, FILED. Service date 08/20/2012 by CM/ECF. [697579] [12-2335, 12-2435]—[Edited 08/21/2012 by TW]
8/20/12	185	OPPOSITION TO MOTION to adjourn oral argument [139], on behalf of Appellee Edith Schlain Windsor in 12-2335, 12-2435, FILED. Service date 08/20/2012 by CM/ECF. [697712] [185] [12-2335, 12-2435]
8/21/12	186	CURED DEFECTIVE FORM, [184], on behalf of Amicus Curiae National Organization for Marriage, Inc. in 12-2335, FILED. [697744] [12-2335, 12-2435]
8/21/12	196	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. Service date 08/21/2012 by CM/ECF. [698768] [12-2335]

DATE	DOCKET NUMBER	PROCEEDINGS
8/21/12	197	CORRECTED APPENDIX, Volume 2, on behalf of Appellant United States of America, FILED. Service date 08/21/2012 by CM/ECF. [698908] [12-2335]—[Edited 08/22/2012 by TW]
8/22/12	198	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of Concerned Women for America, FILED. Service date 08/22/2012 by CM/ECF. [699722] [12-2335, 12-2435]—[Edited 08/22/2012 by TW]—[Edited 08/22/2012 by TW]
8/22/12	199	AMICUS BRIEF, on behalf of Concerned Women for America FILED. Service date 08/22/2012 by CM/ECF. [699727] [12-2335]—[Edited 08/22/2012 by TW]
8/22/12	200	CURED DEFECTIVE FORM, [198], on behalf of Amicus Curiae Concerned Women For America in 12-2335, FILED. [699781] [12-2335, 12-2435]

DATE	DOCKET NUMBER	PROCEEDINGS
8/22/12	202	DEFECTIVE DOCUMENT, BRIEF, [199], on behalf of Amicus Curiae Concerned Women For America in 12-2335, FILED. [699796] [12-2335, 12-2435]
8/22/12	207	REPLY TO OPPOSITION [185], on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives in 12-2335, 12-2435, FILED. Service date 08/22/2012 by CM/ECF. [700065] [207] [12-2335, 12-2435]
8/23/12	211	EXTRA PAPER COPIES, Joint Appendix, Volume 1, on behalf of Appellant United States of America in 12-2335, RECEIVED. [700792] [12-2335, 12-2435]
8/23/12	212	LETTER, on behalf of Appellee Edith Schlain Windsor, RECEIVED. Service date 08/23/2012 by CM/ECF. [700858] [12-2335]
8/23/12	213	LETTER, on behalf of Appellee Edith Schlain Windsor, RECEIVED. Service date 08/23/2012 by CM/ECF. [700899] [12-2335]

DATE	DOCKET NUMBER	PROCEEDINGS
8/23/12	215	AMICUS BRIEF, Concerned Women for America, FILED. Service date 08/23/2012 by CM/ECF. [701180] [12-2335]—[Edited 08/23/2012 by TW]
8/23/12	216	CURED DEFECTIVE BRIEF, [215], on behalf of Amicus Curiae Concerned Women For America in 12-2335, FILED. [701190] [12-2335, 12-2435]
8/23/12	217	LETTER, on behalf of Amicus Curiae Former Attorneys General Edwin Meese III and John Ashcroft, RECEIVED. Service date 08/23/2012 by CM/ECF. [701197] [12-2335]
8/23/12	218	DEFECTIVE DOCUMENT, LETTER, [217], on behalf of Amicus Curiae Former Attorneys General Edwin Meese III and John Ashcroft in 12-2335, FILED. [701329] [12-2335, 12-2435]

DATE	DOCKET NUMBER	PROCEEDINGS
8/23/12	220	LETTER, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, RECEIVED. Service date 08/23/2012 by CM/ECF. [701384] [12-2335]
8/23/12	221	MOTION ORDER, denying motion to adjourn oral argument [139] filed by Appellant Bipartisan Legal Advisory Group of the United States House of Representatives in 12-2335, FILED. [701409] [221] [12-2335, 12-2435]
8/27/12	224	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of Citizens for Responsibility and Ethics in Washington FILED. Service date 08/27/2012 by CM/ECF. [703075] [12-2335, 12-2435]—[Edited 08/27/2012 by TW]—[Edited 08/27/2012 by TW]
8/27/12	225	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellant United States of America in 12-2335, 12-2435, FILED. Service date 08/27/2012 by CM/ECF. [703865] [12-2335, 12-2435]

DATE	DOCKET NUMBER	PROCEEDINGS
8/28/12	226	ATTORNEY, Helen L. Gilbert for United States of America, in case 12-2435 Helen L. Gilbert for United States of America, in case 12-2335, [225], ADDED. [703899] [12-2335, 12-2435]
8/28/12	228	LETTER, on behalf of Amicus Curiae Former Attorneys General Edwin Meese III and John Ashcroft, RECEIVED. Service date 08/28/2012 by CM/ECF. [704045] [12-2335]
8/28/12	229	CURED DEFECTIVE LETTER, [228], on behalf of Amicus Curiae Former Attorneys General Edwin Meese III and John Ashcroft in 12-2335, FILED. [704123] [12-2335, 12-2435]
8/28/12	230	CURED DEFECTIVE BRIEF, [176], on behalf of Amicus Curiae Former Attorneys General Edwin Meese III and John Ashcroft in 12-2335, FILED. [704127] [12-2335, 12-2435]
8/29/12	236	MOTION ORDER, deferring motion to dismiss [94] filed by Appellant Bipartisan Legal Advisory

DATE	DOCKET NUMBER	PROCEEDINGS
		Group of the United States House of Representatives in 12-2335, FILED. [705703] [236] [12-2335, 12-2435]
8/31/12	239	BRIEF, on behalf of Appellee Edith Schlain Windsor, FILED. Service date 08/31/2012 by CM/ECF. [708073] [12-2335]
8/31/12	240	AMICUS BRIEF, on behalf of Citizens for Responsibility and Ethics in Washington, FILED. Service date 08/31/2012 by CM/ECF. [708642] [12-2335]—[Edited 08/31/2012 by TW]
8/31/12	241	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of, Citizens for Responsibility and Ethics in Washington, FILED. Service date 08/31/2012 by CM/ECF. [708650] [12-2335, 12-2435]—[Edited 08/31/2012 by TW]
8/31/12	242	DEFECTIVE DOCUMENT, NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, [224], on behalf of Amicus Curiae Citizens for Responsibility and Ethics in Washington in

DATE	DOCKET NUMBER	PROCEEDINGS
		12-2335, FILED. [708712] [12-2335, 12-2435]
8/31/12	243	CURED DEFECTIVE FORM, [241], on behalf of Amicus Curiae Citizens for Responsibility and Ethics in Washington in 12-2335, FILED. [708728] [12-2335, 12-2435]
8/31/12	245	AMICUS BRIEF, on behalf of Citizens for Responsibility and Ethics in Washington, FILED. Service date 08/31/2012 by CM/ECF. [708888] [12-2335]—[Edited 09/04/2012 by TW]
9/4/12	246	DEFECTIVE DOCUMENT, BRIEF, [240], on behalf of Amicus Curiae Citizens for Responsibility and Ethics in Washington in 12-2335, FILED. [709208] [12-2335, 12-2435]—[Edited 09/06/2012 by TW]
9/4/12	247	CURED DEFECTIVE BRIEF, [245], on behalf of Amicus Curiae Citizens for Responsibility and Ethics in Washington in 12-2335, FILED. [709210] [12-2335, 12-2435]

DATE	DOCKET NUMBER	PROCEEDINGS
9/4/12	250	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders (SAGE), FILED. Service date 09/04/2012 by CM/ECF. [709635] [12-2335, 12-2435]—[Edited 09/04/2012 by TW]—[Edited 09/04/2012 by TW]
9/5/12	252	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellant United States of America in 12-2335, 12-2435, FILED. Service date 09/05/2012 by CM/ECF. [711654] [12-2335, 12-2435]
9/5/12	253	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of, City of New York, Michael R. Bloomberg, In his official capacity as Mayor of the city of New York, Christine C. Quinn, In her official capacity as Speaker of the Council of the city of New York, FILED. Service date 09/05/2012 by CM/ECF. [711678] [12-2335, 12-2435]—[Edited 09/06/2012 by TW]—[Edited 09/11/2012 by TW]

DATE	DOCKET NUMBER	PROCEEDINGS
9/6/12	254	ATTORNEY, Stuart F. Delery for United States of America, in case 12-2435 Stuart F. Delery for United States of America, in case 12-2335, [252], ADDED. [711764] [12-2335, 12-2435]
9/6/12	256	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellant United States of America, FILED. Service date 09/06/2012 by CM/ECF. [711838] [12-2335]
9/6/12	257	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of The Partnership for New York City, FILED. Service date 09/06/2012 by CM/ECF. [712497] [12-2335, 12-2435]—[Edited 09/06/2012 by TW]—[Edited 09/07/2012 by TW]
9/6/12	258	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of NAACP Legal Defense and Educational Fund, Inc., FILED. Service date 09/06/2012 by CM/ECF. [712662] [12-2335, 12-2435]—[Edited 09/07/2012 by TW]—[Edited 09/07/2012 by TW]

DATE	DOCKET NUMBER	PROCEEDINGS
9/6/12	259	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of Asian American Justice Center, FILED. Service date 09/06/2012 by US mail. [712912] [12-2335, 12-2435]—[Edited 09/07/2012 by TW]—[Edited 09/07/2012 by TW]
9/7/12	261	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of Family Law Professors, FILED. Service date 09/07/2012 by CM/ECF. [713105] [12-2335]—[Edited 09/07/2012 by TW]—[Edited 09/07/2012 by TW]
9/7/12	262	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of Family Law Professors, FILED. Service date 09/07/2012 by CM/ECF. [713149] [12-2335, 12-2435]—[Edited 09/07/2012 by TW]
9/7/12	264	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of Family Law Professors, FILED. Service date 09/07/2012 by CM/ECF. [713187] [12-2335, 12-2435]—[Edited 09/07/2012 by TW]

DATE	DOCKET NUMBER	PROCEEDINGS
9/7/12	265	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of Asian American Justice Center, FILED. Service date 09/07/2012 by US mail. [713321] [12-2335, 12-2435] —[Edited 09/07/2012 by TW]
9/7/12	266	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of National Senior Citizens Law Center, FILED. Service date 09/07/2012 by CM/ECF. [713332] [12-2335, 12-2435]—[Edited 09/07/2012 by TW]
9/7/12	267	MOTION TO FILE AMICUS CURIAE BRIEF, on behalf of Historians Peter W. Bardaglio, Norma Basch, George Chauncey, Stephanie Coontz, Nancy F. Cott, Toby L. Ditz, Ariella Dubler, Laura F. Edwards, Estelle B. Freedman, Sarah Barringer Gordon, Michael Grossberg, Hendrik Hartog, Ellen Herman, Martha Hodes, Linda K. Kerber, Alice Kessler-Harris, Elaine Tyler May, Steven Minitz, Amy Dru Stanley, Barbara Young Welke, FILED. Service date 09/07/2012 by CM/ECF. [713389] [12-2335]—[Edited 09/10/2012

DATE	DOCKET NUMBER	PROCEEDINGS
		by TW]—[Edited 09/10/2012 by TW]
9/7/12	268	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of 145 Members of the United States House of Representatives, FILED. Service date 09/07/2012 by CM/ECF. [713397] [12-2335, 12-2435] —[Edited 09/10/2012 by TW]—[Edited 09/10/2012 by TW]
9/7/12	269	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of Historians Peter W. Bardaglio, Norma Basch, George Chauncey, Stephanie Coontz, Nancy F. Cott, Toby L. Ditz, Ariella Dubler, Laura F. Edwards, Estelle B. Freedman, Sarah Barringer Gordon, Michael Grossberg, Hendrik Hartog, Ellen Herman, Martha Hodes, Linda K. Kerber, Alice Kessler-Harris, Elaine Tyler May, Steven Minitz, Amy Dru Stanley, Barbara Young Welke, FILED. Service date 09/07/2012 by CM/ECF. [713410] [12-2335, 12-2435]—[Edited 09/10/2012 by TW]

DATE	DOCKET NUMBER	PROCEEDINGS
9/7/12	270	AMICUS BRIEF, on behalf of 145 Members of the United States House of Representatives, FILED. Service date 09/07/2012 by CM/ECF. [713415] [12-2335]—[Edited 09/10/2012 by TW]
9/7/12	271	AMICUS BRIEF, on behalf of Bar Associations and Public Interest and Legal Service Organizations, FILED. Service date 09/07/2012 by US mail. [713497] [12-2335]—[Edited 09/10/2012 by TW]
9/7/12	272	AMICUS BRIEF, on behalf of The City of New York, The Council of the City of New York, Michael R. Bloomberg, in his official capacity as Mayor of the City of New York, Christince C. Quinn, in her official capacity as Speaker of the Council of the City of New York, FILED. Service date 09/07/2012 by CM/ECF. [713526] [12-2335]—[Edited 09/10/2012 by TW]
9/7/12	273	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of Professors of Family and Child Welfare Law Susan Appleton, Carlos Ball, Brian Bix, Cynthia Bowman,

DATE	DOCKET NUMBER	PROCEEDINGS
		Naomi Cahn, Marion Crain, Nancy Dowd, Joanna L. Grossman, Joan Heifetz Hollinger, Lisa Ikemoto, Melanie Jacobs, Courtney Joslin, Herma Hill Kay, Charles Kindregan, Kristine S. Knaplund, Maya Manian, Linda McClain, Anthony Miller, Martha L. Minow, Douglas Nejaime, Kermit Roosevelt, Laura A. Rosenbury, Shelly Saxer, Katharine Silbaugh, Michael S. Wald, and Barbara Bennett Woodhouse, FILED. Service date 09/07/2012 by CM/ECF. [713637] [12-2335, 12-2435]—[Edited 09/10/2012 by TW]—[Edited 09/10/2012 by TW]—[Edited 09/10/2012 by TW]—[Edited 09/10/2012 by TW]
9/7/12	274	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of American Federation of Labor and Congress of Industrial Organizations, Change to Win, National Education Association, FILED. Service date 09/07/2012 by CM/ECF. [713642] [12-2335, 12-2435]—[Edited 09/10/2012 by TW]—[Edited 09/10/2012 by TW]

DATE	DOCKET NUMBER	PROCEEDINGS
9/7/12	275	AMICUS BRIEF, on behalf of American Federation of Labor and Congress of Industrial Organizations, Change to Win, National Education Association, FILED. Service date 09/07/2012 by CM/ECF. [713654] [12-2335]—[Edited 09/10/2012 by TW]
9/7/12	276	AMICUS BRIEF, The Partnership for New York City, FILED. Service date 09/07/2012 by 3rd party, CM/ECF. [713662] [12-2335]—[Edited 09/10/2012 by TW]
9/7/12	277	MOTION TO FILE AMICUS CURIAE BRIEF, on behalf of Historians Peter W. Bardaglio, Norma Basch, George Chauncey, Stephanie Coontz, Nancy F. Cott, Toby L. Ditz, Ariella Dubler, Laura F. Edwards, Estelle B. Freedman, Sarah Barringer Gordon, Michael Grossberg, Hendrik Hartog, Ellen Herman, Martha Hodes, Linda K. Kerber, Alice Kessler-Harris, Elaine Tyler May, Steven Mintz, Elizabeth H. Pleck, Carole Shammas, Mary L. Shanley, Amy Dru Stanley, Barbara Young Welke, FILED. Service

DATE	DOCKET NUMBER	PROCEEDINGS
		date 09/07/2012 by CM/ECF. [713667] [12-2335]—[Edited 09/10/2012 by TW]
9/7/12	278	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of Bar Associations and Public interest and Legal Service Organizations, FILED. Service date 09/07/2012 by CM/ECF. [713678] [12-2335, 12-2435]—[Edited 09/10/2012 by TW]
9/7/12	279	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of 145 Members of the United States House of Representatives, FILED. Service date 09/07/2012 by CM/ECF. [713689] [12-2335, 12-2435]—[Edited 09/10/2012 by TW]
9/7/12	280	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of Professors of Family and Child Welfare Law Susan Appleton, Carlos Ball, Brian Bix, Cynthia Bowman, Naomi Cahn, Nancy Dowd, Joanna L. Grossman, Joan Heifetz Hollinger, Lisa Ikemoto, Melanie Jacobs, Courtney Joslin, Herma Hill Kay, Charles Kindregan, Kristine S.

DATE	DOCKET NUMBER	PROCEEDINGS
		Knaplund, Maya Manian, Linda McClain, Anthony Miller, Martha L. Minow, Douglas Nejaime, Kermit Roosevelt, Laura A. Rosenbury, Shelly Saxer, Katharine Silbaugh, Michael S. Wald, and Barbara Bennett Woodhouse, FILED. Service date 09/07/2012 by CM/ECF. [713692] [12-2335, 12-2435]—[Edited 09/10/2012 by TW]—[Edited 09/10/2012 by TW]
9/7/12	281	AMICUS BRIEF, on behalf of Professors of Family and Child Welfare Law Susan Appleton, Carlos Ball, Brian Bix, Cynthia Bowman, Naomi Cahn, Nancy Dowd, Joanna L. Grossman, Joan Heifetz Hollinger, Lisa Ikemoto, Melanie Jacobs, Courtney Joslin, Herma Hill Kay, Charles Kindregan, Kristine S. Knaplund, Maya Manian, Linda McClain, Anthony Miller, Martha L. Minow, Douglas Nejaime, Kermit Roosevelt, Laura A. Rosenbury, Shelly Saxer, Katharine Silbaugh, Michael S. Wald, and Barbara Bennett Woodhouse, FILED. Service date 09/07/2012 by CM/ECF.

DATE	DOCKET NUMBER	PROCEEDINGS
		[713694] [12-2335]—[Edited 09/10/2012 by TW]
9/7/12	282	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of American Society on Aging, FILED. Service date 09/07/2012 by CM/ECF. [713698] [12-2335, 12-2435]—[Edited 09/10/2012 by TW]
9/7/12	283	MOTION TO FILE AMICUS CURIAE BRIEF, on behalf of Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders, National Senior Citizens Law Center, American Society on Aging, FILED. Service date 09/07/2012 by CM/ECF. [714027] [12-2335]—[Edited 09/10/2012 by TW]
9/7/12	284	AMICUS BRIEF, on behalf of NAACP Legal Defense and Educational Fund, Inc., FILED. Service date 09/07/2012 by CM/ECF. [714119] [12-2335]—[Edited 09/10/2012 by TW]—[Edited 09/10/2012 by TW]

DATE	DOCKET NUMBER	PROCEEDINGS
9/7/12	285	AMICUS BRIEF, Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders, National Senior Citizens Law Center, American Society on Aging , FILED. Service date 09/07/2012 by CM/ECF. [714125] [12-2335]—[Edited 09/10/2012 by TW]
9/7/12	286	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of The American Psychological Association, The American Academy of Pediatrics, The American Psychiatric Association, The American Psychoanalytic Association, The National Association of Social Workers and its New York City and State Chapters, The New York State Psychological Association, FILED. Service date 09/07/2012 by CM/ECF. [714160] [12-2335, 12-2435] —[Edited 09/10/2012 by TW]
9/7/12	287	AMICUS BRIEF, The American Psychological Association, The American Academy of Pediatrics, The American Psychiatric Association, The American Psychoanalytic Association, The National Associa-

DATE	DOCKET NUMBER	PROCEEDINGS
		tion of Social Workers and its New York City and State Chapters, The New York State Psychological Association, FILED. Service date 09/07/2012 by CM/ECF. [714169] [12-2335]—[Edited 09/10/2012 by TW]
9/7/12	288	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of Anti-Defamation League, Central Conference of American Rabbis, Congregation Beit Simchat Torah, Bend the ARC, A Jewish Partnership for Justice, Hadassah, The Women's Zionist Organization of America, the Hindu American Foundation, Interfaith Alliance Foundation, Japanese American Citizens League, National Council of Jewish Women, People for the American way Foundation, Union for Reform Judaism, Women's League for Conservatism Judaism, Women of Reform Judaism, FILED. Service date 09/07/2012 by CM/ECF. [714193] [12-2335]—[Edited 09/10/2012 by TW]

DATE	DOCKET NUMBER	PROCEEDINGS
9/7/12	289	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of Anti-Defamation League, Central Conference of American Rabbis, Congregation Beit Simchat Torah, Bend the ARC, A Jewish Partnership for Justice, Hadassah, The Women's Zionist Organization of America, the Hindu American Foundation, Interfaith Alliance Foundation, Japanese American Citizens League, National Council of Jewish Women, People for the American way Foundation, Union for Reform Judaism, Women's League for Conservatism Judaism, Women of Reform Judaism, FILED. Service date 09/07/2012 by CM/ECF. [714195] [12-2335, 12-2435]—[Edited 09/10/2012 by TW]
9/7/12	290	AMICUS BRIEF, Anti-Defamation League, Central Conference of American Rabbis, Congregation Beit Simchat Torah, Bend the ARC, A Jewish Partnership for Justice, Hadassah, The Women's Zionist Organization of America, the Hindu American Foundation, Interfaith Alliance Foundation, Japanese Am-

DATE	DOCKET NUMBER	PROCEEDINGS
		erican Citizens League, National Council of Jewish Women, People for the American way Foundation, Union for Reform Judaism, Women's League for Conservatism Judaism, Women of Reform Judaism, FILED. Service date 09/07/2012 by CM/ECF. [714201] [12-2335]—[Edited 09/10/2012 by TW]
9/7/12	291	AMICUS BRIEF, Family Law Professors Katharine Barker, Grace Ganz Blumberg, June Carbone, Barbara Cox, John Culhane, Karen Czapansky, Anne C. Dailey, Jennifer A. Drobac, Maxine Eichner, Ann Laquer Estin, Ira Mark Ellman, Zanita E. Fenton, Leslie Harris, Carol Sanger, Jana Singer, Mark Strasser, Jennifer B. Wriggins, FILED. Service date 09/07/2012 by US mail, CM/ECF. [714209] [12-2335]—[Edited 09/10/2012 by TW]
9/7/12	292	AMICUS BRIEF, on behalf of Amicus Curiae State of New York, FILED. Service date 09/07/2012 by CM/ECF. [714211] [12-2335]

DATE	DOCKET NUMBER	PROCEEDINGS
9/7/12	293	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of Columbia Law School Sexuality and Gender Law Clinic, FILED. Service date 09/07/2012 by CM/ECF. [714224] [12-2335, 12-2435]—[Edited 09/10/2012 by TW]
9/7/12	294	AMICUS BRIEF, Columbia Law School Sexuality and Gender Law Clinic, FILED. Service date 09/07/2012 by CM/ECF. [714225] [12-2335]—[Edited 09/10/2012 by TW]
9/11/12	297	DEFECTIVE DOCUMENT, BRIEF, [272], on behalf of Amicus Curiae Michael R. Bloomberg, Christine C. Quinn, The City of New York and The Council of the City of New York in 12-2335, FILED. [715936] [12-2335, 12-2435]
9/11/12	300	AMICUS BRIEF, on behalf of Michael R. Bloomberg, Christine C. Quinn, The City of New York and The Council of the City of New York, FILED. Service date 09/11/2012 by CM/ECF. [716007] [12-2335]—[Edited 09/11/2012 by TW] —[Edited 09/11/2012 by TW]

DATE	DOCKET NUMBER	PROCEEDINGS
9/11/12	301	CURED DEFECTIVE BRIEF, [300], on behalf of Amicus Curiae Michael R. Bloomberg, Christine C. Quinn, The City of New York and The Council of the City of New York in 12-2335, FILED. [716136] [12-2335, 12-2435]—[Edited 09/11/2012 by TW]
9/11/12	304	DEFECTIVE DOCUMENT, MOTION, [267], [277], on behalf of Movant Peter Bardaglio et al in 12-2335, FILED. [716268] [12-2335, 12-2435]
9/11/12	307	ATTORNEY, Timothy S. Fisher for Asian American Justice Center et al, in case 12-2335, [265], ADDED. [716417] [12-2335, 12-2435]
9/11/12	308	DEFECTIVE DOCUMENT, NOTICE OF APPEARANCE AS AMICUS COUNSEL, [259], on behalf of Amicus Curiae Asian American Justice Center et al in 12-2335, FILED. [716420] [12-2335, 12-2435]
9/11/12	309	CURED DEFECTIVE FORM, [265], on behalf of Amicus Curiae Asian American Justice Center et al

DATE	DOCKET NUMBER	PROCEEDINGS
		in 12-2335, FILED. [716425] [12-2335, 12-2435]
9/12/12	313	ATTORNEY, Dimitri Portnoi for Katharine Baker et al, in case 12-2335, [263], ADDED. [717688] [12-2335, 12-2435]
9/12/12	314	ATTORNEY, Amy Lucas for Katharine Baker et al, in case 12-2335, [262], ADDED. [717693] [12-2335, 12-2435]
9/12/12	315	ATTORNEY, Matthew F. Damm for Katharine Baker et al, in case 12-2335 , [261], ADDED. [717694] [12-2335, 12-2435]
9/12/12	317	DEFECTIVE DOCUMENT, AMICUS BRIEF, [291], on behalf of Amicus Curiae Katharine Baker et al in 12-2335, FILED. [717713] [12-2335, 12-2435]
9/12/12	318	DEFECTIVE DOCUMENT, NOTICE OF APPEARANCE AS AMICUS COUNSEL, AMICUS BRIEF, [268], [279], [270], on behalf of Amicus Curiae Nancy Pelosi et al in 12-2335, FILED. [717755] [12-2335, 12-2435]

DATE	DOCKET NUMBER	PROCEEDINGS
9/12/12	320	AMICUS BRIEF, on behalf of Family Law Professors, FILED. Service date 09/12/2012 by CM/ECF, US mail. [717951] [12-2335]—[Edited 09/13/2012 by TW]
9/12/12	321	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of 145 Members of the United States House of Representatives, FILED. Service date 09/12/2012 by CM/ECF. [718103] [12-2335]—[Edited 09/13/2012 by TW]
9/12/12	322	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of 145 Members of the United States of House of Representatives, FILED. Service date 09/12/2012 by CM/ECF. [718127] [12-2335, 12-2435]—[Edited 09/13/2012 by TW]
9/12/12	323	AMICUS BRIEF, on behalf of United States House of Representatives FILED. Service date 09/12/2012 by CM/ECF. [718139] [12-2335]—[Edited 09/13/2012 by TW]
9/13/12	325	ATTORNEY, Laura W. Brill for Susan Appleton et al, in case 12-

DATE	DOCKET NUMBER	PROCEEDINGS
		2335, [273], ADDED. [718329] [12-2335, 12-2435]
9/13/12	328	DEFECTIVE DOCUMENT, BRIEF, [287], on behalf of Amicus Curiae The American Academy of Pediatrics, The American Psychanalytic Association, The American Psychiatric Association, The American Psychological Association, The National Association of Social Workers and its New York City and State Chapters and The New York State Psychological Association in 12-2335, FILED. [718397] [12-2335, 12-2435]
9/13/12	330	ATTORNEY, Stuart Wesley Yothers for Central Conference of American Rabbis et al, in case 12-2335, [289], ADDED. [718469] [12-2335, 12-2435]
9/13/12	331	CURED DEFECTIVE BRIEF, [320], on behalf of Amicus Curiae Katharine Baker et al in 12-2335, FILED. [718489] [12-2335, 12-2435]

DATE	DOCKET NUMBER	PROCEEDINGS
9/13/12	332	ATTORNEY, Miriam R. Nemetz for Nancy Pelosi et al, in case 12-2335, [321], ADDED. [718526] [12-2335, 12-2435]
9/13/12	333	CURED DEFECTIVE BRIEF, FORM, [321], [322], [323], on behalf of Amicus Curiae Nancy Pelosi et al in 12-2335, FILED. [718553] [12-2335, 12-2435]
9/13/12	336	DEFECTIVE DOCUMENT, BRIEF, [294], on behalf of Amicus Curiae Columbia Law School Sexuality & Gender Law Clinic in 12-2335, FILED. [718645] [12-2335, 12-2435]
9/13/12	338	LETTER, on behalf of Amicus Curiae State of New York, RECEIVED. Service date 09/13/2012 by CM/ECF. [719421] [12-2335]
9/13/12	339	**REVISED**ARGUMENT NOTICE, to attorneys/parties, TRANSMITTED. [719478] [12-2335, 12-2435]
9/13/12	340	LETTER, on behalf of Amicus Curiae Michael R. Bloomberg, Christine C. Quinn, The City of New York

DATE	DOCKET NUMBER	PROCEEDINGS
		and The Council of the City of New York, RECEIVED. Service date 09/13/2012 by CM/ECF. [719557] [12-2335]
9/13/12	341	LETTER, on behalf of Amicus Curiae Citizens for Responsibility and Ethics in Washington, RECEIVED. Service date 09/13/2012 by CM/ECF. [719636] [12-2335]
9/13/12	342	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellant United States of America, FILED. Service date 09/13/2012 by CM/ECF. [719641] [12-2335]
9/13/12	343	LETTER, on behalf of Amicus Curiae The Partnership for New York City, RECEIVED. Service date 09/13/2012 by CM/ECF. [719650] [12-2335]
9/13/12	344	AMICUS BRIEF, The American Psychological Association et al, FILED. Service date 09/13/2012 by email. [719681] [12-2335]—[Edited 09/17/2012 by TW]

DATE	DOCKET NUMBER	PROCEEDINGS
9/13/12	345	AMICUS BRIEF, Columbia Law School Sexuality & Gender Law Clinic, FILED. Service date 09/13/2012 by CM/ECF. [719692] [12-2335]—[Edited 09/17/2012 by TW]
9/13/12	346	LETTER, on behalf of Amicus Curiae National Organization for Marriage, Inc., RECEIVED. Service date 09/13/2012 by CM/ECF. [719694] [12-2335]
9/14/12	347	U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 09/11/2012, U.S. Supreme Court docket # 12-307, RECEIVED. [719969] [12-2335, 12-2435]
9/14/12	349	LETTER, on behalf of Amicus Curiae Concerned Women For America, RECEIVED. Service date 09/14/2012 by CM/ECF. [720362] [12-2335]
9/14/12	350	LETTER, on behalf of Amicus Curiae The States of Indiana, Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Kansas, Michigan, Nebraska, Oklahoma, South Carolina, South Dakota, and Virginia,

DATE	DOCKET NUMBER	PROCEEDINGS
		RECEIVED. Service date 09/14/2012 by CM/ECF. [720399] [12-2335]
9/14/12	351	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellee Edith Schlain Windsor, FILED. Service date 09/14/2012 by CM/ECF. [720431] [12-2335]
9/14/12	353	MOTION ORDER, granting 23 family law historians motion to file amicus curiae brief [277] in 12-2335, FILED. [720490] [353] [12-2335, 12-2435]
9/14/12	354	MOTION ORDER, granting Services and Advocacy for Gay Lesbian et al motion for leave to file brief as amicus curiae, [283] in 12-2335, FILED. [720510] [354] [12-2335, 12-2435]
9/14/12	355	LETTER, on behalf of Amicus Curiae Frederick Douglas Foundation, RECEIVED. Service date 09/14/2012 by CM/ECF. [720618] [12-2335]

DATE	DOCKET NUMBER	PROCEEDINGS
9/14/12	356	AMICUS BRIEF, on behalf of Movant Peter Bardaglio et al, FILED. Service date 09/14/2012 by CM/ECF. [720728] [12-2335]
9/14/12	357	LETTER, on behalf of Amicus Curiae The American Academy of Pediatrics, The American Psychanalytic Association, The American Psychiatric Association, The American Psychological Association, The National Association of Social Workers and its New York City and State Chapters and The New York State Psychological Association, RECEIVED. Service date 09/14/2012 by CM/ECF. [720923] [12-2335]
9/14/12	358	REPLY BRIEF, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. Service date 09/14/2012 by CM/ECF. [721079] [12-2335]
9/17/12	363	LETTER, on behalf of Amicus Curiae Peter Bardaglio et al, RECEIVED. Service date 09/17/2012 by CM/ECF. [721176] [12-2335]

DATE	DOCKET NUMBER	PROCEEDINGS
9/17/12	365	DEFECTIVE DOCUMENT, BRIEF, [275], on behalf of Amicus Curiae American Federation of Labor and Congress of Industrial Organizations, Change To Win and National Education Association in 12-2335, FILED. [721372] [12-2335, 12-2435]
9/17/12	366	CURED DEFECTIVE BRIEF, [344], on behalf of Amicus Curiae The American Academy of Pediatrics, The American Psychanalytic Association, The American Psychiatric Association, The American Psychological Association, The National Association of Social Workers and its New York City and State Chapters and The New York State Psychological Association in 12-2335, FILED. [721479] [12-2335, 12-2435]
9/17/12	367	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. Service date 09/17/2012 by CM/ECF. [721578] [12-2335]

DATE	DOCKET NUMBER	PROCEEDINGS
9/17/12	373	CURED DEFECTIVE [356], on behalf of Amicus Curiae Peter Bardaglio et al in 12-2335, FILED. [721741] [12-2335, 12-2435]
9/17/12	375	DEFECTIVE DOCUMENT, LETTERS, [340], [357], on behalf of Amicus Curiae Michael R. Bloomberg, Christine C. Quinn, The American Psychanalytic Association, The American Psychiatric Association, The American Psychological Association, The City of New York, The Council of the City of New York, The National Association of Social Workers and its New York City and State Chapters and The New York State Psychological Association in 12-2335, FILED. [721828] [12-2335, 12-2435]
9/17/12	376	LETTER, on behalf of Amicus Curiae American Society on Aging, National Senior Citizens Law Center and Service and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders (SAGE), RECEIVED. Service date 09/17/2012 by CM/ECF. [721886] [12-2335]

DATE	DOCKET NUMBER	PROCEEDINGS
9/17/12	377	LETTER, on behalf of Amicus Curiae Nancy Pelosi et al, RECEIVED. Service date 09/17/2012 by CM/ECF. [721897] [12-2335]
9/17/12	378	LETTER, on behalf of Amicus Curiae Katharine Baker et al, RECEIVED. Service date 09/17/2012 by CM/ECF. [721916] [12-2335]
9/17/12	380	DEFECTIVE DOCUMENT, BRIEF, [358], on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives in 12-2435, FILED. [722031] [12-2335, 12-2435]
9/17/12	381	DEFECTIVE DOCUMENT, BRIEF, [345], on behalf of Amicus Curiae Columbia Law School Sexuality & Gender Law Clinic in 12-2335, FILED. [722044] [12-2335, 12-2435]
9/17/12	383	REPLY BRIEF, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives, FILED. Service date 09/17/2012 by CM/ECF. [722232] [12-2335]

DATE	DOCKET NUMBER	PROCEEDINGS
9/17/12	384	LETTER, on behalf of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc., RECEIVED. Service date 09/17/2012 by CM/ECF. [722250] [12-2335]
9/17/12	385	CURED DEFECTIVE BRIEF, [383], on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives in 12-2435, FILED. [722278] [12-2335, 12-2435]
9/18/12	387	LETTER, on behalf of Amicus Curiae Michael R. Bloomberg, Christine C. Quinn, The City of New York and The Council of the City of New York, RECEIVED. Service date 09/18/2012 by CM/ECF. [722396] [12-2335]
9/18/12	388	CURED DEFECTIVE LETTER, [387], on behalf of Amicus Curiae Michael R. Bloomberg, Christine C. Quinn, The City of New York and The Council of the City of New York in 12-2335, FILED. [722464] [12-2335, 12-2435]
9/18/12	390	LETTER, on behalf of Amicus Curiae Former Attorneys General Ed-

DATE	DOCKET NUMBER	PROCEEDINGS
		win Meese III and John Ashcroft, RECEIVED. Service date 09/18/2012 by CM/ECF. [722629] [12-2335]
9/18/12	394	CORRECTED BRIEF, on behalf of Amicus Curiae Columbia Law School Sexuality & Gender Law Clinic, FILED. Service date 09/18/2012 by CM/ECF. [723035] [12-2335]
9/18/12	395	CURED DEFECTIVE BRIEF, [394], on behalf of Amicus Curiae Columbia Law School Sexuality & Gender Law Clinic in 12-2335, FILED. [723095] [12-2335, 12-2435]
9/18/12	398	LETTER, on behalf of Amicus Curiae Central Conference of American Rabbis et al, RECEIVED. Service date 09/18/2012 by CM/ECF. [723509] [12-2335]
9/18/12	399	LETTER, on behalf of Amicus Curiae Susan Appleton et al, RECEIVED. Service date 09/18/2012 by CM/ECF. [723570] [12-2335]

DATE	DOCKET NUMBER	PROCEEDINGS
9/19/12	402	LETTER, on behalf of Amicus Curiae Asian American Justice Center et al, RECEIVED. Service date 09/19/2012 by CM/ECF. [723903] [12-2335]
9/19/12	406	**REVISED** ARGUMENT NOTICE, to attorneys/parties, TRANSMITTED. [724423] [12-2335, 12-2435]
9/19/12	407	LETTER, on behalf of Amicus Curiae American Federation of Labor and Congress of Industrial Organizations, Change To Win and National Education Association, RECEIVED. Service date 09/19/2012 by CM/ECF. [724591] [12-2335]
9/19/12	408	LETTER, on behalf of Amicus Curiae American Federation of Labor and Congress of Industrial Organizations, Change To Win and National Education Association, RECEIVED. Service date 09/19/2012 by CM/ECF. [724593] [12-2335]
9/19/12	409	AMICUS BRIEF, on behalf of American Federation of Labor and Congress of Industrial Organizations et al, FILED. Service date

DATE	DOCKET NUMBER	PROCEEDINGS
		06/19/2012 by CM/ECF. [724654] [12-2335]—[Edited 09/19/2012 by TW]
9/19/12	410	DEFECTIVE DOCUMENT, LETTERS, BRIEF, [407], [408], [409], on behalf of Amicus Curiae American Federation of Labor and Congress of Industrial Organizations in 12-2335, FILED. [724693] [12-2335, 12-2435]
9/19/12	411	LETTER, on behalf of Amicus Curiae American Federation of Labor and Congress of Industrial Organizations, Change To Win and National Education Association, RECEIVED. Service date 09/19/2012 by CM/ECF. [724810] [12-2335]
9/19/12	412	LETTER, on behalf of Amicus Curiae American Federation of Labor and Congress of Industrial Organizations, Change To Win and National Education Association, RECEIVED. Service date 09/19/2012 by CM/ECF. [724811] [12-2335]
9/19/12	413	AMICUS BRIEF, American Federation of Labor and Congress of In-

DATE	DOCKET NUMBER	PROCEEDINGS
		dustrial Organizations et al, FILED. Service date 09/19/2012 by CM/ECF. [724812] [12-2335]—[Edited 09/20/2012 by TW]
9/20/12	415	CURED DEFECTIVE BRIEF, LETTERS, [411], [412], [413], on behalf of Amicus Curiae American Federation of Labor and Congress of Industrial Organizations, Change To Win and National Education Association in 12-2335, FILED. [725005] [12-2335, 12-2435]
9/20/12	419	LETTER, on behalf of Amicus Curiae Columbia Law School Sexuality & Gender Law Clinic, RECEIVED. Service date 09/20/2012 by CM/ECF. [725567] [12-2335]
9/21/12	423	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellant United States of America, FILED. Service date 09/21/2012 by CM/ECF. [727280] [12-2335]
9/21/12	424	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellant Bipartisan Legal Advisory Group of the United States

DATE	DOCKET NUMBER	PROCEEDINGS
		House of Representatives, FILED. Service date 09/21/2012 by CM/ECF. [727348] [12-2335]
9/24/12	426	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellee Edith Schlain Windsor, FILED. Service date 09/24/2012 by CM/ECF. [727845] [12-2335]
9/24/12	427	LETTER, on behalf of Amicus Curiae The American Academy of Pediatrics, The American Psychanalytic Association, The American Psychiatric Association, The American Psychological Association, The National Association of Social Workers and its New York City and State Chapters and The New York State Psychological Association, RECEIVED. Service date 09/24/2012 by CM/ECF. [727983] [12-2335]
9/24/12	428	CURED DEFECTIVE LETTER, [427], on behalf of Amicus Curiae The American Academy of Pediatrics, The American Psychanalytic Association, The American Psychiatric Association, The American Psychological Association, The Nat-

DATE	DOCKET NUMBER	PROCEEDINGS
		ional Association of Social Workers and its New York City and State Chapters and The New York State Psychological Association in 12-2335, FILED. [727997] [12-2335, 12-2435]
9/24/12	432	LETTER, on behalf of Amicus Curiae American College of Pediatricians, RECEIVED. Service date 09/24/2012 by CM/ECF. [728455] [12-2335]
9/24/12	437	REQUEST FOR ARGUMENT CD, with fee, RECEIVED. [733907] [12-2335, 12-2435]
9/27/12	435	CASE, before DJ*, CJS, CFD, C.JJ., HEARD. [731297] [12-2335, 12-2435]
9/28/12	439	REQUEST FOR ARGUMENT CD, with fee, RECEIVED. [733909] [12-2335, 12-2435]
10/1/12	438	ARGUMENT CD, TRANSMITTED. [733908] [12-2335, 12-2435]
10/1/12	440	ARGUMENT CD, TRANSMITTED. [733911] [12-2335, 12-2435]

DATE	DOCKET NUMBER	PROCEEDINGS
10/4/12	442	REQUEST FOR ARGUMENT CD, with fee, RECEIVED. [748968] [12-2335, 12-2435]
10/10/12	444	REQUEST FOR ARGUMENT CD, with fee, RECEIVED. [748988] [12-2335, 12-2435]
10/11/12	443	ARGUMENT CD, TRANSMITTED. [748971] [12-2335, 12-2435]
10/18/12	446	NEW CASE MANAGER, Anna Steglich, ASSIGNED. [749976] [12-2335, 12-2435]
10/18/12	447	OPINION, Affirmed, by DJ, CJS, CFD, FILED. [750098] [12-2335, 12-2435]
10/18/12	448	OPINION, Dissenting, by judge CJS, FILED. [750122] [12-2335, 12-2435]
10/18/12	449	LETTER, on behalf of Amicus Curiae Asian American Justice Center et al, RECEIVED. Service date 10/18/2012 by CM/ECF. [750688] [12-2335]
10/18/12	451	LETTER, on behalf of Amicus Curiae The Partnership for New York City, RECEIVED. Service date

DATE	DOCKET NUMBER	PROCEEDINGS
		10/18/2012 by CM/ECF. [751049] [12-2335]
10/18/12	452	LETTER, on behalf of Amicus Curiae Katharine Baker et al, RECEIVED. Service date 10/18/2012 by CM/ECF. [751090] [12-2335]
10/18/12	455	REQUEST FOR ARGUMENT CD, with fee, RECEIVED. [753421] [12-2335, 12-2435]
10/18/12	457	REQUEST FOR ARGUMENT CD, with fee, RECEIVED. [753424] [12-2335, 12-2435]
10/19/12	453	ERRATA SHEET, for Opinion dated 10/18/2012, by DJ, FILED. [751805] [12-2335, 12-2435]
10/22/12	456	ARGUMENT CD, TRANSMITTED. [753423] [12-2335, 12-2435]
10/22/12	458	ARGUMENT CD, TRANSMITTED. [753425] [12-2335, 12-2435]
10/22/12	459	ERRATA SHEET, for Opinion dated 10/18/2012, by CJS. FILED. [753448] [12-2335, 12-2435]
10/24/12	460	ERRATA SHEET, for Opinion dated 10/18/2012, by DJ. FILED. [755582] [12-2335, 12-2435]

DATE	DOCKET NUMBER	PROCEEDINGS
11/21/12	461	LETTER, on behalf of Amicus Curiae Asian American Justice Center et al, RECEIVED. Service date 11/21/2012 by CM/ECF. [776170] [12-2335]
11/29/12	463	ERRATA SHEET, for Opinion dated October 18, 2012, by DJ. FILED. [781369] [12-2335, 12-2435]
11/29/12	464	MOTION, to extend time, on behalf of Appellant Bipartisan Legal Advisory Group of the United States House of Representatives in 12-2335, 12-2435, FILED. Service date 11/29/2012 by CM/ECF. [782249] [12-2335, 12-2435]
12/5/12	469	MOTION ORDER, granting motion to extend time [464] filed by Appellant Bipartisan Legal Advisory Group of the United States House of Representatives in 12-2335, by CFD, FILED. [787295] [469] [12-2335, 12-2435]
12/11/12	470	U.S. SUPREME COURT NOTICE, dated 12/07/2012, U.S. Supreme Court docket # 12-307, stating the petition for writ of certiorari is

DATE	DOCKET NUMBER	PROCEEDINGS
		granted, RECEIVED. [792500] [12-2335, 12-2435]
1/3/2013	473	U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 12/28/2012, U.S. Supreme Court docket # 12-785, RECEIVED. [807071] [12-2335, 12-2435]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Docket No. 1:10-cv-08435-BSJ-JCF
EDITH SCHLAIN WINDSOR
v.
THE UNITED STATES OF AMERICA

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
11/9/10	1	COMPLAINT against The United States Of America. (Filing Fee $ 350.00, Receipt Number 920552) Document filed by Edith Schlain Windsor. (ama) (Entered: 11/09/2010)
11/9/10		SUMMONS ISSUED as to The United States Of America, U.S. Attorney and U.S. Attorney General. (ama) (Entered: 11/09/2010)
11/9/10		Magistrate Judge James C. Francis IV is so designated. (ama) (Entered: 11/09/2010)
11/9/10		Case Designated ECF. (ama) (Entered: 11/09/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
11/10/10	2	SUMMONS RETURNED EXECUTED Summons and Complaint served. The United States Of America served on 11/9/2010, answer due 1/8/2011. Service was accepted by Calvin Coleman, Legal Technician. Service was made by Certified Mail. Document filed by Edith Schlain Windsor. (Kaplan, Roberta) (Entered: 11/10/2010)
11/23/10	3	ORDER REFERRING CASE TO MAGISTRATE JUDGE. Order that case be referred to the Clerk of Court for assignment to a Magistrate Judge for General Pretrial (includes scheduling, discovery, non-dispositive pretrial motions, and settlement). Referred to Magistrate Judge James C. Francis. (Signed by Judge Barbara S. Jones on 11/23/10) (djc) (Entered: 11/23/2010)
12/2/10	4	NOTICE OF APPEARANCE by Jean Lin on behalf of The United States Of America (Lin, Jean) (Entered: 12/02/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
12/2/10	5	NOTICE OF CHANGE OF ADDRESS by Alexis Brie Karteron on behalf of Edith Schlain Windsor. New Address: New York Civil Liberties Union, 125 Broad Street, 19th Floor, New York, NY, US 10004, 212-607-3300. (Karteron, Alexis) (Entered: 12/02/2010)
12/3/10	6	ORDER: By February 9, 2011 the defendant shall serve and file its motion to dismiss. Plaintiff shall answer the motion by March 11, 2011 and shall make any cross-motion for summary judgment. By March 25, 2011, defendant shall submit its reply on its motion to dismiss and submit any application to stay plaintiff's cross-motion for summary judgment. If defendant does not apply for a stay, it shall answer plaintiff's motion for summary judgment by April 8, 2011. (Signed by Magistrate Judge James C. Francis on 12/3/2010) Copies Mailed By Chambers. (jpo) Modified on 1/5/2011 (jpo). (Entered: 12/03/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
12/3/10		Minute Entry for proceedings held before Magistrate Judge James C. Francis: Initial Pretrial Conference held on 12/3/2010. (mro) (Entered: 12/06/2010)
12/28/10	7	NOTICE OF APPEARANCE by Melissa Goodman on behalf of Edith Schlain Windsor (Goodman, Melissa) (Entered: 12/28/2010)
1/28/11	8	SCHEDULING ORDER: This Court's December 3, 2010 Order is revised as follow: By March 11, 2011, the defendant shall serve and file its motion to dismiss. Plaintiff Shall answer the motion by April 11, 2011 and shall make any cross-motion for summary judgment. By April 25, 2011, defendant shall submit its reply on its motion to dismiss and submit any application to stay plaintiff's cross-motion for summary judgment. If defendant does not apply for a stay, it shall answer plaintiff's motion for summary judgment by May 9, 2011. (Motions due by 3/11/2011. Cross Motions due by 4/11/2011. Re-

DATE	DOCKET NUMBER	PROCEEDINGS
		sponses due by 4/11/2011) (Signed by Magistrate Judge James C. Francis on 1/26/11) (djc) (Entered: 01/28/2011)
2/2/11	9	AMENDED COMPLAINT amending 1 Complaint against The United States Of America. Document filed by Edith Schlain Windsor. Related document: 1 Complaint filed by Edith Schlain Windsor. (mbe) (Entered: 02/03/2011)
2/25/11	10	NOTICE of Notice to the Court by Defendant the United States of America (with attachments). Document filed by The United States Of America. (Attachments: # 1 Attachment, # 2 Attachment) (Lin, Jean) (Entered: 02/25/2011)
3/15/11		Minute Entry for proceedings held before Magistrate Judge James C. Francis: Telephone Discovery Conference held on 3/15/2011. (mro) (Entered: 03/17/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
3/15/11		Set Deadlines: Motions due by 4/18/2011. (lnl) (Entered: 03/21/2011)
4/18/11		MOTION to Intervene *a party defendant in this matter for the limited purpose of litigating the constitutionality of Section III of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7..* Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Attachments: # 1 proposed order, # 2 Certificate of Service) (Clement, Paul) (Entered: 04/18/2011)
4/18/11	13	MEMORANDUM OF LAW in Support re: 12 MOTION to Intervene *a party defendant in this matter for the limited purpose of litigating the constitutionality of Section III of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7.* MOTION to Intervene *a party defendant in this matter for the*

DATE	DOCKET NUMBER	PROCEEDINGS
		limited purpose of litigating the constitutionality of Section III of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7.. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Attachments: # 1 Exhibit 1, # 2 Certificate of Service) (Clement, Paul) (Entered: 04/18/2011)
0/25/11	14	MOTION for Paul D. Clement, Richard A. Cirillo and the law firm of King & Spalding LLP to Withdraw as Attorney. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. Return Date set for 5/25/2011 at 09:30 AM. (Attachments: # 1 Certificate of Service) (Cirillo, Richard) (Entered: 04/25/2011)
4/25/11	15	DECLARATION of Richard A. Cirillo in Support re: 14 MOTION for Paul D. Clement, Richard A. Cirillo and the law firm of King & Spalding LLP to Withdraw as

DATE	DOCKET NUMBER	PROCEEDINGS
		Attorney.. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Cirillo, Richard) (Entered: 04/25/2011)
4/26/11	16	STIPULATION AND ORDER FOR SUBSTITUTION OF COUNSEL: that Bancroft PLLC is hereby substituted for King & Spalding LLP as counsel in this action for intervenor Bipartisan Legal Advisory Group of the U.S. House of Representatives. Motions terminated: 14 MOTION for Paul D. Clement, Richard A. Cirillo and the law firm of King & Spalding LLP to Withdraw as Attorney filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Signed by Magistrate Judge James C. Francis on 4/26/2011) (tro) (Entered: 04/29/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
5/2/11	17	NOTICE OF APPEARANCE by Conor Dugan on behalf of Bipartisan Legal Advisory Group of the U.S. House of Representatives (Dugan, Conor) (Entered: 05/02/2011)
5/2/11	18	NOTICE OF APPEARANCE by Conor Dugan on behalf of Bipartisan Legal Advisory Group of the U.S. House of Representatives (Dugan, Conor) (Entered: 05/02/2011)
5/2/11	19	NOTICE OF APPEARANCE by H Christopher Bartolomucci on behalf of Bipartisan Legal Advisory Group of the U.S. House of Representatives (Bartolomucci, H) (Entered: 05/02/2011)
5/5/11	20	RESPONSE to Motion re: 12 MOTION to Intervene *a party defendant in this matter for the limited purpose of litigating the constitutionality of Section III of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7.* MOTION to Inter-

DATE	DOCKET NUMBER	PROCEEDINGS
		vene *a party defendant in this matter for the limited purpose of litigating the constitutionality of Section III of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7..* Document filed by The United States Of America. (Attachments: # 1 Text of Proposed Order) (Lin, Jean) (Entered: 05/05/2011)
5/5/11	21	NOTICE of Notice of Intent to File Reply re: 20 Response to Motion,, 12 MOTION to Intervene *a party defendant in this matter for the limited purpose of litigating the constitutionality of Section III of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7.* MOTION to Intervene *a party defendant in this matter for the limited purpose of litigating the constitutionality of Section III of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7..* Document filed by Bipartisan

DATE	DOCKET NUMBER	PROCEEDINGS
		Legal Advisory Group of the U.S. House of Representatives. (Kircher, Kerry) (Entered: 05/05/2011)
5/9/11		Minute Entry for proceedings held before Magistrate Judge James C. Francis: Initial Pretrial Conference held on 5/9/2011. (cd) (Entered: 05/12/2011)
5/11/11	22	REVISED SCHEDULING ORDER: Plaintiff's summary judgment Motions due by 7/15/2011 (unless the House has not identified any experts pursuant to paragraphs 5 and 6 above, in which case plaintiff's motion for summary judgment shall be filed on or before June 24, 2011); Responses due by 8/15/2011; Replies due by 9/2/2011. All fact and Expert Discovery due by 7/11/2011. (Signed by Magistrate Judge James C. Francis on 5/11/11). (djc) (Entered: 05/11/2011)
5/12/11	23	REPLY to Response to Motion re: 12 MOTION to Intervene *a party defendant in this matter for the limited purpose of litigating the*

DATE	DOCKET NUMBER	PROCEEDINGS
		constitutionality of Section III of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7. MOTION to Intervene *a party defendant in this matter for the limited purpose of litigating the constitutionality of Section III of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7..* Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Kircher, Kerry) (Entered: 05/12/2011)
5/12/11	24	NOTICE OF CHANGE OF ADDRESS by Melissa Goodman on behalf of Edith Schlain Windsor. New Address: NYCLU, 125 Broad St, 19th Floor, New York, NY, USA 10004, 212.607.3300. (Goodman, Melissa) (Entered: 05/12/2011)
5/27/11	25	STIPULATION AND ORDER GOVERNING PROTECTION AND EXCHANGE OF CONFIDENTIAL INFORMATION...re-

DATE	DOCKET NUMBER	PROCEEDINGS
		garding procedures to be followed that shall govern the handling of confidential material...This order may be modified by further order of the Court. (Signed by Magistrate Judge James C. Francis on 5/26/11) (cd) (Entered: 05/27/2011)
6/2/11	26	MEMORANDUM AND ORDER granting 12 Motion to Intervene as a party defendant. (Signed by Magistrate Judge James C. Francis on 6/2/11); Copies mailed by Chambers. (djc) (Entered: 06/02/2011)
6/13/11	27	ENDORSED LETTER addressed to Magistrate Judge James C. Francis IV from Roberta A. Kaplan dated 6/9/2011 re: Counsel for the Plaintiff writes to provide the Court with an update concerning the schedule in the above-captioned matter and to request permission to file an initial moving brief of up to 45 pages. ENDORSEMENT: Application granted. (Signed by Judge Barbara S. Jones on

DATE	DOCKET NUMBER	PROCEEDINGS
		6/13/2011) (ab) (Entered: 06/13/2011)
6/24/11	28	MOTION for Summary Judgment. Document filed by Edith Schlain Windsor. (Ehrlich, Andrew) (Entered: 06/24/2011)
6/24/11	29	MEMORANDUM OF LAW in Support re: 28 MOTION for Summary Judgment.. Document filed by Edith Schlain Windsor. (Ehrlich, Andrew) (Entered: 06/24/2011)
6/24/11	30	AFFIDAVIT of Andrew J. Ehrlich in Support re: 28 MOTION for Summary Judgment.. Document filed by Edith Schlain Windsor. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8) (Ehrlich, Andrew) (Entered: 06/24/2011)
6/24/11	31	AFFIDAVIT of Edith Schlain Windsor in Support re: 28 MOTION for Summary Judgment.. Document filed by Edith Schlain Windsor. (Attachments: # 1

DATE	DOCKET NUMBER	PROCEEDINGS
		Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L) (Ehrlich, Andrew) (Entered: 06/24/2011)
6/24/11	32	AFFIDAVIT of Letitia Anne Peplau, Ph.D. in Support re: 28 MOTION for Summary Judgment.. Document filed by Edith Schlain Windsor. (Ehrlich, Andrew) (Entered: 06/24/2011)
6/24/11	33	AFFIDAVIT of Nancy F. Cott, Ph.D. in Support re: 28 MOTION for Summary Judgment.. Document filed by Edith Schlain Windsor. (Ehrlich, Andrew) (Entered: 06/24/2011)
6/24/11	34	AFFIDAVIT of Michael Lamb, Ph.D. in Support re: 28 MOTION for Summary Judgment.. Document filed by Edith Schlain Windsor. (Ehrlich, Andrew) (Entered: 06/24/2011)
6/24/11	35	AFFIDAVIT of George Chauncey, Ph.D. in Support re: 28 MO-

DATE	DOCKET NUMBER	PROCEEDINGS
		TION for Summary Judgment.. Document filed by Edith Schlain Windsor. (Ehrlich, Andrew) (Entered: 06/24/2011)
6/24/11	36	AFFIDAVIT of Gary Segura, Ph.D. in Support re: 28 MOTION for Summary Judgment.. Document filed by Edith Schlain Windsor. (Ehrlich, Andrew) (Entered: 06/24/2011)
6/24/11	37	RULE 56.1 STATEMENT. Document filed by Edith Schlain Windsor. (Ehrlich, Andrew) (Entered: 06/24/2011)
7/26/11	38	FILING ERROR-DEFICIENT DOCKET ENTRY-MOTION for Leave to File Brief Amicus Curiae *of New York State in Support of Plaintiff.* Document filed by New York State. (Attachments: # 1 Memorandum of Law in Support, # 2 Proposed Brief) (Heller, Simon) Modified on 7/26/2011 (ldi). (Entered: 07/26/2011)
7/26/11		***NOTE TO ATTORNEY TO RE-FILE DOCUMENT-DEFICIENT DOCKET ENTRY ER-

DATE	DOCKET NUMBER	PROCEEDINGS
		ROR. Note to Attorney Simon Heller to RE-FILE Document 38 MOTION for Leave to File Brief Amicus Curiae *of New York State in Support of Plaintiff.* ERROR(S): Supporting documents must be filed separately, each receiving their own document number. Memorandum of Law in Support of Motion is found under the event list Replies, Opposition and Supporting Documents. (ldi) (Entered: 07/26/2011)
7/26/11	39	FILING ERROR-DEFICIENT DOCKET ENTRY-MEMORANDUM OF LAW in Support re: 38 MOTION for Leave to File Brief Amicus Curiae *of New York State in Support of Plaintiff.* Document filed by New York State. (Heller, Simon) Modified on 7/27/2011 (ldi). (Entered: 07/26/2011)
7/26/11		***NOTE TO ATTORNEY TO RE-FILE DOCUMENT-DEFICIENT DOCKET ENTRY ERROR. Note to Attorney Simon Heller to RE-FILE Document 39 Memorandum of Law in Support

DATE	DOCKET NUMBER	PROCEEDINGS
		of Motion. ERROR(S): Document linked to filing error. ***REMINDER*** You must first re-file the Motion, then file the Memorandum of Law and link to that motion. (ldi) (Entered: 07/27/2011)
7/26/11	42	ENDORSED LETTER addressed to Judge Barbara S. Jones and Magistrate Judge James C. Francis from Conor B. Dugan dated 7/26/11 re: counsel for Defendant-Intervenor the Bipartisan Legal Advisory Group of the U.S. House of Representatives respectfully writes to request permission to file briefs totaling 70 pages for our opposition to plaintiff's motion for summary judgment and in support of our separate motion to dismiss, to be apportioned as necessary. ENDORSEMENT: Application granted. So Ordered. (Signed by Judge Barbara S. Jones on 7/26/11) (pl) Modified on 7/27/2011 (pl). (Entered: 07/27/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
7/27/11	40	CONSENT MOTION for Leave to File amicus curiae brief *in support of the Plaintiff.* Document filed by New York State. (Attachments: # 1 Proposed Brief) (Heller, Simon) (Entered: 07/27/2011)
7/27/11	41	MEMORANDUM OF LAW in Support re: 40 CONSENT MOTION for Leave to File amicus curiae brief *in support of the Plaintiff..* Document filed by New York State. (Heller, Simon) (Entered: 07/27/2011)
7/28/11	43	MEMORANDUM AND ORDER: For the reasons listed herein, the plaintiff's letter motion to compel is granted to the extent that BLAG shall answer Interrogatories 1 and 3 and RFA no. 1 by August 1, 2011. In all other respects, the motion is denied. (Signed by Magistrate Judge James C. Francis on 7/28/2011) Copies Mailed By Chambers. (mro) (Entered: 07/28/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
7/29/11	44	Letter addressed to Magistrate Judge James C. Francis IV from Julie E. Fink dated 7/19/2011 re: It has come to our attention that the incorrect documents were inadvertently included as Exhibits A and B to plaintiff's July 18 letter motion to compel. Document filed by Edith Schlain Windsor. (lmb) (Entered: 07/29/2011)
7/29/11	45	Letter addressed to Magistrate Judge James C. Francis IV from Roberta A. Kaplan dated 7/18/2011 re: We respectfully submit this letter in accordance with Fed. R. Civ. P. 37 to compel responses to certain of the interrogatories and requests for admission that we propounded on party-defendant, the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG"). Document filed by Edith Schlain Windsor. (lmb) (Entered: 07/29/2011)
7/29/11	46	Letter addressed to Magistrate Judge James C. Francis IV from Paul D. Clement dated 7/25/2011 re: The House respectfully re-

DATE	DOCKET NUMBER	PROCEEDINGS
		quests that the Court deny Plaintiff's motion to compel further discovery responses. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (lmb) (Entered: 07/29/2011)
7/29/11	47	Letter addressed to Magistrate Judge James C. Francis IV from Roberta A. Kaplan dated 7/25/2011 re: Because, in their letter dated July 25, 2011 (the "July 25 letter"), the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") adds little to their initial objections refusing to respond in substance to Mr. Windsor's discovery requests, this reply will be brief. Plaintiff respectfully requests that the Court grant her motion to compel. Document filed by Edith Schlain Windsor. (lmb) (Entered: 07/29/2011)
8/1/11	48	NOTICE OF APPEARANCE by Kerry William Kircher on behalf of Bipartisan Legal Advisory Group of the U.S. House of Rep-

DATE	DOCKET NUMBER	PROCEEDINGS
		resentatives (Kircher, Kerry) (Entered: 08/01/2011)
8/1/11	49	MOTION to Dismiss *Amended Complaint*. Document filed by The United States Of America. (Lin, Jean) (Entered: 08/01/2011)
8/1/11	50	MEMORANDUM OF LAW in Opposition re: 28 MOTION for Summary Judgment.. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Kircher, Kerry) (Entered: 08/01/2011)
8/1/11	51	RULE 56.1 STATEMENT. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Kircher, Kerry) (Entered: 08/01/2011)
8/1/11	52	MOTION to Dismiss. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Kircher, Kerry) (Entered: 08/01/2011)
8/1/11	53	MEMORANDUM OF LAW in Support re: 52 MOTION to Dismiss.. Document filed by Bi-

DATE	DOCKET NUMBER	PROCEEDINGS
		partisan Legal Advisory Group of the U.S. House of Representatives. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Kircher, Kerry) (Entered: 08/01/2011)
8/1/11	54	DECLARATION of Conor B. Dugan in Opposition re: 28 MOTION for Summary Judgment.. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Kircher, Kerry) (Entered: 08/01/2011)
8/1/11	55	FILING ERROR-ELECTRONIC FILING FOR NON-ECF DOCUMENT-DECLARATION of Dugan Exhibit A in Opposition re: 28 MOTION for Summary Judgment.. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Kircher, Kerry) Modified on 8/2/2011 (db). (Entered: 08/01/2011)
8/1/11	56	FILING ERROR-ELECTRONIC FILING FOR NON-ECF DOCUMENT-DECLARATION of Dugan Exhibit B in Opposition re:

DATE	DOCKET NUMBER	PROCEEDINGS
		28 MOTION for Summary Judgment.. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Kircher, Kerry) Modified on 8/2/2011 (db). (Entered: 08/01/2011)
8/1/11	57	FILING ERROR-ELECTRONIC FILING FOR NON-ECF DOCUMENT-DECLARATION of Dugan Exhibit C in Opposition re: 28 MOTION for Summary Judgment.. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Kircher, Kerry) Modified on 8/2/2011 (db). (Entered: 08/01/2011)
8/1/11	58	FILING ERROR-ELECTRONIC FILING FOR NON-ECF DOCUMENT-DECLARATION of Dugan Exhibit D in Opposition re: 28 MOTION for Summary Judgment.. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Kircher, Kerry) Modified on 8/2/2011 (db). (Entered: 08/01/

DATE	DOCKET NUMBER	PROCEEDINGS
		2011)
8/1/11	59	FILING ERROR-ELECTRONIC FILING FOR NON-ECF DOCUMENT-DECLARATION of Dugan Exhibit E-1 in Opposition re: 28 MOTION for Summary Judgment.. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Kircher, Kerry) Modified on 8/2/2011 (db). (Entered: 08/01/2011)
8/1/11	60	FILING ERROR-ELECTRONIC FILING FOR NON-ECF DOCUMENT-DECLARATION of Dugan Exhibit E-2 in Opposition re: 28 MOTION for Summary Judgment.. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Kircher, Kerry) Modified on 8/2/2011 (db). (Entered: 08/01/2011)
8/1/11	61	FILING ERROR-ELECTRONIC FILING FOR NON-ECF DOCUMENT-DECLARATION of Dugan Exhibit F in Opposition re: 28 MOTION for Summary Judg-

DATE	DOCKET NUMBER	PROCEEDINGS
		ment.. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Kircher, Kerry) Modified on 8/3/2011 (db). (Entered: 08/02/2011)
8/1/11		***NOTE TO ATTORNEY TO RE-FILE DOCUMENT-NON-ECF DOCUMENT ERROR. Note to Attorney Kerry William Kircher. Document Nos. [55-60] Exhibits are not filed, they may only be added as ATTACHMENTS to documents that are permitted to be filed via ECF. This document is not filed via ECF. (db) (Entered: 08/02/2011)
8/2/11	62	DECLARATION of Conor B. Dugan in Opposition re: 28 MOTION for Summary Judgment.. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E (part 1), # 6 Exhibit E (part 2), # 7 Ex-

DATE	DOCKET NUMBER	PROCEEDINGS
		hibit F) (Kircher, Kerry) (Entered: 08/02/2011)
8/3/11	63	MEMO ENDORSED: granting 40 Motion for Leave to File Brief for the state of New York as Amicus Curiae in Support of the Plaintiff. ENDORSEMENT: Motion granted. (Signed by Magistrate Judge James C. Francis on 8/3/2011) (mbe) (Entered: 08/03/2011)
8/5/11	64	ENDORSED LETTER addressed to Judge Barbara S. Jones and Magistrate Judge James C. Francis IV from Jean Lin dated 8/5/2011 re: Counsel for the Defendant writes to request that they be permitted to file a brief of up to 35 pages. ENDORSEMENT: Application granted. (Signed by Judge Barbara S. Jones on 8/5/2011) (ab) (Entered: 08/05/2011)
8/10/11	65	MOTION to Strike *Documents Referenced by Defendant-Intervenor in Opposition to Plaintiff's Motion for Summary Judgment.* Document filed by Edith Schlain

DATE	DOCKET NUMBER	PROCEEDINGS
		Windsor. (Kaplan, Roberta) (Entered: 08/10/2011)
8/10/11	66	MEMORANDUM OF LAW in Support re: 65 MOTION to Strike *Documents Referenced by Defendant-Intervenor in Opposition to Plaintiff's Motion for Summary Judgment..* Document filed by Edith Schlain Windsor. (Kaplan, Roberta) (Entered: 08/10/2011)
8/10/11	67	AFFIDAVIT of Roberta A. Kaplan in Support re: 65 MOTION to Strike *Documents Referenced by Defendant-Intervenor in Opposition to Plaintiff's Motion for Summary Judgment..* Document filed by Edith Schlain Windsor. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C) (Kaplan, Roberta) (Entered: 08/10/2011)
8/15/11	68	ORDER: BLAG is directed to file its opposition to Plaintiff's motion to strike on or before August 19, 2011. Plaintiff's reply, if any, is due no later than August 23, 2011. Pending resolution of

DATE	DOCKET NUMBER	PROCEEDINGS
		the motion to strike, Plaintiff's deadline for filing a reply brief in support of her motion for summary judgment is adjourned. The Court will decide the motion to strike promptly and will issue a date for submission of Plaintiff's reply in accordance with that decision. Plaintiff may file an opposition to BLAG's motion to dismiss of up to 35 pages; the deadline for submission of this opposition remains August 19, 2011. Plaintiff's request to file a reply in support of her motion for summary judgment of up to 25 pages will be decided along with the Court's resolution of the motion to strike. Set Deadlines/Hearing as to 65 MOTION to Strike Documents Referenced by Defendant-Intervenor in Opposition to Plaintiff's Motion for Summary Judgment: (Responses due by 8/19/2011, Replies due by 8/23/2011.) (Signed by Judge Barbara S. Jones on 8/15/2011) (mro) Modified on 8/16/2011 (mro). (Entered: 08/15/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
8/19/11	69	RESPONSE in Opposition re: 65 MOTION to Strike *Documents Referenced by Defendant-Intervenor in Opposition to Plaintiff's Motion for Summary Judgment.*. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Kircher, Kerry) (Entered: 08/19/2011)
8/19/11	70	MEMORANDUM OF LAW in Opposition re: 52 MOTION to Dismiss.. Document filed by Edith Schlain Windsor. (Kaplan, Roberta) (Entered: 08/19/2011)
8/19/11	71	RESPONSE to Motion re: 28 MOTION for Summary Judgment.. Document filed by The United States Of America. (Lin, Jean) (Entered: 08/19/2011)
8/19/11	72	RESPONSE to Motion re: 52 MOTION to Dismiss. (*Same Filing As ECF No. 71*). Document filed by The United States Of America. (Lin, Jean) (Entered: 08/19/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
8/22/11	73	REPLY MEMORANDUM OF LAW in Support re: 65 MOTION to Strike *Documents Referenced by Defendant-Intervenor in Opposition to Plaintiff's Motion for Summary Judgment.*. Document filed by Edith Schlain Windsor. (Kaplan, Roberta) (Entered: 08/22/2011)
8/22/11	74	DECLARATION of Lisa M. Diamond in Support re: 65 MOTION to Strike *Documents Referenced by Defendant-Intervenor in Opposition to Plaintiff's Motion for Summary Judgment.*. Document filed by Edith Schlain Windsor. (Kaplan, Roberta) (Entered: 08/22/2011)
8/29/11	75	ORDER denying 65 Motion to Strike. Before the Court is Plaintiff's Motion to Strike filed August 10, 2011. After review of the submissions of both parties, Plaintiff's Motion is DENIED. However, the Court finds that the submission of additional evidence by Plaintiff regarding the topics discussed in the motion to strike

DATE	DOCKET NUMBER	PROCEEDINGS
		would be helpful in deciding the pending motion for summary judgment. Therefore, Plaintiff's alternative request to submit "additional affidavits and rebuttal evidence" is GRANTED. Plaintiff's request to file a reply brief of up to 30 pages is GRANTED. Plaintiff's reply is due on or before September 16, 2011. (Signed by Judge Barbara S. Jones on 8/29/2011) (js) (Entered: 08/30/2011)
8/29/11		Set/Reset Deadlines: Replies due by 9/16/2011. (js) (Entered: 08/30/2011)
9/2/11	76	MOTION for Clarification., MOTION for Leave to File Excess Pages., MOTION for Leave to File Sur-Reply. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Kircher, Kerry) (Entered: 09/02/2011)
9/2/11	77	MEMORANDUM OF LAW in support re: 76 MOTION for Clarification. MOTION for Leave to File Excess Pages. MO-

DATE	DOCKET NUMBER	PROCEEDINGS
		TION for Leave to File Sur-Reply.. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Kircher, Kerry) (Entered: 09/02/2011)
9/6/11	78	MEMORANDUM OF LAW in Opposition re: 76 MOTION for Clarification. MOTION for Leave to File Excess Pages. MOTION for Leave to File Sur-Reply.. Document filed by Edith Schlain Windsor. (Kaplan, Roberta) (Entered: 09/06/2011)
9/6/11	79	ORDER terminating 76 Motion; granting 76 Motion for Leave to File Excess Pages; denying 76 Motion for Leave to File Document. The Court considers Defendant's filing of a motion to address this issue necessary; in the future, a simple letter by mail or fax requesting clarification would suffice. Defendant's motion in the alternative to extend the deadline is DENIED. The deadline for Defendant's reply remains 9/9/2011. Defendant's request for an

DATE	DOCKET NUMBER	PROCEEDINGS
		extension of the page limit for its reply in support of their motion to dismiss is GRANTED. Defendant may file a reply brief of up to seventeen pages. As to Defendant's request for leave to file a surreply, the Court denies the request as premature. As the Plaintiff's reply has not yet been filed, the Court cannot now determine whether any "new or unexpected" arguments or issues will be raised that would necessitate a surreply. Defendant may renew its request after the reply brief is submitted if new issues are raised in Plaintiff's reply. (Signed by Judge Barbara S. Jones on 9/6/2011) (tro) (Entered: 09/07/2011)
9/9/11	80	REPLY MEMORANDUM OF LAW in Support re: 52 MOTION to Dismiss.. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Kircher, Kerry) (Entered: 09/09/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
9/15/11	81	REPLY MEMORANDUM OF LAW in Support re: 28 MOTION for Summary Judgment.. Document filed by Edith Schlain Windsor. (Kaplan, Roberta) (Entered: 09/15/2011)
9/15/11	82	DECLARATION of Roberta A. Kaplan in Support re: 28 MOTION for Summary Judgment.. Document filed by Edith Schlain Windsor. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E) (Kaplan, Roberta) (Entered: 09/15/2011)
9/15/11	83	REPLY AFFIDAVIT of Edith Schlain Windsor in Support re: 28 MOTION for Summary Judgment.. Document filed by Edith Schlain Windsor. (Kaplan, Roberta) (Entered: 09/15/2011)
9/15/11	84	REPLY AFFIDAVIT of Anne Peplau, Ph.D. in Support re: 28 MOTION for Summary Judgment.. Document filed by Edith Schlain Windsor. (Kaplan, Roberta) (Entered: 09/15/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
9/15/11	85	REPLY AFFIDAVIT of Michael Lamb, Ph.D. in Support re: 28 MOTION for Summary Judgment.. Document filed by Edith Schlain Windsor. (Kaplan, Roberta) (Entered: 09/15/2011)
9/15/11	86	DECLARATION of Lisa M. Diamond in Support re: 28 MOTION for Summary Judgment.. Document filed by Edith Schlain Windsor. (Kaplan, Roberta) (Entered: 09/15/2011)
9/20/11	87	MOTION for Leave to File Sur-Reply. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Kircher, Kerry) (Entered: 09/20/2011)
9/20/11	88	MEMORANDUM OF LAW in Support re: 87 MOTION for Leave to File Sur-Reply.. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Kircher, Kerry) (Entered: 09/20/2011)
9/21/11	89	ORDER: Any response to Defendant's motion for leave to file a

DATE	DOCKET NUMBER	PROCEEDINGS
		sur-reply in opposition to Plaintiff's motion for summary judgment may be submitted by letter brief. (Signed by Judge Barbara S. Jones on 9/21/2011) (jfe) (Entered: 09/21/2011)
10/18/11	90	ORDER denying 87 Motion for Leave to File Document. After review of both parties' submissions, Intervenor-Defendant's Motion is DENIED. (Signed by Judge Barbara S. Jones on 10/18/2011) (ft) (Entered: 10/18/2011)
10/20/11	91	NOTICE of Recent Decisions re: 50 Memorandum of Law in Opposition to Motion, 53 Memorandum of Law in Support of Motion. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Kircher, Kerry) (Entered: 10/20/2011)
10/21/11	92	RESPONSE re: 91 Notice (Other), Notice (Other). Document filed by Edith Schlain Windsor. (Kaplan, Roberta) (Entered: 10/21/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
6/6/12	93	ORDER granting 28 Motion for Summary Judgment; denying 49 Motion to Dismiss; denying 52 Motion to Dismiss. CONCLUSION: For the foregoing reasons, Plaintiff's motion for summary judgment is GRANTED and Defendant-Intervenor's motion to dismiss is DENIED. The Court declares that section 3 of the Defense of Marriage Act, 1 U.S.C. Section 7, is unconstitutional as applied to Plaintiff. Plaintiff is awarded judgment in the amount of $363,053.00, plus interest and costs allowed by law. Each party shall bear their own costs and fees. This case is CLOSED. The clerk of the court is directed to terminate the motions at docket numbers 28, 49, and 52. (Signed by Judge Barbara S. Jones on 6/6/2012) (bw) Modified on 6/7/2012 (ml). (Entered: 06/06/2012)
6/6/12		Transmission to Judgments and Orders Clerk. Transmitted re: 93 Order on Motion for Summary Judgment, Order on Motion to Dismiss, to the Judgments and

DATE	DOCKET NUMBER	PROCEEDINGS
		Orders Clerk. (bw) (Entered: 06/06/2012)
6/7/12	94	CLERK'S JUDGMENT #12,0973 That for the reasons stated in the Court's Order dated June 6, 2012, Plaintiff's motion for summary judgment is granted and Defendant-Intervenor's motion to dismiss is denied; the Court declares that section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, is unconstitutional as applied to Plaintiff; Plaintiff is awarded judgment in the amount of $363,053.00, plus interest and costs allowed by law; each party shall bear their own costs and fees; accordingly, the case is closed. (Signed by Clerk of Court Ruby Krajick on 6/7/12) (Attachments: # 1 NOTICE OF RIGHT TO APPEAL) (ml) (Entered: 06/07/2012)
6/8/12	95	NOTICE OF APPEAL from 93 Order on Motion for Summary Judgment, Order on Motion to Dismiss,,,,,,, 94 Clerk's Judgment,,. Document filed by Bipartisan Legal Advisory Group

DATE	DOCKET NUMBER	PROCEEDINGS
		of the U.S. House of Representatives. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Kircher, Kerry) (Entered: 06/08/2012)
6/8/12		Appeal Remark as to 95 Notice of Appeal, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. NO FEE. USA. (tp) (Entered: 06/11/2012)
6/11/12		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 95 Notice of Appeal. (tp) (Entered: 06/11/2012)
6/11/12		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 8 Scheduling Order,, 75 Order on Motion to Strike, 7 Notice of Appearance filed by Edith Schlain Windsor, 68 Order, Set Motion and R&R Deadlines/Hearings, 48 Notice of Appearance filed by Bipartisan Legal Ad-

DATE	DOCKET NUMBER	PROCEEDINGS
		visory Group of the U.S. House of Representatives, 23 Reply to Response to Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 12 MOTION to Intervene *a party defendant in this matter for the limited purpose of litigating the constitutionality of Section III of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7.* MOTION to Intervene *a party defendant in this matter for the limited purpose of litigating the constitutionality of Section III of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7.* filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 88 Memorandum of Law in Support of Motion filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 50 Memorandum of Law in Opposition to Motion filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 19 No-

DATE	DOCKET NUMBER	PROCEEDINGS
		tice of Appearance filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 59 Declaration in Opposition to Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 27 Endorsed Letter, 92 Response filed by Edith Schlain Windsor, 18 Notice of Appearance filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 10 Notice (Other) filed by The United States Of America, 43 Order, 82 Declaration in Support of Motion filed by Edith Schlain Windsor, 29 Memorandum of Law in Support of Motion filed by Edith Schlain Windsor, 17 Notice of Appearance filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 77 Memorandum of Law in Support of Motion filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 57 Declaration in Opposition to Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 41 Memorandum of Law in Support

DATE	DOCKET NUMBER	PROCEEDINGS
		of Motion filed by New York State, 39 Memorandum of Law in Support of Motion, filed by New York State, 73 Reply Memorandum of Law in Support of Motion filed by Edith Schlain Windsor, 14 MOTION for Paul D. Clement, Richard A. Cirillo and the law firm of King & Spalding LLP to Withdraw as Attorney. filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 26 Order on Motion to Intervene, 81 Reply Memorandum of Law in Support of Motion filed by Edith Schlain Windsor, 63 Order on Motion for Leave to File Document, 42 Endorsed Letter, 76 MOTION for Clarification. MOTION for Leave to File Excess Pages. MOTION for Leave to File Sur-Reply. filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 72 Response to Motion filed by The United States Of America, 93 Order on Motion for Summary Judgment, Order on Motion to Dismiss, 11 Order, Set Deadlines/Hearings, 67 Affidavit in Support of Motion,

DATE	DOCKET NUMBER	PROCEEDINGS
		filed by Edith Schlain Windsor, 83 Reply Affidavit in Support of Motion filed by Edith Schlain Windsor, 6 Order, Set Deadlines/ Hearings, 71 Response to Motion filed by The United States Of America, 87 MOTION for Leave to File Sur-Reply. filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 64 Endorsed Letter, 70 Memorandum of Law in Opposition to Motion filed by Edith Schlain Windsor, 55 Declaration in Opposition to Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 58 Declaration in Opposition to Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 52 MOTION to Dismiss. filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 49 MOTION to Dismiss *Amended Complaint.* filed by The United States Of America, 94 Clerk's Judgment, 13 Memorandum of Law in Support of Motion, filed by Bipartisan Legal Advisory Group of the U.S.

DATE	DOCKET NUMBER	PROCEEDINGS
		House of Representatives, 25 Protective Order, 20 Response to Motion, filed by The United States Of America, 95 Notice of Appeal, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 28 MOTION for Summary Judgment. filed by Edith Schlain Windsor, 56 Declaration in Opposition to Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 61 Declaration in Opposition to Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 1 Complaint filed by Edith Schlain Windsor, 9 Amended Complaint filed by Edith Schlain Windsor, 38 MOTION for Leave to File Brief Amicus Curiae *of New York State in Support of Plaintiff.* filed by New York State, 21 Notice (Other), Notice (Other), Notice (Other) filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 37 Rule 56.1 Statement filed by Edith Schlain Windsor, 2 Summons Returned Executed as to

DATE	DOCKET NUMBER	PROCEEDINGS
		USA, filed by Edith Schlain Windsor, 65 MOTION to Strike *Documents Referenced by Defendant-Intervenor in Opposition to Plaintiff's Motion for Summary Judgment*. filed by Edith Schlain Windsor, 84 Reply Affidavit in Support of Motion filed by Edith Schlain Windsor, 91 Notice (Other), Notice (Other) filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 22 Scheduling Order, 62 Declaration in Opposition to Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 89 Order, 16 Stipulation and Order, Terminate Motions, Add and Terminate Parties, 51 Rule 56.1 Statement filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 32 Affidavit in Support of Motion filed by Edith Schlain Windsor, 79 Order on Motion for Miscellaneous Relief, Order on Motion for Leave to File Excess Pages, Order on Motion for Leave to File Document, 3 Order Referring Case to Magistrate Judge, 54 Declaration

DATE	DOCKET NUMBER	PROCEEDINGS
		in Opposition to Motion filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 5 Notice of Change of Address filed by Edith Schlain Windsor, 24 Notice of Change of Address filed by Edith Schlain Windsor, 40 CONSENT MOTION for Leave to File amicus curiae brief *in support of the Plaintiff.* filed by New York State, 53 Memorandum of Law in Support of Motion filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 66 Memorandum of Law in Support of Motion filed by Edith Schlain Windsor, 78 Memorandum of Law in Opposition to Motion filed by Edith Schlain Windsor, 86 Declaration in Support of Motion filed by Edith Schlain Windsor, 35 Affidavit in Support of Motion filed by Edith Schlain Windsor, 80 Reply Memorandum of Law in Support of Motion filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 30 Affidavit in Support of Motion, filed by Edith Schlain Windsor, 15 Declaration in

DATE	DOCKET NUMBER	PROCEEDINGS
		Support of Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 4 Notice of Appearance filed by The United States Of America, 31 Affidavit in Support of Motion, filed by Edith Schlain Windsor, 34 Affidavit in Support of Motion filed by Edith Schlain Windsor, 69 Response in Opposition to Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 33 Affidavit in Support of Motion filed by Edith Schlain Windsor, 60 Declaration in Opposition to Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 90 Order on Motion for Leave to File Document, 36 Affidavit in Support of Motion filed by Edith Schlain Windsor, 74 Declaration in Support of Motion filed by Edith Schlain Windsor, 85 Reply Affidavit in Support of Motion filed by Edith Schlain Windsor were transmitted to the U.S. Court of Appeals. (tp) (Entered: 06/11/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
6/14/12	96	FILING ERROR NO ORDER SELECTED FOR APPEAL NOTICE OF APPEAL. Document filed by The United States Of America. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Lin, Jean) Modified on 6/14/2012 (tp). (Entered: 06/14/2012)
6/14/12		***NOTE TO ATTORNEY REGARDING DEFICIENT APPEAL. Note to Attorney Lin, Jean to RE-FILE Document No. 96 Notice of Appeal. The filing is deficient for the following reason: No Order being appealed was selected. Re-file the document as a Corrected Notice of Appeal event and SELECT the correct Order being appealed. (tp) (Entered: 06/14/2012)
6/14/12	97	CORRECTED NOTICE OF APPEAL re: 96 Notice of Appeal, 93 Order on Motion for Summary Judgment, Order on Motion to Dismiss,,,,,,, 94 Clerk's Judgment,,. Document filed by The

DATE	DOCKET NUMBER	PROCEEDINGS
		United States Of America. (Attachments: # 1 Exhibit Judgment, # 2 Exhibit Order) (Lin, Jean) (Entered: 06/14/2012)
6/14/12		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 96 Notice of Appeal, 97 Corrected Notice of Appeal,. (nd) (Entered: 06/14/2012)
6/14/12		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 96 Notice of Appeal, filed by The United States Of America, 97 Corrected Notice of Appeal, filed by The United States Of America, 8 Scheduling Order,, 75 Order on Motion to Strike, 7 Notice of Appearance filed by Edith Schlain Windsor, 68 Order, Set Motion and R&R Deadlines/Hearings, 48 Notice of Appearance filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 23 Reply to Response to Motion, filed by Bipartisan Legal Advisory Group of the U.S.

DATE	DOCKET NUMBER	PROCEEDINGS
		House of Representatives, 12 MOTION to Intervene a party defendant in this matter for the limited purpose of litigating the constitutionality of Section III of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. 7. MOTION to Intervene a party defendant in this matter for the limited purpose of litigating the constitutionality of Section III of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. 7. filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 88 Memorandum of Law in Support of Motion filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 50 Memorandum of Law in Opposition to Motion filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 19 Notice of Appearance filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 59 Declaration in Opposition to Motion, filed by

DATE	DOCKET NUMBER	PROCEEDINGS
		Bipartisan Legal Advisory Group of the U.S. House of Representatives, 27 Endorsed Letter, 92 Response filed by Edith Schlain Windsor, 18 Notice of Appearance filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 10 Notice (Other) filed by The United States Of America, 43 Order, 82 Declaration in Support of Motion filed by Edith Schlain Windsor, 29 Memorandum of Law in Support of Motion filed by Edith Schlain Windsor, 17 Notice of Appearance filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 77 Memorandum of Law in Support of Motion filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 57 Declaration in Opposition to Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 41 Memorandum of Law in Support of Motion filed by New York State, 39 Memorandum of Law in Support of Motion, filed by New York State, 73 Reply Memorandum of Law in Support

DATE	DOCKET NUMBER	PROCEEDINGS
		of Motion filed by Edith Schlain Windsor, 14 MOTION for Paul D. Clement, Richard A. Cirillo and the law firm of King & Spalding LLP to Withdraw as Attorney. filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 26 Order on Motion to Intervene, 81 Reply Memorandum of Law in Support of Motion filed by Edith Schlain Windsor, 63 Order on Motion for Leave to File Document, 42 Endorsed Letter, 76 MOTION for Clarification. MOTION for Leave to File Excess Pages. MOTION for Leave to File Sur-Reply. filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 72 Response to Motion filed by The United States Of America, 93 Order on Motion for Summary Judgment, Order on Motion to Dismiss, 11 Order, Set Deadlines/Hearings, 67 Affidavit in Support of Motion, filed by Edith Schlain Windsor, 83 Reply Affidavit in Support of Motion filed by Edith Schlain Windsor, 6 Order, Set Deadlines/Hearings, 71 Response

DATE	DOCKET NUMBER	PROCEEDINGS
		to Motion filed by The United States Of America, 87 MOTION for Leave to File Sur-Reply. filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 64 Endorsed Letter, 70 Memorandum of Law in Opposition to Motion filed by Edith Schlain Windsor, 55 Declaration in Opposition to Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 58 Declaration in Opposition to Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 52 MOTION to Dismiss. filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 49 MOTION to Dismiss Amended Complaint. filed by The United States Of America, 94 Clerk's Judgment, 13 Memorandum of Law in Support of Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 25 Protective Order, 20 Response to Motion, filed by The United States Of America, 95 Notice of Appeal, filed by Bipar-

DATE	DOCKET NUMBER	PROCEEDINGS
		tisan Legal Advisory Group of the U.S. House of Representatives, 28 MOTION for Summary Judgment. filed by Edith Schlain Windsor, 56 Declaration in Opposition to Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 61 Declaration in Opposition to Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 1 Complaint filed by Edith Schlain Windsor, 9 Amended Complaint filed by Edith Schlain Windsor, 38 MOTION for Leave to File Brief Amicus Curiae of New York State in Support of Plaintiff. filed by New York State, 21 Notice (Other), Notice (Other), Notice (Other) filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 37 Rule 56.1 Statement filed by Edith Schlain Windsor, 2 Summons Returned Executed as to USA, filed by Edith Schlain Windsor, 65 MOTION to Strike Documents Referenced by Defendant-Intervenor in Opposition to Plaintiff's Motion for Sum-

DATE	DOCKET NUMBER	PROCEEDINGS
		mary Judgment. filed by Edith Schlain Windsor, 84 Reply Affidavit in Support of Motion filed by Edith Schlain Windsor, 91 Notice (Other), Notice (Other) filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 22 Scheduling Order, 62 Declaration in Opposition to Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 89 Order, 16 Stipulation and Order, Terminate Motions, Add and Terminate Parties, 51 Rule 56.1 Statement filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 32 Affidavit in Support of Motion filed by Edith Schlain Windsor, 79 Order on Motion for Miscellaneous Relief, Order on Motion for Leave to File Excess Pages, Order on Motion for Leave to File Document, 3 Order Referring Case to Magistrate Judge, 54 Declaration in Opposition to Motion filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 5 Notice of Change of Address filed by

DATE	DOCKET NUMBER	PROCEEDINGS
		Edith Schlain Windsor, 24 Notice of Change of Address filed by Edith Schlain Windsor, 40 CONSENT MOTION for Leave to File amicus curiae brief in support of the Plaintiff. filed by New York State, 53 Memorandum of Law in Support of Motion filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 66 Memorandum of Law in Support of Motion filed by Edith Schlain Windsor, 78 Memorandum of Law in Opposition to Motion filed by Edith Schlain Windsor, 86 Declaration in Support of Motion filed by Edith Schlain Windsor, 35 Affidavit in Support of Motion filed by Edith Schlain Windsor, 80 Reply Memorandum of Law in Support of Motion filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 30 Affidavit in Support of Motion, filed by Edith Schlain Windsor, 15 Declaration in Support of Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 4 Notice of Appearance filed by The United States Of

DATE	DOCKET NUMBER	PROCEEDINGS
		America, 31 Affidavit in Support of Motion, filed by Edith Schlain Windsor, 34 Affidavit in Support of Motion filed by Edith Schlain Windsor, 69 Response in Opposition to Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 33 Affidavit in Support of Motion filed by Edith Schlain Windsor, 60 Declaration in Opposition to Motion, filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives, 90 Order on Motion for Leave to File Document, 36 Affidavit in Support of Motion filed by Edith Schlain Windsor, 74 Declaration in Support of Motion filed by Edith Schlain Windsor, 85 Reply Affidavit in Support of Motion filed by Edith Schlain Windsor were transmitted to the U.S. Court of Appeals. (nd) (Entered: 06/14/2012)
8/7/12	98	Letter addressed to Judge Barbara S. Jones from Roberta A. Kaplan dated 5/31/2012 re: We write on behalf of plaintiff Edie Windsor to bring to the Court's

DATE	DOCKET NUMBER	PROCEEDINGS
		attention the decision issued earlier today by the Unites States Court of Appeals for the First Circuit holding that Section 3 of the Defense of Marriage Act ("DOMA") is unconstitutional in a case that presents substantially similar facts and raises overlapping legal issues as the above-captioned matter Document filed by Edith Schlain Windsor. (ama) (Entered: 08/07/2012)
8/7/12	99	Letter addressed to Judge Barbara S. Jones from Roberta A. Kaplan dated 5/29/2012 re: We write on behalf of plaintiff Edie Windsor to bring to the Court's attention a decision issued last week by Judge Claudia Wilken of the Northern District of California holding that Section 3 of the Defense of Marriage Act ("DOMA") is unconstitutional in a case that presents substantially similar facts and raises similar legal issues as the above-captioned matter currently pending before Your Honor. Document filed by Edith Schlain

DATE	DOCKET NUMBER	PROCEEDINGS
		Windsor. (ama) (Entered: 08/07/2012)
8/7/12	100	Letter addressed to Judge Barbara S. Jones from Roberta A. Kaplan dated 5/29/2012 re: We write to follow up on our March 28 letter, in which we enclosed the Motion to Consolidate and Expedite Appeals filed by the United States Department of Justice in the United States Court of Appeals for the Ninth Circuit in the Golinski case (the "DOJ Br."). For many of the same reasons stated in the DOJ's motion to expedite in Golinski, Ms. Windsor respectfully requests that this Court issue a decision on her pending motion for summary judgment (and defendant-intervenor's motion to dismiss) as promptly as possible. Document filed by Edith Schlain Windsor. (ama) (Entered: 08/07/2012)
8/7/12	101	Letter addressed to Judge Barbara S. Jones from Roberta A. Kaplan dated 5/28/2012 re: On behalf of plaintiff, we write to let

DATE	DOCKET NUMBER	PROCEEDINGS
		Your Honor know that Edie Windsor is back at home and is recovering from her most recent heart attack. Document filed by Edith Schlain Windsor. (ama) (Entered: 08/07/2012)
8/7/12	102	Letter addressed to Judge Barbara S. Jones from Roberta A. Kaplan dated 3/07/2012 re: We respectfully write to inform the Court that plaintiff Edie Windsor suffered a heart attack yesterday and was admitted to the cardiac unit at Mount Sinai Hospital. Document filed by Edith Schlain Windsor. (ama) (Entered: 08/07/2012)
8/7/12	103	Letter addressed to Judge Barbara S. Jones from H. Christopher Bartolomucci dated 3/06/2012 re: This responds to Plaintiffs letter to the Court dated February 21, 2012, regarding the Attorney General's recent decision not to defend 38 U.S.C. § 101(3) and 101(31). The constitutionality of those two statutory provisions is not at issue in this case. Docu-

DATE	DOCKET NUMBER	PROCEEDINGS
		ment filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (ama) (Entered: 08/07/2012)
8/8/12	105	Letter addressed to Judge Barbara S. Jones, from Roberta A. Kaplan, dated 2/21/2012, re: bringing to the Court's attention a recent decision by the Attorney General and the Department of Justice to cease defending 38 U.S.C. Secs. 101(3) and (31), which affect the eligibility of same-sex couples for military and veterans' benefits. Document filed by Edith Schlain Windsor. (ja) (Entered: 08/08/2012)
8/8/12	106	Letter addressed to Judge Barbara S. Jones, from H. Christopher Bartolomucci, dated 2/16/2012, re: Perry v. Brown, 9th Cir. No. 10-16696 (Feb. 7, 2012). Contrary to the suggestion made in Plaintiff's letter dated February 8, 2012, Perrydoes not support Plaintiff's challenge to Section 3 of the Defense of Marriage Act ("DOMA"). The most

DATE	DOCKET NUMBER	PROCEEDINGS
		striking thing about the Ninth Circuit's opinion is the very narrowness of its reasoning in striking down California's Proposition 8. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives.(ja) (Entered: 08/08/2012)
8/8/12	107	Letter addressed to Judge Barbara S. Jones, from Roberta A. Kaplan, dated 2/8/2012, re: ruling issued by the United States Court of Appeals for the Ninth Circuit in Perry v. Brown, No. 10-16696 (9th Cir. Feb. 7, 2012). The Court in Perry held that California's Proposition 8, which prohibits marriage between same-sex couples, is unconstitutional. Document filed by Edith Schlain Windsor. (ja) (Entered: 08/08/2012)
8/8/12	108	Letter addressed to Judge Barbara S. Jones, from Roberta A. Kaplan, dated 7/6/2012, re: bringing the Court's attention to a decision a recent decision handed

DATE	DOCKET NUMBER	PROCEEDINGS
		down by Judge Wilken of the Northern District of California concerning the constitutionality of the Defense of Marriage Act ("DOMA"). Document filed by Edith Schlain Windsor. (ja) (Entered: 08/08/2012)
8/8/12	109	Letter addressed to Judge Barbara S. Jones, from Roberta A. Kaplan, dated 1/23/2012, re: two recent developments since the submission of the materials in connection with plaintiff's motion for summary judgment. Document filed by Edith Schlain Windsor. (ja) (Entered: 08/08/2012)
8/8/12	110	Letter addressed to Judge Barbara S. Jones, from Roberta A. Kaplan, dated 12/8/2011, re: pending in this case, plaintiff's motion for summary judgment and the Bipartisan Legal Advisory Group's motion to dismiss informing Your Honor of some recent developments concerning Edith Windsor's health. Document filed by Edith Schlain Windsor. (ja) (Entered: 08/08/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
8/8/12	111	Letter addressed to Judge Barbara S. Jones, from H. Christopher Bartolomucci, dated 9/23/2011, re: the House's motion for leave to file a surreply in opposition to Plaintiff's motion for summary judgment. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (ja) (Entered: 08/08/2012)
8/8/12	112	Letter addressed to Judge Barbara S. Jones, from Roberta A. Kaplan, dated 9/21/2011, re: In light of the above, Plaintiff requests that BLAG's renewed motion for leave to file surreply should be denied. In the alternative, requests that the Court issue an order providing that BLAG's sur-reply should be strictly limited to the specific issue or issues that warrant the filing of a surreply. Document filed by Edith Schlain Windsor. (ja) (Entered: 08/08/2012)
8/8/12	113	Letter addressed to Judge Barbara S. Jones, from Roberta A.

DATE	DOCKET NUMBER	PROCEEDINGS
		Kaplan, dated 9/19/2011, re: on 9/15/2011 we filed our reply brief in support of Plaintiff's motion for summary judgment. Enclosed please find two copies of each of the following motion papers and briefs filed in connection with that motion. Document filed by Edith Schlain Windsor. (ja) (Entered: 08/08/2012)
8/8/12	114	Letter addressed to Judge Barbara S. Jones, from Jean Lin, dated 4/18/2011, re: this tax refund case challenging the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. Sec. 7. The Bipartisan Legal Advisory Group ("BLAG") of the United States House of Representatives has filed a motion to intervene pursuant to 28 U.S.C. § 530D(b)(2). Accordingly, the United States requests that this Court not rule on the motion until it has had an opportunity to review the United States' response. Document filed by The United States Of America. (ja) (Entered: 08/08/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
8/8/12	115	Letter addressed to Judge Barbara S. Jones, from Roberta A. Kaplan, dated 9/23/2012 re: For the reasons set forth in our September 21 letter, a sur-reply is not warranted. As a result, Plaintiff submits that the Court should disregard the portions (at pp. 3-6) of BLAG's September 23 letter. Document filed by Edith Schlain Windsor. (ja) (Entered: 08/08/2012)
8/8/12	116	Letter addressed to Judge Barbara S. Jones, from H. Christopher Bartolomucci, dated 8/12/2011, re: request that plaintiff be required to file, on or before August 19, (1) a reply in support of her motion for summary judgment of no more than 10 pages containing her complete response to the contentions in our opposition, and (2) an opposition to our motion to dismiss of no more than 35 papers. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (ja) (Entered: 08/08/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
8/8/12	117	Letter addressed to Judge Barbara S. Jones, from H. Christopher Bartolomucci, dated 8/11/2011, re: in response to plaintiff's letter of today's date. The House does not oppose plaintiff's request to file a 35 page brief in opposition to the House's (45-page) motion to dismiss. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (ja) (Entered: 08/08/2012)
8/8/12	118	Letter addressed to Judge Barbara S. Jones and Magistrate Judge James C. Francis, from Roberta A. Kaplan, dated 8/12/2011, re: defendant-intervenor raises for the first time in his letter in sur-reply the issue of constitutional facts. Document filed by Edith Schlain Windsor. (ja) (Entered: 08/08/2012)
8/8/12	119	Letter addressed to Judge Barbara S. Jones, from Roberta A. Kaplan, dated 8/12/2011, re: response to the letter that the Bipartisan Legal Advisory Group

DATE	DOCKET NUMBER	PROCEEDINGS
		of the House of Representatives ("BLAG") sent to the Court last night concerning how best to deal with plaintiff's pending motion for summary judgment. Document filed by Edith Schlain Windsor. (ja) (Entered: 08/08/2012)
8/8/12	120	Letter addressed to Judge Barbara S. Jones, from Roberta A. Kaplan, dated 8/11/2011, re: challenging the constitutionality of Section 3 of the Defense of Marriage Act, or "DOMA." Finally, because the Court's rules require that memoranda of law should be no longer than 25 pages, and given the length of the briefs submitted by BLAG on August 1 (totaling approximately 70 pages), we would respectfully request permission to file a reply brief of up to 30 pages in connection with our motion for summary judgment and an opposition brief of up to 35 pages with respect to BLAG's motion to dismiss; although again, we will make every effort to file briefs under those limits. Document filed by Edith Schlain

DATE	DOCKET NUMBER	PROCEEDINGS
		Windsor. (ja) (Entered: 08/08/2012)
8/8/12	121	Letter addressed to Judge Barbara S. Jones, from Roberta A. Kaplan, dated 8/17/2011, re: the Court's Order dated August 15, 2011. In connection with Your Honor's consideration of Plaintiff's motion to strike, filed on August 10, 2011, enclosed we believe to be true and correct copies of the 12 documents referenced by Defendant-Intervenor, the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG"), in opposition to Plaintiff's motion for summary judgment that are also the subject of Plaintiff's motion to strike. Document filed by Edith Schlain Windsor. (ja) (Entered: 08/08/2012)
8/8/12	122	Letter addressed to Judge Barbara S. Jones, from Roberta A. Kaplan, dated 4/19/2011, re: request that the Court rule on the motion to intervene no later than May 9, when Judge Francis has

DATE	DOCKET NUMBER	PROCEEDINGS
		ordered there to be a status/scheduling conference among the parties. Document filed by Edith Schlain Windsor. (ja) (Entered: 08/08/2012)
8/8/12	123	Letter addressed to Judge Barbara S. Jones, from Roberta A. Kaplan, dated 2/2/2011, re: enclose for the Court's convenience a copy of the amended complaint that we filed today. Document filed by Edith Schlain Windsor. (ja) (Entered: 08/08/2012)
8/8/12	124	Letter addressed to Judge Barbara S. Jones, from Roberta A. Kaplan, dated 11/22/2010, re: Edie filed her complaint on November 9, 2010 and her case has been assigned to Your Honor. Informing the Court about several matters relevant to scheduling in this case and to request a conference with the Court as soon as possible. Document filed by Edith Schlain Windsor. (ja) (Entered: 08/08/2012)
8/8/12	125	Letter addressed to Judge Barbara S Jones from Roberta A

DATE	DOCKET NUMBER	PROCEEDINGS
		Kaplan dated 2/23/2012 re: Northern District of California decision holding Section 3 of the Defense of Marriage Act unconstitutional. Document filed by Edith Schlain Windsor. (cd) Modified on 9/17/2012 (jar). (Entered: 08/09/2012)
8/8/12		***DELETED DOCUMENT as per instructions from Judge Barbara S. Jones' Chambers on 8/15/2012. Deleted document number 104 Letter addressed to Judge Barbara S. Jones, from Roberta A. Kaplan, dated 2/23/2012. The document was incorrectly filed in this case. See entry 125 . (tro) (Entered: 08/15/2012)
8/9/12	126	Letter addressed to Judge Barbara S Jones from H. Christopher Bartolomucci dated 3/15/2012 re: In response to plaintiff's letter dated 2/23/2012 and an appeal has been filed in Golinski. Document filed by Bipartisan Legal Advisory Group of the U.S. House of Representatives. (cd) (Entered: 08/09/2012)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NO. 10 Civ. 8435 (BSJ) (JFC) EFC CASE
EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed: Feb. 2, 2011]

AMENDED COMPLAINT

PRELIMINARY STATEMENT

1. This is an action seeking a refund of the estate tax levied on a married same-sex couple, which would not have applied to a married straight couple, and which consequently violates the United States Constitution.

2. Edith Schlain Windsor ("Edie") met her late spouse, Thea Clara Spyer ("Thea"), nearly a half-century ago at a restaurant in New York City. Edie and Thea went on to spend the rest of Thea's life living together in a loving and committed relationship in New York.

3. After a wedding engagement that lasted more than forty years, and a life together that would be the

envy of any couple, Thea and Edie were finally legally married in Toronto, Canada in 2007. Having spent virtually their entire lives caring for each other in sickness—including Thea's long, brave battle with multiple sclerosis—and in health, Thea and Edie were able to spend the last two years of Thea's life together as married.

4. New York State legally recognizes Edie and Thea's marriage and provided them with the same status, responsibilities, and protections as other married people. However, Edie and Thea were not considered "married" under federal law because of the operation of the statute known (ironically) as the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7.

5. This clearly unequal treatment of Edie and Thea's marriage both demeans their remarkable commitment to one another and has great practical significance for the sole beneficiary of Thea's estate, Edie. Under the Internal Revenue Code, the transfer of money or property from one spouse to another upon death generally does not trigger any estate tax at all. Because of the operation of DOMA, however, the federal government does not consider Edie and Thea to have been married, and, as a result, more than $350,000 in federal estate tax was imposed on Thea's estate that would not otherwise have been imposed if Edie and Thea's marriage were recognized under federal law.

6. In other words, the inheritance of the sole beneficiary of Thea's estate—Edie, Thea's surviving spouse—has been significantly reduced by the estate

tax, unlike the inheritance of a widow who had been left everything by her deceased husband. Edie, now 81 years old, faces the rest of her life without Thea, with shrunken retirement savings, and with the added insult of the federal government refusing to recognize the validity of her marriage, not to mention her forty-four-year committed relationship.

7. Throughout the history of this country, whenever the federal government has attached protections or responsibilities to marriage, it has always deferred to the states' determination of whether a couple is validly married. Since 1996, the federal government has deviated from that practice, but only for same-sex couples who marry.

8. Accordingly, Edie Windsor, in her capacity as executor of Thea Spyer's estate, now brings this action to recover the federal estate tax that she, as executor, was forced to pay in violation of the Constitutional guarantee of equal protection of the law.

JURISDICTION

9. This action arises under the Constitution of the United States and the laws of the United States, including 26 U.S.C. § 7422. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1346(a)(1).

VENUE

10. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(e)(2), (3) and 1402(a)(1) because plaintiff Edith Schlain Windsor, the executor of Thea Clara Spyer's estate, resides in this judicial district, because Thea Spyer resided in this judicial district, because the estate of Thea Spyer was probated in this judicial district, and because the defendant is the United States of America.

PARTIES

11. Plaintiff Edith Schlain Windsor is a citizen of the United States. She resides in New York County, New York. Plaintiff is the executor of the estate of her late spouse, Thea Clara Spyer.

12. Defendant United States of America is the proper defendant in an action seeking refund of any internal revenue tax pursuant to 26 U.S.C. § 7422(f)(1).

FACTS

13. Edie and Thea's life stories are in one sense remarkable for the extraordinary times through which they lived, and at the same time quite typical of the lives of gay men and lesbians of their generation, given the pervasive discrimination and homophobia that Edie and Thea encountered on a routine basis. Yet despite obstacles nearly unimaginable today to the generations of gay men and lesbians who followed in their wake, Edie and Thea went on to live lives of great joy, full of dancing, love, and celebration.

Thea Spyer's Background

14. Thea Spyer was born in Amsterdam, The Netherlands on October 8, 1931. Having lost her mother as an infant, Thea not only knew great sadness, but as a Jew witnessed first-hand the devastation wrought by Nazi Germany. Thea was fortunate enough to be able to flee Amsterdam with her stepmother at the outbreak of the Second World War, thereby escaping the Holocaust. They first went to England, where her father, a Dutch soldier, later joined them just as the Nazi troops were about to invade, and then to the United States, where they built a new life.

15. Thea enrolled at Sarah Lawrence College, but was expelled when a campus security guard saw Thea and another woman kissing. She subsequently enrolled in and received a bachelor's degree from The New School for Social Research. Later, she obtained a master's degree in clinical psychology from the City University of New York and a Ph.D. in clinical psychology from Adelphi University.

16. Upon receiving her doctorate, Thea interned at St. Vincent's Hospital and the Veterans Administration Hospital in New York City. Afterwards, she became Director of the Psychiatric Clinic at the International Center for the Disabled and then a Clinical Consultant in Rehabilitation at St. Vincent's Hospital, Westchester. For most of her career, she focused on her private practice as a clinical psychologist.

Edie Windsor's Background

17. Edie was born on June 20, 1929, in Philadelphia, Pennsylvania. Edie's parents struggled for financial security during the Great Depression, and her family lost its home when she was a child.

18. Edie received a bachelor's degree from Temple University in 1950.

19. In the early 1950s, Edie moved to New York City from Philadelphia. Shortly after arriving in New York, she decided to pursue graduate studies in mathematics. She obtained a master's degree in mathematics from New York University in 1957. Edie then joined International Business Machines Corp. ("IBM"), where she worked for sixteen years in senior technical and management positions related to systems architecture and implementation of operating systems and language processors. During her time at IBM, Edie spent two semesters studying applied mathematics at Harvard University on an IBM fellowship. In May 1968, she attained the title of Senior Systems Programmer, the highest technical position at IBM.

Edie and Thea's Introduction

20. Edie and Thea met in New York City in 1963, at a time when few gays or lesbians publicly identified as such. Lesbians and gay men then faced extensive prejudice, and their relationships were not afforded rights anywhere in the world. Police officers would often shut down bars and restaurants catering to gay men and lesbians, at times physically beating and arresting the patrons. The constant threat of dis-

closure and harassment forced gay people into an underground network, where they could socialize with other gay men and lesbians.

21. Edie and Thea first met at Portofino, a restaurant in Greenwich Village, where it was comfortable for a lesbian clientele to go on Friday evenings. Edie, who was working long hours at her job, decided to call an old friend and ask her to take her "to where the lesbians go." At the restaurant, Edie was introduced to Thea. Although Edie and Thea were each there with other people, they danced together all night. In fact, by the end of the evening, Edie had danced a hole through the bottom of one of her stockings.

22. After that first night dancing together, Edie and Thea occasionally saw each other at parties over the next two years. At these parties, they would start dancing, and their respective dates would stand frustrated on the side of the dance floor with their coats on, waiting for Edie and Thea to separate.

Edie and Thea's Courtship and Engagement

23. Edie and Thea did not forget about each other —that first night made a deep impression on them both. Some two years later, in the late spring of 1965, Edie learned through mutual acquaintances that Thea would be spending Memorial Day weekend on the East End of Long Island. Desperate to see Thea again, Edie asked some friends with a nearby house to let her stay with them for the weekend. After she arrived at the house, Edie declined to go out with her

friends that Friday night so she could wait for Thea to arrive.

24. When her friends returned home later that evening, they told Edie that Thea was delayed at work in New York City and was not expected until the next day. Nervous but excited, Edie reconnected with Thea when she arrived that Saturday afternoon. As it turned out, there was nothing to be nervous about: from that moment on, Edie and Thea were inseparable.

25. When Thea asked Edie that weekend what she wanted from her, Edie's response was simple: "Not much. I'd like to date for a year. And if that goes the way it is now, I think I'd like to be engaged, say for a year. And if it still feels this goofy joyous, I'd like us to spend the rest of our lives together." And they did. That weekend marked the start of a committed relationship of mutual love and support that would last for the next forty-four years.

26. Two years later, Thea asked Edie to marry her, even though no state in the United States afforded legal recognition to same-sex couples, much less marriage rights, at that time. Thea feared that if Edie wore an engagement ring to work, her sexual orientation might be disclosed to her colleagues at her job at IBM, so Thea proposed to Edie with a circular diamond pin instead. With this brooch symbolizing their commitment, Edie and Thea began their very long engagement in 1967.

27. Edie and Thea's choice not to wear traditional engagement rings was just one of many ways in which

Edie and Thea had to mold their lives to make their relationship invisible. Both women faced pressures not only in the workplace and in society at large, but also from family and friends. It is worth noting that Edie and Thea were engaged *two years before* the Stonewall riots in June 1969 that led to the birth of the modern gay rights movement in the United States and around the world. Like countless other same-sex couples, Edie and Thea engaged in a constant struggle to balance their love for one another and their desire to live openly and with dignity, on the one hand, with their fear of disapproval and discrimination from others, on the other.

Edie and Thea's Life Together

28. Edie and Thea's relationship blossomed rapidly. They moved in to an apartment in Greenwich Village together six months after getting engaged.

29. In 1968, Edie and Thea bought a small house together on Long Island. It was just big enough for them to shower off the sand from the beach and change into clothes for dancing. In that home, they spent the next forty summers, and it was the site of some of their happiest memories together.

30. During their decades together, Thea and Edie lived a full life. They enjoyed travel and often took trips both in the United States and abroad. Thea and Edie also loved to entertain frequently, and Thea, an accomplished cook, would prepare elaborate meals for their friends on holidays and at other times, including annual celebrations of their anniversary every Memorial Day weekend.

Thea's Illness

31. Twelve years into their relationship, Edie and Thea were confronted with what became the most serious challenge of their lives. In 1977, at the age of forty-five, Thea was first diagnosed with Progressive Multiple Sclerosis, or MS, a chronic disease of the central nervous system that causes gradually worsening and irreversible neurological damage and paralysis.

32. Despite the difficulties they faced following the diagnosis, Edie and Thea refused to give up on the life they had built together. Thea reinvented herself with each year of her increasing physical disability, working to maintain a life that was active and joyous. Edie committed herself to ensuring that their lives remained full of the passion they had felt when they first met. They even modified their dancing style, with Thea balancing herself on two canes to get to the dance floor and then dropping them to dance to the latest disco hit.

33. Thea's MS caused a gradual, but ever-increasing paralysis. Edie nursed, encouraged and supported Thea as her disability grew ever more severe—first requiring a cane, then crutches, then a manual wheelchair, then a motorized wheelchair that Thea could operate with her remaining usable hand.

34. When Thea could no longer swim, the couple installed special equipment to help Thea enter, exit and float in the pool at their Long Island house so that Thea could exercise and enjoy herself in the water, with Edie's assistance.

35. When Thea started using a wheelchair, they adopted a new style of dancing. Edie would sit on Thea's lap as Thea maneuvered her electric wheelchair across the dance floor.

The Journey Toward Marriage

36. As the years passed, Thea and Edie never gave up on their dream of getting married. In 1993, twenty-eight years into their relationship and sixteen years after Thea's diagnosis, New York City first began recognizing domestic partnerships between same-sex couples.

37. Edie told Thea she wanted them to be one of the first couples to register as domestic partners in New York City. Thea, ever-dedicated to her private practice as a psychologist, told Edie that they would have to wait to register as domestic partners because she had appointments with patients all day long. Edie responded, "I have waited more than twenty-eight years for this day, and I am not waiting a single day more!" Fortunately, Thea agreed, cleared her schedule for the day, and bought flowers for Edie before they proudly became one of the first couples registered as domestic partners in New York City.

38. Notwithstanding their excitement, both women saw the limited rights and benefits afforded by domestic partnership, although a significant step forward, is no substitute for the institution of marriage.

39. Although they had always hoped to marry in their home state of New York. Thea's worsening condition was a constant and grave reminder that they

were running out of time. After celebrating their fortieth anniversary together as a committed couple, they decided they could not wait for the law in New York to finally recognize the reality of their relationship. They decided to seek civil marriage rights where they could get them.

The Marriage

40. With six friends, including one who was a physician, Edie, then seventy-seven, and Thea, then seventy-five, traveled to Toronto, Canada, where they were legally married on May 22, 2007. A copy of their wedding announcement, which was published in the *New York Times*, is attached as Exhibit A.

41. Wanting to share their journey toward marriage and their love with the world, Edie and Thea agreed to be featured in the documentary film entitled "Edie & Thea: A Very Long Engagement," which chronicled the couple's courtship, engagement and marriage.

42. Edie and Thea's marriage is recognized as a valid marriage in New York State. *See Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (4th Dep't 2008); *see also In re May's Estate*, 114 N.E.2d 4, 7 (N.Y. 1953); Memorandum from David Nocenti to Agency Counsel (May 14, 2008), http://www.ny.gov/governor/reports/pdf/Nocenti_memo.pdf (the "Nocenti Memo"); *Golden v. Paterson*, 877 N.Y.S.2d 822 (N.Y. Sup. Ct. 2008) (rejecting challenge to legality of Nocenti Memo).

43. New York State recognizes marriages of same-sex couples as valid in a multitude of ways. The New York State Department of Civil Service, for example, provides same-sex spouses access to all the benefits available under the New York State Health Insurance Program. *See Godfrey v. Spano*, 920 N.E.2d 328, 335-37 (N.Y. 2009) (upholding Civil Service Department's non-exclusive policy). The New York State Comptroller recognizes, for retirement benefit purposes, out-of-state marriages between same-sex couples. See *Godfrey v. DiNapoli*, 866 N.Y.S.2d 844 (N.Y. Sup. Ct. 2008) (upholding State Comptroller's non-exclusive policy). The New York State Insurance Department, in turn, has directed that all insurance companies doing business in New York must extend insurance offered under state policies to same-sex spouses on the same terms as to other married couples. Circular Letter No. 27 (Nov. 21, 2008), http://www.ins.state.ny.us/circltr/2008/cl08_27.pdf.

44. And New York courts recognize marriages between same-sex couples performed outside New York, including for purposes of determining entitlement to spousal health care benefits, *Martinez v. County of Monroe*, 850 N.Y.S.2d at 743 (holding that New York affords legal recognition to civil marriages that are lawful in jurisdiction in which they are entered into, even if such marriage could not be entered into in New York); probating a will. *Matter of the Estate of Ranftle*, No. 4585-2008 (N.Y. Sur. Ct. Jan. 26, 2009) (holding that Canadian marriage to another person of same sex "is entitled to recognition in New

York"); adoption and protecting parent-child relationships, *In re Adoption of Sebastian*, 879 N.Y.S.2d 677 (N.Y. Sur. Ct. 2009) (recognizing Dutch marriage between two women and declaring that legal parent-child relationship already exists by operation of law between both women and their child, but nonetheless entering redundant adoption order to ensure portability of parent-child rights in other jurisdictions).

45. Thus, New York considered Thea and Edie as validly married.

Thea's Final Years

46. In 2002, Thea was diagnosed with another serious medical condition: aortic stenosis, or a narrowing of the aortic valve of the heart. This condition caused her to suffer a heart attack in 2002. Because of increasing paralysis resulting from her MS, Thea was not willing to undergo the lengthy hospitalization that would have resulted from surgery to fix the valve. The doctors told Edie and Thea that Thea did not have long to live.

47. Thea long outlived her doctors' expectations. She spent the next five years receiving hospice care at home, moving from her apartment in Manhattan to their home on Long Island during the summer, all the time with Edie at her side providing love and support.

48. Prior to her passing, Thea agonized over the financial burden that her death would impose on Edie. Thea and Edie engaged in thorough financial planning to ensure that they would have enough money to live out their days comfortably.

49. During the dramatic collapse of the financial markets in the fall of 2008, however, Thea was understandably panicked over how she and Edie would afford the high cost of her medical care, which they had to pay out-of-pocket since a significant portion of the costs were not covered. They also were well aware of the huge lump-sum payment that Edie would have to make following Thea's death because of the federal estate tax and the fact that Edie would not benefit from the marital deduction as a result of DOMA.

50. Although the film documenting Edie and Thea's lives was meant to focus only on their relationship and marriage, as Thea's illness became increasingly debilitating, Thea decided that she wanted posterity to see the realities of her MS and disability. Thea therefore changed her mind and allowed the filmmakers to film Edie moving her in and out of her bed and the pool using a mechanical lift, as well as Edie arranging Thea's breathing apparatus as she did each night before Thea went to sleep. Why was Thea comfortable showing strangers such intimate and potentially embarrassing details of her illness? Because, as Thea explained, they were making a *documentary* and she wanted everyone to know that "s___ happens," and that marriage is about sharing the good times and the bad times with the person you love. And Edie and Thea did exactly that.

51. Edie and Thea were able to spend two years as a married couple before Thea succumbed to complications from her heart condition on February 5, 2009 and died.

52. After Thea's passing, in the midst of her mourning, Edie was forced to attend to the financial burdens, including the federal estate tax, that accompanied Thea's death.

Thea's Estate and the Estate Tax

53. Thea's Last Will and Testament, dated September 7, 2004, was admitted to probate by the Surrogate's Court of New York County (Index No. 2009-1162), and Edie was appointed as executor of Thea's estate on April 24, 2009.

54. In accordance with Article Third of Thea's Last Will and Testament, her executor is directed to distribute her entire estate to the TCS Revocable Trust created by Thea.

55. In accordance with Article III of the trust agreement creating the TCS Revocable Trust, because Edie survived Thea, the trustees were directed to distribute the remaining trust property, after the payment of taxes and administration expenses, to the trustees of the ESW Revocable Trust created by Edie. Edie is a trustee and sole beneficiary of the ESW Revocable Trust during her life, and she has the power, exercisable by her alone, to invade the trust property and to revoke the trust agreement in its entirety at any time.

56. Because Thea's estate slightly exceeded the applicable exclusion amount set forth in 26 U.S.C. § 2010(c), Thea's estate was subject to federal estate tax.

57. Under 26 U.S.C. § 2056(a), a decedent's estate is generally entitled to deduct the value of any interest in property which passes from the decedent to his or her surviving spouse. Accordingly, property that passes from a decedent to a surviving spouse generally passes free of the federal estate tax.

58. Congress passed this unlimited marital deduction in order to eliminate what the House Ways and Means Committee called the "widow's tax," which fell "most heavily on widows" who were "subject to estate taxes even though the property remains within the marital unit." H.R. Rep. No. 97-201, at 159 (1981). The Committee explained that "an individual should be free to pass his entire estate to a surviving spouse without the imposition of any additional tax." *Id.*; *see also* S. Rep. No. 97-144, at 127(1981).

59. Ordinarily, whether a couple is married for purposes of applying the estate tax marital deduction depends on whether the couple is considered validly married under the law of their state. *Cf.*, *e.g.*, *Eccles v. Comm'r*, 19 T.C. 1049, 1051, 1053-54 (1953) (holding that "[m]arriage, its existence and dissolution, is particularly within the province of the states" and discussing in dicta that were the opposite rule to prevail, "problems of inconsistency with the language of the estate tax 'marital deduction' . . . immediately arise"), *aff'd mem.*, 208 F.2d 796 (4th Cir.); Rev. Rul. 58-66, 1958-1 C.B. 60, 60 ("The marital status of individuals as determined under state law is recognized in the administration of the Federal income tax laws."); Rev. Rul 29, 1953-1 C.B. 67, 67 (deferring to New York State's recognition of validity of marriage).

The Defense of Marriage Act

60. Although the estate tax marital deduction applies on its face to all lawfully married couples, same-sex couples alone are denied its benefits by operation of DOMA. DOMA provides, in relevant part, that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7.

61. Solely because of the operation of DOMA, the Internal Revenue Service ("IRS") has determined that the estate of a decedent whose surviving spouse is a person of the same sex as the decedent is not entitled to the marital deduction under 26 U.S.C. § 2056(a).

62. As a direct result of DOMA's unconstitutional exclusion of same-sex spouses from the benefits of the estate tax marital deduction, $363,053.00 in federal estate tax was imposed on Thea's estate.

63. There can be no dispute that if "Thea" were instead "Theo," her estate would have passed for the benefit of Edie tax-free. Solely because Edie and Thea were both women, Thea's estate was denied the marital deduction.

64. In addition to the estate tax burden described above, DOMA has placed other burdens on Edie, including preventing her from being eligible for a Social

Security lump-sum death benefit that would be payable to her as a surviving spouse, *see* 42 U.S.C. § 402(i), and Social Security widow's insurance benefits, *see id.* § 402(e). Edie has applied for these benefits from the Social Security Administration, and if she is denied those benefits based on DOMA, she will move to amend her complaint to add claims that DOMA violates the United States Constitution by preventing recognition of her marriage for purposes of these programs.

65. Despite the sweeping impact of DOMA, the federal government does not have a rational basis for, much less a compelling interest in, enforcing this statute. According to the House of Representatives Report on DOMA, H.R. Rep. No. 104-664 (1996), Congress put forward four rationales for treating an individual married to a person of the same sex differently from an individual married to a person of a different sex. All of them are irrational.

66. First, Congress claimed that DOMA advances the government's interest in defending and nurturing the institution of traditional heterosexual marriage. *Id.* at 12. This so-called rationale simply restates the government's intent to discriminate against same-sex couples and provides no independent justification for the government's discriminatory action. By failing to recognize Thea and Edie's marriage, the federal government does nothing to "nurture" the institution of marriage; rather, it minimizes and denigrates a loving, committed relationship that should serve as a model for all couples, whether homosexual or heterosexual.

67. Like the first rationale, Congress's second justification for DOMA, advancing the government's interest in defending traditional notions of morality, *id.* at 15, is yet another form of discrimination cloaked in the rhetoric of government interest. Discrimination for its own sake is not a legitimate government interest.

68. Congress claimed, as its third rationale, that DOMA advances the government's interest in protecting state sovereignty and democratic self-governance. *Id.* at 16. Yet DOMA hinders rather than protects state sovereignty, because it refuses to respect state sovereign decisions regarding what marriages to recognize. Before the passage of DOMA, states such as New York determined the marital status of their citizens, and the federal government deferred to a state's determination of marriage in the application of federal law. DOMA, rather than enhancing state sovereignty, actually diminishes states' autonomy.

69. The federal government's final rationale for enacting DOMA is that the law advances the government's interest in preserving scarce government resources. *Id.* at 18. However, according to the Congressional Budget Office, the recognition of the marriages of same-sex couples will increase annual net federal revenue rather than deplete "scarce government resources." Cong. Budget Office, U.S. Cong., The Potential Budgetary Impact of recognizing Same-Sex Marriages 1 (June 21, 2004), http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf.

PROCEDURAL HISTORY AND STANDING

70. Thea Spyer died on February 5, 2009.

71. Edie, in her capacity as executor of Thea's estate, filed an Application for Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes (Form 4768) with the IRS on October 28, 2009.

72. On November 5. 2009, Edie, in her capacity as executor of Thea's estate, made an advance payment of the estate's federal estate tax to the U.S. Treasury in the amount of $520,000.00.

73. On January 28, 2010, Edie, in her capacity as executor of Thea's estate, filed a United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706) with the IRS, which showed that $363,053.00 was due in federal estate tax, $156,947.00 less than the advance payment made in November 2009.

74. Schedule M (Bequests, etc., to Surviving Spouse) of the estate's United States Estate (and Generation-Skipping Transfer) Tax Return explained that, although the decedent was married at the time of her death and the decedent's entire estate passed for the benefit of her surviving spouse, the estate was not claiming the marital deduction authorized by 26 U.S.C. § 2056(a) because of the operation of DOMA.

75. In March, 2010, the U.S. Treasury issued a refund to the estate in the amount of $156,947.00, representing the overpayment of federal estate tax by the estate in November 2009.

76. For federal tax purposes, an individual is married if she or he is married under local law. See Rev. Rul. 58-66, 1958-1 C.B. 60 (recognizing common law marriages for tax purposes). Consistent with this authority, Edie, in her capacity as executor of Thea's estate, filed a Claim for Refund and Request for Abatement (Form 843) and a Disclosure Statement (Form 8275) with the IRS on April 7, 2010, stating that Edie and Thea were lawfully married in Toronto, that New York State recognizes that marriage under local law, that DOMA unconstitutionally discriminates on the basis of sexual orientation, and, as a result, that Thea's estate is entitled to the marital deduction and to a refund in the amount of $363,053.00. In the Disclosure Statement, Edie, in her capacity as executor of Thea's estate, explained that DOMA is unconstitutional.

77. On May 26, 2010, the IRS notified Edie, in her capacity as executor of Thea's estate, that it disallowed the estate's claim for a refund on the grounds that "[s]ince both spouses were women and since under DOMA '. . . the words [sic] "spouse" refers only to a person of the opposite sex who is a husband or a wife', Section 2056 is inapplicable because the surviving spouse is not a spouse as defined by DOMA."

78. As a result of this disallowance, and solely because of the existence and operation of DOMA, the estate has suffered specific and concrete financial harms. Specifically, the disallowance has forced the executor of Thea's estate to pay $363,053.00 more in federal estate tax than would be paid by the executor

of a similarly situated estate of a decedent with a spouse of the opposite sex, thereby reducing the inheritance of the beneficiary of Thea's estate by $363,053.00.

79. Under 26 U.S.C. § 7422(a), "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." 26 U.S.C. § 7422(a).

80. Under 26 U.S.C. § 6532(a)(1), "[n]o suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates." 26 U.S.C. § 6532(a)(1).

81. As set forth above, the plaintiff has satisfied all of the prerequisites to bring this action required by 26 U.S.C. §§ 7422(a) and 6532(a).

CAUSE OF ACTION

82. The plaintiff realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

83. This is an action for the recovery of federal estate tax erroneously or illegally assessed and collected. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1346(a)(1). This action also arises under 26 U.S.C. § 7422. The defendant is the United States of America.

84. As a direct result of DOMA, the federal government treats legally married same-sex couples in New York differently than heterosexual married couples in New York, and because of this disparity in treatment, the estate of Thea Spyer owed, and the executor of the estate paid, $363,053.00 more in federal estate tax than that of a similarly situated heterosexual decedent. Because the federal government defers to New York's determination of who is married for all married couples in New York except married same-sex couples, DOMA discriminates on the basis of sexual orientation.

85. Because DOMA, as applied by the IRS, requires this disparity of treatment with regard to Thea Spyer's estate, it creates a classification that singles out one class of valid marriages—those of same-sex couples—and subjects persons in those marriages to differential treatment compared to other similarly situated couples without justification in violation of the right of equal protection secured by the Fifth Amendment to the Constitution of the United States.

PRAYERS FOR RELIEF

WHEREFORE, the plaintiff prays that this Court:

1. Declare DOMA, 1 U.S.C. § 7, unconstitutional as applied to the plaintiff, Edith Schlain Windsor, in her capacity as executor of the estate of Thea Clara Spyer.

2. Enjoin the defendant from continuing to discriminate against the plaintiff by treating the estate of Thea Clara Spyer differently from similarly situated estates of decedents married to persons of the opposite sex.

3. Award the plaintiff judgment in the amount of $363,053.00, plus interest and costs as allowed by law, and such other relief as the Court may deem just, including an award of reasonable litigation costs incurred in this proceeding pursuant to 26 U.S.C. § 7430 and an award of reasonable costs and attorneys' fees pursuant to 28 U.S.C. § 2412.

4. Grant such other and further relief as the Court may deem equitable and proper.

Dated: New York, New York
Feb. 2, 2011

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP

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Attorneys for Plaintiff Edith Schlain Windsor, in her capacity as Executor of the Estate of Thea Clara Spye

EXHIBIT A

The New York Times
Weddings/Celebrations

Thea Spyer and Edith Windsor

Published May 27 2007

Thea Clara Spyer and Edith Schlain Windsor were married in Toronto on Tuesday. Justice Harvey Brownstone of the North Toronto Family Court officiated at the Sheraton Gateway Hotel.

[IMAGE OMITTED]

Dr. Spyer (above, left) is 75. She is a clinical psychologist with a private practice in Manhattan. She graduated from the New School for Social Research and received a master's degree in clinical psychology from City University of New York and a Ph.D. in that subject from Adelphi. Dr. Spyer is the daughter of the late Elisabeth Ketellapper and the late Willem Spyer, who lived in Amsterdam.

Ms. Windsor, 77, who is retired, worked in New York as a computer systems consultant for I.B.M. She was a board member of Social Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders, also known as SAGE, from 1985 to 1987 and from 2004 to 2006. She graduated from Temple University and received a master's degree in mathematics from New York University. Ms. Windsor, whose previous marriage ended in divorce, is a daughter of the late Celia and James D. Schlain, who lived in Philadelphia.

Dr. Spyer and Ms. Windsor met in 1965 in New York at Portofino, a restaurant in the West Village.

"Everyone lived in the closet," Ms. Windsor said of lesbian life in New York in the 1960s. "The only place to go was bars, and they were rough."

Adjourning to a friend's apartment that night. Dr. Spyer and Ms. Windsor danced until the impromptu party ended, finally "dancing with our coats on, and other people standing at the door, annoyed, waiting for us," Ms. Windsor recalled, adding, "She was smarter than hell, beautiful—and sexy."

Dr. Spyer recalled of Ms. Windsor that night, "We danced so much and so intensely that she danced a hole through her stockings."

It was not until two years later, during a Memorial Day weekend in the Hamptons, that the two women again encountered each other, and both happened to be uninvolved.

"I heard she would be there, and called friends who had a house, and begged them, 'Please can I come out,'" Ms. Windsor said. "Then I waited at a house where I knew she would drop by."

Dr. Spyer, who has become a quadriplegic as a result of advanced multiple sclerosis, said of the weekend, and her time spent with Ms. Windsor: "It was a feeling of complete delight in being with her. I had a real sense of I've *landed* in my life.'" That was 40 years ago.

Dr. Spyer had the help of three aides who traveled with her to Canada to officially marry Ms. Windsor, ending an engagement that began in 1967.

AFFIDAVIT OF SERVICE BY FIRST CLASS MAIL

STATE OF NEW YORK

COUNTY OF NEW YORK

AUSTIN K. WILKINSON, being duly sworn, deposes and says:

1. I am not a party to this action, am over 18 years of age and am employed by Paul, Weiss, Rifkind, Wharton & Garrison LLP, 1285 Avenue of the Americas, New York, New York 10019.

2. On February 2, 2011, I served a true copy of the AMENDED COMPLAINT on the following:

Jean Lin
U.S. Department of Justice
Civil Division
20 Massachusetts Ave., N.W., 7th Fl.
Washington, DC 20530

3. I made such service by personally enclosing a true copy of the aforementioned document in properly addressed prepaid wrapper and depositing it into an official depository under the exclusive custody and care of the United States Postal Service, within the State of New York.

/s/ AUSTIN K. WILKINSON
AUSTIN K. WILKINSON

Sworn to before me this 2nd day of Feb., 2011

ALEX SOUZA
Notary Public

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 10-CV-8435 (BSJ) (JFC) EFC CASE

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Filed: Feb. 25, 2011

NOTICE TO THE COURT BY DEFENDANT UNITED STATES OF AMERICA

Defendant United States of America, by its undersigned counsel, hereby notifies the Court and the parties that the Department of Justice will cease defending the constitutionality of Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, for the reasons explained in the attached letter to the Court from Tony West, Assistant Attorney General for the Civil Division, dated February 24, 2011. The reasons cited in Assistant Attorney General West's letter are further explained in the letter from the Attorney General to The Honorable John A. Boehner, Speaker of the House, dated February 23, 2011, which is attached thereto. The Attorney General has informed Members of Congress of this decision pursuant to 28 U.S.C. § 530D(a)(1)(B)(ii), so that Members who wish to defend Section 3 may pursue that option.

Dated: Feb. 25, 2011

Respectfully submitted,

TONY WEST
Assistant Attorney General

ARTHUR R. GOLDBERG
Assistant Branch Director

/s/ JEAN LIN
JEAN LIN (NY Bar No. 4074530)
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* * * * *

[SEAL OMITTED]

U.S. Department of Justice
Civil Division

Assistant Attorney
General

Washington, DC 20530

Feb. 24, 2011

VIA ECF

Honorable Barbara S. Jones
United States District Judge
United States District Court for the
Southern District of New York
500 Pearl Street
New York, NY 10007-1312

Re: *Windsor v. United States*, Civil Action No. 10-8435 (BSJ)(JCF)

Dear Judge Jones:

The above-referenced action involves the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7. The President and Attorney General have recently made a determination regarding the constitutionality of Section 3. Pursuant to the attached letter, the Attorney General and President have concluded: that heightened scrutiny is the appropriate standard of review for classifications based on sexual orientation; that, consistent with that standard, Section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law; and that the Department will cease its defense of Section 3 in such cases.

Further, as the Attorney General explained in the attached letter, we hereby "notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases." In addition, we "will remain parties to the case and continue to represent the interests of the United States throughout the litigation."

Respectfully submitted,

/s/ TONY WEST
TONY WEST
Assistant Attorney General

* * * * *

[SEAL OMITTED]

Office of the Attorney General
Washington, D.C. 20530

Feb. 23, 2011

The Honorable John A. Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: Defense of Marriage Act

Dear Mr. Speaker:

After careful consideration, including review of a recommendation from me, the President of the United States has made the determination that Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7,[1] as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment. Pursuant to 28 U.S.C. § 530D, I am writing to advise you of the Executive Branch's determination and to inform you of the steps the Department will take in two pending DOMA cases to implement that determination.

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[1] DOMA Section 3 states: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

While the Department has previously defended DOMA against legal challenges involving legally married same-sex couples, recent lawsuits that challenge the constitutionality of DOMA Section 3 have caused the President and the Department to conduct a new examination of the defense of this provision. In particular, in November 2011, plaintiffs filed two new lawsuits challenging the constitutionality of Section 3 of DOMA in jurisdictions without precedent on whether sexual-orientation classifications are subject to rational basis review or whether they must satisfy some form of heightened scrutiny. *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y.); *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn.). Previously, the Administration has defended Section 3 in jurisdictions where circuit courts have already held that classifications based on sexual orientation are subject to rational basis review, and it has advanced arguments to defend DOMA Section 3 under the binding standard that has applied in those cases.[2]

These new lawsuits, by contrast, will require the Department to take an affirmative position on the level of scrutiny that should be applied to DOMA Section 3 in a circuit without binding precedent on the issue. As described more fully below, the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.

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[2] *See, e.g.*, *Dragovich v. U.S. Department of the Treasury*, 2011 WL 175502 (N.D. Cal. Jan. 18, 2011); *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal., 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 145 (Bkrtcy. W.D. Wash. 2004); *In re Levenson*, 587 F.3d 925, 931 (9th Cir. E.D.R. Plan Administrative Ruling 2009).

Standard of Review

The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation. It has, however, rendered a number of decisions that set forth the criteria that should inform this and any other judgment as to whether heightened scrutiny applies: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *See Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985).

Each of these factors counsels in favor of being suspicious of classifications based on sexual orientation. First and most importantly, there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today.

Indeed, until very recently, states have "demean[ed] the[] existence" of gays and lesbians "by making their private sexual conduct a crime." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).[3]

Second, while sexual orientation carries no visible badge, a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable, *see* Richard A. Posner, Sex and Reason 101 (1992); it is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination, *see* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

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[3] While significant, that history of discrimination is different in some respects from the discrimination that burdened African-Americans and women. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216 (1995) (classifications based on race "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States," and "[t]his strong policy renders racial classifications 'constitutionally suspect.'"); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (observing that "'our Nation has had a long and unfortunate history of sex discrimination'" and pointing out the denial of the right to vote to women until 1920). In the case of sexual orientation, some of the discrimination has been based on the incorrect belief that sexual orientation is a behavioral characteristic that can be changed or subject to moral approbation. *Cf. Cleburne*, 473 U.S. at 441 (heightened scrutiny may be warranted for characteristics "beyond the individual's control" and that "very likely reflect outmoded notions of the relative capabilities of" the group at issue); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (Stevens, J., dissenting) ("Unfavorable opinions about homosexuals 'have ancient roots.'" (quoting *Bowers*, 478 U.S. at 192)).

Third, the adoption of laws like those at issue in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence*, the longstanding ban on gays and lesbians in the military, and the absence of federal protection for employment discrimination on the basis of sexual orientation show the group to have limited political power and "ability to attract the [favorable] attention of the lawmakers." *Cleburne*, 473 U.S. at 445. And while the enactment of the Matthew Shepard Act and pending repeal of Don't Ask, Don't Tell indicate that the political process is not closed *entirely* to gay and lesbian people, that is not the standard by which the Court has judged "political powerlessness." Indeed, when the Court ruled that gender-based classifications were subject to heightened scrutiny, women already had won major political victories such as the Nineteenth Amendment (right to vote) and protection under Title VII (employment discrimination).

Finally, there is a growing acknowledgment that sexual orientation "bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). Recent evolutions in legislation (including the pending repeal of Don't Ask, Don't Tell), in community practices and attitudes, in case law (including the Supreme Court's holdings in *Lawrence* and *Romer*), and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives. *See, e.g.*, Statement by the President on the Don't Ask, Don't Tell Repeal Act of 2010 ("It is time to recognize that sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed.")

To be sure, there is substantial circuit court authority applying rational basis review to sexual-orientation classifications. We have carefully examined each of those decisions. Many of them reason only that if consensual same-sex sodomy may be criminalized under *Bowers v. Hardwick*, then it follows that no heightened review is appropriate—a line of reasoning that does not survive the overruling of *Bowers* in *Lawrence v. Texas*, 538 U.S. 558 (2003).[4] Others rely on claims regarding "procreational responsibility" that the Department has disavowed already in litigation as unreasonable, or claims regarding the immutability of sexual orientation that we do not believe can be reconciled with more recent social science understandings.[5] And none engages in an examination of all the factors that the Supreme Court has identified as relevant to a decision about the appropriate level of scrutiny. Finally, many of the more recent decisions have relied on the fact that the Supreme Court has not recognized that gays and lesbians constitute a suspect class or the fact that the Court has applied rational basis review in its most recent decisions addressing classifications based on sexual orientation, *Lawrence* and *Romer*.[6] But neither of those decisions reached, let alone resolved, the level of scrutiny issue because in both the Court concluded that the laws could not even survive the more deferential rational basis standard.

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[4] *See Equality Foundation v. City of Cincinnati*, 54 F.3d 261, 266-67 & n.2. (6th Cir. 1995); *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

[5] *See, e.g., Lofton v. Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (discussing child-rearing rationale); *High Tech Gays v. Defense Indust. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (discussing immutability). As noted, this Administration has already disavowed in litigation the argument that DOMA serves a governmental interest in "responsible procreation and child-rearing." H.R. Rep. No. 104-664, at 13. As the Department has explained in numerous filings, since the enactment of DOMA, many leading medical, psychological, and social welfare organizations have concluded,

Application to Section 3 of DOMA

In reviewing a legislative classification under heightened scrutiny, the government must establish that the classification is "substantially related to an important government objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Under heightened scrutiny, "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *United States v. Virginia*, 518 U.S.

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based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.

[6] *See Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-94 (6th Cir. 1997).

515, 535-36 (1996). "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *Id.* at 533.

In other words, under heightened scrutiny, the United States cannot defend Section 3 by advancing hypothetical rationales, independent of the legislative record, as it has done in circuits where precedent mandates application of rational basis review. Instead, the United States can defend Section 3 only by invoking Congress' actual justifications for the law.

Moreover, the legislative record underlying DOMA's passage contains discussion and debate that undermines any defense under heightened scrutiny. The record contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships—precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.[7] *See*

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[7] *See, e.g.*, H.R. Rep. at 15-16 (judgment [opposing same-sex marriage] entails both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality"); *id.* at 16 (same-sex marriage "legitimates a public union, a legal status that most people feel ought to be illegitimate" and "put[s] a stamp of approval . . . on a union that many people . . . think is immoral"); *id.* at 15 ("Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality"); *id.* (reasons behind heterosexual marriage—procreation and child-rearing—are "in accord with nature and hence have a moral component"); *id.* at 31 (favorably citing the holding in *Bowers* that an "anti-sodomy law served the rational purpose of expressing the presumed belief . . . that homosexual sodomy is immoral and

Cleburne, 473 U.S. at 448 ("mere negative attitudes, or fear" are not permissible bases for discriminatory treatment); *see also Romer*, 517 U.S. at 635 (rejecting rationale that law was supported by "the liberties of landlords or employers who have personal or religious objections to homosexuality"); *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

Application to Second Circuit Cases

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in *Windsor* and *Pedersen*, now pending in the Southern District of New York and the District of Connecticut. I concur in this determination.

Notwithstanding this determination, the President has informed me that Section 3 will continue to be

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unacceptable"); *id.* at 17 n.56 (favorably citing statement in dissenting opinion in *Romer* that "[t]his Court has no business . . . pronouncing that 'animosity' toward homosexuality is evil").

enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.

As you know, the Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense, a practice that accords the respect appropriately due to a coequal branch of government. However, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a "reasonable" one. "[D]ifferent cases can raise very different issues with respect to statutes of doubtful constitutional validity," and thus there are "a variety of factors that bear on whether the Department will defend the constitutionality of a statute." Letter to Hon. Orrin G. Hatch from Assistant Attorney General Andrew Fois at 7 (Mar. 22, 1996). This is the rare case where the proper course is to forgo the defense of this statute. Moreover, the Department has declined to defend a statute "in cases in which it is manifest that the President has concluded that the statute is unconstitutional," as is the case here. Seth

P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1083 (2001).

In light of the foregoing, I will instruct the Department's lawyers to immediately inform the district courts in *Windsor* and *Pedersen* of the Executive Branch's view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law. If asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard. Our attorneys will also notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases. We will remain parties to the case and continue to represent the interests of the United States throughout the litigation.

Furthermore, pursuant to the President's instructions, and upon further notification to Congress, I will instruct Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3.

A motion to dismiss in the *Windsor* and *Pedersen* cases would be due on March 11, 2011. Please do not hesitate to contact us if you have any questions.

Sincerely yours,

/s/ ERIC H. HOLDER, JR.
ERIC H. HOLDER, JR.
Attorney General

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 1:10-cv-8435 (BSJ) (JCF)
ECF Case

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Filed: Apr. 18, 2011

UNOPPOSED MOTION OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES TO INTERVENE FOR A LIMITED PURPOSE

Pursuant to Rule 24(a), (b) of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 530D(b)(2), 2403, and for the reasons set forth in the accompanying Memorandum of Points and Authorities, the Bipartisan Legal Advisory Group of the U.S. House of Representatives (hereinafter "the House") respectfully moves for leave to intervene as a party defendant in this matter for the limited purpose of defending the constitutionality of Section III of the Defense of Marriage Act, Pub. No. L. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7 ("DOMA"), from attack on the ground that it violates the equal protection component of the Fifth Amendment Due Process Clause.[1] The Department of Justice has stated that it will "continue to represent the interests of the United States" in this litigation, Letter from Tony West, Assistant Attorney General, to the Honorable Barbara S. Jones (Feb. 24, 2011), attached to Notice to the Court by Defendant United States of America (Feb. 25, 2011), and we understand that to mean that the Department will take full responsibility for litigating issues other than Section III's constitutionality under the equal protection component of the Due Process Clause.

Counsel for the House has conferred with Roberta A. Kaplan, Esq., counsel for plaintiff, who has (i) advised that plaintiff does not oppose the relief sought by this motion, and (ii) agreed that the House should not be required to file an Answer or other "pleading" in conjunction with this motion. The Department of Justice has also informed us that the United States does not oppose this motion to intervene for purposes of presenting arguments in support of the constitutionality of Section 3 of DOMA, but will be filing a response to explain its position. In addition, the United States agrees that the motion need not be accompanied by a pleading.

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[1] The United States House of Representatives has articulated its institutional position in litigation matters through a five-member bipartisan leadership group since at least the early 1980's (although the formulation of the group's name has changed somewhat over time). Since 1993, the House rules have formally acknowledged and referred to the Bipartisan Legal Advisory Group, as such, in connection with its function of providing direction to the Office of the General Counsel. *See, e.g.*, Rule I.11, Rules of the House of Representatives, 103rd Cong. (1993); Rule II.8, Rules of the House of Representatives, 112th Cong. (2011). While the group seeks consensus whenever possible, it functions on a majoritarian basis, like the institution it represents, when consensus cannot be achieved. The Bipartisan Legal Advisory Group is currently comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. The Democratic Leader and the Democratic Whip decline to support the filing of this motion.

A proposed Order is submitted herewith and oral argument is not requested.

Respectfully submitted,

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[2] King & Spalding LLP has been "specially retained by the Office of General Counsel" of the House to litigate the constitutionality of Section III of DOMA on behalf of the House. Its attorneys are, therefore, "entitled, for the purpose of performing [that] function[], to enter an appearance in any proceeding before any court of the United States . . . without compliance with any requirement for admission to practice before such court. . . . " 2 U.S.C. § 130f(a).

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April 18, 2011

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 1:10-cv-8435 (BSJ) (JCF)
ECF Case

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Filed: Apr. 18, 2011

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNOPPOSED MOTION OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES TO INTERVENE FOR A LIMITED PURPOSE

INTRODUCTION

Plaintiff Edith Schlain Windsor asks this Court to declare "unconstitutional as applied to [her]," under the equal protection component of the Due Process Clause of the Fifth Amendment, Section III of the Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), 1 U.S.C. § 7. *See* Amended Complaint at 21-22 (Feb. 2, 2011). As the Court is aware, ordinarily it is the duty of the executive branch to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and of the Department of Justice in particular, in furtherance of that responsibility, to defend the constitutionality of duly enacted federal laws when they are challenged in court. DOMA, of course, is such a law.

DOMA was enacted by the 104th Congress in 1996. The House and Senate bills which became DOMA passed by votes of 342-67 and 85-14, respectively. *See* 142 Cong. Rec. H7505-06 (July 12, 1996) (House vote on H.R. 3396), *and* 142 Cong. Rec. S10129 (Sept. 10, 1996) (Senate vote on S. 1999). President Clinton signed the bill into law on September 21, 1996. *See* 32 Weekly Comp. Pres. Doc. 1891 (Sept. 21, 1996).

While the Department has repeatedly defended the constitutionality of Section III of DOMA in the intervening years—*see, e.g.*, Corrected Brief for the United States Department of Health and Human Services, *et al.* (Jan. 19, 2011), in *Commonwealth of Massachusetts v. United States Department of Health and Human Services, et al.*, Nos. 10-2204, 10-2207, 10-2214 (1st Cir.) (pending)—the Attorney General announced on February 23, 2011 that the Department would no longer do so. In particular, he announced that the Department would not defend the statute's constitutionality in this case. *See* Letter from Eric H. Holder, Jr., Attorney General, to Kerry Kircher, General Counsel (Feb. 23, 2011), attached as Exhibit 1.[1] At the same time, the Attorney General articulated his intent to "provid[e] Congress a full and fair opportunity to participate in the litigation in [the] cases [at issue]." *Id.* at 5-6.

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[1] In so announcing, the Attorney General acknowledged that (i) *nine* U.S. circuit courts of appeal have rejected his conclusion that sexual orientation classifications are subject to a heightened

In response, the Bipartisan Legal Advisory Group of the U.S. House of Representatives (hereinafter, "the House"), which articulates the institutional position of the United States House of Representatives in litigation matters, formally determined on March 9, 2011 to defend the statute in civil actions in which Section III's constitutionality has been challenged. *See* Press Release, Speaker of the House John Boehner, *House Will Ensure DOMA Constitutionality Is Determined by Courts* (March 9, 2011) ("House General Counsel has been directed to initiate a legal defense of [Section III of DOMA]"), *available online at* http://www.speaker.gov/News/DocumentSingle.aspx?DocumentID=228539. While the House most often appears in judicial proceedings as *amicus curiae*,[2] it also intervenes in judicial proceedings where

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standard of scrutiny under the Equal Protection Clause, *id.* at 3-4 nn.4-6, and (ii) "professionally responsible" arguments can be advanced in defense of the statute. *Id.* at 5 (appearing to draw distinction between arguments deemed to be "reasonable" and those that are merely "professionally responsible").

[2] *See, e.g., Dickerson v. United States*, 530 U.S. 428, 430 n.* (2000); *Raines v. Byrd*, 521 U.S. 811, 818 n.2 (1997); *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 154 (1989); *Morrison v. Olson*, 487 U.S. 654, 659 (1988); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 223 (1986); *Helstoski v. Meanor*, 442 U.S. 500, 501 (1979); *United States v. Helstoski*, 442 U.S. 477, 478 (1979); *United States v. Renzi*, No. 10-10088,

appropriate. *See, e.g., North v. Walsh*, 656 F. Supp. 414, 415 n.1 (D.D.C. 1987); *American Federation of Government Employees v. United States*, 634 F. Supp. 336, 337 (D.D.C. 1986). In particular, the House has intervened to defend the constitutionality of federal statutes when the Department has declined to do so. *See, e.g., INS v. Chadha*, 462 U.S. 919, 930 n.5 (1983); *Adolph Coors Co. v. Brady*, 9[illegible] F.2d 1543, 1545 (10th Cir. 1991); *Synar v. U.S.*, 626 F. Supp. 1374, 1378-79 (D.D.C. 1986), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986); *Ameron, Inc. v. U.S. Army Corp of Engineers*, 607 F. Supp. 962, 963 (D.N.J. 1985), *aff'd*, 809 F.2d 979 (3d Cir. 1986); *Barnes v. Carmen*, 582 F. Supp. 163, 164 (D.D.C. 1984), *rev'd sub nom. Barnes v. Kline*, 759 F.2d 21, 22 (D.C. Cir. 1984), *rev'd on mootness grounds sub nom. Burke v. Barnes*, 479 U.S. 361, 362 (1987); *In re Production Steel, Inc.*, 48 B.R. 841, 842 (Bankr. M.D. Tenn. 1985); *In re Moody*, 46 B.R. 231, 233 (Bankr. M.D.N.C. 1985); *In re Tom Carter Enterprises, Inc.*, 44 B.R. 605, 606 (Bankr. C.D. Cal. 1984); *In re Benny*, 44 B.R. 581, 583 (Bankr. N.D. Cal. 1984), *aff'd in part & dismissed in part*, 791 F.2d 712 (9th Cir. 1986).

10-10122 (9th Cir. argued Feb. 17, 2011); *In re: Grand Jury Subpoenas*, 571 F.3d 1200 (D.C. Cir. 2009); *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 3 (D.C. Cir. 2006) (en banc); *Beverly Enterprises v. Trump*, 182 F.3d 183, 186 (3d Cir. 1999); *United States v. McDade*, 28 F.3d 283, 286 (3d Cir. 1996); *In the Matter of Search of Rayburn House Office Bldg.*, 432 F. Supp. 2d 100, 104-05 (D.D.C. 2006), *rev'd sub nom. United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007).

In light of the Attorney General's February 23, 2011 announcement, we respectfully suggest that the Court allow the House to intervene here for the limited purpose of defending the constitutionality of Section III of DOMA against the argument that it violates the equal protection component of the Fifth Amendment Due Process Clause.

ARGUMENT

I. Intervention by the House Is Appropriate Here Under Rule 24.

Rule 24(a)(1) provides for intervention as of right where the proposed intervener "is given an unconditional right to intervene by a federal statute," while Rule 24(b)(1)(A) provides for permissive intervention where the proposed intervener "is given a conditional right to intervene by a federal statute." A "federal statute," namely, 28 U.S.C. § 2403, clearly contemplates that the federal government will defend the constitutionality of an act of Congress when challenged:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn into question, the court . . . *shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.* The United States shall, subject to the applicable provisions of law, have all the rights of a party and be

> subject to all liability of a party as to the court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Id. § 2403(a) (emphasis added). Here, of course, the United States is a party, but in light of the Justice Department's decision to decline to play the role contemplated by § 2403(a), it makes sense to allow the House to intervene to discharge that function. *See Chadha*, 462 U.S. at 940; *see also* 28 U.S.C. § 530D(b)(2) (specifically contemplating that House and/or Senate may intervene to defend constitutionality of federal statute where Justice Department declines to do so).

Ordinarily the Department not only intervenes under § 2403(a) where appropriate, but also more generally represents the United States in the defense of such challenged statutes. *See* 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General."). However, where, as here, the Department declines to defend a challenged statute, the Supreme Court has held that the legislative branch may, if it wishes, accept that responsibility: "Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." *Chadha*, 462 U.S. at 940 (citing *Cheng Fan Kwok* *v. INS*, 392 U.S. 206, 210 n.9 (1968); *United States v. Lovett*, 328 U.S. 303 (1946)). That is the precise situation at issue here. Moreover, as noted above, numerous other courts have followed *Chadha's* direction and permitted the House to intervene to defend the constitutionality of federal statutes. *See supra* at 3.

Accordingly, whether the Court construes 28 U.S.C. § 2403(a) as vesting the legislative branch with an "unconditional right to intervene," Rule 24(a)(1), or a "conditional right to intervene," Rule 24(b)(1)(A), intervention here by the House to defend the constitutionality of Section III of DOMA is clearly appropriate.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case Action No. 10-cv-8435 (BSJ)(JCF)
ECF Case

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Filed: May 5, 2011

DEFENDANT'S RESPONSE TO THE MOTION TO INTERVENE

Defendant the United States of America, through undersigned counsel, hereby responds to the Motion to Intervene filed by the Bipartisan Legal Advisory Group ("BLAG") of the United States House of Representatives. As the Attorney General previously has stated, the Department of Justice is interested in providing Congress a full and fair opportunity to participate in this and other cases challenging the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7. Consistent with the Attorney General's statement, the United States does not oppose BLAG's Motion to Intervene to present arguments in support of the constitutionality of Section 3 of DOMA.

The Executive Branch, through the Department of Justice, represents the only defendant, the United States, in this litigation, *see* 28 U.S.C. § 516; *see also Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (the conduct of litigation on behalf of the United States falls exclusively within the President's constitutional powers), and only a judgment against the United States can redress plaintiff's alleged injuries. Although the Executive Branch believes that Section 3 of DOMA is subject to heightened constitutional scrutiny and is unconstitutional under that standard, the Executive departments and agencies will continue to comply with Section 3, pursuant to the President's direction, unless and until Section 3 is repealed by Congress or there is a definitive ruling by the Judicial Branch that Section 3 is unconstitutional. Accordingly, there remains a live case or controversy between plaintiff and the United States. *See INS v. Chadha*, 462 U.S. 919, 930 (1983). Although Congress's interest in the constitutional validity of a law does not confer standing to enter an action as a party any more than citizens with a generalized grievance would have standing to do so, *see Valley Forge Christian College v. Americans United for Separation for Church and State, Inc.*, 454 U.S. 464, 482-83 (1982); *Newdow v. U.S. Congress*, 313 F.3d 495, 499-500 (9th Cir. 2002), the Executive Branch's continuing role in the litigation, as described further below, ensures the continuing existence of a justiciable case or controversy and makes it unnecessary for BLAG to have an independent basis for standing in order to participate in the litigation to present arguments in support of the constitutionality of Section 3.1.[1] Accordingly, the United States has attached a proposed order permitting BLAG's intervention, consistent with the Executive Branch's role in this case.

To fulfill the Attorney General's commitment to provide Congress a full and fair opportunity to participate in the litigation, the United States will take the procedural steps necessary to enable BLAG to present arguments in support of the constitutionality of Section 3. The United States intends to file appropriate motions, purely as a procedural matter, to ensure that this Court can consider arguments on both sides of the constitutional issue and that the Court has jurisdiction to enter judgment on the basis of those arguments. This approach is consistent with what the Department of Justice has done in prior cases in which the Executive Branch has taken the position that an Act of Congress is unconstitutional but announced its intention to enforce or comply with the law pending a final judicial determination of the constitutional issue: the cases proceeded, Congress or the Senate or the House of Representatives filed briefs supporting the constitutionality of the statute, and when the lower courts agreed with the Department of Justice's position that the statute was unconstitutional, the Department took appropriate steps to invoke the jurisdiction of the Supreme Court in order to provide an opportunity for that Court's full consideration of the constitutional question. *See, e.g., Chadha*, 462 U.S at 928, 930-93 (Solicitor General filed an appeal from the Court of Appeals' decision); *United States v. Lovett*, 328 U.S. 303, 306-307 (1946) (Solicitor General filed a petition for a writ of certiorari).

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[1] As explained above, the United States is the party defendant in this suit and the Attorney General represents the United States. Section 2403 of Title 28, cited in BLAG's memorandum (at 4-5), is thus inapplicable as a basis for BLAG's intervention. Section 2403(a) provides for certification "to the Attorney General" when an Act of Congress is challenged in a suit to which the United States is not already a party, and provides for intervention by the "United States," which is represented by the Department of Justice. The United States agrees, however, that BLAG's intervention for purposes of presenting arguments in support of the constitutionality of Section 3 is both appropriate and consistent with past practice.

Dated: May 5, 2011

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 1:10-CV-8435 (BSJ) (JCF)

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: May 5, 2011

REPLY OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES TO DEFENDANT'S RESPONSE TO THE MOTION TO INTERVENE

As the Court is aware, the Attorney General announced on February 23, 2011, that the Department of Justice (the "Department") would cease defending—including in this case—the constitutionality of Section III of the Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419 (1996), 1 U.S.C. § 7, against attacks that DOMA violates the equal protection component of the Fifth Amendment. In so announcing, the Attorney General expressly articulated his intent to "provid[e] Congress a *full and fair* opportunity to participate in the litigation in [the] cases [at issue]." Doc. 13-1, Letter from Eric H. Holder, Jr., Att'y Gen., to Hon. John A. Boehner, Speaker, U.S. House of Representatives at 5-6 (Feb. 23, 2011) (emphasis added).

On March 9, 2011, the Bipartisan Legal Advisory Group of the U.S. House of Representatives (the "House") determined to defend the statute and, taking the Attorney General at his word, moved to intervene as a party defendant because that is the only way for the House "fully and fairly" to participate in this litigation. *See* Doc. 13, Mem. of P. & A. in Supp. of Unopposed Mot. of . . . House . . . to Intervene for Limited Purpose (Apr. 18, 2011).

On May 5, 2011, the Department responded. *See* Def.'s Resp. to Mot. to Intervene (May 5, 2011) ("Response"). Notwithstanding its continued professions of non-opposition—"the United States does not oppose [the House's] Motion to Intervene," *id.* at 1—the Department now seeks effectively to reduce the House to the status of *amicus curiae* by questioning the House's standing to intervene, *id.* at 2, by proposing to limit the House to "present[ing] arguments," *id.*, and by asserting a right to act as gatekeeper for the House's efforts to defend a validly enacted statute that the Department itself refuses to defend, *id.* at 2-3.

The Court should reject the Department's attempt to control the manner in which the House defends DOMA, including its implied assertion of authority unilaterally to preclude judicial determination of the constitutionality of legislation. Where, as here, the Department refuses to carry out its constitutional responsibility to defend a duly enacted Federal statute, Congress is empowered to intervene, without restriction, to defend the statute in order to enable the judiciary, *and not the executive*, to make the ultimate determination of the statute's constitutionality: "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." *INS v. Chadha*, 462 U.S. 919, 940 (1983).

* * *

1. The Department's Response begins with the misplaced premise that the House lacks standing to serve as a party in this litigation. *See* Resp. at 2 ("Congress's interest in the constitutional validity of a law does not confer standing to enter an action as a party any more than citizens with a generalized grievance would have standing to do so."). As an initial matter, this argument is beside the point. As long as the United States is a defendant in this action (and the United States will remain a defendant, regardless of the role that the Department chooses to play or not play in this litigation, until it is dismissed or the case concludes, neither of which has occurred), the House need not demonstrate any standing whatever. *See, e.g., U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) ("The question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to cases and controversies. The existence of a case or controversy having been established as between the [existing parties],

there was no need to impose the standing requirement upon the proposed intervenor [defendant]." (quotation marks, citations, and brackets omitted)); *Hoblock v. Albany Cnty. Bd. of Elections*, 233 F.R.D. 95, 97 (N.D.N.Y. 2005) ("[T]here is no Article III standing requirement in the Second Circuit, with an intervenor only needing to meet the Rule 24(a) requirements and have an interest in the litigation, if there is already a case or controversy in existence between the original parties to [the] litigation who have standing.").[1]

As a result, neither of the cases cited by the Department is apposite. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 482-83 (1982), stands only for the unremarkable proposition that status as a U.S. citizen and/or taxpayer does not alone confer standing to challenge government action (or inaction). And in *Newdow v. U.S. Congress*, 313 F.3d 495 (9th Cir. 2002), the Ninth Circuit (not the Second Circuit) denied the Senate's request to intervene in an Establishment Clause case that challenged, among other things, a federal statute inserting the words "under God" into the Pledge of Allegiance, where (i) the Senate sought to intervene pursuant to a statute that specifically limited Senate intervention to cases "in which the powers and responsibilities of Congress under the Constitution . . . are placed in issue" and required that the Senate's Article III standing be shown to exist, 2 U.S.C. § 288e(a); and (ii) most importantly, the Department actively was defending the constitutionality of the statute in the litigation. In so holding, the Ninth Circuit distinguished a number of cases in which, unlike in *Newdow* (but exactly like here), a congressional body successfully intervened to defend the constitutionality of a statute that the Department had refused to defend. 313 F.3d at 498. Accordingly, neither case supports the Department's suggestion that the House lacks standing here, even if standing were required.

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[1] *See also, e.g.*, *San Juan Cnty., Utah v. U.S.*, 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc) (Article III standing not required for defendant intervention where ongoing case or controversy); *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998) (same).

In any event, although the Court need not reach this issue, it is clear from *Chadha* that the House indeed does have standing. In *Chadha*, a private party challenged the constitutionality of a federal statute that the Department declined to defend. Following an appellate ruling on behalf of the plaintiff, the House and Senate moved to intervene for the purpose of filing a petition for certiorari. *See* 462 U.S. at 930 n.5. The appellate court granted that motion, and the Supreme Court granted the subsequent House and Senate petitions for certiorari, holding (over the Department's suggestion otherwise) that "Congress is both a proper party to defend the constitutionality of [the statute] and a proper petitioner under [the statute governing petitions for writs of certiorari]." *Id.* at 939; *see also* Dep't Resp. to House & Senate Pets. for Cert., *U.S. House of Representatives v. INS*, at *4 (Aug. 28, 1981) (Nos. 80-2170 & 80-2171), 1981 U.S. S. Ct. Briefs LEXIS 1423. In so holding, the Court made crystal clear that the House and Senate

* * * * *

intervene without, at the same time, trying to hamstring the House, what are the chances that the Department will get out of the way when it comes time for the House to make substantive litigation decisions?

The answer is that the Court should decline the Department's invitation to create conditions that would strain relations between the legislative and executive branches of the government, and interfere with the orderly consideration by the judiciary of DOMA's constitutionality, by granting the House's motion to intervene as a full party defendant.[2]

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[2] Notably, this Court on May 11, 2011, issued a Revised Scheduling Order, which the Department did not oppose, that is inconsistent with the view that the House is a mere *amicus curiae* in this case. *See* Doc. 22, Revised Scheduling Order. For example, that order requires the House to make initial disclosures under Federal Rule of Civil Procedure 26, which *amici* are not required to do, and likewise allows the House to proffer expert witnesses, move to dismiss, and oppose plaintiff's motion for summary judgment. The Revised Scheduling Order cannot be reconciled with the *amicus curiae* status that the Department envisions for the House.

CONCLUSION

For all the reasons stated above and in its motion to intervene, the House respectfully requests that the Court grant its motion to intervene as a party defendant and enter its proposed Order (Doc. 12-1).[3]

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[3] Initially, the House moved to intervene only pursuant to Federal Rule of Civil Procedure 24(a)(1) and/or (b)(1)(A) because it understood that the motion was unopposed. In light of the Department's questioning now of the House's right to intervene under those provisions, the House is constrained to point out that intervention also is appropriate here under Rule 24(a)(2). Under the law of this Circuit: "Rule 24(a), intervention of right, requires that the proposed intervenor '(1) file a timely motion; (2) show an interest in the litigation; (3) show that its interest may be impaired by the disposition of the action; and (4) show that its interest is not adequately protected by the parties to the action.'" *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001) (quoting *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 197 (2d Cir. 2000)). The House plainly satisfies each of those requirements here.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No.: 10 Civ 8435 (BSJ) (JCF)

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: June 2, 2011

MEMORANDUM AND ORDER

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Plaintiff Edith Schlain Windsor brings this action challenging the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7. The Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") has filed a motion to intervene as a party defendant pursuant to Rule 24 of the Federal Rules of Civil Procedure. For the reasons that follow, the motion is granted.

Background

Ms. Windsor and Thea Clara Spyer were married in 2007 following a 40-year engagement. (Amended Complaint ("Am. Compl."), ¶¶ 2, 3, 26). In 2009, Ms.

Spyer passed away. (Am. Compl., ¶ 51). Although their marriage was recognized by New York State, DOMA prevented the federal government, and, in particular, the Internal Revenue Service ("IRS"), from treating them as a married couple. (Am. Compl., ¶¶ 42-45, 60-61). As a result, Ms. Spyer's estate was required to pay $363,053 in federal tax that would have been waived by the estate tax marital deduction had the IRS recognized their marriage. (Am. Compl., ¶¶ 62, 72-75, 78). Ms. Windsor, the executor of Ms. Spyer's estate, filed a Claim for Refund with the IRS, seeking return of the $363,053; her request was denied on the ground that DOMA restricts the definition of "spouse" to "a person of the opposite sex."[1] (Am. Compl., ¶¶ 76-77).

Ms. Windsor filed this action on November 9, 2010, arguing that the IRS's refusal to apply the estate tax marital deduction to her wife's estate—and by extension DOMA itself—discriminated against her on the basis of her sexual orientation in violation of the equal protection clause of the Fifth Amendment to the United States Constitution. (Am. Compl., ¶¶ 84-85).

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[1] Section 3 of DOMA provides that

> [i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7.

The Department of Justice (the "DOJ") appeared on behalf of the defendant, the United States of America, and an amended complaint was filed on February 2, 2011. Soon thereafter, however, the Department of Justice gave notice to the plaintiff and this Court that it would "cease defending the constitutionality" of Section 3 of DOMA because

> the Attorney General and President have concluded: that heightened scrutiny is the appropriate standard of review for classifications based on sexual orientation; [and] that, consistent with that standard, Section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law . . . .

(Notice to the Court by Defendant United States of America dated Feb. 25, 2011 ("2/25/11 Notice") at 1 & Exh. 1).

The DOJ also notified Representative John A. Boehner, Speaker of the United States House of Representatives (the "House"), of its change in position and expressed its "interest in providing Congress a full and fair opportunity to participate in [this] litigation" while still "remain[ing] parties to the case and continu[ing] to represent the interests of the United States throughout the litigation." (Letter of Eric H. Holder, Jr., dated Feb. 23, 2011, attached as Exh. 2 to 2/25/11 Notice, at 5-6). On March 9, 2011, BLAG decided to seek approval to intervene in this litigation to defend the constitutionality of Section 3 of DOMA. (Memorandum of Points and Authorities in Support of the Unopposed Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives to Intervene for a Limited Purpose ("BLAG Memo.") at 2). Neither the plaintiff nor the DOJ opposes BLAG's intervention; however, the DOJ asks that BLAG's involvement be limited to making substantive arguments in defense of Section 3 of DOMA while the DOJ continues to file all procedural notices. (Defendant's Response to the Motion to Intervene ("DOJ Opp. Memo.")). BLAG does not acquiesce in this request, which it contends would relegate it to the status of amicus curiae. (Reply of the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG Reply Memo.") at 2, 6-9).

Discussion

A. Intervention

BLAG seeks intervention pursuant to Rule 24 of the Federal Rules of Civil Procedure, which states in relevant part:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> > (1) is given an unconditional right to intervene by a federal statute; or
> >
> > (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

> (1) In General. On timely motion, the court may permit anyone to intervene who:
>
> > (A) is given a conditional right to intervene by a federal statute. . . .

BLAG first argues that its intervention is appropriate pursuant to subsection (a)(1), or, in the alternative, subsection (b)(1)(A), because it is authorized by 28 U.S.C. § 2403(a). (BLAG Memo. at 4-5). However, that statute only authorizes "the United States to intervene" in an action where "the United States or any agency, officer or employee thereof is *not* a party." 28 U.S.C. § 2403(a) (emphasis added). Here, the United States of America is already a party to the litigation, and thus the statute does not authorize BLAG's intervention, either permissively or as of right.[2]

BLAG also seeks to intervene pursuant to subsection (a)(2) of Rule 24 of the Federal Rules of Civil Procedure. (BLAG Reply Memo. at 9 n.3). Such intervention is appropriate where:

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[2] Although there is a statute that contemplates intervention by the Senate in defense of the constitutionality of statutes, *see* 2 U.S.C. §§ 288a-288n, and federal law requires the Attorney General to notify both houses of Congress when it intends not to defend the constitutionality of any statute, *see* 28 U.S.C. § 530D, there is no statute explicitly authorizing intervention by the House (or any subgroup or representative thereof) to defend the constitutionality of a statute.

> "(1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties."

United States v. New York State Board of Elections, 312 Fed. Appx. 353, 354 (2d Cir. 2008) (quoting *MasterCard International Inc. v. Visa International Service Association, Inc.*, 471 F.3d 377, 389 (2d Cir. 2006)). Although failure to satisfy any of these requirements justifies denial of the motion, courts apply them in a "'flexible and discretionary'" way, considering "'all four factors as a whole rather than focusing narrowly on any one of the criteria.'" *Cole Mechanical Corp. v. National Grange Mutual Insurance Co.*, No. 06 Civ. 2875, 2007 WL 2593000, at *2 (S.D.N.Y. Sept. 7, 2007) (quoting *Tachiona ex rel. Tachiona v. Mugabe*, 186 F. Supp. 2d 383, 394 (S.D.N.Y. 2002) ("*Tachiona I*")).

BLAG has fulfilled all four prerequisites. First, the DOJ does not dispute that this motion is timely, and there is no evidence of delay in its filing. *See id.* at *4 (finding motion to intervene timely absent excessive delay or prejudice to existing parties). Second, BLAG has a cognizable interest in defending the enforceability of statutes the House has passed when the President declines to enforce them. *See Barnes v. Kline*, 759 F.2d 21, 23 n.3 (D.C. Cir. 1985) (noting district court allowed BLAG's intervention pursuant to Rule 24(a)(2) to challenge presidential "pocket veto" of legislation passed by House), *vacated on other grounds sub nom. Burke v. Barnes*, 479 U.S. 361 (1987). In recognition of this interest, courts have permitted Congress to intervene as a full party in numerous cases where the Executive Branch declines to enforce a statute that is alleged to be unconstitutional, although they have often neglected to explain their rationale for doing so. *See, e.g., Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1546 (10th Cir. 1991); *Lear Siegler, Inc., Energy Products Division v. Lehman*, 893 F.2d 205, 206 (9th Cir. 1989); *In re Benny*, 812 F.2d 1133, 1135 (9th Cir. 1987); *Ameron, Inc. v. United States Army Corps of Engineers*, 787 F.2d 875, 888 (3d Cir. 1986); *Matter of Koerner*, 800 F.2d 1358, 1360 (5th Cir. 1986). Third, BLAG may be unable to advance its arguments regarding the constitutionality of Section 3 of DOMA in any forum should it be denied intervention here and should the statute subsequently be declared unconstitutional in the course of this litigation. Finally, BLAG's interests are not currently being adequately represented in this action, particularly in light of the "'minimal'" burden for demonstrating inadequacy of representation. *New York State Board of Elections*, 312 Fed. Appx. at 354 (quoting *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001)); *see also Brennan v. New York City Board of Education*, 260 F.3d 123, 132-33 (2d Cir. 2001) ("The test [] is not whether [the defendant] did well on behalf of [the intervenors] . . . but whether the [defendant]'s interests were so similar to those of [the intervenors] that adequacy of representation was assured."). The DOJ has made clear that it will not defend the constitutionality of Section 3 of DOMA in any way, while such a defense is precisely what BLAG wishes to undertake here. Therefore, intervention pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure is justified.

The DOJ asks that BLAG be permitted to appear in this action only for the limited purpose of "present[ing] arguments in support of the constitutionality of Section 3" of DOMA, while the DOJ would continue to file all procedural motions, including notices of appeal and petitions for certiorari, that are necessary "to ensure that this Court can consider arguments on both sides of the constitutional issue." (DOJ Opp. Memo. at 2-3). As established above, however, BLAG is entitled to intervene in this action as a party defendant, which enables it to make such procedural motions on its own. *See INS v. Chadha*, 462 U.S. 919, 930 n.5, 939 (1983) (finding House to be "proper petitioner" for certiorari following its intervention to defend constitutionality of statute that executive agency had declined to defend). Furthermore, there is no clear precedent for the DOJ's requested protocol. The DOJ cites two cases to support its contention that "[t]his approach is consistent with what the [DOJ] has done in prior cases in which the Executive Branch has taken the position that an Act of Congress is unconstitutional but announced its intention to enforce or comply with the law pending a final judicial determination . . . ." (DOJ Opp. Memo. at 2-3). However, in the first of these, the Houses of Congress were plainly also parties to the litigation with authority to petition for review if desired. *Chadha*, 462 U.S. at 930-31 nn. 5, 6. In the second, a case from 1946, the procedural necessity of the Solicitor General's filing the petition for certiorari review is never discussed or made explicit. *United States v. Lovett*, 328 U.S. 303, 305-07 (1946). The DOJ continues to represent a party to the present litigation and may certainly file any petitions or appeals that it chooses. However, there is no good precedent for preventing BLAG from intervening as a full party. Therefore, the DOJ's request that BLAG's participation be circumscribed is denied.

B. Standing

The DOJ's desire to remain the sole defendant for procedural purposes appears premised on the contention that BLAG does not have standing to intervene in this action as a party "any more than citizens with a generalized grievance would have standing to do so" because "Congress's interest in the constitutional validity of a law does not confer standing." (DOJ Opp. Memo. at 2). This characterization is incorrect. The Second Circuit does not require intervenors to establish independent Article III standing as long as there is an ongoing case or controversy between the existing parties to the litigation. *See United States Postal Service v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) ("The existence of a case or controversy having been established as between the [named parties], there was no need to impose the standing requirement upon the proposed intervenor."); 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1908 (3d ed. 2007); *see also*

Chadha, 462 U.S. at 939 ("Congress is . . . a proper party to defend the constitutionality of [the challenged statute]."); *Ameron*, 787 F.2d at 888 n.8 ("However, the parties agree, and we concur, that Congress has standing to intervene whenever the executive declines to defend a statute or, as in this case, actually argues that it is unconstitutional."); *cf. Tachiona v. United States*, 386 F.3d 205, 211 (2d Cir. 2004) (requiring intervenor to demonstrate standing where intervention was solely for purpose of appeal and losing party did not join appeal (citing *Diamond v. Charles*, 476 U.S. 54, 68 (1986))). Therefore, BLAG has standing to intervene in this litigation to defend the constitutionality of Section 3 of DOMA.

C. Pleading Requirements

Rule 24(c) of the Federal Rules of Civil Procedure requires all intervenors to submit a pleading setting out "the claim or defense for which intervention is sought." "Where, however, the position of the movant is apparent from other filings and where the opposing party will not be prejudiced, Rule 24(c) permits a degree of flexibility with technical requirements." *Tachiona I*, 186 F. Supp. 2d at 393 n.8; *see also Official Committee of Asbestos Claimants of G-I Holding, Inc. v. Heyman*, No. 01 Civ. 8539, 2003 WL 22790916, at *4 (S.D.N.Y. Nov. 25, 2003) (allowing intervenor to adopt "claims already asserted" by plaintiff where no prejudice would be caused to either party).

BLAG asks this Court to waive its obligation to file an answer, arguing that its motion to intervene is sufficient to put the plaintiff on notice of its intent to "defend[] Section [3 of DOMA] on equal protection grounds." (BLAG Memo. at 7). The DOJ does not oppose this request. (BLAG Memo. at 7; DOJ Opp. Memo.). Waiver of the pleading requirement is justified here because BLAG's position on the subject matter of the litigation is clearly articulated in its motion papers. Furthermore, the plaintiff appears to have waived the DOJ's obligation to file an answer, and the parties are preparing to make cross-motions for summary judgment. (Revised Scheduling Order dated May 11, 2011). Therefore, BLAG is not required to file an answer at this time.

Conclusion

For the reasons set forth above, BLAG's motion to intervene as a party defendant (Docket No. 12) is granted.

SO ORDERED.

/s/ JAMES C. FRANCIS IV
JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE
JUDGE

Dated: New York, New York
June 2, 2011

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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10 CIV. 8435 (BSJ) (JFC)
EFC CASE

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: June 24, 2011

AFFIDAVIT OF EDITH SCHLAIN WINDSOR

Edith Schlain Windsor declares under penalty of perjury, pursuant to 28 U.S.C.§ 1746, as follows:

1. I am the Plaintiff in this action seeking a refund of the federal estate tax levied on and paid by the estate of Thea Clara Spyer ("Thea"). I am the sole executor of Thea's estate.

2. I was born on June 20, 1929, in Philadelphia, Pennsylvania. My parents struggled for financial security during the Great Depression, and my family lost our home when I was a child.

3. I received a bachelor's degree from Temple University in 1950.

4. In the early 1950s, I moved to New York City from Philadelphia. Shortly after arriving in New York, I decided to pursue graduate studies in mathematics. I obtained a master's degree in mathematics from New York University in 1957. I then joined International Business Machines Corp. ("IBM"), where I worked for sixteen years in senior technical and management positions related to systems architecture and implementation of operating systems and language processors. During my time at IBM, I spent two semesters studying applied mathematics at Harvard University on an IBM fellowship. In May 1968, I attained the title of Senior Systems Programmer, the highest technical position at IBM.

5. I met Thea in New York City in 1963 at Portofino, a restaurant in Greenwich Village, where it was comfortable for a lesbian clientele to go on Friday evenings. I was working long hours at my job and decided to call an old friend and ask her to take me "to where the lesbians go." At the restaurant, I was introduced to Thea. Although Thea and I were each there with other people, we danced together all night. In fact, by the end of the evening, I had danced a hole through the bottom of one of my stockings.

6. After that first night dancing together, Thea and I occasionally saw each other at parties over the next two years. At these parties, we would start dancing, and our respective dates would stand frustrated on the side of the dance floor with their coats on, waiting for us to separate.

7. We did not forget about each other—that first night made a deep impression on us both. Some two years later, in the late spring of 1965, I learned through mutual acquaintances that Thea would be spending Memorial Day weekend on the East End of Long Island. Eager to see Thea again, I asked some friends with a nearby house to let me stay with them for the weekend. After I arrived at the house, I declined to go out with my friends that Friday night so I could wait for Thea to arrive.

8. When my friends returned home later that evening, they told me that Thea was delayed at work in New York City and was not expected until the next day. Nervous but excited, I reconnected with Thea when she arrived that Saturday afternoon. As it turned out, there was nothing to be nervous about.

9. When Thea asked me that weekend what I wanted from her, my response was simple: "Not much. I'd like to date for a year. And if that goes the way it is now, I think I'd like to be engaged, say for a year. And if it still feels this goofy joyous, I'd like us to spend the rest of our lives together." And we did.

10. Two years later, Thea asked me to marry her, even though no state in the United States afforded legal recognition to same-sex couples, much less marriage rights, at that time. Thea feared that if I wore an engagement ring to work, my sexual orientation might be disclosed to my colleagues at my job at IBM, so she proposed to me with a circular diamond pin

instead. With this brooch symbolizing our commitment, we began our very long engagement in 1967.

11. Our choice not to wear traditional engagement rings was just one of many ways in which Thea and I had to mold our lives to make our relationship invisible. We both faced pressures not only in the workplace and in society at large, but also from family and friends. Like countless other same-sex couples, we engaged in a constant struggle to balance our love for one another and our desire to live openly and with dignity, on the one hand, with our fear of disapproval and discrimination from others, on the other.

12. Our relationship blossomed rapidly. We moved into an apartment in Greenwich Village together six months after getting engaged.

13. In 1968, Thea and I bought a small house together on Long Island. It was just big enough for us to shower off the sand from the beach and change into clothes for dancing. In that home, we spent the next forty summers, and it was the site of some of our happiest memories together.

14. During our decades together, Thea and I lived a life full of joy and passion. We enjoyed travel and often took trips both in the United States and abroad. We also loved to entertain frequently, and Thea, an accomplished cook, would prepare elaborate meals for our friends on holidays and at other times, including annual celebrations of our anniversary every Memorial Day weekend. We grew closer together as a couple, and we independently thrived professionally and personally.

15. Twelve years into our relationship, Thea and I were confronted with what became the most serious challenge of our lives. In 1977, at the age of forty-five, Thea was first diagnosed with Progressive Multiple Sclerosis, or MS, a chronic disease of the central nervous system that causes gradually worsening and irreversible neurological damage and paralysis.

16. Despite the difficulties we faced following the diagnosis, we refused to give up on the life we had built together. Thea reinvented herself with each year of her increasing physical disability, working to maintain a life that was active and joyous. I committed myself to ensuring that our lives remained full of the passion they had felt when we first met. We even modified our dancing style, with Thea balancing herself on two canes to get to the dance floor and then dropping them to dance to the latest disco hit.

17. Thea's MS caused a gradual, but ever-increasing paralysis. I nursed, encouraged and supported her as her disability grew ever more severe—first requiring a cane, then crutches, then a manual wheelchair, then a motorized wheelchair that Thea could operate with her remaining usable hand.

18. When Thea could no longer swim, we installed special equipment to help her enter, exit and float in the pool at our Long Island house so that Thea could exercise and enjoy herself in the water, with my assistance.

19. When Thea started using a wheelchair, we adopted a new style of dancing. I would sit on Thea's

lap as she maneuvered her wheelchair across the dance floor.

20. Despite Thea's illness, our love and commitment for one another never wavered. And as the years passed, we never gave up on our dream of getting married.

21. In 1993, twenty-eight years into our relationship and sixteen years after Thea's diagnosis. New York City first began registering domestic partnerships between same-sex couples.

22. I told Thea that I wanted us to be one of the first couples to register as domestic partners in New York City. Thea, ever-dedicated to her private practice as a psychologist, told me that we would have to wait to register as domestic partners because she had appointments with patients all day long. I responded, "I have waited almost twenty-eight years for this day, and I am not waiting a single day more!" Fortunately, Thea agreed, cleared her schedule for the day, and bought me flowers before we proudly became registered as domestic partners in New York City—we were issued certificate number eighty.

23. Notwithstanding our excitement, we both saw the limited rights and benefits afforded by domestic partnership as no substitute for the institution of marriage.

24. In 2002, Thea suffered a heart attack and was diagnosed with another serious medical condition, aortic stenosis, the narrowing of the aortic valve of the heart. Because of the near complete paralysis that

had resulted from her MS, Thea was not willing to undergo the lengthy hospitalization that would have resulted from surgery to fix the valve. Without the surgery, the doctors told us that Thea did not have long to live.

25. Although we had always hoped to marry in our home state of New York, Thea's worsening condition was a constant and grave reminder that we were running out of time. Sometime after celebrating our fortieth anniversary together as a committed couple, Thea's doctor told her that she had less than a year to live. We decided we could not wait for the law in New York to finally recognize the reality of our relationship. We decided to seek civil marriage rights where we could get them.

26. With six friends, including one who was a physician, Thea, then seventy-five, and I, then seventy-seven, traveled to Toronto, Canada, where we were legally married on May 22, 2007.

27. A copy of our marriage license is attached hereto as **Exhibit A**, and a copy of our marriage certificate is attached hereto as **Exhibit B**. A copy of our wedding announcement, which was published in the *New York Times*, is attached as **Exhibit C**.

28. Thea and I were able to spend two years as a married couple before Thea succumbed to complications from her heart condition on February 5, 2009 and died. A copy of Thea's Death Certificate is attached hereto as **Exhibit D**.

29. After Thea's passing, I was hospitalized. I learned that I was suffering from stress cardiomyopathy, an ailment commonly known as "broken heart syndrome." Complications occurred in the hospital, resulting in "total heart stoppage," insertion of an implantable cardioverter-defibrillator (ICD), and serious, irreversible damage to my heart.

30. Thea's Last Will and Testament, dated September 7, 2004, was admitted to probate by the Surrogate's Court of New York County (Index No. 2009-1162), and I was appointed as executor of Thea's estate on April 24, 2009. A copy of Thea's Last Will and Testament is attached hereto as **Exhibit E**. A copy of the Letters Testamentary appointing me as executor of Thea's estate is attached hereto as **Exhibit F**.

31. In accordance with Article Third of Thea's Last Will and Testament, her executor is directed to distribute her entire estate to the TCS Revocable Trust created by Thea. A copy of the TCS Revocable Trust is attached hereto as **Exhibit G**.

32. In accordance with Article III of the trust agreement creating the TCS Revocable Trust, because I survived Thea, the trustees were directed to distribute the remaining trust property, after the payment of taxes and administration expenses, to the trustees of the ESW Revocable Trust created by me. I am a trustee and the sole beneficiary of the ESW Revocable Trust during my life, and I have the power, exercisable by me alone, to invade the trust property and to revoke the trust agreement in its entirety at

any time. A copy of the ESW Revocable Trust is attached hereto as **Exhibit H.**

33. Because Thea's estate slightly exceeded the applicable exclusion amount set forth in 26 U.S.C. § 2010(c), Thea's estate was subject to federal estate tax.

34. As executor of Thea's estate, I filed an Application for Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes (Form 4768) with the IRS on October 28, 2009. A copy of Form 4768 is attached hereto as **Exhibit I.**

35. On November 5, 2009, in my capacity as executor of Thea's estate, I made an advance payment of the estate's federal estate tax to the U.S. Treasury in the amount of $520,000.00.

36. On January 28, 2010, in my capacity as executor of Thea's estate, I filed a United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706) with the IRS, which showed that $363,053.00 was due in federal estate tax, $156,947.00 less than the advance payment made in November 2009. A copy of Form 706 (without attachments) is attached hereto as **Exhibit J.**

37. On Schedule M (Bequests, etc., to Surviving Spouse) of the estate's United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706) I, as executor of Thea's estate, explained that, although Thea and I were married at the time of her death and her entire estate passed for my benefit, the estate was not claiming the marital deduction author-

ized by 26 U.S.C. § 2056(a) because of the operation of the Defense of Marriage Act, or DOMA.

38. In March, 2010, the U.S. Treasury issued a refund to the estate in the amount of $156,947.00, representing the overpayment of federal estate tax by the estate in November 2009.

39. In my capacity as executor of Thea's estate, I filed a Claim for Refund and Request for Abatement (Form 843) and a Disclosure Statement (Form 8275) with the IRS on April 7, 2010, stating that Thea and I were lawfully married in Toronto, that New York State recognizes that marriage under local law, that DOMA unconstitutionally discriminates on the basis of sexual orientation, and, as a result, that Thea's estate is entitled to the marital deduction and to a refund in the amount of $363,053.00. In the Disclosure Statement, I, in my capacity as executor of Thea's estate, explained that DOMA is unconstitutional. A copy of Form 843 and Form 8275 filed therewith are attached hereto as **Exhibit K.**

40. On May 26, 2010, the IRS notified me, in my capacity as executor of Thea's estate, that it disallowed the estate's claim for a refund on the grounds that "[s]ince both spouses were women and since under DOMA '. . . the words [sic] "spouse" refers only to a person of the opposite sex who is a husband or a wife'. Section 2056 is inapplicable because the surviving spouse is not a spouse as defined by DOMA." A copy of the letter from the IRS dated May 26, 2010 disallowing the estate's claim for a refund is attached hereto as **Exhibit L.**

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed at New York, New York on this 23rd day of June 2011:

/s/ EDITH S. WINDSOR
EDITH SCHLAIN WINDSOR

EXHIBIT K

Form **843**
(Rev. February 2009)
Department of the Treasury
Internal Revenue Service

Claim [illegible]r Refund and Request for A[illegible]ement

▶ See separate instructions.

OMB No. 1545-0024

Use Form 843 if your claim or request involves:

- (a) a refund of one of the taxes (other than income taxes and an employer's claim for FICA tax, RRTA tax, or income tax withholding), shown on line 3,
- (b) an abatement of FUTA tax or certain excise taxes, or
- (c) a refund or abatement of interest, penalties, or additions to tax for one of the reasons shown on line 5a.

Do not use Form 843 if your claim or request involves:

- (a) an overpayment of income taxes or an employer's claim for FICA tax, RRTA tax, or income tax withholding (use the appropriate amended tax return),
- (b) a refund of excise taxes based on the nontaxable use or sale of fuels, or
- (c) an overpayment of excise taxes reported on Form(s) 11-C, 720, 730, or 2290.

Name(s) Edith S. Windsor, Executor of the Estate of Thea C. Spyer	Your social security number Redacted.
Address (number, street, and room or suite no.) Redacted	Spouse's social security number
City or town, state, and ZIP code New York, New York 10011	Employer identification number (EIN) Decedent's ss Redacted
Name and address shown on return if different from above	Daytime telephone number Redacted
1 Period. Prepare a separate Form 843 for each tax period From to	2 Amount to be refunded or abated $ 363,053

3 Type of tax. Indicate the type of tax to be refunded or abated or to which the interest, penalty, or addition to tax is related.
☐ Employment ☒ Estate ☐ Gift ☐ Excise ☐ Income

4 Type of penalty. If the claim or request involves a penalty, enter the Internal Revenue Code section on which the penalty is based (see instructions). IRC section:

5a Interest, penalties, and additions to tax. Check the box that indicates your reason for the request for refund or abatement. (If none apply, go to line 6.)

☐ Interest was assessed as a result of IRS errors or delays.
☐ A penalty or addition to tax was the result of erroneous written advice from the IRS.
☐ Reasonable cause or other reason allowed under the law (other than erroneous written advice) can be shown for not assessing a penalty or addition to tax.

b Date(s) of payment(s) ▶

6 Original return. Indicate the type of return filed to which the tax, interest, penalty, or addition to tax relates.
☒ 706 ☐ 709 ☐ 940 ☐ 941 ☐ 943 ☐ 945
☐ 990-PF ☐ 1040 ☐ 1120 ☐ 4720 ☐ Other (specify) ▶

7 Explanation. Explain why you believe this claim or request should be allowed and show the computation of the amount shown on line 2. If you need more space, attach additional sheets.

The Executor of the Estate of Thea C. Spyer did not claim the marital deduction authorized by Internal Revenue Code (IRC) Sec. 2056 on the Estate Tax Return, filed on January 29, 2010 The decedent and Edith S. Windsor, both women, were married on May 22, 2007 in Canada, which recognizes same-sex marriages. The decedent and Edith S Windsor were married as of the date of decedent's death, February 5, 2009. Decedent was domiciled in New York State as of the date of her death, a state that recognizes sa[illegible]-sex marriages that are valid where performed. Therefore, the Estate is entitled to claim the marital deduction authorized by IRC Sec. 2056 for all property passing to the decedent's survivin[illegible] spouse, Edith S. Windsor. Due to the marital deduction, the Estate is entitled to a refund of $363,053. Please see attached revised portions of Form 706 and exhibits for computat[illegible] of refund.

Signature. If you are filing Form 843 to request a refund or abatement relating to a joint return, both you and your spouse must sign t[illegible] claim. Claims filed by corporations must be signed by a corporate officer authorized to sign, and the officer's title must be shown

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and, to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge

Edith S Windsor 04/07/2010
Signature (Title, if applicable. Claims by corporations must be signed by an officer.) Date

Signature (spouse, if joint return) Date

Paid Preparer's Use Only	Preparer's signature ▶	Date	Check if self-employed ☐	Preparer's SSN or PTIN
	Firm's name (or yours if self-employed), address, and ZIP code ▶			EIN Phone no.

For Privacy Act and Paperwork Reduction Act Notice, see separate instructions. Form **843** (Rev. 02-2009)

ISA

Form **8275**
(Rev August 2008)
Department of the Treasury
Internal Revenue Service

Disclosure Statement

Do not use this form to disclose items or positions that are contrary to Treasury regulations. Instead, use Form 8275-R, Regulation Disclosure Statement.
See separate instructions.
▶ **Attach to your tax return.**

OMB No 1545-0889
Attachment
Sequence No **92**

Name(s) shown on return: Edith S. Windsor, Executor of the Estate of Thea C. Spyer

Identifying number shown on return: Redacted

Part I **General Information** (see instructions)

	(a) Rev. Rul., Rev. Proc., etc.	(b) Item or Group of Items	(c) Detailed Description of Items	(d) Form or Schedule	(e) Line No.	(f) Amount
1			Marital deduction authorized by IRC Sec. 2056	706;schd M	3B	$363,053
2						
3						
4						
5						
6						

Part II **Detailed Explanation** (see instructions)

1 See Attachment.

2

3

4

5

6

Part III **Information About Pass-Through Entity.** To be completed by partners, shareholders, beneficiaries, or residual interest holders.

Complete this part only if you are making adequate disclosure for a pass-through item.

Note: *A pass-through entity is a partnership, S corporation, estate, trust, regulated investment company (RIC), real estate investment trust (REIT), or real estate mortgage investment conduit (REMIC).*

1 Name, address, and ZIP code of pass-through entity

2 Identifying number of pass-through entity

3 Tax year of pass-through entity
to

4 Internal Revenue Service Center where the pass-through entity filed its return

For Paperwork Reduction Act Notice, see separate instructions. Form **8275** (Rev 8-2008)
ISA
STF 8XOO1001 1

Edith S. Windsor, Executor
SS#Redacted-
Attachment to Form 8275, Part II

On May 22, 2007, Edith Schlain Windsor was lawfully married to decedent, Thea Clara Spyer, in Toronto, Canada, and the couple were still married at the time of Ms. Spyer's death. As executor of Ms. Spyer's estate, Ms. Windsor noted that the decedent was married to Ms. Windsor at the time of her death, but did not claim the marital deduction in the Form 706 "United States Estate (and Generation-Skipping Transfer) Tax Return," filed on January 29, 2009, due to the operation of 1 U.S.C. § 7 (the "Defense of Marriage Act" or "DOMA"). DOMA provides in pertinent part that, when interpreting federal law, the term "marriage" means only a legal union between one man and one woman. It is submitted that DOMA violates the United States Constitution, and therefore the marital deduction authorized by Internal Revenue Code Sec. 2056 should be available. Accordingly, the estate overpaid $363,053.00 in taxes (in addition to another $320,000.00 in taxes to New York State).

More specifically, DOMA discriminates against surviving spouses in married same-sex couples, such as Ms. Windsor. If Ms. Spyer had been married to a man, rather than to another woman, her estate would undoubtedly be entitled to claim the marital deduction. The taxpayer believes that the Government cannot establish a legitimate, much less, an important or compelling, government interest furthered by such unequal and unfair treatment. Accordingly, DOMA violates the Equal Protection Clause of the Fifth Amendment and is unconstitutional. *See In the Matter of Brad Levenson*, 560 F.3d 1145 (9th Cir. 2009) (holding that the application of DOMA to deny the same-sex spouse of a federal employee health insurance or other benefits is unconstitutional, because there exists no rational basis for denying benefits to same-sex spouses); *see also In the Matter of Karen Golinski*, No. 09-80173, Am. Order at 3-5 (9th Cir. Jan. 13, 2009) (finding that whether DOMA furthers a legitimate governmental interest was "at least doubtful," and that the constitutionality of DOMA presented a "hard question"). DOMA also violates the Due Process Clause of the Fifth Amendment, because it interferes with the fundamental right to marry without a narrowly tailored justification that serves a compelling state interest. *See Loving* v. *Commonwealth of Virginia*, 388 U.S. 1 (1967) (holding that marriage is a fundamental right). Accordingly, the estate is entitled to recover the full amount of overpaid taxes.

EXHIBIT L

[SEAL OMITTED]

IRS Department of the Treasury
Internal Revenue Service

CINCINNATTI OH 4599-0021

71836086645481508145

In reply refer to: 0283138518
May 26, 2010 LER 105C E1
Redacted 000000 52 0
00001499
BODC: SB

THEA C SPYER ESTATE
EDITH S. WINDSOR
% SONNENSCHEIN NATH & ROSENTHAL
Redacted
NEW YORK, NY 10011

CERTIFIED MAIL

Taxpayer Identification Number: **Redacted**
Kind of Tax: Estate
Amount of Claim: $ 363,053.00

Date of Claim(s) Received: Apr. 11, 2010
Tax Period: Feb. 05, 2009

WE COULDN'T ALLOW YOUR CLAIM

Dear Taxpayer:

WHY WE'RE SENDING YOU THIS LETTER

This letter is your notice that we've disallowed your claim for credit for the period shown above.

WHY WE CANNOT ALLOW YOUR CLAIM

We have considered your refund claim along with the legal arguments contained in the 843 and in the Disclosure Statement. Please see attachment for explanation for the disallowance.

IF YOU DISAGREE

You have the right to appeal our decision to disallow your claim. You may represent yourself before Appeals. You may have an attorney, certified public accountant, or person enrolled to practice before the Internal Revenue Service represent you. To have someone represent you, attach Form 2848, Power of Attorney and Declaration of Representative, (or similar written power of attorney) to your written statement. If we do not hear from you within 30 days from the date of this letter, we will process your case without further action.

You may request a small dollar case appeal for a disallowed claim that is not more than $25,000 or prepare a formal protest for a disallowed claim over $25,000.

To request a small dollar case appeal for a claim, do the following:

1. State that you want to appeal.
2. List the disallowed items you disagree with and why you don't agree with each item.

3. Provide your name, address, taxpayer identification number, daytime telephone number, and a copy of this letter.
4. Mail your appeal request to the address shown on this letter.

To prepare a formal protest, do the following:

1. Prepare a written statement that you want to appeal the disallowance to the Appeals Office.
2. Provide your name, address, taxpayer identification number, a daytime telephone number, and a copy of this letter. Show the tax periods or years and disallowed items you disagree with and why you don't agree with each item.
3. Include a detailed statement of facts with names, amounts, locations, etc. to support your reasons for disputing the disallowance.
4. If you know the particular law or authority that supports your position, you should inform us of that law or authority. Please include a legal citation to assist in the appeals process that supports your claim, if applicable.
5. Sign the statement below and include it with your written appeal. If your authorized representative prepares the request for an appeal, he/she must sign the statement and include it with the appeal.
6. Mail your written formal protest to the address shown on this letter.

STATEMENT BY INDIVIDUALS OR SOLE PROPRIETORS

> "Under penalties of perjury, I declare that the facts present on my written appeal are, to the best of my knowledge and belief, true, correct and complete."

Signature ____________________ Date ______

Spouse's Signature, if a Joint Return ____________________ Date ______

STATEMENT BY ATTORNEY, ENROLLED AGENT OR CERTIFIED PUBLIC ACCOUNTANT

> "Under penalty of perjury, I declare that I prepared the written statement and accompanying documents. To the best of my knowledge the protest and accompanying documents are true and correct."

Signature of Representative ____________________

Enrollment Number ____________________ Date ______

If you do not agree with our decision, you may file suit to recover tax, penalties, or other amounts, with the United States District Court having jurisdiction or with the United States Claims Court. These courts are part of the judiciary branch of the federal government and have no connection with the Internal Revenue Service.

The law permits you to do this within 2 years from the date of this letter. If you decide to appeal our decision first, the 2-year period still begins from the date of this letter. However, if you signed an agreement that waived your right to the notice of disallowance (Form 2297), the period for filing suit begins on the date you filed the waiver.

If you need forms, schedules or publications to respond to this letter, you can obtain them by visiting the IRS website at www.irs.gov or by calling 1-800-TAX-FORM (1-800-829-3676).

HOW TO CONTACT US

If you have any questions, please call us toll free at 1-866-699-4083.

If you prefer, you may write to us at the address shown at the top of the first page of this letter.

Whenever you write, please included this letter and, in the spaces below, give us your telephone number with the hours we can reach you. Also, you may want to keep a copy of this letter for your records.

Telephone Number ( ) ________ Hours ______

A copy of this letter and any referenced enclosures have been forwarded to your authorized representative(s).

Sincerely yours,

/s/ R.A. MITCHELL
R.A. MITCHELL, DIRECTOR

Campus Compliance, Cincinnati

Enclosure(s):

Publication 1
Attachment Sheet

* * * * *

Attachment to Letter

FULL DISALLOWANCE

Claimant Name: THEA C SPYER ESTATE

Period of Claim: 02-05-2009

We are unable to process your Form 843, Claim for Refund and Request for Abatement, because of the following reason(s) listed below:

We have considered your refund claim along with the legal arguments contained in the 842 and in the Disclosure Statement. You have asserted that the marital deduction, which is the sole issue of your refund claim, is authorized because the decedent was lawfully married at the time of her death and because she bequeathed the Schedule M property to her spouse. Since both spouses were women, you assert that DOMA violates the United States Constitution by defining "marriage" to mean only a legal union between one man and one woman. Therefore, your conclusion is that IRC Section 2056 should be available to the decedent since, but for the fact that both spouses were of the same sex, the conditions required by Section 2056 have been met.

The IRS is an administrative agency rather than a court of law. As such, it must interpret and apply existing federal laws with no authority to determine whether any of such existing laws violate the United States Constitution. Since a determination regarding the constitutionality of a federal law is within the province of the courts, we must consider the facts of your claim without regard to the merits of your constitutional challenge. Therefore, we must consider and apply the provisions of both DOMA and Section 2056. Since both spouses were women and since under DOMA " . . . the words 'spouse' refers only to a person of the opposite sex who is a husband or a wife.", Section 2056 is inapplicable because the surviving spouse is not a spouse as defined by DOMA. We must, therefore, disallow your refund claim.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

10-cv-8435 (BSJ) (JFC)

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: June 24, 2011

EXPERT AFFIDAVIT OF LETITIA ANNE PEPLAU, PH.D

I, Letitia Anne Peplau, Ph.D., hereby depose and say as follows:

PRELIMINARY STATEMENT

1. My professional background, experience, and publications are detailed in my curriculum vitae, which is attached as Exhibit B to this affidavit. I have been retained by counsel for Plaintiff as an expert in connection with the above-captioned litigation ("*Windsor*") and by counsel for the Plaintiffs in *Pedersen, et al. v. Office of Personnel Management, et. al.*, 3:10-cv-01750 (VLB) (D. Conn., filed Nov. 9, 2010). I have actual knowledge of the matters stated in this

affidavit and could and would so testify if called as a witness.

2. I have been a Professor of Psychology at the University of California, Los Angeles since 1973, with promotions to tenure in 1978, to full professor in 1982, and to Distinguished Professor in 2010. I am currently the Psychology Department Vice Chair for Graduate Studies. From 2005-2011, I served as Director of the UCLA Interdisciplinary Relationship Science Program. This program, funded by the National Science Foundation, trains doctoral students in the study of families and other personal relationships.

3. In broad terms, my research addresses topics concerning personal relationships, gender, and sexual orientation. I have conducted research on heterosexual couples, co-authored a book entitled *Close Relationships*, and published articles comparing empirical findings about men's and women's experiences in close relationships. In the 1970s, I was one of the first researchers to conduct empirical investigations of the intimate relationships of lesbians and gay man, and I have continued this program of research for the past 30 years. In addition, I have written several major reviews of the scientific research on same-sex relationships, including a 2007 article in the *Annual Review of Psychology* and a 2009 article in the *Encyclopedia of Human Relationships*. I have also conducted empirical studies on gay and lesbian identity.

4. I received my B.A. in Honors Psychology from Brown University in 1968 and my Ph.D. in Social Psy-

chology from Harvard University in 1973. As reflected in my curriculum vitae (Exhibit B), I have published more than 120 papers in scholarly journals and scholarly books, primarily in the field of couple relationships. I have co-authored or co-edited over 10 books, and I have frequently presented my research at universities and scientific meetings.

5. My expertise extends beyond the specific areas addressed in my own empirical research program to include other theory and empirical research related to sexual orientation and same-sex relationships. A broad knowledge of this area has been necessary not only for my own scholarship, but also for successfully completing my professional duties as a teacher, as Director of the UCLA Interdisciplinary Relationship Science Program, and as a reviewer of academic journal and book manuscripts.

6. As a result of my research and other accomplishments, I have received several professional awards. I have been elected a fellow of the American Psychological Association and of the Association for Psychological Science. I have received lifetime achievement awards from the American Psychological Association, the International Association for Relationship Research, and the Society for the Scientific Study of Sexuality. I also had the honor of being elected president of the International Society for the Study of Personal Relationships (an organization since renamed the International Association for Relationship Research).

7. In preparing this Affidavit, I reviewed the Complaints in *Windsor* and *Pedersen*, and the materials listed in the attached Bibliography (Exhibit A). I may rely on those documents, in addition to the documents specifically cited as supportive examples in particular sections of this Affidavit, as additional support for my opinions. I have also relied on my years of experience in this field, as set out in my curriculum vitae (Exhibit B), and on the materials listed therein.

8. In the past four years, I have provided expert testimony at trial in two matters, *In the Matter of the Adoption of X.X.G. and N.R.G.* in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida, Case No. 06-43881 FC 04, and in *Perry v. Schwarzenegger*, Case No. 09-CV-2292 VRW. I was not deposed in the *X.X.G.* matter, and was deposed in the *Perry* case on October 21, 2009 and December 10, 2009. Additionally, I was deposed as an expert on October 2, 2009 in *Cole v. The Arkansas Department of Human Services* in the Circuit Court of Pulaski County, Arkansas, Case No. CV2008-14284. I also submitted expert testimony through affidavit in *Donaldson and Guggenheim v. Montana*, in the Montana First Judicial District Court, Lewis and Clark County, Case No. BDV-2010-702, on December 8, 2010.

9. For my work in this matter, I am being compensated at my standard consulting rate of $200 per hour for preparation time, time spent writing my report, and time spent giving deposition and trial testimony. My compensation does not depend on the

outcome of this litigation, the opinions I express, or the testimony I provide.

I. Summary of Opinions

10. Sexual orientation refers to an enduring pattern of emotional, romantic, and/or sexual attractions to men, women, or both sexes. Most adults are attracted to and form relationships with members of only one sex. Efforts to change a person's sexual orientation through religious or psychotherapy interventions have not been shown to be effective.

11. It is well-established that homosexuality is a normal expression of human sexuality. It is not a mental illness, and being gay or lesbian has no inherent association with a person's ability to lead a happy, healthy, and productive life or to contribute to society.

12. Like their heterosexual counterparts, many lesbian, gay, and bisexual individuals form loving, long-lasting relationships, including marriage, with a partner of the same sex.

13. Marriage provides a range of social and legal benefits and protections to spouses. These contribute to enhanced psychological well-being, physical health and longevity among married individuals. In the United States, lesbian, gay, and bisexual individuals experience pervasive social stigma and the added stress that results from prejudice and discrimination. Stigma is reflected both in acts of individuals and in the institutions of society, including its laws, that legitimate and perpetuate the second-class status of gay

men, lesbians, and bisexuals. By denying federal recognition to legally married same-sex couples, DOMA both reflects and perpetuates stigma against lesbians, gay men, and same-sex couples. The stigma and discrimination perpetuated by DOMA harm not only individuals in legal same-sex marriages, but gay men, lesbians, and bisexuals as a group.

II. Understanding Sexual Orientation

A. What is Sexual Orientation?

14. The American Psychological Association provides a widely accepted definition of sexual orientation: "Sexual orientation refers to an enduring pattern of emotional, romantic, and/or sexual attractions to men, women, or both sexes. Sexual orientation also refers to a person's sense of identity based on those attractions, related behaviors, and membership in a community of others who share those attractions."[1]

15. Beginning with the research of Alfred Kinsey in the 1940s, researchers have recognized that sexual orientation can range along a continuum from exclusively heterosexual to exclusively homosexual. Nonetheless, it is most often discussed in terms of three categories: heterosexual (having emotional, romantic, or sexual attractions to members of the other sex), gay/lesbian (having attractions to members of one's own sex), and bisexual (having attractions to both men and women). Most adults in the United States can

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[1] American Psychological Association, 2008; Herek, 2000, 2001.

readily categorize themselves as heterosexual, gay/lesbian, or bisexual.[2] The specific category name that an individual prefers (e.g., homosexual, gay, queer) may vary,[3] but in national surveys in the U.S., nearly all participants are able to indicate their sexual orientation category.

16. For clarity, it is important to distinguish sexual orientation from other aspects of sex and gender. These include biological sex (the anatomical, physiological, and genetic characteristics associated with being male or female), gender identity (an individual's psychological sense of being male or female), and gender-role orientation (the extent to which an individual conforms to cultural norms defining feminine and masculine behavior).

17. Social scientists view sexual orientation as a multi-faceted phenomenon involving attractions, related behaviors, and identity. In research studies, the particular component of sexual orientation that researchers assess will differ depending on the purpose of the research. For example, a study about the experiences of individuals in same-sex marriages would recruit participants based on their behavior of marrying a person of the same sex. A study of personal experiences of social stigma and discrimination among

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[2] See, e.g., Chandra, Mosher, Copen & Sionean, 2011, pp. 29-30; Laumann, Gagnon, Michael & Michaels, 1994, p. 293.

[3] See, e.g., Herek, Norton, Allen & Sims, 2010.

openly gay and lesbian individuals would most likely recruit individuals who self-identify as gay or lesbian.

18. Sexual orientation is inherently linked to social relationships. Sexual orientation is a characteristic of an individual, like their biological sex, age, or race, and it is also about relationships—whether an individual is attracted sexually or romantically to partners of the same sex or the opposite sex.[4] Just as heterosexual individuals often express their sexual orientation through relationships including marriage with a different sex partner, so gay and lesbian individuals express their sexual orientation through relationships including marriage with a same-sex partner. Further, sexual orientation is not merely about sexual behavior but also about building enduring intimate relationships. In other words, sexual orientation is centrally linked to the most important personal relationships that adults form with other adults in order to meet their basic human needs for love, attachment, and intimacy. These relationships, whether with a same-sex or different-sex partner, are an essential part of an individual's personal identity.

B. Can Sexual Orientation Be Changed?

19. Currently, the factors that cause an individual to become heterosexual, homosexual, or bisexual are not well understood. Many theories have been proposed but no single theory has gained prominence or is

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[4] Peplau & Cochran, 1990; Peplau & Fingerhut, 2007.

definitively established by scientific research. Today, most social and behavioral scientists view sexual orientation as resulting from the interplay of biological, psychological, and social factors.[5]

20. A consistent finding across many studies, beginning with the work of Alfred Kinsey in the 1940s and 1950s and continuing through current research, is that most adults report having sexual attractions to and experiences with members of *only* one sex.[6] As adults, the majority of these individuals have had exclusively heterosexual experiences and attraction, and a minority have had exclusively same-sex experiences and attraction. A small percentage of adults report sexual attractions and experiences with both sexes.[7]

21. The fact that many lesbian and gay adults form long-term intimate relationships with a partner of the same sex, just as heterosexual adults do with a partner of the other sex, provides evidence of the stability of sexual orientation over time.

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[5] American Psychological Association, 2008.

[6] Kinsey, Pomeroy & Martin, 1948; Kinsey, Pomeroy, Martin & Gebhard, 1953; Laumann, et al., 1994; Chandra, et al., 2011.

[7] Some individuals are very clear about their sexual orientation at an early age. In contrast, because of the social prejudice and discrimination against gay men and lesbians, some adolescents and young adults go through a prolonged period of trying to understand their own sexual identity and coming to terms with being lesbian, gay or bisexual.

22. There are currently no national data for same-sex relationships comparable to statistics on heterosexual marriage and divorce. Nonetheless, available research clearly indicates that many same-sex couples are in a committed, long-lasting relationship. Findings from two large population-based surveys of gay men and lesbians in California demonstrate this point.[8] In these surveys, 37% to 46% of gay men and 51% to 61% of lesbians aged 18-59 were in a cohabiting relationship. Among heterosexuals of comparable ages, 62% were married or living with a partner. The relationships of lesbians and gay men were of relatively long duration, and were longer for those who had registered as domestic partners (12.3 years for gay men and 8.9 years for lesbians) than for those who lived together without registering (9.6 years for gay men and 7.8 years for lesbians). Given that most respondents were in their early 40s, the data indicate that many of them had spent a substantial portion of their adult life with the same partner.

23. As discussed above, the significant majority of adults exhibit a consistent and enduring sexual orientation.[9] Nonetheless, a small minority of individuals

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[8] Carpenter & Gates, 2008; see also Peplau & Fingerhut, 2007.

[9] Based on large-scale survey data, Chandra et al. (2011, p. 1) conclude that "Sexual attraction and identity correlate closely but not completely with reports of sexual behavior." Thus, most heterosexual individuals do not engage in sexual activity with same-sex partners, and most gay and lesbian individuals similarly do not engage in heterosexual behavior.

are exceptions to this majority pattern. For example, while in prison, some men who identify as heterosexual may nonetheless engage in sexual activities with men since female partners are unavailable. Some individuals have reported changes in their sexual orientation in midlife, perhaps as a result of meeting a particular person. Understanding these kinds of exceptions to the general pattern of stable sexual orientation described above is of theoretical interest to scholars. Researchers have used terms like "sexual fluidity" or "sexual plasticity" to refer to changes in sexual behavior, attractions, and identity over time or across situations. Importantly, observations about fluidity in a small minority of people should not obscure the big picture of stability for the majority of adults. In a discussion of women's sexual fluidity, Peplau and Garnets[10] noted: "Claims about the potential erotic plasticity of women do not mean that most women will actually exhibit change over time. At a young age, many women adopt patterns of heterosexuality that are stable across their lifetime. Some women adopt enduring patterns of same-sex attractions and relationships." Nor does the fact that a small minority of people may experience some change in their sexual orientation over their lifetime suggest that such change is within their power to effect. This is why standard definitions of sexual orientation characterize it as stable.

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[10] Peplau & Garnets, 2000, p. 333.

24. Before the emergence of gay communities in the United States, it was fairly common for lesbians and gay men to marry a person of the other sex.[11] They entered these ostensibly "heterosexual" marriages for diverse reasons: to avoid social stigma, in response to pressure from family and friends, from a belief that marriage was the only way to have children, and/or to participate in a fundamental social institution. In some cases, these individuals only recognized or acknowledged their sexual orientation after marriage. It is psychologically harmful to ask lesbians and gay men to deny a core part of their identity by ignoring their attraction to same-sex partners and instead marrying a different-sex partner. Moreover, the disclosure that a spouse is gay or lesbian is often hurtful to the heterosexual spouse, highly upsetting to the married partners and their children or other family members, and may set the stage for separation or divorce. Therefore, encouraging gay men and lesbians to enter into a marriage with a heterosexual partner is not in the best interests of the individuals or the interests of society.

25. When gay men and lesbians are asked by researchers about their sexual orientation, the vast ma-

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[11] Bozett, 1982; Higgins, 2006. Researchers have estimated the percentage of lesbians and gay men who have been married. An analysis of responses to a 2003 survey of adults in California found that about 25% of lesbians and 9% of gay men ages 18-59 reported having ever been married, most of them presumably to a person of the other sex (Carpenter & Gates, 2008, Table 3).

jority report that they experienced no choice or very little choice about their sexual orientation. In a national survey conducted with a representative sample of more than 650 self-identified lesbian, gay, and bisexual adults, 95% of the gay men and 83% of the lesbians reported that they experienced "no choice at all" or "very little choice" about their sexual orientation.[12]

26. Sexual orientation is highly resistant to change through psychological or religious interventions. Recently, the American Psychological Association appointed a task force to conduct a systematic review of the peer-reviewed journal literature on sexual orientation change efforts.[13] The Task Force concluded that "efforts to change sexual orientation are unlikely to be successful and involve some risk of harm" (p. 3). Based on currently available research, there is no credible evidence that these efforts are either effective

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[12] Herek, Norton, Allen & Sims, 2010. In that survey, 88% of gay men reported that they had "no choice," and 7% reported "very little choice." Similarly, 68% of lesbians responded that they had "no choice at all," and 15% reported having "very little choice." See also results from a California survey by Herek, Gillis & Cogan, 2009, Table 5.

[13] APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation, 2009, *Report of the Task Force on Appropriate Therapeutic Responses to Sexual Orientation*. Washington, DC: American Psychological Association. This report provides a detailed review and analysis of relevant research. It is available online at: http://www.apa.org/pi/lgbt/publications/therapeutic-response.pdf.

or safe, and ample reason to believe that these interventions can harm those who participate.[14] The Task Force also found evidence that many individuals who unsuccessfully attempt to change their sexual orientation experience considerable psychological distress.

27. Currently, no major mental health professional organization has approved interventions to change sexual orientation and virtually all of them have adopted policy statements cautioning professionals

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[14] Although some psychotherapists and religious counselors have reported changing their clients' sexual orientation from homosexual to heterosexual, empirical support for these claims is lacking. After reviewing published empirical research on this topic, the APA Task Force reported that it found "serious methodological problems in this area of research, such that only a few studies met the minimal standards for evaluating whether psychological treatments, such as efforts to change sexual orientation, are effective" (p. 2). Based on its review of the studies that met acceptable standards, the Task Force concluded that "enduring change to an individual's sexual orientation is uncommon. The participants in this body of research continued to experience same-sex attractions following SOCE [sexual orientation change efforts] and did not report significant change to other-sex attractions that could be empirically validated, though some showed lessened physiological arousal to all sexual stimuli. Compelling evidence of decreased same-sex sexual behavior and of engagement in sexual behavior with the other sex was rare. Few studies provided strong evidence that any changes produced in laboratory conditions translated to daily life. Thus, the results of scientifically valid research indicate that it is unlikely that individuals will be able to reduce same-sex attractions or increase other-sex sexual attractions through SOCE" (pp. 2-3).

and the public about these treatments.[15] These include the American Psychiatric Association, American Psychological Association, American Counseling Association, and National Association of Social Workers. Further, since adolescents may be subjected to these treatments after disclosing to their families that they are gay, lesbian, or bisexual, the American Academy of Pediatrics has adopted a policy statement advising that therapy directed specifically at attempting to change an adolescent's sexual orientation is contraindicated and unlikely to result in change.

28. In summary, there is converging scientific evidence documenting that sexual orientation reflects an enduring set of attractions and experiences for most people. Efforts to change a person's sexual orientation through religious or psychotherapy interventions have not been shown to be effective.

III. Sexual Orientation Does Not Affect a Person's Ability to Function Effectively

29. The consensus view of scientific researchers and mental health professionals is that homosexuality is a normal expression of human sexuality. Homosexuality is not a mental illness, and being gay or les-

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[15] These policy statements are compiled in *Just the Facts About Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel*, a publication that is available from the Just the Facts Coalition on the American Psychological Association's Web site: http://www.apa.org/pi/lgbt/publications/justthefacts.pdf.

bian has no inherent association with a person's ability to participate in or contribute to society.[16] Lesbians and gay men are as capable as heterosexuals of leading a happy, healthy, and productive life. They are also as capable as heterosexuals of doing well in their jobs and of excelling in school.

30. Although homosexuality was once believed to be a mental illness, that mistaken view was discredited by scientific research beginning in the 1970s. In 1973, the American Psychiatric Association removed homosexuality from its Diagnostic and Statistical Manual of Mental Disorders, noting that "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities."[17] In 1975, the American Psychological Association endorsed this position and urged psychologists to help educate the public and to dispel the stigma of mental illness associated with homosexuality.[18]

31. Lesbians and gay men are as able to form loving, committed relationships with a same-sex partner and to raise healthy, well-adjusted children, as are

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[16] Herek, 2010; Herek & Garnets, 2007.

[17] American Psychiatric Association, 1974. For other resolutions by this organization, see http://www.healthyminds.org/More-Info-For/GayLesbianBisexuals.aspx.

[18] Conger, 1975. Also, the American Psychological Association has endorsed several resolutions concerning sexual orientation. These can be found at: http://www.apa.org/pi/lgbt/resources/policy/index.aspx.

heterosexuals in committed relationships with a different-sex partner. Empirical research has repeatedly shown that gay men and lesbians have happy, satisfying relationships.[19] Like their heterosexual counterparts, lesbians and gay men form deep emotional bonds and strong commitments to their partners. Research documents striking similarities between same-sex and heterosexual couples on standardized measures of love, relationship satisfaction, and relationship adjustment. The extensive body of research that examines the quality and functioning of same-sex relationships demonstrates that same-sex couples are not inherently different from heterosexual couples. To the contrary, same-sex couples closely resemble heterosexual couples and the processes that affect both types of relationships are remarkably similar.[20]

32. Gay and lesbian individuals are subject to the same stresses of life as their heterosexual counterparts, including the death of a close relative, loss of a job, or a serious illness. Research consistently demonstrates that high levels of stress are harmful not only to psychological well-being but also to physical health.[21] In addition to the life stresses that can affect everyone, members of stigmatized minority

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[19] Kurdek, 2004, 2005; Peplau & Fingerhut, 2007.

[20] American Psychological Association, 2004.

[21] Thoits, 2010.

groups, including gay men and lesbians as well as ethnic/racial minorities, may experience additional stress caused by prejudice and discrimination. This has been termed "minority stress."[22] This excess stress has been associated with an increased risk of psychological problems, especially those like anxiety and depression that are most closely linked to stress.[23] Despite the pervasive social stigma against homosexuality and the resulting unique social stressors lesbians and gay men experience, the vast majority of lesbian and gay individuals cope successfully with these challenges and lead healthy, happy, well-adjusted lives. And there is nothing about sexual orientation itself—whether one is heterosexual or homosexual—that makes a person more or less able to contribute to or participate in society.

33. Social relationships can play an important role in buffering individuals from the stresses of life. Like heterosexuals, lesbians and gay men benefit from having a close intimate relationship, for example, with a spouse. Further, people benefit from the social, emotional, and material support that can be provided by family, friends, and others. Research also documents that the psychological well-being of lesbians and gay men is enhanced by having positive feelings about being gay, having developed a positive sense of gay

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[22] Meyer, 2003, 2007.

[23] Herek & Garnets, 2007; Pascoe & Richman, 2009.

identity, and being open about their sexual orientation with important other people.[24]

IV. Lack of Federal Recognition of Marriage Harms Same-Sex Couples

34. There is widespread consensus among social science researchers that marriage generally provides many benefits to both spouses. A large body of scientific research comparing heterosexuals who are currently married to those who are not married establishes that marriage fosters psychological well-being, physical health, and longevity. Of course, marriages that are unhappy, conflict-ridden, or violent do not provide the same benefits as the average marriage.[25]

35. The positive benefits of marriage stem, in part, from the tangible resources and special protections that law and society provide to spouses. For example, federal and state statutes accord married partners many financial benefits that promote enhanced economic and financial security compared to unmarried individuals. These include benefits deriving from tax laws, employee benefits, death benefits, and entitlement programs. In addition, married couples enjoy special rights and privileges that buffer them against the psychological stress associated with

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[24] Herek & Garnets, 2007; Meyer, 2003; Pachankis, 2007; Pascoe & Richman, 2009.

[25] Johnson, et al., 2000; Lamb, et al., 2003; Proulx, et al., 2007; Schoenborn, 2004; Waite, 1995.

traumatic life events, such as the death or incapacitation of a partner. For example, the federal tax code exempts married persons from having to pay estate taxes on any inheritance they receive from their spouses, thus sparing married persons an additional economic burden at the time of their spouse's death. In contrast, by imposing this tax on married same-sex partners, the federal government not only imposes an additional economic burden, but also stigmatizes the relationship at a time when the surviving partner may be particularly vulnerable. The legal status of marriage also enables spouses to exert greater control over their lives when stressful situations arise and to avoid some types of stressors entirely. These include, for example, being compelled to testify against one's spouse in court, having a noncitizen spouse deported, and having one's relationship or joint parental status challenged outside one's home state.[26]

36. There are many other ways in which marriage provides protective benefits that contribute to the health and well-being of spouses.[27] The marriage relationship is a social union that creates a well-recognized and valued kinship relationship. Marriage binds spouses not only to each other but also to the broader community, which understands, appreciates,

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[26] E.g., Herek, 2006; U. S. General Accounting Office. (2004). Defense of Marriage Act: Update to prior report, Document GAO-04-353R, Washington, DC.

[27] E.g., Cherlin, 2009; Herek, 2006; Nock, 1995; Umberson, 1992.

and values the significance of the marriage relationship. As Gove, Style and Hughes[28] note, "in our society the role that most frequently provides a strong positive sense of identity, self-worth, and mastery is marriage." Social support is central to the institution of marriage. Compared to unmarried individuals, married adults tend to receive more social support from other people, especially from their parents, and this support contributes to individual well-being. The public aspect of marriage can increase each spouse's sense of security that the relationship will be long-lasting. Finally, for many people, marriage has great symbolic significance, establishing that the individual has a new social identity and is part of a valued and respected social institution.

37. Although these conclusions are derived from studies of heterosexual couples, it is reasonable to infer that same-sex couples will generally benefit from marriage as do their heterosexual counterparts. This idea is supported by the many well-established similarities in the nature and quality of same-sex and heterosexual couples' relationships.[29]

38. Leading organizations of mental health professionals recognize the benefits of marriage for same-sex couples and the harm created by denying access to civil marriage, including the state and federal

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[28] Gove, Style & Hughes, 1990, p. 16.

[29] Kurdek, 2004, 2005; Peplau & Fingerhut, 2007.

legal protections and benefits associated with marriage, to same-sex couples. As one example, in 2005 the American Psychiatric Association, the leading organization representing physicians in the field of mental health, adopted a policy statement on this issue. Their resolution stated: "In the interest of maintaining and promoting mental health, the American Psychiatric Association supports the legal recognition of same-sex civil marriage with all rights, benefits, and responsibilities conferred by civil marriage, and opposes restrictions to those same rights, benefits, and responsibilities."[30] Further, based on a review of research on marriage and same-sex relationships, the American Psychological Association passed a *Resolution on Sexual Orientation and Marriage*[31] in which it resolved "[t]hat APA believes that it is unfair and discriminatory to deny same-sex couples legal access to civil marriage and all its attendant benefits, rights, and privileges."

IV. DOMA Reflects and Perpetuates Stigma Against Lesbians, Gay Men, and Same-Sex Couples

39. Lesbian, gay, and bisexual individuals are the targets of prejudice and discrimination in the United

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[30] American Psychiatric Association (2005). Support of legal recognition of same-sex civil marriage position statement. Retrieved September 25, 2009 from http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200502.aspx.

[31] American Psychological Association, 2004.

States.[32] National opinion surveys document that many Americans have negative attitudes toward this group of people and toward legal marriage for same-sex couples. Research has also documented that heterosexuals often view same-sex couples more negatively than heterosexual couples.[33] Gay, lesbian, and bisexual individuals experience discrimination at work and in their communities[34] and most states provide no legal protection against discrimination based on sexual orientation. Significant numbers of gay, lesbian, and bisexual individuals are targets of harassment and violence.[35] These facts demonstrate that gay, lesbian, and bisexual individuals experience pervasive social stigma.

40. Social stigma refers to severe social disapproval of a class of people perceived as being different, deviant, or in violation of cultural norms.[36] In American society today, gay men, lesbians, and bisexuals continue to be a highly stigmatized minority group. Many heterosexuals, who are the dominant group in society, perceive gay men, lesbians, and bisexuals, and same-sex couples, as fundamentally different, hold negative stereotypes about their characteristics, and

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[32] Herek, 2009a.

[33] Testa, Kinder & Ironson, 1987.

[34] Herek, 2009b.

[35] Herek, 2009b.

[36] Herek, 2009a.

view discrimination against them as acceptable. Social stigma is reflected both in the acts of individuals and in the institutions of society, including its laws, that legitimate and perpetuate the second-class status of gay men, lesbians, bisexuals, and same-sex couples.

41. By denying federal recognition to married same-sex couples, DOMA both reflects and perpetuates stigma against lesbians, gay men, and same-sex couples. DOMA devalues and delegitimizes the relationships of legally married same-sex couples. By giving heterosexuals exclusive access to the many resources and benefits associated with the institution of marriage, including the many practical and financial benefits extended by the federal government, DOMA perpetuates power differentials between heterosexual citizens and non-heterosexual citizens. DOMA indicates that in the eyes of the federal government, the committed relationships of same-sex couples, even those recognized as legal marriages by a state government, are inferior to heterosexual relationships. By extension, DOMA conveys that partners in same-sex relationships are less deserving of social recognition and government protection. The stigma perpetuated by DOMA affects not only individuals in legal marriages with a person of the same sex, but all gay, lesbians, and bisexual individuals as a group.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of May 2011.

/s/ LETITIA ANNE PEPLAU, PH.D
LETITIA ANNE PEPLAU, PH.D

[Exhibits omitted]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NO. 1:10-CV-8435 (BSJ) (JFC)

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Filed: June 24, 2011

EXPERT AFFIDAVIT OF NANCY F. COTT, PH.D

I, Nancy F. Cott, Ph.D., hereby depose and declare as follows:

I. BACKGROUND AND QUALIFICATIONS

1. I am presently the Jonathan Trumbull Professor of American History at Harvard University. I have been retained by Plaintiff's counsel in connection with the above-referenced litigation. I have actual knowledge of the matters stated in this Affidavit and could and would so testify if called as a witness.

2. My background, experience, and list of publications are summarized in my curriculum vitae, which is attached as Exhibit A to this Affidavit. In the past four years, I have submitted an expert report, been

deposed as an expert or testified as an expert at trial in *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal.), and *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services*, No. 09-11156 (D. Mass.). I have also been retained as an expert by counsel for the plaintiffs in *Pedersen v. Office of Personnel Management*, No. 3:10-cv-01750-VLB (D. Conn.). I am rendering my expert services in this case on a pro bono basis, and am receiving reimbursement from counsel for plaintiff, Paul, Weiss, Rifkind, Wharton & Garrison, LLP, for any out-of-pocket costs associated with my rendering expert testimony.

3. In 1969, I received a master's degree in History of American Civilization from Brandeis University. In 1974, I received a Ph.D. degree in History of American Civilization from Brandeis University. Since that time, I have researched and taught United States history. I taught for twenty-six years at Yale University, where I gained the highest honor of a Sterling Professorship, and in 2002 I joined the faculty at Harvard University.

4. I teach graduate students and undergraduates in the area of American social, cultural and political history, including history of marriage, the family, and gender roles. I also am the Pforzheimer Family Foundation Director of the Schlesinger Library on the History of Women in America, Radcliffe Institute for Advanced Study.

5. I have received multiple fellowships, honors and grants, from a John Simon Guggenheim Memorial Foundation Fellowship in 1985 and National Endowment for the Humanities Fellowship in 1993, to a Fulbright Lectureship in Japan in 2001 and election to the American Academy of Arts & Sciences in 2008.

6. I am the author or editor of eight published books, including *Public Vows: A History of Marriage and the Nation* (Harvard Univ. Press, 2000), the subject of which is marriage as a public institution in the United States. I also have published over twenty scholarly articles, including a number discussing the history of marriage in the United States. I have delivered scores of academic lectures and papers over the past thirty-five years on a variety of topics, including the history of marriage in the United States. I also have served on many advisory and editorial boards of academic journals.

7. I spent over a decade researching the history of marriage in the United States, especially its legal attributes, obligations, and social meaning, before and while writing my book *Public Vows: A History of Marriage and the Nation.* The claims and evidence in this Affidavit come principally from the research for that book and are more fully documented there and in an article based on that research, "Marriage and Women's Citizenship," which was published in *American Historical Review* in 1998. The numerous historical sources, legal cases, and government documents that I studied and analyzed while researching

and writing the book, as well as the other scholars' work that I consulted, are cited in my published footnotes in the book and article. In addition, I have supplemented my past research with more recent reading and research on matters referenced in this Affidavit. In preparing to write this Affidavit, I reviewed *Public Vows*, "Marriage and Women's Citizenship," and certain of the sources cited therein, as well as the materials listed in the attached Exhibit B. I have also relied on my years of experience in this field, as set out in my curriculum vitae, and on the materials listed therein.

II. SUMMARY OF EXPERT OPINIONS

8. I have been asked for my expert opinion concerning the United States' history of regulating marriage, including both by state governments and the federal government. My conclusions are as follows:

- In the United States, marriage is a double-facing institution, both public and private. It is a public institution in that it is constituted by the state; its form and requirements are created by public authority, and it operates as systematic public sanction, bringing rights and benefits along with duties. At the same time, marriage signifies a freely-chosen relationship between two individuals and founds a private realm of individual liberty and familial intimacy.

- The institution of marriage in the United States is a particular, not a universal form of the institution, and it has been defined and controlled at the state level, historically, in accord with premises established by the U.S. Constitution. Marriage has been shaped by legislators and judges in the various states to adjust to changing needs from the founding of the nation until today.

- States' variance today on validating marriage for couples of the same sex resembles and is parallel to the history of states' divergences with respect to many other dimensions of marriage validity.
- States have varied from one another in defining the basic elements of marriage, including whether or not ceremonies are required for validation, how spousal roles shall be defined and enforced, what other 'race' may marry a 'white' person, how marriage may be dissolved, and other issues.
- Heated controversy often surrounded changes to the features of marriage on which state laws diverged in the past. The controversies today focusing on marriage between couples of the same sex, and state variance on the matter, resemble these past disagreements.
- Despite the extent and frequency of states' variation in definitions of marriage, prior to 1996 the federal government never stipulated a uniform definition of marriage for purposes of fed-

eral law, and instead relied upon states' determinations.

- In defining marriage for all federal purposes, the Defense of Marriage Act represents a substantial deviation from all the prior history of federal-state relations in marriage regulation.

III. BASIS AND REASONS FOR OPINIONS

A. Exclusive State Power over Marriage Rules and Transformation of Status Upon Marriage

9. Before the American Revolution, colonial legislatures (rather than Great Britain's Parliament) set the terms of colonists' marriages. When the United States declared its independence, each state set up marriage laws and regulations among its very first founding legislation. These laws were often very detailed, indicating each state's wish to define the institution for its citizens and thus to create public order and social benefit through the vehicle of marriage.

10. During the framing of the U.S. Constitution in 1787, the topic of marriage was not raised in the process of defining the powers of the federal government. The Constitution's silence on marriage rules conceded states' sovereignty over the area. States had exclusive power over marriage rules as a central part of the individual states' "police power"—meaning their responsibility (subject to the requirements and protections of the federal Constitution) for the health, safety and welfare of their populations.

11. Marriage in the United States has always been governed by civil rather than religious authorities. Whether a marriage is recognized or not by a religion does not dictate its legality or validity. Religious authorities have been authorized to act as deputies of the civil authorities in performing marriage ceremonies, but not to determine the qualifications for entering or leaving a legally valid marriage.

12. Marriage in all of the United States has always been a consent-based, voluntary choice of the partners that embodies both a contract and a status. Although marriage must be based upon mutual consent, it cannot be modified or ended thereby. The state prescribes the obligations as well as rights of marriage in its dual role as a party to and guarantor of the couple's bond. For couples who follow the marriage regulations prescribed by the state, their wedding formally and legally transforms their status, giving each of them a new legal standing and a distinctive set of obligations and rights pertaining to them as married persons.

B. Purposes of Marriage

13. Societies in various times and places have defined marriage in different ways. Marriage is an institution of human culture and thus can vary as much as human cultures vary. What is seen as legitimate marriage in a given society may be, for instance, polygamous or monogamous, matrifocal or patrifocal, patrilineal or matrilineal, lifelong or temporary, open

or closed to concubinage, divorce-prone or divorce-averse, and so on.

14. In the United States, the institution of marriage is a public/private hybrid. It is public both in the sense that a couple makes vows publicly before a witness, and in that the state makes certain vows to the couple about the protection and support of their relationship in granting them a marriage license. By its very definition it is a public institution that the state has authorized and uses to regulate the population and the public and to dispense benefits. At the same time, marriage is the exercise of an individual liberty and the foundation of the private familial realm.

15. Marriage in the United States has served numerous complementary purposes and functions, among which the relative salience has changed over time. No one outside a particular couple can describe their private, subjective experience of "being married," since this may vary as much as individuals vary. Historians can, however, document how the institution of marriage has functioned, changed and been defined by law. Among the purposes that marriage and its regulation by civil authorities have served over this country's history are: to create stable households; to create public order and economic benefit; to legitimate children; to assign providers to care for dependents (including the very young, the very old, and the disabled) and thus limit the public's liability to care for the vulnerable; to facilitate property ownership and inheritance; to shape the "people," or to compose the body

politic; and to facilitate governance (state regulation of the population).

16. In the interest of public order, state governments have bundled together legal obligations with social rewards in marriage to encourage couples to choose committed relationships of sexual intimacy over transient relationships, whether or not these relationships will result in children. In the Anglo-American practice of four or five centuries ago that underlies our contemporary system, marriage was designed to be a regulatory institution that established recognizable household heads who would take economic responsibility for their dependents. In the early United States, state governments encouraged marriage (among the free white population) because maritally-organized households organized the broader population under male household heads and promised economic stability, both of which functions contributed to the common good. These benefits advantaged the state in the past when households more often included large numbers of people, as well as now, when most households and families are small.

17. Today, too, the purpose of the state in licensing and incentivizing marriage is to create stable households in which the adults who reside there are committed to one another by their own consents and will support one another as well as any dependents they may have.

18. Over time, marriage has developed a social meaning in which the state places a unique value on

the couple's choice to join in marriage, to remain committed to one another, to form a household based on their relationship, and to join in an economic partnership to support one another in the material needs of life.

19. The ability or willingness of couples to produce progeny has never been required for or necessary to marriage under the law of any American state. For example, no state ever barred women past menopause from marrying or allowed a husband to divorce his wife because she was past childbearing age. Men or women known to be sterile have not been prevented from marrying. Nor could a marriage be annulled for an inability to bear or beget children.

20. In the past, older adults who were widows and widowers remarried whenever a willing mate could be found; although it was often clear that no children would result, marriage was desirable because a married couple together had the wherewithal to carry on a stable household. In our contemporary post-industrial economy, many divorced or widowed older adults marry when they are past childbearing age, usually for reasons of intimacy and stability. Ever since the 1920s, when reliable (if not always convenient) contraception became available to those who sought it, sexual intimacy has been separable from reproductive consequences even for those of reproductive age. Since then—and even more commonly since the 1960s when contraception became more efficient and widely available—couples with no interest in or expectation of childbearing marry and re-marry.

21. The notion that the main purpose of marriage is to provide an ideal or optimal context for raising children was never the prime mover in states' structuring of the marriage institution in the United States, and it cannot be isolated as the main reason for the state's interest in marriage today. Nor is it historically correct to say that a biological link between parents and children is a necessary foundation for marriage or the principal or sole reason why marriage is good for society.

22. Arguably, states' marriage rules with respect to children have aimed more consistently at supporting them than producing them. While having children was never a requirement, support for any child born or adopted into a family always has been an obligation of the household head. Today, it is a shared responsibility among the family, as much in the case of divorce or separation as in an intact marriage. Such rules have put a critical limit on the public's responsibilities for the young and the dependent.

23. Historically, marriage between the parents of a child was required for the child's "legitimacy." Marriage drew the line between legitimacy and illegitimacy—a function that was particularly important among the propertied who were concerned about "legitimacy" in lines of inheritance. Today, parentage can be determined for all children regardless of their parents' marital status, and both adoption and reproductive technology create parents apart from biology. The law requires all parents to support their children,

regardless of the circumstances in which those children came to be.

C. Diversity in States' Marriage Rules

24. Marriage rules have varied from state to state, and legislators and judges in every state have changed those rules and interpretations significantly over time. Despite these many changes to the terms of marriage, the federal government has accepted the states' differing definitions of marriage for purposes of federal law.

25. Since the founding of the United States, different states have set, interpreted, altered and adjusted marriage terms and rules in response to local circumstances and preferences. Over time there have been many nontrivial differences in states' laws on who was permitted to marry, what steps composed a valid marriage, what spousal roles should be, and what conditions permitted divorce. State marriage laws arose and responded to changes in the political and economic environment, religious forces, changes in the ethnic composition of a state's residents, and many other local conditions. (In Massachusetts and New York, for example, after the large Irish immigration of the 1840s, the Catholic Church became a distinctive pressure group, its views influencing legislators regarding divorce policies.)

26. Regional and cultural differences, as well as state legislators' understandings of their states' interests, resulted in a patchwork quilt of marriage rules in the United States. Sometimes states purposely dis-

tinguished their marriage rules from those of other states for moral or political reasons, to compete in drawing population to their borders, or with the intent to reap economic benefit for their own state.

27. The legal historian Hendrik Hartog has observed of state practices in the nineteenth century, "Legislators and courts tinkered constantly with the rules of marital property, the rules regarding child custody, and those regarding divorce. In some states, particularly in the Midwest and West, lawmakers appear to treat the law of marriage not as an unchangeable inherited structure but, rather, as a testing ground for changing social theories." For example, the writers of California's first constitution in 1849 decided upon a marital regime of community property not only because it was familiar to the Mexican and Spanish settlers there, but also because they hoped that this regime would appeal (more than a common law system of husband's sole ownership of marital property) to the young white women whom they hoped would migrate to their state.

28. Competition and differentiation were not the only modes of states' expressions of their sovereignty over marriage rules, however; imitation was another. Marriage and divorce reform waves swept over states at various times, and as states looked to each others' laws and judicial opinions, multiple states might move sequentially in roughly the same direction.

29. The inconsistencies in marriage practice that occurred as a result of the diversity in states' rules

raised alarms among some American reformers. When cumulative state statistics of marriage and divorce were first published (in the 1880s, covering the preceding twenty years), some observers were horrified by the evidence and saw in it an augury of marital decline. The statistics showed considerable regional and state differences in marriage laws and an increasing frequency of divorce. Reformers fearful about the future of marriage began calling for uniform marriage and divorce laws. Such reformers advocated a national legal code in order to cure the lack of uniformity and to eliminate the incitement to divorce present in a faraway state's liberality on the matter.

30. A constitutional amendment to establish national uniformity in marriage and divorce laws was first proposed in 1885-86. Legislative and constitutional proposals to nationalize the definition of marriage were put before Congress again and again, from the 1880s to 1950s, with a particular burst of activity during and after World War II, because of the war's perceived damage to the stability of marriage and because of a steep upswing in divorce. No proposal ever succeeded. Few members of Congress were willing to supersede their own states' power over marriage and divorce. While members of Congress oversaw an expansion of the powers of the federal government in other domains, they guarded their own states' sovereignty over marriage.

31. In what follows, I will illustrate how states have varied in their decision-making about the forms of valid marriage, restrictions on who can marry, and

ways of ending marriage. The examples that I will discuss are illustrative only, rather than comprehensive; numerous other kinds of difference could be cited. I will discuss common law marriage, age at marriage, "hygienic" restrictions, marriage across the color line, and grounds for divorce.

(i) Common Law Marriage

32. From the Revolutionary era on, state laws and court decisions have varied even in the most basic point of what constitutes a valid marriage. This became apparent soon after 1800 with respect to the validity of marriage without ceremony, which is often called "common law marriage." In many parts of early America, couples cohabited and acted like married partners but had not followed prescribed ceremonies, and their local community accepted them as married if they lived conventionally. Court challenges to such marriages usually arose in the course of a property inheritance dispute after the death of one of the partners.

33. Many American state courts were lenient (where English judges were not) in accepting these relationships as valid marriages—but not all. The Supreme Court of New York (then the state's highest court), in an 1809 decision attributed to Chief Justice James Kent (later the state's Chancellor and a highly influential jurist), affirmed an informal marriage, saying that "no formal solemnization of marriage was requisite" when the couple consented through mutual vows. Kent elaborated on this view in his 1826 Com-

mentaries, saying that "consent is all that is required by natural or public law," citing Roman law for the doctrine that "the very foundation and essence of the construct consisted in consent freely given" and seeing this as "the language equally of the common law and canon law and of common reason."

34. The Supreme Judicial Court of Massachusetts had a different view. In cases in 1804 and 1810, the Commonwealth's high court refused to recognize marriages that had not been solemnized according to the prescribed ceremonies conducted by an authorized agent. Justice Theophilus Parsons saw marriage as a civil contract, but one that required public oversight and validation. Even though Massachusetts did not expressly prohibit common law marriage, such an informal arrangement could not be validated, Parsons concluded, without rendering "all the statute regulations" on the subject of marriage "in a great measure nugatory."

35. Diversity in states' willingness to credit common law marriage continued through the nineteenth century. A few states absolutely prohibited or nullified such marriages, and even in the majority that did not, judges sometimes refused to recognize them, following Justice Parsons's reasoning. But Kent's view became the interpretation of the majority.

36. By the end of the nineteenth century, the tide turned. In one state after another, the reformers who were upset by the rising divorce rate also thought that marriages were too casually entered into, and they

pressured legislators to regulate marriage formally to a greater extent than earlier generations had. Although the pattern was highly varied, a majority of states invalidated informal marriages over the course of a century.

37. Several states still hold out today, however, and continue to accept common law marriage for some or all purposes, including Alabama, Colorado, Iowa, Kansas, Montana, South Carolina, Rhode Island, Texas, and the District of Columbia. Others do not recognize common law marriages entered now, but will recognize one made before a certain date. For example, Pennsylvania honors common law marriages entered into prior to 2005; Idaho recognizes those contracted before 1996; and New Hampshire is willing to honor common law marriage for inheritance purposes after one spouse dies, but not before.

38. Despite this variation, the federal government has not interceded to determine whether any or some forms of common law marriage should be recognized for the purpose of federal law. The federal government accepts states' definitions in these cases.

(ii) Age at Marriage

39. In the late nineteenth century, reformers also urged state legislators to raise the bar to marriage entry in other ways, for example with respect to age limits. Common law set the age of consent at puberty. Under pressure from reformers, most state legislatures raised the age of consent to at least 14 for females and 16 for males. States have made subse-

quent adjustments, all upwards, in the past century. At present, all states but one allow 18-year-olds to marry without parental consent; Nebraska makes 19 the required age.

40. States also differ on the absolute minimum age for marrying Most states set this minimum at 16, but Mississippi, for example, has no minimum marriage age (so long as a judge or the parents give consent); West Virginia sets the minimum at age 18 and makes exceptions in case of pregnancy or the birth of a child; Hawaii sets the minimum at 15, and New Hampshire even lower.

41. Despite this variation, no minimum age is required for a marriage to be accepted as valid for purposes of federal law.

(iii) Public Health Concerns

42. State legislators in the late nineteenth and early twentieth centuries also implemented reformers' insistence on a new category of "hygienic" or "eugenic" regulation of marriage, though the implementation varied. Concerns about biological "fitness" to marry led states to add strictures about venereal disease, "feeblemindedness," epilepsy, and other conditions. Michigan led in 1899; by the 1930s, 25 more states criminalized marriage by persons with venereal disease. Wisconsin, in 1913, was the first state to require a medical examination for the prospective groom (to determine whether he had venereal disease) before a marriage license could be issued, and most states followed. Indiana was first in 1907 to require sterili-

zation before individuals considered to be "idiots," "imbeciles," habitual criminals, or convicted rapists could marry. By 1931, 27 states had similar laws.

43. In the same time period, states also began to ban first-cousin unions. Marriages between first cousins had been common and approved for centuries in Europe and many U.S. states; elites especially favored first-cousin marriages as a way to consolidate rather than disperse family property. Kansas was the first state to ban first cousin marriage in 1858, presumably because of worries about hereditary risk. Seven states, mostly but not only in the West, followed suit in the 1860s. Other states followed in subsequent decades, to the 1920s, passing these bans along with others based on presumed hygienic or eugenic reasons. Then the wave of concern passed: only Kentucky (1946), Maine (1985), and Texas (2005) have passed such laws since the 1920s. At present, 31 states either ban first-cousin marriage or impose certain conditions on its validation.

44. Despite this variation, the federal government has not interceded to determine hygienic requirements for qualifying marriages under federal law and has accepted states' determinations.

(iv) Marriage across the Color Line

45. A major example of state variation in marriage law is the criminalization, nullification and voiding of marriages that crossed a "racial" or color line. This is a chequered history, not at all confined to the American South. The slaveholding states before the Civil

War relied on the regime of slavery itself, more than marriage bans, to prevent legitimate marriage between whites and blacks. Because slaves lacked basic civil rights (*i.e.*, the right to body, liberty and property), they also lacked the ability to consent validly to marriage. Furthermore, marriage obliged those undertaking it to fulfill certain duties defined by the state; a slave's prior and overriding obligation of service to the master made carrying out the duties of marriage impossible.

46. Following the abolition of slavery, state legislators strengthened bars to marriage across the color line. Ten states enacted new laws that voided or criminalized marriage between blacks and whites, eight others strengthened their similar laws, and still others kept theirs in place. Enforcement of these laws usually occurred at the point of obtaining a marriage license. County clerks charged with issuing marriage licenses would typically look at the couple applying and decide whether to grant a license or not; hence, there was a great deal of inexactness in enforcement.

47. Following agitation in California and other Western states over Asian immigration, five Western states in the 1860s added the categories of Indians, Chinese and "mongolians" to those (Negro and mulatto) already prohibited from marrying whites. As theories of "race" continued to develop, laws using racial designations to proscribe marriages became more complex, especially the Western states. As many as 41 states and territories of the U.S. banned,

nullified, or criminalized marriages across the color line for some period of their history, often using "racial" classifications that are no longer recognized.

48. These laws varied widely across the states. New England was less avid in preventing these marriages than other regions; Vermont, New York, and Connecticut never had such laws, but Massachusetts, Rhode Island, and Maine did, early in their histories.

49. Many states had complicated histories on this issue, legislating repeatedly and differently over the decades. Some imposed outsize punishments: Alabama, for example, penalized marriage, adultery, or fornication between a white and "any negro, or the descendant of any negro to the third generation," with hard labor of up to seven years. Some states (especially in the West) expanded the categories of groups whose marriage to whites was prohibited. As the historian Peggy Pascoe has shown: "In one state or another, all of the following groups were prohibited from marrying Whites: Negroes, Mulattoes, Quadroons, Octoroons, Blacks, Persons of African Descent, Ethiopians, Persons of Color, Indians, Mestizos, Half-Breeds, Mongolians, Chinese, Japanese, Malays, Kanakas, Coreans, Asiatic Indians, West Indians, and Hindus."

50. The 1910s and 1920s were explosive in this contentious area, both because more African Americans migrated north and because Victorian sexual standards were overridden by more sexually expressive modern values. The marriage of African Ameri-

can heavyweight boxing champion Jack Johnson to a young white woman made sensational national news in 1912, shortly after he had defeated the "great white hope," Jack Jeffries, in a match viewed as a contest for racial supremacy. In the next year, fourteen state legislatures—including New York's—saw bills introduced to institute or strengthen intermarriage bans. None passed in Northern states, however, mostly because of organized pressure by black voters. In the late 1920s, sparked by the resurgence of the Ku Klux Klan, legislators in Maine, Rhode Island and New York introduced new bills to criminalize intermarriage; and Congress introduced and returned several times to such a bill for the District of Columbia. None of these was successful, mainly because of the strong countermobilization by the NAACP.

51. Legislators often justified the laws criminalizing marriage across the color line by saying that such marriages were against nature or against the Divine plan, much as opponents of same-sex marriage argue today. They contended that permitting cross-racial couples to marry would degrade the institution of marriage fatally. To the white legislators who passed these laws, only marriage to other whites qualified as "natural."

52. Whatever the high-flown rhetoric surrounding them, however, these bars to marriage served to deprive intimate white-black relationships of public approval. By preventing an intimate relationship between a white and a person of color from ever gaining the status of marriage, legislators sought to delegiti-

mize the relationship. In parallel fashion, preventing legal recognition of a relationship between a couple of the same sex (either at the state or federal level) functions to discredit that relationship.

53. These laws expressed state preferences at the time. In 1930, laws in thirty states nullified and/or punished marriage between whites and blacks—many of them, especially in the West, treating marriage between whites and Asians the same way. As a result, marriage was the most criminalized form of race-related conduct at the height of the Jim Crow era.

54. Social and legal views on this question changed slowly and haltingly during the twentieth century. Although the Supreme Court of the United States articulated the right to marry as a fundamental right in 1923, Virginia passed the most restrictive marriage law in the nation the very next year.

55. The first real shift occurred in the wake of World War II, which had stimulated an emphasis on cultural and religious pluralism as national values in the United States. In 1948, the Supreme Court of California, where marriages between whites and either blacks or Asians had been prohibited for almost a century, was the first state high court to hold that race-based restrictions on marriages were unconstitutional. The California court recognized that freedom in exercising the "fundamental right" to marry was "essential to the orderly pursuit of happiness by free men." The Court struck down race-based restrictions on choice of spouse, holding that legislation addressing

the right to marry "must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws."

56. Over the next two decades, more than a dozen other states followed California by eliminating their own race-based bars to marriage, spurred, to be sure, by the civil rights movement's impact on Americans' racial views. Eventually, a challenge to Virginia's 1924 law (which made marriage between a white and a non-white person a felony) led the Supreme Court of the United States to affirm freedom of choice of spouse regardless of race in *Loving v. Virginia.* (At that time, sixteen states still banned interracial marriage.) Chief Justice Earl Warren's opinion for a unanimous Court rejected the longstanding contention that bans on marriage across the color line affected both races equally. He called such bans "measures designed to maintain White Supremacy" that were insupportable in view of the Fourteenth Amendment. The Court's opinion in *Loving* reiterated clearly that marriage was a fundamental freedom protected by the Constitution, observing (in an echo of *Perez v. Sharp*, the case decided by the Supreme Court of California): "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."

57. Although opinion on interracial marriage was bitterly divided at the time, the federal government accepted all state marital status determinations for the purpose of federal law, throughout this period of legal change. When controversy arose because a state that

did not allow interracial marriages refused to recognize the marital status of a mixed couple validly married elsewhere, the issue was considered a conflict between the states and not a federal matter.

(v) Marriage Dissolution

58. The states also varied widely in setting the terms on which marriages could legally end.

59. Divorce is not a modern innovation in America. Several colonial legislatures made divorce possible (although English law would not have allowed it). Soon after the American Revolution, almost every state legislature entertained petitions for divorce, and by 1800 about a dozen states permitted divorce suits in court under limited circumstances. At first, divorce was typically only permitted for adultery, desertion for a number of years, and conviction for certain crimes. Most states expanded their grounds in the early nineteenth century; before the Civil War, many states permitted divorce for extreme cruelty, gross neglect of duty, and (under pressure from the temperance movement) habitual drunkenness.

60. As states expanded their grounds for divorce in response to local circumstances, extreme differences among them arose. South Carolina permitted no divorces until the late 1940s, and New York granted divorce for adultery only until the 1960s. Others went in the opposite direction. Before 1800, Connecticut added what critics called an "omnibus" clause, allowing a court to grant a divorce for any misconduct that "permanently destroys the happiness of the peti-

tioner." Indiana had seven statutory grounds and added "any other cause for which the Court shall deem it proper that a divorce should be granted"—a provision that, together with its lack of a real residency requirement, made Indiana notorious as a "divorce mill" in the 1850s and 1860s. California also had several grounds, bringing a *San Francisco Chronicle* writer to observe sardonically in 1854 that "marriage among us seems to be regarded as a pleasant farce."

61. The multiplication of grounds for divorce was fiercely opposed in some quarters. Critics were sure that liberalized treatment of divorce would undermine the marital compact entirely. The significant differences among states' provisions caused great alarm about "migratory" divorce, which was attacked as a pernicious evil. Yet the wide disparities persisted, and no proposal for a uniform code for marriage and divorce succeeded.

62. Between the late 1960s and mid-1980s, in a major change of approach, almost all states left behind the previous adversary scheme in divorce suits and enabled couples who found themselves incompatible to end their marriages. States retained a strong role in the ending of marriages (*e.g.*, post-divorce terms of support must be approved in state courts), but the move to what is commonly called "no-fault" divorce has reflected a major shift toward enabling spouses to set their own marriage goals and to determine how well these goals are being met.

63. Despite states moving in the same general direction, differences continue in states' specific provisions for divorces. Not all use the "no-fault" rubric today. States differ considerably in residency requirements for divorce, as well, requiring anywhere from six weeks (for example, in Nevada) to one year (for example, in New York and Connecticut).

64. Despite all of these variations, the federal government never interceded to create uniform requirements for termination of marriage for purposes of federal law.

D. States' Prescriptions for Spousal Roles

65. The common law of marriage inherited by the American states treated husbands and wives unequally and asymmetrically. According to the marital doctrine of coverture, the husband and wife were considered to be a single entity. The wife upon marriage ceded her legal and economic identity to her husband and was "covered" by him. (That is why Ann Doe became Mrs. John Smith.)

66. Coverture, which reflected a view of the marital couple as a unit naturally headed by the husband, allowed the wife no separate legal or economic existence. A married woman could not own or dispose of property, earn money, have a debt, sue or be sued or enter into an enforceable agreement under her own name, because her husband had to represent her. Neither married partner could testify for or against the other in court, nor commit a tort against the other, because the two were considered one person. Com-

mon law assigned the marriage partners opposite economic roles understood as complementary: the husband was bound to support and protect the wife, and the wife owed her service and labor to her husband. Any property she owned before marriage became his. (In community property states, unlike common law states, the wife retained title to her property but the husband became the manager of that property and had the right to dispose of it.)

67. States at first incorporated common law expectations in their marriage rules (with some exceptions in states with Spanish influence). By the 1830s, however, the notion that married women could have no economic personhood apart from their husbands began to clash with the realities of a developing society.

68. In several waves of statutory reform between 1830 and 1930, states replaced the common law regime of marriage with their own detailed and evolving provisions about the economic competence of married women. The timing and content of individual state actions depended on local conditions and perceptions. Some acted much sooner than others.

69. The initial phase was influenced by a rash of bankruptcies after the Panic of 1837, when state legislators in several states saw the usefulness of a wife's keeping the family homestead in her own name when her husband's creditors came calling. Mississippi was one of the earliest (1839) to declare married women's right to property, but its state law concerned only property in slaves. Agricultural states acted to sep-

arate wives' landed or slave property, while more urban areas gave broader property rights. Another economic panic, in 1857, spurred another rash of similar laws. Then a third series of state actions took place roughly from the 1860s to the 1880s, as more women became gainfully employed; these measures secured wives' rights to their own earnings.

70. Over a century, repeated law-making in every state incrementally eliminated the property basis of coverture and replaced it with myriad state laws. "The sheer volume of legislation astonished friends and foes alike" while "the reform impulse varied dramatically by region," in the words of the legal historian Sandra VanBurkleo.

71. Although coverture had been in place for hundreds of years and was typically seen as absolutely essential to marriage, state legislators used their power to alter marriage fundamentally. Far from viewing marriage as immutable, they took account of changing societal needs and spouses' evolving relationships within their households and in the larger society.

72. In a subsequent phase of major change in marriage, repeated and successful challenges to sex discrimination in state laws during the 1970s had profound effects on domestic relations law. Although the strenuous campaign to put an Equal Rights Amendment into the U.S. Constitution failed, states passed their own Equal Rights Amendments, which led toward gender neutrality in marriage and divorce re-

form. In divorce, for example, as in other aspects of family law today, gender neutrality in roles and decision-making is the premise. Obligations of the two spouses upon marital dissolution used to be assigned by gender, and they were asymmetrical: the husband was responsible for the economic support of any dependent children, while courts gave the mother a strong preference for custody. Under current divorce laws, in contrast, both parents of dependent children have responsibility for economic support and for childrearing; gender neutrality is the judicial starting point for post-divorce arrangements.

73. For couples who consent to marry today, marriage has been transformed from an institution rooted in gender inequality and prescribed spousal roles to one in which the contracting parties decide on appropriate behavior toward one another, and the legal obligations and benefits of the spouses do not depend on their sex. The two partners in a marriage are still economically and in other ways bound to one another by law. But the law no longer assigns asymmetrical roles to the two spouses.

E. The Exceptional Role of the Federal Government in Marriage Regulation in the Nineteenth Century

74. The U.S. Congress has involved itself directly in making or breaking marriages only in exceptional situations. In the nineteenth century, federal authorities exercised their plenary powers when they enabled ex-slaves to marry legally during and in the wake of

the Civil War, and when they campaigned against polygamy in the Utah Territory. These examples illustrate by their uniqueness the historical commitment to state jurisdiction over these matters.

(i) Civil War and Reconstruction

75. A signal mark of slaves' lack of freedom was their exclusion from legal marriage. Deprived of all civil rights, slaves lacked the ability to consent to marriage. They lacked the power to fulfill marital responsibilities because their masters could always supervene. A slave wedding meant nothing to the state government where the couple resided; that absence of public authority was the very essence of the marriage's legal invalidity. During Congressional debate on the proposed Thirteenth Amendment to eliminate slavery, more than one speaker noted disparagingly that no Confederate state honored "the relation of husband and wife among slaves, save only so far as the master may be pleased to regard it."

76. As the Union Army marched south, Confederate states crumbled and ceased to regulate marriage. In the spring of 1864, a Union military edict authorized the clergy in the Union-occupied areas to perform marriages among slaves who had fled to freedom from behind Union lines. Ex-slave recruits welcomed the opportunity to exercise a civil right that had long been denied them. An army chaplain in Mississippi remarked on the "very decided improvement in the social and domestic feelings of those married by the authority protection of Law. It causes them to feel

that they are beginning to be regarded and treated as human beings."

77. Promoting legal marriage among ex-slaves then became a core policy of the Union government. In the Union Army's "contraband camps" where ex-slaves fled toward the end of the Civil War, the Secretary of War announced that couples who wished to cohabit would have to be legally married. During Reconstruction, the newly formed U.S. Freedmen's Bureau took power in the occupied South (where state legislatures had not yet been reconstituted), and regulated marriage there. This direct federal involvement in creating marriages among ex-slave couples was the exceptional result of a devastating Civil War that left no state governments in the occupied South to authorize marriages. Once state governments were reconstituted, the Freedmen's Bureau gave up its unusual authority, and Southern states resumed their jurisdiction over marriage law, subject however to the authority of the Fourteenth Amendment, ratified in 1868.

(ii) Polygamy in the Utah Territory

78. The other important and revealing example of exceptional federal action comes from the nineteenth-century federal campaign to eliminate polygamy as practiced by the Church of Jesus Christ of Latter-Day Saints. In 1862, after members of that church had moved to the Utah Territory, the U.S. Congress outlawed bigamy there and in all the territories under its jurisdiction. Congress had the same

powers over marriage in the territories that states had in their own domains (and bigamy was a crime in every state). Federal anti-polygamy legislation applied only to the territories, over which Congress had plenary authority.

79. Congress acted not only because the presence of polygamy on the North American continent seemed loathsome, but because Utah's intent to apply for statehood loomed on the horizon. Federal legislators knew that they would have no power to define or regulate marriage in Utah once it obtained statehood. Under extreme federal pressure, the Church of Jesus Christ of Latter-Day Saints gave up polygamy. Still, Congress required Utah's state constitution to stipulate that polygamy was "forever prohibited" before Utah could be admitted to the Union.

80. The anti-polygamy laws, like the federal attention to the marriages of former slaves at the close of the Civil War, were exceptional actions in which plenary power was available to federal authorities to define marriage validity. In assaulting polygamy in the Utah Territory, Congress used the unique constitutional powers accorded it. The *quid pro quo* for Utah's admission to the Union as a state showed Congressional understanding of the legitimacy and primacy of state jurisdiction over marriage.

F. Federal Benefits in Relation to Marriage

81. While accepting state jurisdiction over marriage definition, the federal government used marriage as a vehicle to convey benefits to the population. This

began during the Revolutionary War, when men's war service prompted the Continental Congress in 1780 to award "pensions" to the widows and orphans of soldiers who died serving the new nation. Many subsequent U.S. Congresses perpetuated awards of military widows' pensions, to incentivize men to enlist and to express the nation's gratitude for their service. Benefits of this type were originally gender-specific (the soldiers assumed to be male and the surviving spouses assumed to be female), but after successful legal challenges on equal protection and sex discrimination grounds in the 1970s, federal benefits for married spouses have been gender-neutral.

82. Revolutionary War pensions 230 years ago became, in effect, the model for the federal government's use of marriage as a vehicle for channeling benefits to adult citizens and their dependents. With the expansion of federal economic programs over time, the extent of federal laws and policies utilizing marriage in this way has grown to cover vast and important areas, including income tax, Social Security, and citizenship and naturalization privileges and limits.

83. The federal laws directing benefits to flow through marital relationships are sometimes referred to, imprecisely, as "federal family law," but the policies in question do not define or regulate marriage per se, nor do they deny any state's power to create fully valid marriages among its inhabitants. Until 1996, Congress deferred to the laws of the states with respect to

the definition of marriage partners who could benefit from federal policies.

IV. CONCLUSION

84. Throughout American history, state legislatures and courts have made and altered laws governing the meaning and structure of marriage.

85. Americans from the era of the American Revolution or the Civil War would be profoundly shocked by the gender equality of marriage today and the frequency of marriage across the color line. Restrictions on marriage that were seen as necessary in their time have since been removed as unwarranted and/or unconstitutional. Yet Americans of any era would recognize in contemporary marriage the institution's foundation in two consenting parties freely choosing one another, and the state's role in defining and honoring their committed relationship, economic partnership, and common household.

86. Distinctive features of contemporary marriage that we take for granted (including the ability of both spouses to act as individuals while married, the freedom to marry a spouse of a different race, and the liberal availability of divorce) were fiercely resisted when first introduced and were viewed by opponents as threatening to destroy the institution of marriage itself.

87. The institution of marriage has endured in great part because it has been flexible and resilient, not static. State legislators have preserved the appeal and value of marriage in our dynamic society by

making adjustments in key features of marital roles, duties, obligations, and rules of entry.

88. Prior to 1996, the federal government accommodated the diversities among state marriage laws and their continual evolution by accepting states' determinations of marital status for purposes of federal law. In enacting the Defense of Marriage Act, however, the U.S. Congress interceded to define marriage by statute as between a man and a woman, at a time when only a minority of states had so specified the institution in their legal codes. In thus defining marriage for all federal purposes, the Defense of Marriage Act represents a substantial deviation from all the prior history of federal-state relations in marriage regulation.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on [20] day of May, 2011.

/s/ NANCY F. COTT, PH.D
NANCY F. COTT, PH.D

[Exhibits Omitted]

* * * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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10 Civ. 8435 (BSJ) (JFC)
ECF Case

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Filed: June 24, 2011

EXPERT AFFIDAVIT OF MICHAEL LAMB, PH.D.

I, Michael Lamb, Ph.D., hereby depose and say as follows:

PRELIMINARY STATEMENT

1. I am Professor of Psychology in the Social Sciences, Head, Department of Social and Developmental Psychology, Faculty of Politics, Psychology, Sociology, and International Studies, Cambridge University. I have been retained as a consultant by counsel for Plaintiff in connection with the above-referenced litigation ("*Windsor*") and by counsel for the Plaintiffs in *Pedersen, et al.* v. *Office of Personnel Management, et. al.*, 3:10-cv-01750(VLB) (D. Conn., filed Nov. 9, 2010). I have actual knowledge of the matters stated in this

affidavit and could and would so testify if called as a witness.

2. My background, experience, and list of publications from the last 10 years are summarized in my curriculum vitae, which is attached as Exhibit A to this report.

3. I hold a Bachelor's degree in psychology and economics from the University of Natal in Durban, South Africa (1972), Master's degrees in psychology from Johns Hopkins University (1974) and Yale University (1975), and a Ph.D. in psychology from Yale University (1976).

4. I have held academic positions as Assistant Professor of Psychology at the University of Wisconsin, Assistant Professor of Psychology at the University of Michigan, and Professor of Psychology, Psychiatry, and Pediatrics at the University of Utah. In 2004, took a position as Professor and Head of the Department of Social and Developmental Psychology at Cambridge University in the United Kingdom, where I am now employed.

5. From 1987 until 2004, I was head of the Section on Social and Emotional Development and a Senior Research Psychologist at the United States National Institute of Child Health and Human Development (NICHD), an institute within the National Institutes of Health (NIH).

6. I have authored more than 500 publications that have appeared either in peer-reviewed professional journals or in professional books published by aca-

demic presses primarily for the readership of other professionals. I have written or edited about 45 books in the field of developmental psychology, development in infancy, mother-child relationships, father-child relationships, the role of the father, sibling relationships, the effects of nontraditional rearing circumstances, the effects of daycare, child abuse, and forensic interview practices. A number of my books, including my books on nontraditional families, are used widely as texts in graduate courses.

7. I have been a peer-reviewer for various professional journals regularly for more than 30 years. I currently average two reviews of other professionals' work per week. In connection with my work as a peer-reviewer, I have peer-reviewed dozens of articles that address the parenting abilities of gay men and/or lesbians and/or their children's adjustment.

8. Over the past 35 years, I have pursued two broad areas of research. One line of research has focused on forensic issues such as the credibility of children and the best ways of eliciting accurate information from victims of child abuse. This work is not directly relevant to the present litigation. The other line of research is concerned with children's development and adjustment, especially the formative effects of the relationships that children establish with their parents and the ways in which these relationships shape children's development over time. In this context, I have also examined factors that are likely to have an adverse effect on development, such as child abuse, and I have explored variations in rearing expe-

riences that might affect child development, such as the effects of various types of nontraditional family forms. I am familiar with the research on families headed by gay and lesbian individuals and couples.

9. My initial research in the United States was about the formation of relationships between babies and their parents in households with a mother and a father. When I began my research, I focused on the role played by fathers in children's development. I later expanded my research in order to understand better the role that fathers play in children's lives—when they live with their children and when they do not, in both divorced and married families, and when they are highly involved or uninvolved in childcare.

10. In the past four years, I have provided expert testimony at trial in two matters, *In the Matter of the Adoption of X.X.G. and N.R.G.* in the Circuit Court of the 11th Judicial Circuit and in Miami-Dade County, Florida, Case No. 06-43881 FC 04, and in *Perry* v. *Schwarzenegger*, Case No. 09-CV-2292 VRW. I was also deposed in those cases. Additionally, I was deposed as an expert on December 11, 2009, in *Cole* v. *The Arkansas Department of Human Services*, Case No. CV2008-14824, in the Circuit Court of Pulaski County, Arkansas.

11. In preparing this Affidavit, I reviewed the Complaints in *Windsor* and *Pedersen*, and the materials listed in the attached Bibliography (Exhibit B). I may rely on those documents, in addition to the docu-

ments specifically cited as supportive examples in particular sections of this Affidavit, as additional support for my opinions. I have also relied on my years of experience in this field, as set out in my curriculum vitae (Exhibit A), and on the materials listed therein.

I. Summary Of Ultimate Conclusions

12. Children and adolescents raised by same-sex parents are as likely to be well-adjusted as children raised by heterosexual parents, including 'biological' parents. Numerous studies of youths raised by same-sex parents conducted over the past 25 years by respected researchers and published in peer-reviewed academic journals conclude that children and adolescents raised by same-sex parents are as successful psychologically, emotionally, and socially as children and adolescents raised by heterosexual parents, including 'biological' parents. Furthermore, the research makes clear that the same factors, as elaborated below, affect the adjustment of youths, whatever the sexual orientation of their parents.

13. It is beyond scientific dispute that the factors that best account for the adjustment of children and adolescents are the quality of the youths' relationships with their parents, the quality of the relationship between the parents or significant adults in the youths' lives, and the availability of economic and socioeconomic resources. These factors affect adjustment in both traditional and nontraditional families. The parents' sex or sexual orientation does not affect the capacity to be good parents or their children's healthy

development. There is also no empirical support for the notion that the presence of both male and female role models in the home promotes children's adjustment or wellbeing.

II. The Factors That Determine Children's And Adolescents' Adjustment

14. Psychologists use the term "adjustment" to refer to psychological well-being. "Adjustment" refers to characteristics (including the absence of psychological or psychiatric symptoms and the absence of behavior problems) that allow children or adolescents to function well in their everyday life. Well-adjusted youths have sufficient social skills to get along with others, to get along and comply with adults, to function well in school, to function effectively in the workplace, and establish meaningful intimate relationships later in life. In contrast, maladjustment might be manifested by behavior problems, such as bullying and acting aggressively with others, or deficient social skills making it difficult for individuals to establish relationships with others, thus leaving them socially isolated.

15. Over the last 50 years, more than 1000 studies have examined the factors that predict healthy adjustment in children and adolescents. As a result of this significant body of research, psychologists have reached consensus on the factors that predict healthy development and adjustment. Among these are:

a) the quality of children's or adolescents' relationships with their parents or parent figures;

b) the quality of the relationship between the parents and other significant adults; conflict between them is associated with maladjustment while harmonious relationships between the adults support healthy adjustment;

c) the availability of adequate economic and social resources, with poverty and social isolation being associated with maladjustment, and adequate resources supporting healthy adjustment.

16. The quality of parent-offspring relationships is determined by the degree to which parents offer love and affection, emotional commitment, reliability and consistency, as well as the extent to which the parents 'read' their children or adolescents effectively and provide appropriate stimulation, guidance, and limit-setting. The better the quality of parent-child relationships, the better the children's or adolescents' adjustment is likely to be, whether the parents have same- or opposite-sex orientations.

17. Not all differences between youths are differences in adjustment. Many ways in which children or adolescents differ from each other are simply normal variations among people, and are unrelated to adjustment. For example, there has been considerable research on intelligence, but individual differences in intelligence are not viewed as markers of adjustment or maladjustment. Other normal variations can result from cultural differences (such as in assertiveness or individualism) or differences in personality (e.g.,

some children are extroverted while others are introverted).

III. The Factors Predicting Healthy Adjustment Are The Same For Traditional and Nontraditional Families, And Children Or Adolescents In Nontraditional Families Are Just As Capable Of Healthy Adjustment As Those In Traditional Settings.

18. In the social sciences, the term "traditional family" refers to the childrearing environment that social scientists formerly considered the norm—a middle-class family with a bread-winning father and a stay-at-home mother, married to each other and raising their biological children. "Nontraditional" family forms, by definition, involve any kind of variation from this pattern. Thus, families with fathers who assume responsibility for childcare would qualify as nontraditional, as would families with employed mothers, with two employed parents, with one parent, or that rely on childcare centers instead of performing childcare exclusively within the home. Nontraditional families constitute the vast majority of families in the United States today.

19. Society's early assumptions about the superiority of the traditional family form have been challenged by the results of empirical research. Early in the Twentieth Century, it was widely believed that traditional family settings were necessary in order for children to adjust well. This view derived directly from psychoanalytic thinking that was based on clinical observations, but not on empirical research. As psychoanalysis yielded to more empirically-based

psychology over the early parts of the last century, it became clear that this notion was unsupported. Research beginning in the late 1940's and continuing until the present has tested many of the hypotheses that flowed from the assumption that children and adolescents need to be raised in traditional families in order to develop healthily. Specifically, there have been over 50 years of research into the effects on children or adolescents of having one parent, of divorce, and of maternal employment. Intense interest in the effects of daycare began in the 1970's, as did interest in highly involved fathers (stay-at-home fathers or families in which mothers and fathers share childcare responsibilities) and in same-sex families and households.

20. This research has demonstrated that the correlates of children's or adolescents' adjustment listed above are important regardless of whether children and adolescents are raised in traditional family settings or in nontraditional families. Children's or adolescents' adjustment depends overwhelmingly upon such qualities as the parents' affection, consistency, reliability, responsiveness, and emotional commitment, as well as on the quality and character of the relationships between the parents and their intimates, and on the availability of sufficient economic and social resources. Since the end of the 1980's, as a result, it has been well established that children and adolescents can adjust just as well in nontraditional settings as in traditional settings.

A. Difficulties in one-parent families have nothing to do with parental gender or sexual orientation; the absence of a father or of a mother, by itself, is not a predictor of healthy adjustment.

21. Numerous large-scale studies show that most of the children and adolescents who grow up in one-parent families are well adjusted. However, there is a significant body of research on the impact of father absence, divorce, and one-parent family life demonstrating that children and adolescents in one-parent families are more likely to have adjustment difficulties than children and adolescents in two-parent families. Research shows that the reasons for this disparity are consistent with the predictors of adjustment generally. The primary causes of increased risk of maladjustment among children or adolescents in one-parent families are the reduced resources available when there is one parent, and the disruptive effects of and conflict associated with parental separation.

22. Many children and adolescents of parents whose relationships dissolve lose one of their supportive parental relationships, and do not get the benefit of both psychological and financial support from their non-resident parents. Additionally, many divorces expose children and adolescents to parental conflict both preceding and following the separation, may also involve rejection by or separation from one of the parents, and possible dislocations, such as moving to a new neighborhood and school. Finally, families headed by single mothers, in particular, often suffer considerable degrees of financial hardship because of a

combination of factors including the continuing disparity in pay received by men and by women, and because many women, whether or not they were once married, have taken time out from the workforce to raise children.

B. Male and female parents can be equally competent; the absence of male or female parents in the home does not impair development.

23. Fifty years ago, it was widely assumed that the absence of a male parent figure accounted for the problems in adjustment encountered by some children and adolescents in single-parent families. However, extensive empirical research on nontraditional families has demonstrated that father absence is not itself important to adjustment; instead, it is the quality of the children's experiences more broadly and, specifically the quality of the parent-child relationships, the quality of the relationship between the parents, and the adequacy of resources that explain the higher levels of maladjustment on the part of children and adolescents in one-parent families. It is well-established that both men and women have the capacity to be good parents, and that having parents of both genders does not enhance adjustment.

24. Studies have shown that, at the time that parents first receive their children, whether by birth or adoption, men and women are equivalently competent (or incompetent) at parenting. Most parenting skills are learned 'on the job.' Because women in this society on average spend more time on the job, they often

become more skillful at it over time. However, this disparity in parenting skills simply reflects women's greater experience and greater opportunities to learn rather than a biologically given capacity. When men actively care for their children, they become more skillful, too. Nothing about a person's sex determines the capacity to be a good parent.

25. Many studies have pointed to differences between the ways in which mothers and fathers interact with their children, but this is not significant to adjustment. These studies suggest that, on average, men's patterns of interaction are dominated by a more boisterous, playful, unpredictable interaction, while women's patterns are more soothing, containing, and restrictive. However, these differences do not apply across the board to all men or to all women, nor is it harmful when parents do not assume traditional sex-typed parenting styles.

26. Male and female adults can adopt sensitive or authoritative parenting styles. When fathers are the primary caregivers, for example, the style of interaction between fathers and children often becomes more like typical mother-child interaction. The observed differences in parenting style appear to reflect, in large part, differences in the type of responsibility that the parent has within the home (i.e., differences between being the primary or secondary parent). Many children do not have parents who offer both of these parenting styles and this does not appear to affect their adjustment adversely.

27. There also is no empirical support for the notion that the presence of both male and female role models in the home enhances the adjustment of children and adolescents. Society is replete with role models from whom children and adolescents can learn about socially prescribed male and female roles. Some normal variations do characterize children and adolescents raised in some nontraditional settings, however. For example, such children often have distinctive attitudes about sex-role norms. Within the field, sex-role norms refer to the awareness of and beliefs in behavioral differences between boys and girls or men and women. In nontraditional families, children may have more flexible sex-role standards. This means, for example, that the children are more likely to think that both boys and girls can be astronauts or doctors, and that it is acceptable for both girls and boys to play with both trucks and dolls. By contrast, children raised in traditional family settings tend to have more sex-stereotypical notions about appropriate gender roles. Again, this variation with respect to sex-role norms is a normal variation, and has nothing to do with adjustment.

IV. Research Specific To Same-Sex Parenting Demonstrates That The Children And Adolescents of Same-Sex Parents Are Just As Well-Adjusted As Those With Heterosexual Parents.

A. Based on a significant and well-respected body of research, the scientific community has reached consensus that parental sexual orientation does not affect adjustment.

28. The body of research that has examined children's and adolescents' adjustment in the specific context of same-sex parenting represents approximately 30 years of scholarship and includes more than 50 peer-reviewed empirical reports. The earliest reports from studies of same-sex parenting were published in the late 1970's, and research has continued to the present. More than 100 articles about same-sex parents and/or their offspring have been published in respected academic journals or as chapters in books for use by other professionals. These present both qualitative research (relying primarily on interviews and discussions with either the youths or with the parents) and quantitative research.

29. The results of these studies support and are consistent with the results of the broader body of research on socialization in both traditional and non-traditional families. They demonstrate that the adjustment of children and adolescents of same-sex parents is determined by the quality of the youths' relationships with the parents, the quality of the relationship between the parents, and the resources available to the families.

30. They further demonstrate that adjustment is not affected by the gender or sexual orientation of the parent(s). Research comparing the adjustment of children and adolescents of same-sex parents with the children and adolescents of heterosexual parents consistently shows that the children or adolescents in both groups are equivalently adjusted. The children and adolescents of same-sex parents are as emotionally healthy, and as educationally and socially successful, as children and adolescents raised by heterosexual parents. The social science literature overwhelmingly rejects the notion that there is an optimal gender mix of parents or that children and adolescents with same-sex parents suffer any developmental disadvantages compared with those with two opposite sex parents.

31. There is consensus within the scientific community that parental sexual orientation has no effect on children's and adolescents' adjustment. Numerous organizations representing mental health and child welfare professionals have issued statements confirming that same-sex parents are as effective as heterosexual parents in raising well-adjusted children and adolescents and should not face discrimination. See Exhibit B. These organizations include the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, the National Association of Social Workers, the Child

Welfare League of America, and the North American Council on Adoptable Children.

B. Studies identifying differences in the children or adolescents of same-sex parents have identified only normal variations, and not differences in adjustment.

32. Like children and adolescents in other nontraditional families, children and adolescents with same-sex parents have sometimes been found to have less sex-stereotyped beliefs, and to be more open in their views of societal norms and standards about appropriate behavior for males and females. For example, some studies of young children suggest that girls raised by lesbian mothers may play with both dolls and trucks, and be more willing to think that being an astronaut or being a doctor are appropriate aspirations for girls as well as boys, than girls raised by heterosexual mothers. Although there was a time when some developmental psychologists believed that conformance to sex-based stereotypes was a component of healthy adjustment, this view has been discredited and abandoned. The differences seen in sex-stereotyped beliefs and behavior between children of lesbian and heterosexual parents are not differences in adjustment. Children and adolescents raised by same-sex parents do not differ from those raised by heterosexual parents with respect to gender identity, which is an aspect of psychological adjustment.

C. The methodology of the research examining same-sex parenting is standard, reliable, and accepted in the field.

33. Social scientists use and value diverse methodologies, research designs, and types of data that vary depending on the discipline involved, the specific area of research, the questions being raised, and the theories being applied and evaluated. Developmental psychologists (and psychologists more generally) tend to emphasize intensive examination of relatively small numbers of individuals, often studied in the context of social relationships and influences. Developmental psychologists rarely use research methods based on statistically representative national samples. Such large-scale survey research methods are often too blunt to address adequately the complex and nuanced questions that generally are at issue when scholars attempt to assess and compare the course of development in different circumstances. It is more common for researchers to use what might be called "convenience" samples, and to explore those samples intensively, rather than to study large samples more superficially.

34. The methodologies used in the major studies of same-sex parenting meet the standards for research in the field of developmental psychology and psychology generally. Proper research methods and standards in social sciences are determined through a rigorous peer review process that is conducted by established scholars in individual disciplines and sub-fields. When scholarly papers are submitted for publication,

the research methods used, the analyses conducted, and the findings drawn are critically reviewed. In order to be published, an academic's work must satisfy the scrutiny and standards of scholars considered to be experts in the field of research under review.

35. The studies specific to same-sex parenting from which I draw my conclusions were published in leading journals in the field of child and adolescent development, such as *Child Development*, *Developmental Psychology*, and *The Journal of Child Psychology and Psychiatry*. The journals *Child Development*, published by the Society for Research in Child Development, *Developmental Psychology*, published by the American Psychological Association, and *The Journal of Child Psychology and Psychiatry* are the flagship peer-reviewed journals in the field of child development. Most of the studies on which I rely appeared in these (or similar) rigorously peer-reviewed and highly selective journals, whose standards represent expert consensus on generally accepted social scientific standards for research on child and adolescent development. Prior to publication in these journals, these studies were required to go through a rigorous peer-review process, and as a result, they constitute the type of research that members of the respective professions consider reliable. The body of research on same-sex families is consistent with standards in the relevant fields and produces reliable conclusions.

D. Data concerning one-parent families does not support conclusions about the preferred gender of parents.

36. Research showing that children and adolescents in one-parent families are at greater risk of maladjustment than those raised by two parents is sometimes used to support the view that youths need both mothers and fathers, and therefore that heterosexual couples make the best parents. This mischaracterizes the research into one-parent families, which typically does not explore the effects of parental sexual orientation or gender.

37. Studies on the impact of one-parent family life generally compare one-parent and married-couple *heterosexual* parents; I am aware of no study that includes same-sex couples. Consequently, it is inappropriate to attribute the differences resulting from the number of parents and resources in a household to parental gender or sexual orientation, or to draw conclusions about the children of same-sex parents from these studies. The relevant studies do suggest, however, that, all other things being equal, children and adolescents tend to do better with two parents than one, and therefore, that children and adolescents with same-sex parents, like their peers, likely would benefit if their parents could choose to marry and solidify their family and parental ties.

V. Research Concerning The Benefits Of Being Raised By 'Biological' Parents Does Not Support Arguments That Same-Sex Couples Are Inferior Parents.

38. Others claim that children thrive in families with 'biological' parents and, by implication, claim that same-sex parenting is bad for children because same-sex parents cannot provide children with the advantages of being raised by their two biological parents. This argument is misleading. In many of the relevant studies, the term 'biological' is used to distinguish between children raised by biological or adoptive parents, on the one hand, and those raised in non-traditional families, on the other. Children adopted early in life have similar outcomes to biological children. These studies thus provide no evidence in support of the argument that the children and adolescents raised by same-sex parents would be at psychological risk.

39. While some studies show that children do better when raised by their 'biological' parents than when raised by one 'biological' parent and the parent's new partner, these studies do not examine children being raised by same-sex couples, including the many who jointly planned to bring children into their families either by birth or adoption, and are jointly raising the children. Children in one-parent families or stepfamilies are at a higher risk for adverse outcomes for reasons explained earlier (i.e., these children may have endured their parents' separations, exposing the children to parental conflict and related dislocations, the children may have experienced separation from or

abandonment by parents, and the step-parents may have entered their lives relatively late in their development, affecting the quality of the parent-child relationships). One would not expect to see these difficulties in same-sex families who jointly plan to marry and have children. As explained above, the research comparing children with same-sex and opposite-sex parents shows no differences in outcome.

40. There is a substantial body of research on parents who have chosen to raise biologically unrelated children rather than remain childless. These studies show that such parents are at least as competent as parents raising their biological children; indeed, many studies show that these parents are more competent or committed in some respects.

VI. Children And Adolescents With Married Same-Sex Parents Would Benefit If The Federal Government Recognized Their Parents' Marriages.

41. Marriage can yield important state and federal legal protections for families, which thereby protect children, including the right to social security spousal and survivor benefits (which protect the family's economic stability), inheritance rights for spouses (again, which protect the family's economic stability), and insurance coverage (both access to it and protections from taxes on that insurance). These benefits are equally advantageous for children and adolescents in same-sex and opposite-sex families. Many lesbians and gay men already are parents, and it is in the best interests of their children for their parents to have

equal access to the federal protections and benefits afforded through marriage. In addition to denying children important federal legal protections, DOMA may convey to children of married same-sex couples that their parents' relationships are less valid or legitimate than the marriages of heterosexual couples.

42. The 2000 Census identified 594,000 households headed by same-sex partners. About a quarter of these had co-resident children. A total of 416,000 children were living in such households. Many more children (estimates vary from 6 million to 12 million) live with single gay or lesbian parents.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 19th day of May 2011 at Cambridge, Cambridgeshire, United Kingdom.

/s/ MICHAEL LAMB, PH.D
MICHAEL LAMB, PH. D

[Exhibits omitted]

* * * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 10-cv-8435 (BSJ)

EDITH SCHLAIN WINDSOR, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: May 9, 2011]

EXPERT AFFIDAVIT OF GEORGE CHAUNCEY, PH.D

I, George Chauncey, hereby depose and state as follows:

Expert Background and Qualifications

1. I am a Professor of History at Yale University, where I have taught since 2006. My testimony will relate to my opinions as an expert in the history of the United States in the twentieth century and gender, homosexuality, sexuality, and civil rights in the United States, with a particular focus on the history of discrimination experienced by gay men and lesbians in the United States. I have actual knowledge of the matters stated in this declaration, and could and would so testify if called as a witness.

2. My background, experience, and publications are summarized in my curriculum vitae, which is attached as Exhibit A to this affidavit. In the past four years, I have testified as an expert—either at trial or through declaration—or been deposed as an expert in *Donaldson v. Montana*, No. 10-702 (Mont. 1st Jud. Dist. Ct.), *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal.); *Gill v. Office of Pers. Mgmt.*, No. 09-10309 (D. Mass.), and *Commonwealth of Mass. v. U.S. Dep't of Health and Human Servs.*, No. 09-11156 (D. Mass.). I have been retained by counsel for Plaintiff in both the above-referenced litigation ("Windsor") and by counsel for the plaintiffs in *Pedersen v. Office of Personnel Management, et al.*, Civ. A. No. 310 CV 1750 (VLB) (D. Ct.).

3. From 1991 to 2006, I was a Professor of History at the University of Chicago. I am the author of Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940 (New York: Basic Books, 1994), which won the Organization of American Historians' Merle Curti Award for the best book in social history and Frederick Jackson Turner Award for the best first book in any field of history, the Los Angeles Times Book Prize in History, and Lambda Literary Award. I am also the author of Why Marriage? The History Shaping Today's Debate over Gay Equality (New York: Basic Books, 2004); coeditor of three books and special journal issues, including Hidden From History: Reclaiming the Gay and Lesbian Past (NAL, 1989); and the author of numerous articles,

which are listed in my curriculum vitae, attached to this affidavit as Exhibit A.

4. I base my opinions on my own research, experience and publications, the work of other historians and scholars as listed in the attached bibliography, and the general statutes of a number of states, including New York, Connecticut, Vermont, and New Hampshire.

Summary of Opinions

5. It is my professional opinion that the historical record, which is outlined below, demonstrates that gay and lesbian people have been subject to widespread and significant discrimination and hostility in the United States.

6. Through much of the twentieth century, in particular, gay men and lesbians suffered under the weight of medical theories that treated their desires as a disorder; penal laws that condemned their consensual adult sexual behavior as a crime; police practices that suppressed their ability to associate and socialize publicly; censorship codes that prohibited their depiction on the stage, in the movies, and on television; and federal policies and state regulations that discriminated against them on the basis of their homosexual status. These state policies and ideological messages worked together to create and reinforce the belief that gay and lesbian persons comprised an inferior class to be shunned by other Americans.

7. Despite social and legal progress in the past thirty years towards greater acceptance of homosexuality, gay and lesbian people continue to live with the legacy of the anti-gay measures enacted in the 1930s, 1940s, and 1950s and the attitudes that motivated those measures. That legacy is evident both in laws that remain on the books and in the many legal protections that have not been enacted.

8. Among the many products of the legacy of discrimination in the twentieth century, the most conspicuous today include Congress' repeated failure to enact or even seriously consider federal legislative protections for gay and lesbian people in housing, employment, and public accommodations; the numerous state statutes and constitutional amendments that brand gay men and lesbians as second-class citizens by denying them the right to marry the person they love; and the federal Defense of Marriage Act, which prohibits the federal government from recognizing such a marriage when it does occur. The legacy of discrimination is also evident in the demeaning stereotypes and inflammatory rhetoric used by anti-gay organizations and public officials as they campaign to enact further measures meant to erode gay people's civil rights and diminish their status as full citizens of the United States—campaigns that are, to this day, very often successful.

9. Today, the limited civil rights enjoyed by gay and lesbian Americans vary substantially from region to region and are still subject to the vicissitudes of public opinion. Like other minority groups, gay men

and lesbians often must rely on judicial decisions to secure equal rights.

History of Discrimination Against Gay and Lesbian People in the United States

I. Introduction

10. While there is ample evidence that same-sex love and intimacy have persisted across the ages, most historians now agree that the concept of the homosexual and the heterosexual as distinct categories of people emerged only in the late nineteenth century. This concept had profound effects on the regulation of homosexuality. Early American legislators, drawing on their understanding of ancient Judeo-Christian prohibitions against sodomy and "unnatural acts," penalized a wide range of non-procreative behavior, including many forms of what would now be called homosexual conduct. While these laws prohibited conduct, it was in the twentieth century that governments began to classify and discriminate against certain of their own citizens on the basis of their status or identity as homosexuals.

11. Official, government-sanctioned hostility and discrimination has had a profound and enduring negative impact on lesbians and gay men in American society. In the 1920s, the State of New York prohibited theaters from staging plays with lesbian or gay characters. Beginning in the 1930s and 1940s, many states prohibited gay people from being served in bars and restaurants. In the 1950s, the federal government banned the employment of homosexuals and insisted

that its private contractors ferret out and dismiss their gay employees. It also prohibited gay foreigners from entering the country or securing citizenship. Until the 1960s, all states penalized sexual intimacy between men. Throughout the twentieth century, many municipalities launched police campaigns to suppress gay meeting places, and sought to purge gay civil servants from government employment.

12. Private hostility and discrimination, often encouraged by government officials, has had a similarly profound and enduring negative effect on lesbians and gay men in American society. Until the 1970s, leading physicians and medical researchers claimed that homosexuality was a pathological condition or disease. In the 1930s, the Hollywood studios enacted a censorship code that for nearly thirty years prohibited the discussion of gay issues or the appearance of gay or lesbian characters in the era's most powerful communications medium. In the 1940s and 1950s, municipal police officials, state governmental leaders, local newspapers, and national magazines justified anti-gay discrimination and the suppression of gay meeting places by fostering frightening stereotypes of homosexuals as child molesters. These stereotypes have had enduring consequences, and continue to inspire public fears and hostility, especially concerning gay teachers and parents. In the 1980s, the early press coverage of AIDS reinforced the view that homosexuals were diseased and threatened other Americans. In the 1990s, many clergy condemned (and still condemn) homosexuality as sinful. The Southern Baptist Convention,

for example, called for a boycott of all Disney products because Disney offered domestic partnership benefits to its employees and Disneyland organized gay theme nights. Also, some anti-gay groups threatened to organize boycotts against the sponsors of network television shows which included gay characters.

13. Historically, anti-gay measures often were enacted or strengthened in response to periods of relative growth in the visibility or tolerance of gay people. For example, the effervescence and visibility of gay life in the 1920s contributed to the backlash gay and lesbian people endured during the Great Depression. The increased visibility of gay men and lesbians during the Second World War helped precipitate a second wave of hostility in the late 1940s and 1950s. The dramatically increased visibility of gay people in the 1970s and 1980s, and their success in persuading some state and local governments to include sexual orientation in their anti-discrimination laws, resulted in a wave of referenda and initiatives between 1977 and the early 1990s that overturned such laws and/or prohibited the enactment of others.

14. In recent decades, and especially in the last twenty years, many (though not all) of these discriminatory measures were repealed, but considerable discrimination and animosity persisted. Given the long history of campaigns demonizing homosexuals as child molesters, it is unsurprising that in 1977—the year Anita Bryant launched her "Save Our Children" campaign—two-thirds of Americans told pollsters they objected to lesbians or gay men being hired as ele-

mentary school teachers. By 1992, after fifteen years of extensive public discussion of this and other gay issues, opinion had shifted, but half of those parents polled still rejected the idea of their child having a gay elementary school teacher. By 2002, about forty percent of Americans still were unwilling to have elementary schools employ gay teachers, and one-third of them found gay high school teachers unacceptable.

15. When marriage emerged as the new flashpoint in debates over civil rights for gay men and lesbians almost two decades ago, the debate was shaped by the legacy of anti-gay policies and attitudes. Many Americans initially responded to the idea that gay and lesbian couples should be allowed to marry with the same misgivings and even hostility with which they once greeted the idea of gay teachers or gay characters on television sitcoms. Opponents of marriage equality mobilized some of the most enduring anti-gay stereotypes to heighten public apprehension. For instance, during the 2008 campaign over Proposition 8—the California ballot initiative that revoked the marriage rights of gay men and lesbians that the California Supreme Court had recognized under the state constitution—several television commercials aired by the supporters of Proposition 8 warned that marriage equality might encourage children to become homosexuals themselves. The recent campaign to repeal marriage equality in Maine used the same tactics, including recycling commercials and scripts from the Proposition 8 campaign because they had been so effective in California. The approval of Proposition 8

in California, Question 1 in Maine, and similar laws and constitutional amendments in a total of forty-one states indicates the enduring influence of anti-gay hostility and the persistence of ideas about the inequality of gay people and their relationships. The civil rights enjoyed by gay and lesbian people throughout the United States continue to be subject to the vicissitudes of public opinion in an ever-changing social, political, and cultural landscape.

16. At several critical junctures, a handful of state and federal courts have been the only authorities willing to defend the rights of gay people against the antipathy of the majority. In the 1950s and 1960s, at a time when overwhelming public sentiment supported the criminalization of gay bars and other meeting places, state courts in California and New York ruled that gay people had the right to assemble. In 1954, the United States Supreme Court ruled that the United States Post Office could not ban a gay political magazine from the mails. In the 1990s, when voters in cities and states across the country were voting to ban states and local municipalities from enacting anti-discrimination protections for gay people, the Supreme Court, in *Romer v. Evans*, struck down a Colorado constitutional amendment that withdrew from gay men, lesbians, and bisexuals, but no others, specific legal protection from discrimination. Sometimes quickly and sometimes more slowly, these decisions played a critical role in shifts in public opinion.

II. The Roots of Anti-Gay Discrimination

17. The first American laws against homosexual conduct were rooted in the earliest English settlers' understanding of the religious and secular traditions that prohibited sodomy, and they reflected the ambiguity of those traditions. Although sodomy included some forms of what today would be called homosexual conduct, medieval theologians did not use sodomy to refer systematically and exclusively to such conduct; they usually understood sodomy to include male anal intercourse, but less frequently oral sex and rarely sex between women.

18. The English Reformation Parliament of 1533 turned the religious injunction against sodomy into the secular crime of buggery when it made "the detestable and abominable vice of buggery committed with mankind or beast" punishable by death. The English courts interpreted this to apply to sexual intercourse between a human and an animal, and anal intercourse between a man and woman, as well as anal intercourse between two men.

19. Colonial American statutes drew on these religious and secular traditions and shared their imprecision in the definition of the offense. Variously defining the crime as (the religious) sodomy or (the secular) buggery, they generally proscribed anal sex between men and men, men and women, and humans and animals, but their details and their rationales varied. The southern colonies generally adopted the English law against buggery, while the Puritan New England

colonies usually drew on religious traditions to penalize many forms of "carnall knowledge," including adultery, fornication, sex with prepubescent girls, and "men lying with men." Puritan clergy in the New England colonies were especially vigorous in their denunciation of sodomitical sins as contrary to God's will, but their condemnation was motivated by the pressing need to increase the population and to secure the stability of the family, as well as their reading of scripture. In the Massachusetts Bay Colony, sodomy was prohibited from 1641 by a statute taken directly from Leviticus: "If any man lyeth with mankinde as he lyeth with a woeman, both of them have committed abhomination, they both shall surely be put to death." Although several men were executed for sodomy, the colonies rarely prosecuted men for this offense, for reasons that still are not entirely clear to historians.

III. Modern American History: 1890-1940

20. Prosecutions for sodomy and related offenses increased dramatically in the late nineteenth and early twentieth centuries as a result of the emergence of the idea of the homosexual as a distinct category of person, the expansion of laws penalizing homosexual conduct, and the growing influence of religiously-inspired moral reform societies, which insisted on criminal prosecutions.

21. These types of prosecutions continued to penalize people on the basis of their homosexual conduct rather than their identity as homosexuals. Current historical research suggests that the concept of the

homosexual as a distinct category of person developed as recently as the late nineteenth century. The word "homosexual" appeared for the first time in a German pamphlet in 1868, and was introduced to the American lexicon only in 1892. Between the 1920s and 1950s, the government, drawing on long traditions of hostility to same-sex conduct and responding both to new conceptions of the homosexual as an individual and to the growing visibility of those individuals, began to classify and discriminate against certain of its citizens on the basis of their status or identity as homosexuals. This discrimination reached remarkable, and still largely unrecognized, proportions.

22. The dramatic growth of American cities in the late nineteenth century permitted lesbians and gay men to develop a more complex and extensive collective life than was possible in small towns and rural areas. While everyone was likely to know everyone else's business in small towns, the size, complexity, and relative anonymity of cities made it easier for gay people (and other nonconformists) to forge a collective life with people like themselves, away from the eyes of hostile outsiders. The early history of the migration of gay people to the relative freedom of the cities is little understood, but it seems to have increased in the early twentieth century, at about the same time as growing numbers of African Americans fled the small towns of the Jim Crow South for the relative freedom of northern cities. Like African Americans, gay people, both black and white, found that the relative free-

dom of city life was tempered by continuing hostility and discrimination.

23. The emergence of gay and lesbian communities described in this affidavit took place to varying degrees in every American city studied by historians. Because the field of lesbian and gay history remains relatively young in 2011 and has been hampered by the legacy of censorship described below, historians still know most about the history of such communities in major metropolitan centers such as New York, Chicago, San Francisco, and Los Angeles, and they will therefore loom large in the history that follows. However, recent studies of the gay history of smaller cities and communities, ranging from Buffalo, New York, and Portland, Oregon, to Jackson, Mississippi, and its surrounding rural areas, both confirm the broad outlines of the history described here and reveal regional variations in that history. Important recent historical studies of the development of federal and military policies concerning homosexuality and gay citizens have documented discriminatory laws and policies that had nationwide effects.

24. New York City provides one of the best documented examples of the emergence of a distinctive gay world in the early twentieth century. By the 1910s, New York's "gay world" included gay residential and commercial enclaves in several immigrant, African American, and bohemian neighborhoods; widely publicized dances and other social events; and a host of commercial establishments where gay people gathered, ranging from saloons, speakeasies, and bars to

cheap cafeterias and elegant restaurants. In the 1920s and early 1930s, gay writers and performers produced a flurry of gay literature and theater. Some gay people were involved in long-term relationships they called marriages. Most remained very careful to conceal their homosexuality from non-gay associates, though, for fear of losing their jobs, homes, and respect.

25. Many Americans responded to the growing visibility of gay life with fascination and sympathy, regarding it as simply one more sign of the growing complexity and freedom from tradition of a burgeoning metropolitan culture. Popular fascination with gay culture reached a crescendo during the Prohibition Era (or Jazz Age), when lesbians ran some of the most popular tearooms and cafes in bohemian neighborhoods such as New York's Greenwich Village and Chicago's Towertown. That said, the poor, immigrant, African American, and bohemian neighborhoods where gay life became most visible were regarded as the underside of city life by "respectable society."

A. Hostile Religious and Medical Views Prompted the Escalation of Anti-Gay Policing in the Early Twentieth Century

26. Other Americans regarded the growing visibility of lesbian and gay life with dread. Hostility to homosexuals sometimes was motivated by an underlying uneasiness about the dramatic changes underway in gender roles at the turn of the last century. In this era—indeed until 1973—homosexuality was classified

as a disease, defect, or disorder. Conservative physicians initially argued that the homosexual (or "sexual invert") was characterized as much by his or her violation of conventional gender roles as by specifically sexual interests. At a time when many doctors argued that women should be barred from most jobs because employment would interfere with their ability to bear children, numerous doctors identified suffragists, women entering the professions, and other women challenging the limits placed on their sex as victims of a medical disorder. Thus, doctors explained that "the female possessed of masculine ideas of independence" was a "degenerate" and that "a decided taste and tolerance for cigars, * * * [the] dislike and incapacity for needlework * * * and some capacity for athletics" were all signs of female "sexual inversion." Similarly, another doctor thought it significant that a male "pervert" "never smoked and never married; [and] was entirely averse to outdoor games."

27. Such views about gender roles lost their credibility once public opinion had come to accept significant changes in women's roles in the workplace and political sphere, but doctors continued for several more decades to identify homosexuality per se as a "disease," "mental defect," "disorder," or "degeneration." For generations, such hostile medical pronouncements provided a powerful source of legitimation to anti-homosexual sentiment, just as medical science previously had legitimized widely held (and subsequently discarded) beliefs about male superiority

and white racial superiority. The medical profession's classification of homosexuality as a defect or disorder also helped spur and legitimate anti-gay law enforcement activity throughout the country.

28. Religiously-inspired hostility to homosexuality also inspired an escalation in anti-gay policing. In the late nineteenth century, native-born Protestants organized numerous "antivice" societies to suppress what they regarded as the sexual immorality and social disorder of the nation's burgeoning Catholic and Jewish immigrant neighborhoods. Although these organizations focused on female prostitution and what they regarded as the weakening of moral strictures governing relations between men and women, they also opposed the growing visibility of homosexuality, which they regarded as a particularly egregious sign of the loosening of social controls on sexual expression under urban conditions. They encouraged the police to step up harassment of gay life as one more part of their campaigns to shut down dance halls and movie theaters, prohibit the consumption of alcohol and the use of contraceptives, dissuade restaurants from serving an interracial mix of customers, and otherwise impose their vision of the proper social order and sexual morality. In New York City in the 1910s and 1920s, for instance, the Society for the Suppression of Vice (also known as the Comstock Society) worked closely with the police to arrest several hundred men for homosexual conduct, and also participated in a raid on a lesbian-run café and encouraged the deportation of the café's owner. In Massachusetts, the Watch and

Ward Society, established as the New England Society for the Suppression of Vice, conducted surveillance on virtually all the popular gay bars and gathering places of the time.

29. As a result of the pressure from Protestant moral reform organizations, municipal police forces began using misdemeanor charges, such as disorderly conduct, vagrancy, lewdness, loitering, and so forth to harass homosexuals. These state misdemeanor or municipal offense laws, which carried fewer procedural protections than felony sodomy charges, allowed further harassment of individuals engaged in same-sex intimacy. In some cases, state officials tailored these laws to strengthen the legal regulation of homosexuals. For example, in 1923, the New York State legislature specified for the first time that a man's "frequent[ing] or loiter[ing] about any public place soliciting men for the purpose of committing a crime against nature or other lewdness" was a form of disorderly conduct. Many more men were arrested and prosecuted under this misdemeanor charge than for sodomy. Between 1923 and 1966, when Mayor John Lindsay ordered the police to stop using entrapment to secure arrests of gay men, there were more than 50,000 arrests on this charge in New York City alone.

30. The social marginalization of gay men and lesbians gave both the police and the public even broader informal authority to harass them. The threat of violence and verbal harassment deterred many gay people from doing anything that might reveal their homosexuality in public. Gay people knew that any-

one discovered to be homosexual risked the loss of livelihood and social respect, so most gay people were careful to lead a double life, hiding their homosexuality from their heterosexual employers and other associates.

B. Censorship

31. The growing visibility of lesbian and gay life in the early twentieth century precipitated censorship campaigns designed to curtail gay people's freedom of speech and the freedom of all Americans to discuss gay issues.

32. The earliest gay activists fell victim to such campaigns. In 1924, when the police learned of the country's earliest known gay political group, which had been established by a postal worker in Chicago, they raided his home and seized his group's files and membership list. After the raid, the group ceased publication of its short-lived magazine, Friendship and Freedom. In the 1910s and 1920s, a handful of plays included lesbian and gay characters or addressed homosexual themes. But in 1927, after "The Captive," a serious drama exploring lesbianism, opened on Broadway to critical acclaim, New York State passed a "padlock law" that threatened to shut down for a year any theater that staged a play with lesbian or gay characters. Given Broadway's national importance as a staging ground for new plays, this law effectively censored American theater for a generation.

33. Theater censorship occurred in other cities in addition to New York. In the early twentieth century,

Boston had a particularly strict culture of "moral purity" censorship, and the phrase "Banned in Boston" was familiar to people throughout the country. In 1935, for instance, Boston Mayor Frederick W. Mansfield banned Lillian Hellman's "The Children's Hour," a play with lesbian themes. Mansfield explained his decision to the press by asserting that the play "showed moral perversion, the unnatural appetite of two women for each other."

34. Such censorship had even wider-reaching effects when it spread to the movies. A censorship movement led by religious leaders threatened the Hollywood studios with mass boycotts and restrictive federal legislation if they did not begin censoring their films. Seeking to avoid federal legislation, the studios established a production code (popularly known as "the Hays Code") that from 1934 on prohibited the inclusion of gay or lesbian characters, discussion of homosexual issues, or even the "inference" of "sex perversion" in Hollywood films. This censorship code remained in effect for some thirty years and effectively prohibited discussion of homosexuality in a powerful communications medium. This censorship stymied and delayed democratic debate about homosexuality for more than a generation.

C. The Great Depression and the Curtailment of Gay People's Freedom of Association

35. In the early years of the Great Depression, restrictions on gay life intensified. By depriving millions of men of their role as breadwinners, the De-

pression transformed already-existing anxiety over gender roles into a crisis in gender and family relations. Federal, state, and local governments responded to this perceived crisis with policies that directly affected women and gay people. New Deal public works projects, for instance, which offered jobs only to male heads of households, were designed in part to restore men's status in their families and larger society, even when this meant limiting women's economic opportunities.

36. The apparent fragility of the family and gender arrangements made the visibility of gay life seem more threatening to many people, especially given the long-standing representation of gay men and lesbians as gender deviants. After a generation in which gay life had been relatively visible and integrated into urban public life, restrictions on gay life increased. Gay people were forced into hiding by new laws that pushed gay people out of restaurants and bars, as well as off the stage and silver screen.

37. New regulations curtailed gay people's freedom of association. In New York State, for instance, the State Liquor Authority, established after the repeal of Prohibition in 1933, issued regulations prohibiting bars, restaurants, cabarets, and other establishments with liquor licenses from employing or serving homosexuals or even allowing them to congregate on their premises. The Authority's rationale was that the mere presence of homosexuals made an establishment "disorderly," and when the courts rejected that argument, the Authority began using evidence of un-

conventional gender behavior or homosexual solicitation gathered by plainclothes investigators to provide proof of a bar's disorderly character. Hundreds of bars were closed for this reason in the next thirty years in New York City alone.

38. Similar regulations were introduced around the country in subsequent years. In California in the 1950s, notes historian Nan Alamilla Boyd, the Alcoholic Beverage Control Board "collapsed the difference between homosexual status (a state of being) and conduct (behavior) and suggested that any behavior that signified homosexual status could be construed as an illegal act. Simple acts such as random touching, mannish attire (in the case of lesbians), limp wrists, high-pitched voices, and/or tight clothing (in the case of gay men) became evidence of a bar's dubious character" and grounds for closing it.

IV. Modern American History: World War II

39. Changes in the policies of the Armed Forces of the United States during the Second World War both reflected and expanded the government's growing campaign of classifying and discriminating against gay citizens. The military had long made sodomy a criminal offense (and, indeed, it continues to do so). But the Second World War marked the first time the military moved beyond criminalizing homosexual conduct to develop policies that systematically endeavored to exclude personnel on the basis of their identity as homosexuals. All of the branches of the armed forces put in place screening mechanisms designed to ferret

out homosexuals during the induction process. Thousands of men and women were kept from serving their country, and often faced public opprobrium as a result. Notwithstanding the new prohibition, many gay men and lesbians served in the armed forces in the Second World War, but they had to be careful to whom they disclosed their sexual orientation.

40. Across the country, the number of lesbian and gay bars and other meeting places increased during the war years. Military authorities responded to the growth in the number of gay meeting places by collaborating with civil authorities to close them or at least keep servicemen from visiting them. The Army and the Navy created a joint Disciplinary Control Board that worked together with state liquor control agents and municipal police forces to identify and police bars and night clubs, including almost one hundred in San Francisco alone, with the intent of harassing and suspending the licenses of those that served a gay clientele. Military and civilian police also cooperated in anti-vice raids against gay bars and other meeting places. Servicemen who were caught in these raids risked being discharged, and several thousand patriotic Americans who honorably served to defend their country were not honorably discharged solely because of their gay or lesbian identity.

41. Following the war, the Veterans Administration denied GI Bill benefits to soldiers who had received undesirable discharges. Eventually most other groups of soldiers discharged in this way had their benefits restored, but the Veterans Administration

steadfastly refused to restore them to homosexuals. This meant that gay veterans—members of the "Greatest Generation"—who had risked their lives for their country before being discharged were denied the educational, housing, and readjustment allowances provided to millions of their peers.

V. Modern American History: Post-WWII Period

A. Government Policies in the McCarthy Era

42. Even the stepped-up policing of gay life in the 1930s and 1940s did not equal the scale of discrimination faced by gay men and lesbians in the generation following the Second World War. The persecution of gay men and lesbians dramatically increased at every level of government after the war.

43. In 1950, following Senator Joseph McCarthy's denunciation of the employment of gay persons in the State Department, the Senate conducted a special investigation into "the employment of homosexuals and other sex perverts in government." The Senate Committee recommended excluding gay men and lesbians from all government service, civilian as well as military. To support this recommendation, the Committee argued that homosexual acts violated the law, and it gave its imprimatur to the prejudice that "those who engage in overt acts of perversion lack the emotional stability of normal persons" and that homosexuals "constitute security risks."

44. The Committee also portrayed homosexuals as predators: "[T]he presence of a sex pervert in a Gov-

ernment agency tends to have a corrosive influence on his fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert. Government officials have the responsibility of keeping this type of corrosive influence out of the agencies under their control. . . . One homosexual can pollute a Government office."

45. The Senate investigation and report were only one part of a massive antihomosexual campaign launched by the federal government after the war. The Senate Committee reported that "[a] spot check of the records of the Civil Service Commission indicates that between January 1, 1947, and August 1, 1950, approximately 1,700 applicants for Federal positions were denied employment because they had a record of homosexuality or other sex perversion." In 1953, President Eisenhower issued an executive order requiring the discharge of homosexual employees from federal employment, civilian or military. Thousands of men and women were discharged or forced to resign from civilian and military positions because they were suspected of being gay or lesbian. At the height of the McCarthy era, the U.S. State Department discharged more homosexuals than communists. The government's purge of its gay employees prompted the founding of some of the earliest gay rights organizations. Frank Kameny, for one, founded the first gay rights group in Washington, D.C. after he was dis-

missed from his job as a government astronomer for being homosexual in 1957.

46. President Eisenhower's executive order prohibiting federal employment for homosexuals also required defense contractors and other private corporations with federal contracts to ferret out and discharge their homosexual employees. Many other private employers without federal contracts adopted the federal government's policy by refusing to hire gay people. Furthermore, the FBI initiated a widespread system of surveillance to enforce the executive order. As the historian John D'Emilio has noted, "The FBI sought out friendly vice squad officers who supplied arrest records on morals charges, regardless of whether convictions had ensued. Regional FBI officers gathered data on gay bars, compiled lists of other places frequented by homosexuals, and clipped press articles that provided information about the gay world. . . . Federal investigators engaged in more than fact-finding; they also exhibited considerable zeal in using information they collected."

47. Two years after the Senate Committee recommended that homosexuals be purged from government employment, Congress signaled its conviction that homosexuals had no place in American society in the most palpable way possible: by denying them entry into the country. In 1952, Congress prohibited homosexuals (whom it called "psychopaths") from entering the country, much as it previously had prohibited immigration from Asia and curtailed the immigration of Jews and Catholics from eastern and

southern Europe. In the case of homosexuals, the prohibition extended beyond people seeking long-term residency or citizenship; a generation of foreign visitors applying for mere tourist visas had to sign statements swearing they were not homosexual before they could make even the briefest trip to the United States.

48. Many state and local governments followed the federal government's lead in seeking to ferret out and discharge their homosexual employees. As a result of these official policies, countless state employees, teachers, hospital workers, and others lost their jobs. Beginning in 1958, for instance, the Florida Legislative Investigation Committee, which had been established by the legislature in 1956 to investigate and discredit civil rights activists, turned its attention to homosexuals working in the state's universities and public schools. Its initial investigation of the University of Florida resulted in the dismissal of fourteen faculty and staff members, and in the next five years it interrogated some 320 suspected gay men and lesbians. It "pressured countless others into relinquishing their teaching positions, and had many students quietly removed from state universities." Its 1959 report to the legislature called the extent of homosexual activity in the state's school system "absolutely appalling." In addition, in a well-publicized 1949 case in Massachusetts, Dr. Miriam Van Waters, long-time superintendent of the Women's Reformatory at Framingham, was dismissed by the Commissioner of Corrections because she had either not known or had known and had not prevented "an unwholesome relationship" that

"existed between inmates of the Reformatory," which had "resulted in 'crushes', 'courtships', and homosexual practises [sic] among the inmates." She was then forced to defend her policies in public hearings held by a Massachusetts house committee over several months.

49. During this period, both federal and local agencies sought to curtail gay people's freedom of speech and the freedom of all people to discuss homosexuality. In 1954, postal officials in Los Angeles banned an issue of the first gay political magazine, ONE, from the mails, a ban overturned by the Supreme Court in 1958. In some cities the police continued to shut down newsstands that dared to carry it. In 1957, San Francisco officials arrested Lawrence Ferlinghetti and Shig Murao for publishing and selling "Howl," a poem by Allen Ginsberg that openly proclaimed his homosexuality.

50. Censorship, government-sanctioned discrimination, and the fear of both made it difficult for gay people to organize and speak out on their own behalf. Given the severity of anti-gay policing, for instance, the Mattachine Society, the most significant gay rights organization in the 1950s, repeatedly had to reassure its anxious members that the police would not seize its membership list. In Denver in 1959, a few weeks after Mattachine held its first press conference during a national convention, the police raided the homes of three of its Denver organizers; one lost his job and spent sixty days in jail.

B. The Demonization of Homosexuals

51. The official harassment of homosexuals received further legitimization from a series of press and police campaigns in the 1940s and 1950s that fomented demonic stereotypes of homosexuals as child molesters out to recruit the young into their way of life. In response to a series of local panics over sex crimes against women and children, in which homosexuals were almost never identified as the culprits, numerous local newspapers and national magazines claimed that children faced a growing threat from homosexuals. The press warned that, in breaking with social convention to the extent necessary to engage in homosexual behavior, a man had demonstrated the refusal to adjust to social norms that was the hallmark of the psychopath. In 1950, Coronet, a popular national magazine, asserted: "Once a man assumes the role of homosexual, he often throws off all moral restraints. . . . Some male sex deviants do not stop with infecting their often-innocent partners: they descend through perversions to other forms of depravity, such as drug addiction, burglary, sadism, and even murder."

52. The demonization of homosexuals by the press was reinforced by the statements of public officials. A Special Assistant Attorney General of California claimed in 1949 that "[t]he sex pervert, in his more innocuous form, is too frequently regarded as merely a queer individual who never hurts anyone but himself. All too often we lose sight of the fact that the homosexual is an inveterate seducer of the young of both

sexes, and is ever seeking for younger victims." Detroit's prosecuting attorney demanded the authority to arrest, examine, and possibly confine indefinitely "anyone who exhibited abnormal sexual behavior, whether or not dangerous." In 1957, the Hartford Courant reported on comments by a Connecticut judge at a criminal sentencing. The judge endorsed jail terms for homosexuals because his "observation" was that homosexuality "ha[d] spread much too far."

53. Such press campaigns and official statements created fearsome new stereotypes of homosexuals as child molesters, which continue to incite public fears about gay teachers and parents as well as other gay people who come into contact with children. Between the late 1930s and late 1950s, public hysteria incited by such press campaigns prompted more than half the state legislatures to enact laws allowing the police to force persons convicted of certain sexual offenses—or, in some states, merely suspected of being "sexual deviants"—to undergo psychiatric examinations. These examinations could result in indeterminate civil confinements for individuals deemed in need of a "cure" for their homosexual "pathology."

C. Another Escalation of Anti-Gay Policing

54. During the postwar era, bars became an especially important meeting place for lesbians and gay men because they were often the only public spaces in which people dared to be openly gay. Given their growing importance to gay people as a social center and the growing pressure on the police to enforce

regulations prohibiting bars from serving homosexuals, gay bars became an important battleground in the postwar years. Despite the prevailing popular animosity toward homosexuals, state courts in New York and California issued rulings that curtailed the right of state liquor authorities and the police to discriminate against gay bar patrons. Official antipathy to homosexuals was so strong, however, that police officials circumvented or simply disregarded these judicial decisions.

55. This sharp escalation in the policing of gay life after the Second World War occurred throughout the country. In 1955, for example, the government of Boise, Idaho launched a fifteen-month investigation of gay men in town, interrogating fourteen hundred persons and pressuring men known to be gay to reveal the names of other gay men. Police departments from Seattle and Dallas to New Orleans and Baltimore stepped up their raids on bars and private parties attended by gay and lesbian persons, and made thousands of arrests for "disorderly conduct." By 1950, Philadelphia had a six-man "morals squad" arresting more gay men than the courts knew how to handle, some 200 a month. In the District of Columbia, there were more than a thousand arrests every year. In 1965, the Boston City Council's Committee on Urban Renewal debated whether to bulldoze several downtown gay bars. A proponent of the effort, City Councilor Frederick Langone, gave a speech at the meeting calling for the destruction of "these incubators of homosexuality and indecency and a Bohemian way of

life," and insisting that "[w]e must uproot these joints so innocent kids won't be contaminated." Many gay bars were razed in the "revitalization" that followed. In 1969, a Councilman in Rocky Hill, Connecticut called for a nightclub frequented by homosexuals (Alice's Joker Club) to be closed as a "public nuisance" because it was a "threat to the morals" of the town's citizens. From 1933 until the mid 1960s, hundreds of bars that tolerated gay customers were closed in New York City alone. Some bars in New York and Los Angeles posted signs telling potential gay customers: "If You Are Gay, Please Stay Away" or, more directly, "We Do Not Serve Homosexuals."

VI. The Gay Rights Movement and its Opponents in the 1970s and 1980s

A. Early Successes of the Gay and Lesbian Rights Movement

56. The dramatic escalation in policing and suppression in the post-war years failed to eradicate gay life. In larger cities, lesbians and gay men covertly patronized bars and restaurants, which they turned into informal meeting places, took over remote sections of public beaches, and held dances and parties. In many smaller towns, gay life took shape unnoticed in church choirs, amateur theaters, and women's softball leagues, and was sustained by closely knit social circles.

57. Nonetheless, most gay men and lesbians responded to the escalation in policing after the Second World War by keeping their homosexuality carefully

hidden from non-gay people. They developed elaborate verbal codes that allowed them to communicate with one another while remaining invisible to hostile outsiders. The word "gay" is a good example of this: before the 1970s few heterosexuals realized gay people had given it a distinctly homosexual meaning. But the very success of such subterfuges in concealing gay life made it difficult for gay people to find one another in the 1950s, and it severely limited the capacity of gay people to organize on their own behalf.

58. The earliest gay rights organizations, the Mattachine Society, ONE, and the Daughters of Bilitis, were founded in the early 1950s at the height of the demonization of homosexuals as dangerous, irrational, and unstable pariahs who threatened the nation's children as well as national security. This initial generation of activists worked to educate and cultivate allies among sociologists, psychologists, criminologists, and other professionals who had the credibility to speak on homosexuality that was denied to homosexuals themselves.

59. Gay rights organizations began to influence public policy in the mid-1960s, although the pace of change varied enormously across the country. The New York Mattachine Society's success in 1966 in persuading Mayor John Lindsay to end the widespread police use of entrapment had a profound effect on gay male New Yorkers, who for the first time in decades did not have to worry that the men who approached them in bars and elsewhere were undercover policemen. New York and California state court rulings

finally curtailed the policing of gay bars and other meeting places in those states in the 1960s, but in some other parts of the country the police continued to raid gay bars well into the 1970s and 1980s. The growing divergence in the treatment of gay people in different parts of the country prompted a growing number of gay people to migrate from hostile areas to New York, Boston, San Francisco, Los Angeles, Chicago, and other more tolerant cities and regions. This mass migration, in turn, affected the political and cultural climate of those cities and regions, making them more likely to enact gay rights legislation and similar policies.

60. Major institutions that once helped legitimize anti-gay attitudes also began to change their positions. Medical writers and mental health professionals whose stigmatization of homosexuality as a disease or disorder had been used to justify discrimination for decades were among the first to change their views. In 1973, the American Psychiatric Association voted to remove homosexuality from its list of mental disorders. The American Psychological Association soon followed suit. However, the American Psychiatric Association's decision was fiercely opposed by prominent members of the association such as Charles Socarides and Irving Bieber, and they and other medical professionals who believed homosexuality was a treatable psychological disorder continued to receive considerable attention.

61. Censorship of gay images and speech declined. By the early 1960s, competition from television led the Hollywood studios to reorganize their nearly thirty-

year-old censorship code, enabling the studios to make films for adult viewers which addressed "serious themes" such as homosexuality. These themes remained off-limits for television. The studios initially still included very few gay characters in their features, and the television networks included virtually none, but ending formal censorship opened a door that resulted in significant cultural changes in later years.

62. A small but growing number of municipalities enacted legislation protecting people from certain forms of discrimination on the basis of their sexual orientation. In 1972, East Lansing, Michigan, home to Michigan State University, became the first town to do so. Within five years, another twenty-seven communities passed such legislation, more than half of them university towns such as Ann Arbor, Austin, Berkeley, and Madison. They were joined by a handful of larger cities such as San Francisco, Minneapolis, Seattle, and Detroit. During this same period, however, a number of states enacted new legislation that criminalized homosexual sodomy, even as they decriminalized heterosexual sodomy.

63. Attitudes toward homosexuals and homosexuality in some religious denominations also began to change. Since the 1970s, many mainline Protestant denominations have issued official statements condemning legal discrimination against homosexuals and affirming that homosexuals ought to enjoy equal protection under criminal and civil law. Several of these groups descended from the historically influential denominations whose religious authority had been

invoked to justify colonial statutes against sodomy. The Lutheran Church in America, the Unitarian Universalist Association, the United Methodist Church, the United Church of Christ, the Protestant Episcopal Church, the Disciples of Christ, and the United Presbyterian Church in the U.S.A. all issued statements in support of civil rights for gay men and lesbians by 1980.

64. Those seven denominations, however, account for only 10.3 percent of the American population. Many more Americans belong to faith traditions that remain strongly opposed to gay civil rights, including 26.3 percent affiliated with historically white evangelical Protestant churches and 23.9 percent who are Catholics. Leading clergy and laypeople from those churches have played a major role in opposing gay rights measures across the country.

B. Anti-Gay Discrimination in the 1970s and 1980s

65. Gay men and lesbians continued to suffer discrimination at the hands of government officials in the 1970s and 1980s. For example, police continued to raid gay bars in some cities. In 1970, the Connecticut State Motor Vehicle Department refused to renew the drivers license of a man on the grounds that he was "an admitted homosexual and that his homosexuality makes him an improper person to hold an operator's license."

66. Beginning in the late 1970s, the initial success of the gay movement in securing local gay rights legislation, as well as the increasing visibility of gay peo-

ple in the media, provoked a vigorous, negative reaction. Anti-gay rights advocates drew on pernicious stereotypes developed in previous decades to argue that enacting gay rights laws, permitting gay people to teach, and even simply allowing gay characters to appear on television sitcoms threatened the security of children and the stability of the family.

67. The anti-gay rights campaign of this era was effectively launched in 1977, when Anita Bryant, a prominent Baptist singer and the spokeswoman for the Florida citrus growers, led a campaign to "Save Our Children" from newly enacted civil rights protections for gay men and lesbians in Dade County, Florida. Her success in persuading a decisive majority of Miami voters to vote against the ordinance depended heavily on her use of the still powerful postwar images of homosexuals as child molesters. Her organization published a full-page advertisement the day before the vote warning that the "other side of the homosexual coin is a hair-raising pattern of recruitment and outright seductions and molestation." Her victory in Miami prompted groups in other cities to take up the cause, and in the next three years, laws extending civil rights protections to gay men and lesbians were repealed in more than a half-dozen bitterly fought referenda stretching from St. Paul, Minnesota to Eugene, Oregon. Gay rights advocates managed to defeat such referenda only in two elections, in November 1978, when Seattle voted to preserve its antidiscrimination ordinance and when California rejected the Briggs Initiative. The Briggs Initiative was a pro-

posal so onerous it would have prohibited public school teachers, gay or straight, from saying anything that could be construed as "advocating homosexuality."

68. The Save Our Children campaign had other far reaching effects. The day after the Dade County gay rights ordinance was repealed, the governor of Florida signed into law a ban on adoption by lesbians and gay men, the first such statewide prohibition. Thousands of children who might otherwise have had loving parents were thus denied the stability of family life. Similarly, in 1985, Massachusetts Governor Michael Dukakis removed two boys from their foster care placement with a gay male couple and implemented a policy of preferred placement in "traditional family settings." While Massachusetts' ban was reversed in 1990 as a result of litigation, the Florida ban remained in effect until 2010.

69. Across the country, the unfounded fear that homosexuals posed a threat to children itself threatened some children: those already being raised by lesbians and gay men. In the 1970s, most children being raised by lesbian or gay parents had been born before their parents came out as gay. When a parent came out, any dispute over child custody that had to be resolved in court was likely to be heavily influenced by stereotypes and prejudices. A growing number of such cases reached the courts in the 1970s and 1980s, and in case after case the courts took the custody of children away from a mother or father whose estranged husband or wife raised the parent's lesbian or gay identity. Some courts confronting early disputes

of this nature articulated a "per se" rule against custody and visitation claims made by gay and lesbian parents, holding that homosexuality was inherently inconsistent with parenthood as a matter of law.

70. The long-standing association of homosexuals with disease was reinforced in the 1980s by the media's initial sensationalist coverage of AIDS, which frequently depicted homosexuals as bearers of a deadly disease threatening others. Fear of contagion prompted a new wave of discrimination against gay people in medical care, housing, and employment. Media coverage and the government's slow response to the disease also reflected and reinforced the enduring conviction that homosexuals stood outside the moral boundaries of the nation. Even after the name AIDS (Acquired Immune Deficiency Syndrome) replaced the moniker GRID (Gay-Related Immune Deficiency), media reports initially minimized the crisis by reassuring Americans that the "general public" was not at risk, since the disease only affected homosexuals and a handful of other groups, as if gay people were not part of the "general public."

71. The media coverage of AIDS and the numerous campaigns against local gay rights laws had a dramatic effect on public opinion. In 1987, six years after the AIDS crisis unleashed a new wave of fear of homosexuals, public disapproval of homosexuality reached its peak. Polling data showed virtually no change through the 1970s, but the number of people who declared that homosexual relations were always wrong climbed from 73 percent in 1980 to 78 percent in

1987. In the 1980s, gay rights activists secured the enactment of gay rights ordinances in an additional forty cities, counties, and suburbs, including Boston, New York, Chicago, and Atlanta, bringing the national total to eighty. But these victories often were more difficult to achieve than they had been in the 1970s. In New York City, for example, the law passed the city council only after more than a decade of struggle.

72. National religiously-inspired organizations formed in the 1970s and 1980s, such as the Moral Majority, Focus on the Family, Family Research Council, and Traditional Values Coalition, provided national leadership and coordination to the movement against gay rights and disseminated campaign materials, political strategies, and financial resources to local groups fighting gay rights ordinances.

VII. The Persistence of Anti-Gay Discrimination from the 1990s to the Present

A. Legal Inequality in State Law

73. The spread of AIDS and the escalation of debate over gay rights at the local level fueled a growing polarization of the nation over homosexuality in the 1980s and especially the 1990s. By the end of the 1980s, even cities and states that had managed to pass gay rights laws found those laws under attack from an increasingly well-organized and well-funded opposition. Beginning in 1988, and reaching a crescendo from 1992 to 1994, groups in Colorado, Oregon, Maine, and six other states used anti-gay referenda and initiatives to challenge gay rights laws, and built local

anti-gay rights organizations. In the twenty-five years after Anita Bryant's campaign in Florida, anti-gay activists introduced and campaigned for more than sixty anti-gay rights referenda around the country. Nationwide, gay rights supporters lost almost three-quarters of these contests. In Oregon alone, there were sixteen local anti-gay initiatives in 1993 and another eleven in 1994. Oregon's gay rights supporters lost all but one.

74. Following Anita Bryant's lead, anti-gay rights activists frequently fomented voter fear of gay people by reviving demonic stereotypes of homosexuals as perverts who threatened the nation's children and moral character. Two videos that repeatedly were screened in churches and on cable television, "The Gay Agenda" and "Gay Rights, Special Rights," juxtaposed discussions of pedophilia with images of gay teachers and gay parents marching with their children in Gay Pride parades. With little subterfuge, the videos depicted homosexuals as child molesters. This message was reinforced by mass mailings and door-to-door distribution of anti-gay pamphlets, which fostered a climate of hostility and fear during the referenda.

75. In 1992, voters in Colorado passed Amendment Two, which amended the state constitution to prohibit any municipality or unit of the government from enacting anti-gay discrimination ordinances or policies. This amendment repealed the ordinances already enacted by Denver, Boulder, and Aspen. Moreover, it removed from the political arena any future effort to secure anti-discrimination legislation

for gay people. In the face of public antipathy to gay people, represented by the success of this and other referenda overturning non-discrimination laws, several legal groups filed a lawsuit, *Romer v. Evans*, challenging the constitutionality of such constitutional amendments. Once again, the courts protected the rights of the minority against the prejudice of the majority. In 1996, the Supreme Court overturned this state constitutional amendment because it withdrew specific legal protection from discrimination from gay men, lesbians, and bisexuals, but no others.

76. Although a number of states now have extended basic anti-discrimination protections to gay men and lesbians, in twenty-nine states, there is no statutory barrier to firing, refusing to hire, or demoting a person in private sector employment solely on the basis of their identity as a gay man or lesbian. In twenty-two states, there is no statutory or administrative barrier to such discrimination even in state government employment. Similarly, gay men and lesbians remain without statutory protection from discrimination in housing in thirty states. And, despite the critical role played by harassment of gay and lesbian meeting places in enforcing discrimination toward them throughout the twentieth century, gay and lesbian people in twenty-nine states have no statutory protection from discrimination in public accommodations.

B. Legal Inequality in Federal Law

77. At the national level, employment discrimination against gay men and lesbians by federal agencies remained permissible until the late 1990s. Although the outright ban on hiring gay federal employees was lifted in 1975, federal agencies were free to discriminate against gay men and lesbians in hiring and employment decisions until former President Clinton issued a first-of-its-kind executive order forbidding such hiring discrimination in 1998.

78. In 1992, President Bill Clinton's proposal to end the armed forces' policy banning lesbians and gay men from serving in the military sparked a firestorm in the first months of his presidency and revealed how deeply divided the nation remained. The public outcry against his plan (calls to Congress ran a hundred to one against lifting the ban) had been stoked by years of local anti-gay organizing. Opposition to the new policy by both the Pentagon leadership and the public led Congress and President Clinton to enact a new law known as "Don't Ask, Don't Tell," which allowed for the discharge of gay and lesbian soldiers if they acknowledged their sexual orientation under any circumstances, even in private counseling. Discharge of gay men and lesbians from the military continued after "Don't Ask, Don't Tell" became law. According to the Service members Legal Defense Network, an organization dedicated to assisting military personnel affected by "Don't Ask, Don't Tell," "more than 14,000

service members have been have been fired under the law since 1993."

79. "Don't Ask, Don't Tell" was repealed in December 2010. However, the repeal will not be implemented until the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certify that repeal will not harm military readiness. After that certification there is a sixty-day waiting period. Although the conditional repeal of "Don't Ask, Don't Tell" in 2010 was an important advance for gay men and lesbians, it did not restore the careers of the thousands of service members who had been discharged under the policy. Nor does it protect gay men and lesbians from the significant discrimination that they continue to face in other domains. After years of effort, gay and lesbian advocates and their allies still have not been able to enact any federal legislation that prohibits discrimination in schools, employment, housing, and public accommodations on the basis of sexual orientation. The Employment Non-Discrimination Act, which would extend employment protections on the basis of sexual orientation, has been introduced regularly since 1994 (and earlier versions as far back as the 1970s) and has never passed both houses of Congress.

80. Government-sanctioned discrimination against gay men and lesbians still exists in federal immigration law. Federal law prohibits gay and lesbian Americans from sponsoring their same-sex spouses or registered partners from other countries for immigration benefits.

C. Discrimination in Adoption, Custody, and Parenting

81. In the 1990s, lesbian mothers and gay fathers continued to risk their parenting rights when their former different-sex spouses used their sexual orientation to try to deny them custody or visitation rights in divorces. By the mid-1990s, courts in most states followed rules that required individualized assessment of a parent's fitness. But as Julie Shapiro's 1996 study of custody cases around the country demonstrated, many courts continued to infuse those individualized assessments with their own prejudice against lesbians and gay men. As she discovered, courts were especially disapproving of lesbians and gay men who were honest about their sexual orientation with their children. In a widely publicized case, a Virginia trial court in 1993 granted a grandmother's petition to take Sharon Bottoms' two-year-old son away from her because, as the trial court judge explained, her lesbian "conduct is illegal . . . a Class 6 felony in the Commonwealth of Virginia." He went on to declare "that it is the opinion of this Court that her conduct is immoral" and "renders her an unfit parent." Virginia's Supreme Court upheld the trial court's decision terminating Sharon's parental rights despite the presumption favoring her as a natural parent. In doing so, it relied on a wider range of evidence, including the finding that Bottoms' lesbianism would subject her child to social condemnation and thus disturb the child's relationships with peers and the community at large. Some courts had used simi-

lar reasoning to remove children from the homes of divorced white mothers who had married or lived with black men, a practice ruled unconstitutional by the Supreme Court in 1984. In that case, *Palmore v. Sidoti*, Chief Justice Warren Burger ruled that "private biases may be outside the reach of the law, but the law cannot directly, or indirectly, give them effect." 466 U.S. 429, 433 (1984). But courts in many states continued to give legal effect to the private bias they assumed existed against lesbian and gay parents by preferring heterosexual parents over gay parents, without regard to other factors bearing on the child's best interests.

82. Gay and lesbian parents continue to be forced by some courts to choose between hiding their gay identities and losing parental rights. As one Texas attorney commented in 1988, "unless [a mother] ended her open lesbian relationship I would have little chance of winning a custody trial." According to Clifford J. Rosky, in 2004, after ordering a gay father not to expose his child to his "gay lover(s) and/or gay lifestyle," a Tennessee trial court sentenced the father to two days in jail for coming out to the child.

83. State and popular efforts that began in the 1970s to ban lesbians and gay men from adopting or serving as foster parents continued throughout the 1990s and 2000s. For example, in 2000, Mississippi's legislature passed a ban on adoption by same-sex couples that was subsequently signed by the governor. As recently as 2008, Arkansas enacted by popular

referendum a ban on foster care and adoption by gay people.

84. Some states enacted laws that bar recognition of out-of-state adoptions by same-sex couples. For example, in 2004, Oklahoma passed the "Adoption Invalidation Law," which stated that Oklahoma "shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction."

85. Some states refuse to allow a biological parent's same-sex partner to adopt the children they raise together. For example, as recently as December 2010, the North Carolina Supreme Court invalidated a second parent adoption by a woman's same-sex partner, holding that a non-biological same-sex partner could not be recognized as a legal parent.

86. During the 1980s and 1990s, gay and lesbian parents continued to face significant obstacles in custody and visitation disputes. Courts continued to demonstrate harsh judgments toward gay and lesbian parents even when a child was conceived with two gay or lesbian parents intending to raise the child jointly. This was especially evident when the courts had to decide where to place a child when its biological mother died and one of her relatives contested the right of her surviving partner, the child's second mother, to continue to raise the child. In a number of cases, courts granted custody to those relatives despite clear evidence that the child wished to remain with her surviving mother.

D. Depiction of Gay Men and Lesbians in the Media

87. With the decline in movie and television censorship and the growing interest in gay people and issues, there was a significant increase in the coverage of gay issues in the media and in the number of gay characters in movies and on television in the 1990s. By the time the immensely popular Will & Grace premiered on NBC in 1998, gay and lesbian characters were a more regular part of the television landscape. This exposure changed the dominant representation of homosexuals. Gay people usually appeared in the media in the 1950s as shadowy and dangerous figures, but they now appeared as a diverse and familiar group whose all-too-human struggles and pleasures drew the interest of large viewing audiences.

88. It was not only in the media that heterosexuals began to see gay and lesbian people. Dramatically increasing numbers of lesbians and gay men revealed their homosexuality to their families, friends, neighbors, and co-workers in the 1990s. Polling data suggest the magnitude of the shift. In 1985, only a quarter of Americans reported that a friend, relative, or co-worker had personally told them that they were gay, and more than half believed they did not know anyone gay. Fifteen years later, in 2000, the number of people who knew someone openly gay had tripled to three-quarters of the population. Acceptance of gay men and lesbians and support for civil rights protections increased as growing numbers of heterosexuals

realized that some of the people they most loved and respected were gay.

90. It is important not to overstate the results of this nationwide "coming out" experience, however. In 2000, a significant majority of Americans still expressed moral disapproval of homosexuality. Moreover, support for lesbian and gay civil rights and equality continued to show significant regional differences. Polls showed that public opinion in Massachusetts, Connecticut, and Hawaii was the most tolerant. Support for civil rights also was strong in most other states in New England, in New Jersey and New York, and in other regional clusters: Maryland in the mid-Atlantic, Wisconsin, Minnesota, and Illinois in the upper Midwest, and California, Oregon, and Washington on the West Coast. Anti-gay sentiment was strongest in southern states and in the lower Midwest and plains states. The effects of these regional differences could be seen in regional variations in congressional votes on key gay rights issues, in the treatment of gay couples and individuals by state laws, regulations and court rulings concerning adoption and foster parenting, parental rights, and in the passage of gay rights laws. Only two states—Wisconsin in 1982 and Massachusetts in 1989—enacted legislation banning anti-gay discrimination before 1990. The number rose to eleven by 2000, but eight of the states were in the Northeast or on the Pacific Coast. The rights of gay people continue to vary enormously across the nation.

E. Continued Official, Religious, and Private Condemnation of Homosexuality in the 1990s-2000s

91. Gay people also continue to face discrimination and opprobrium from highly regarded institutions and officials. The Boy Scouts of America, a federally-chartered organization, continues to insist that "homosexual conduct is not morally straight," and refuses to allow gay men into the organization. *Boy Scouts of America v. Dale*, 530 U.S. 640, 651 (2000). Less than a decade ago, the Chief Justice of the Alabama Supreme Court referred, in a judicial opinion, to homosexual conduct as "abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our laws are predicated." Ex Parte H.H., 830 So. 2d 21, 26 (2002) (Moore, C.J., concurring).

92. Although the American Psychiatric Association removed homosexuality from its list of mental disorders in 1973, dissident psychiatrists and psychologists led by Charles Socarides and Joseph Nicolosi established the National Association for Research and Therapy of Homosexuality (NARTH) in 1992. Disagreeing with both the APA and prevailing professional opinion, NARTH continues to disseminate materials claiming a scientific basis for believing that homosexuality is a psychological disorder and a "potentially deadly lifestyle," and that homosexuals can be "healed." NARTH also lectures, partners with religious organizations, supports conversion therapy activities, and files amicus briefs in court cases.

93. Anti-gay activists also used the appearance of AIDS in the early 1980s to rekindle the historic associations between homosexuality, disease, and public danger.

F. Anti-Gay Policing and Private Anti-Gay Violence

94. Although police harassment of gay men and lesbians and their meeting places is not as common as it was some years ago, it continues to be a problem. In 2009, for example, there were highly publicized police raids of gay bars in Atlanta, Georgia, and in Ft. Worth, Texas, where one patron was critically injured.

95. Gay people also continue to face violence motivated by anti-gay bias. A handful of horrific incidents have drawn widespread media attention. In 1984, in Bangor, Maine, 23-year-old Charlie Howard was targeted by three teens due to his sexual orientation. They attacked him and, although he protested that he could not swim, threw him off a bridge into the Kenduskeag Stream, where he drowned. Then, in 1998, Matthew Shepard, a college student in Laramie, Wyoming, was bound, tied to a fence, beaten with a pistol, and left to die because he was gay. Ten years later, Lawrence "Larry" Fobes King, a 15-year-old student at E.O. Green Junior High School in Oxnard, California, was shot and killed in school by a fellow student because of his sexual orientation. But the problem reaches far beyond these three incidents. The FBI reported 1,260 hate crime incidents based on perceived sexual orientation in 1998 and 1,265 in 2007. In 2008, the year of Lawrence King's murder, a na-

tional coalition of anti-violence social service agencies identified twenty-nine murders motivated by the assailants' hatred of lesbian, gay, bisexual, or transgender people. The threat of violence continues to lead many gay people to hide their identities or to avoid such commonplace expressions of affection as holding hands with their partners in public.

96. The most vulnerable victims of discrimination are youth. A national study published in December 2010 found that gay and lesbian teenagers are nearly 40 percent more likely than heterosexual teenagers to be punished by schools, police, and the courts. According to the Gay, Lesbian and Straight Education Network's 2009 National School Climate Survey published in 2010, 61.1 percent of lesbian, gay, bisexual and transgender (LGBT) students surveyed felt unsafe at school because of their sexual orientation; 84.6 percent were verbally harassed because of their sexual orientation; 40.1 percent were physically harassed in the past year because of their sexual orientation; and 18.8 percent were physically assaulted because of their sexual orientation. A recent study sponsored by the New York City Council noted the over-representation of LGBT youth among the city's homeless population. And the recent spate of suicides among LGBT youth has highlighted the personal consequences of the ostracization and demonization of gay men and lesbians in American society.

G. Marriage

97. Gay men and lesbians are still prohibited from marrying in the vast majority of states in this country and the question of marriage rights for same-sex couples remains hotly contested across-the-board. Some of the arguments made in the debate over the right of gay couples to marry have echoed those made in earlier debates over the rights of disfavored minority groups. Fifty years ago, for instance, segregationists often claimed that segregation and statutes banning interracial marriage reflected God's plan for humankind. In the 1960s, a Virginia judge who upheld that state's law against interracial marriage in the lower-court proceeding in *Loving v. Virginia* claimed that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

98. Opponents of the right of gay people to marry or adopt children also have drawn on their reading of scripture to justify their positions. As recently as 2002, when the Supreme Court of Alabama reversed the Alabama Court of Civil Appeals' decision to grant a lesbian mother custody of her children, the Chief Justice of the Supreme Court of Alabama used language as strong as that used by the trial judge in *Loving v. Virginia* in his concurring opinion: "Homosexuality is strongly condemned in the common law because it

violates both natural and revealed law. The law of the Old Testament enforced this distinction between the genders by stating that '[i]f a man lies with a male as he lies with a woman, both of them have committed an abomination.' Leviticus 20:13 (King James) . . . The common law designates homosexuality as an inherent evil, and if a person openly engages in such a practice, that fact alone would render him or her an unfit parent." Ex parte H.H. 830 So.2d 21, 33, 35 (Ala. 2002).

99. The vigorous opposition to ending discrimination against lesbian and gay couples in marriage law is the latest example of this pattern. The marriage issue first reached the national stage in 1993, when Hawaii's Supreme Court ruled that the state's ban on marriages between same-sex couples presumptively violated the state's equal rights amendment and remanded Baehr, the lawsuit challenging that ban, to a lower court for review. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). By 1996, when a second trial began in the lower court, the prospect of gay couples winning the right to marry had galvanized considerable opposition. Ultimately, while the litigation was pending, Hawaii amended its constitution to give the legislature the authority to limit marriage to different-sex couples, *see* Haw. Const. art. I, § 23, which it did. The Hawaii Supreme Court then dismissed the case as moot. *Baehr v. Miike*, Civ. No. 20371 slip op. at 5-8 (Dec. 9, 1999) (taking notice of constitutional amendment). In addition, under pressure from organizations proclaiming support for "traditional family values," the United

States Senate passed the Defense of Marriage Act (DOMA) on the day the Hawaii trial began. The Act provided a federal definition of marriage as the union of one man and one woman and declared that no state needed to give "full faith and credit" to "same-sex marriages" licensed in another state. It also denied federal benefits to such married couples. Fourteen states passed state-level DOMA statutes that year, and another eleven passed such statutes the following year. In 2004, when Massachusetts became the first state to permit gay couples to marry, a full thirteen states passed constitutional amendments banning such marriages even though twelve of those states already had enacted statutory DOMAs.

100. Indeed, in each state where gay men and lesbians have achieved the right to marry—either through judicial decision or legislative action—there has been significant and organized action by those opposed to marriage rights for same-sex couples to take that right away. California provides a good—and especially contentious—example. In February 2004, San Francisco mayor Gavin Newsom instructed city officials to issue marriage licenses to same-sex couples. The California Supreme Court ordered the city to stop doing so the following month, and it later nullified the marriages which had been performed. In 2005, and again in 2007, California's legislature approved bills that would legalize marriage for same-sex couples, but both bills were vetoed by then-Governor Schwarzenegger. In May 2008, the California Supreme Court decided in In re Marriage Cas-

es, 183 P.3d 384 (Cal. 2008) that the privacy and due process provisions of state constitution guarantee the basic civil right of marriage to all individuals and couples, without regard to their sexual orientation. Six months later, on November 4, 2008, California voters approved Proposition 8, adding to the California Constitution the provision "Only marriage between a man and a woman is valid or recognized in California." Same-sex couples immediately sued to prevent the enforcement of Proposition 8, but their efforts were rebuffed by the California Supreme Court in Strauss v. Horton, 207 P.3d 48 (Cal., June 17, 2009). The court held that the amendment was lawfully enacted, but that it did not invalidate marriages of same-sex couples performed in California prior to its effective date. Federal litigation concerning the constitutionality of Proposition 8 is ongoing.

101. Opponents of marriage equality who supported Proposition 8 mobilized some of the most enduring anti-gay stereotypes to heighten public apprehension. Several television commercials aired by the supporters of Proposition 8, for instance, warned that marriage equality might encourage children to become homosexuals themselves. The approval of California's Proposition 8 along with similar laws and constitutional amendments in forty other states indicates the enduring influence of anti-gay hostility and the persistence of ideas about the inequality of gay people and their relationships.

102. Iowa provides another example. In April 2009, a unanimous Iowa Supreme Court struck down

the exclusion of qualified same-sex couples from civil marriage. In response, national organizations opposed to marriage for same-sex couples, such as the National Organization for Marriage and the American Family Association, initiated a campaign for the removal of three of the judges involved in that decision who were subject to retention elections. The campaign was successful, and all three judges were ousted from their position on the bench. Efforts to legislatively repeal marriage for same-sex couples now are underway in Iowa.

CONCLUSION

103. Today the civil rights enjoyed by gay and lesbian Americans vary substantially from region to region and are still subject to the vicissitudes of public opinion. Like other minority groups, they often must rely on judicial decisions to secure equal rights. The role of the courts in this dispute is reminiscent of earlier disputes in which courts had to confront public opposition to minority rights. In 1948, when the California Supreme Court became the first state supreme court in the nation to overturn a state law banning interracial marriage, it bucked the tide of white public opposition to such marriages. While the United States Supreme Court overturned the remaining state bans on interracial marriage in 1967 in Loving v. Virginia, it was not until 2001 that more Americans approved of interracial marriage than disapproved of it. History has vindicated the judges who had the courage and foresight to uphold the constitutional rights of

disfavored minorities in the face of majoritarian hostility.

Signed under the penalty of perjury under the laws of the United States this 9th day of May, 2011

/s/ GEORGE CHAUNCEY
GEORGE CHAUNCEY

[Exhibits omitted]

* * * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

10-cv-8435

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: May 17, 2011]

EXPERT AFFIDAVIT OF GARY SEGURA, PH.D.

I, Gary M. Segura, Ph.D., hereby depose and say as follows:

PRELIMINARY STATEMENT

I. Expert Background and Qualifications

1. I am a Professor of American Politics in the Department of Political Science at Stanford University. I have been retained by counsel for Plaintiffs as an expert in connection with both the above-referenced litigation. I am being compensated for this effort at a rate of $250 per hour, and may be reimbursed for expenses in the event that I have to travel in connection with my services. I have actual knowledge of the matters stated in this affidavit and could and would so testify if called as a witness. My background, expe-

rience and list of publications from the last 10 years are summarized in my curriculum vitae, which is attached as Exhibit A to this Affidavit.

2. In the past four years, I have testified as an expert—either at trial or through declaration—or been deposed as an expert in *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal. May 22, 2009), *Gill v. Office of Pers. Mgmt.*, No. 09-10309 (Mar. 3, 2009), and *Commonwealth of Mass. v. U.S. Dep't of Health and Human Servs.*, No. 09-11156 (July 8, 2009).

3. I received a Ph.D. in American Politics and Political Philosophy from the Department of Political Science at the University of Illinois in Urbana-Champaign in 1992. My tertiary field of emphasis was political methodology. My MA was also from the University of Illinois in 1990, and I earned my undergraduate degree from Loyola University of New Orleans in 1985.

4. I am also the founding Director of the Institute on the Politics of Inequality, Race and Ethnicity at Stanford, and the founding co-Director of the Stanford Center for American Democracy. In the latter role, I am one of the Principal Investigators of the American National Election Studies for 2009-2013, the premier data-gathering project for scholars of American elections.

5. My primary emphases in my scholarly research and writing are on public attitudes, opinion, and behavior with respect to politics, and minority group politics. I have taught classes on elections, public

opinion, representation, Congress, Latino politics, gay and lesbian politics, race and racism, the Voting Rights Act, inequality and American democracy, interest group politics, philosophy of science, research design, and statistical analysis (introductory and advanced).

6. To date, I have authored 44 article-length publications in professional journals and edited volumes. Those journals include the *American Political Science Review*, the *American Journal of Political Science*, *Political Research Quarterly*, *Political Behavior*, and the *Journal of Politics*. I edited *Diversity in Democracy: Minority Representation in the United States*, published by the University of Virginia Press in 2005. I am also the co-author of *Latino Lives in America: Making It Home*, addressing new patterns of Latino life and politics in the U.S., published by Temple University Press in 2010. I have a third book being published in the Autumn of 2011 with Congressional Quarterly Press, entitled *"The Future is Ours:" Minority Politics, Political Behavior, and the Multiracial Era of American Politics*, a comparative exploration of political behavior across American racial and ethnic minority groups and how such behaviors will shape American party coalitions in the coming decades. I am the co-author of Latinos in the New Millennium: An Almanac of Opinion, Behavior, and Policy Preferences, currently under contract with Cambridge University Press and scheduled to appear in 2012.

7. I am the former President of the Midwest Political Science Association (MPSA), the second-largest organization of American political scientists. In 2006, I was the General Program Chair of the MPSA Annual Meeting. In 2011, I was elected Vice-President and Program Chair of the Western Political Science Association for 2012-2013, and will serve as President in 2013-14. In addition, I am a member and former Executive Council Member of the American Political Science Association, member and former Executive Council Member of the Western Political Science Association, and member of the Southern Political Science Association. I serve or have served on the editorial boards of the American Journal of Political Science, Journal of Politics, and Political Research Quarterly. I am a member of the Sexuality and Politics organized section of the American Political Science Association, have served on the Southern Political Science Association's Committee on the Status of Gays and Lesbians, and was part of the Executive Committee of the Sexuality Studies Program at the University of Iowa.

8. In preparing this affidavit, I reviewed the Complaint, Attorney General Eric Holder's letter to Representative John Boehner dated February 23, 2011, and the materials listed in the attached list of sources (Exhibit B). I rely on those documents, in addition to the documents specifically cited as supportive examples in particular sections of this affidavit, as support for my opinions. I have also relied on my years of experience in the field of political science, as

set out in my curriculum vitae (Exhibit A), and on the materials listed therein.

II. Summary of Conclusions

9. Gay men and lesbians do not possess a meaningful degree of political power, and are politically vulnerable, relying almost exclusively on allies who are regularly shown to be insufficiently strong or reliable to achieve their goals or protect their interests. The powerlessness of gay men and lesbians is evidenced in numerous ways, and they are subject to political exclusion and suffer political disabilities greater than other groups that have received suspect class protection from the courts.

III. Political Powerlessness in General

10. Any evaluation of the political power of a particular group in the United States takes place in the context of a general understanding of the role that groups play in American politics. From James Madison onward, American democracy frequently has been understood as a pluralist system, in which competition among groups should ideally ensure that no one interest becomes permanently dominant, or determines outcomes over a large number of decisions over a long time. Madison believed that in an "extended" republic, coalitions commanding the day on one issue would dissolve and be replaced by a different majority coalition on the next issue.

11. Modern political scientists generally approach pluralism through the concept of group interests. In

what David Truman calls "disturbance" theory, the action of one group raises challenges to the interests of another, causing the latter to react, and preventing a single interest from dominating the political process. However, scholarly work on collective action (including Mancur Olson among others) has found that not all groups have an equal opportunity to form and act successfully to stave off threats to their interests. Differences in group size, resources, and position in the class structure mean that some groups are inherently better positioned to act on their own behalf than others, and some groups suffer a permanent disadvantage that places them at the mercy of others. Reflecting this concern, eminent political scientist Elmer Eric Schattschneider famously wrote, "The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent." Those with greater resources—time, money, and numbers—exert greater influence on the political process. Minorities, by definition, are less numerous than the majority.

12. The existence of societal prejudice against a particular group makes the accumulation of resources, including finances and allies, more difficult. Moreover, that same prejudice imposes an additional systematic burden because it tends to prevent that group's interests or policy preferences from receiving due consideration by other actors in the political process, or causes that consideration to be sacrificed to political expediency. Relative to minority groups that are otherwise similarly situated, a group that suffers such prejudice does not receive an equivalent hearing in

political contestation and debate. Constitutions (and courts, through judicial review) play the role of the Madisonian corrective in the pluralist system by protecting disadvantaged minorities from majoritarian excesses and from effective exclusion from the political process.

13. Political power refers to a person's or group's demonstrated ability to extract favorable (or prevent unfavorable) policy outcomes from the political system. In a well-established and commonly cited definition, Robert Dahl wrote that A has power over B when A is able to compel B to do something that B otherwise would not do. Thus, simple meetings of the mind are insufficient to demonstrate the exercise of power. One does not have power over those who, for other reasons, already agree. For example, in the last national election, millions voted for the same candidate I did, but this is not evidence of my electoral influence.

14. Power may also be reflected in the content of the political agenda, the issues that are considered for legislative action. More powerful political actors face fewer legislative threats to their interests than less powerful actors. The very circumstance of being forced to defend interests against potential legislative action is a reflection of weakness rather than strength.

15. Groups that lack political power may, on occasion, receive pledges of support, or even desirable legislative outcomes, that they themselves lack the power to *compel* through the political process. An elected official may arrive at a position on a policy or proposal

for their own reasons unrelated to the specific communicated preferences of the minority group's constituents.

16. In some instances, the minority preferences may be entirely beside the point. For example, an elected official may choose not to support a bill or policy proposal because he or she may determine that the policy has implications adverse to *other* interests or because the costs of implementation or enforcement of the policy are too great.

17. Positive legislative outcomes may also be the result of "affinity" or sympathy from legislators in a position to bestow them. An elected official may decide not to support a bill or policy proposal that discriminates against, singles out, or mistreats a minority group because he or she independently believes that discriminating against, singling out, or mistreating the minority group is wrong. But since these pledges or outcomes are not the result of an exercise of political power *by the minority group*, they are not necessarily indicative of a group's actual political power. Moreover, they are significantly more vulnerable to reversal than those achieved through the exercise of actual power. The affinity or sympathy that gave rise to the support could dissipate or flatten, and is likely to be abandoned in the face of subsequent opposition, and in the absence of sufficient power and influence of the minority group to counter opposition.

18. For example, in a recent legislative debate over the legalization of marriage for same-sex couples

in the Maryland House of Delegates, several members of the chamber who had *co-sponsored* the legislation—and even some who had solicited endorsements and donations during the election cycle on this basis—ultimately voted against it in committee, publicly announced their intention to vote against it on the floor, and subsequently did so. These legislators' apparent support in the earlier stage of the legislative process was costless, and withered in the face of mobilized opposition and as an actual roll-call vote approached.

19. Following Dahl's understanding, power can be illustrated only in comparison to a baseline understanding of the decision-makers' preferred actions. That is, to demonstrate that power had been at work, one would need to observe successful instances of opinion change on the part of a legislator in the face of positive or negative sanction or, alternatively, electoral change precipitated by the ire of the dissatisfied constituency.

20. Apparent policy "agreement" is a particularly erroneous measure of power when mere "agreement" requires no action on the part of the policy-maker. Again, the example of candidates and officials endorsing a policy position, only to recant that support when an actual vote approaches, illustrates the illusory nature of this form of support.

21. My opinion does not rest on the extreme assumption that in no place, at no time, under any circumstances, have gay men and lesbians won any outcome.

22. Rather, my view is that we must weigh the relative impact of positive and negative outcomes against the numerosity of moments of contestation and the insecure nature of legislative gains. Policy "successes" should not be considered in isolation. While legislative gains have occurred in some states and localities, the adoption of statute and constitutional amendments expressly in opposition to the interests of gay men and lesbians has also occurred in numerous jurisdictions. Even an assessment of "trend" requires consideration of the relative frequency of each and the stakes involved in each of the policy debates.

23. Policy successes—whether at the state or federal level—are insecure so long as the rights and legal status of lesbians and gays remains a subject of legislative action. We must consider the frequency with which legislative gains have been repealed, turned back by the voters, or foregone altogether, as well as the serious risk of repeal of legislative gains after each election cycle in which political power shifts to a different political party. Recent policy modifications, such as the adoption of a mechanism to end the "Don't Ask, Don't Tell" policy, illustrate precisely this dynamic. Several prospective Republican presidential candidates have expressed support for a repeal of this legislation and the reinstatement of "Don't Ask, Don't Tell," a view also shared by members of the new House majority and Republican members of the Armed Services Committee. Similarly, a repeal of the legislative enactment of marriage equality for same-sex couples in New Hampshire, adopted just one year ago, is al-

ready under deliberation in the state's legislature, whose partisan control shifted in the last election.

24. Even positive outcomes for gay men and lesbians that are secured through court rulings are vulnerable to popular or legislative rollback. For example, in response to the Iowa Supreme Court's ruling that lesbians and gay men could not be excluded from the institution of civil marriage, anti-gay forces like the National Organization for Marriage organized a nationally funded campaign to defeat three of the members of that court in judicial retention elections in November 2010, and were ultimately successful in defeating all three. The defeat of state jurists facing retention elections has the dual effect of weakening that court's majority—raising the possibility of their reversing the previous decision—as well as chilling similar action by jurists in other states whose judicial views might otherwise lead them to similar conclusions.

25. Furthermore, many of the policy "successes" that have benefitted gay men and lesbians are acts that remediate or repeal express, *de jure* discrimination against the group. Remediation of existing discrimination and disadvantage should be distinguished from affirmative political power. For example, the adoption of hate crimes statutes inclusive of sexual orientation, while a "success" for gay men and lesbians, was necessary only because there is such prevalent bias-related violence against gay men and lesbians. While a fair assessment of the relative political "power" of gay men and lesbians would include the

adoption of such legislation, it must also include a consideration of the underlying behavior and bias that gave rise to the need for the legislation, which is an indicator of political powerlessness, not strength.

26. In light of the political disadvantages still faced by a small, targeted, and disliked group, I conclude that gay men and lesbians are powerless to secure *basic* rights within the normal political processes.

27. Traditional markers of political powerlessness include systematic disadvantages in the political process; the existence of significant prejudice, stigmatization, or *de facto or de jure* second-class status; or an inability, alone or in concert with reliable coalition partners, to secure basic rights or equal treatment from and within the political process. Here, I organize traditional markers of political powerlessness into two categories: manifestations of power and powerlessness, on which gays and lesbians score poorly, and factors that contribute to political disadvantage, on which gays and lesbians—to their detriment—score high.

IV. Political Powerlessness of Gays and Lesbians

A. Manifestations of Political Powerlessness

28. Although an exhaustive catalog is impossible, the lack of meaningful political power possessed by gay men and lesbians is reflected in numerous features of the nation's laws, institutions, and political history that are adverse to policy outcomes favored by and important to gay men and lesbians. Some examples are discussed below. The political powerlessness of

gay men and lesbians is evidenced by their inability to bring an end to pervasive prejudice and discrimination, and to secure desired policy outcomes and prevent undesirable outcomes on fundamental matters that closely and directly impact their lives. Furthermore, the demonstrated vulnerability of occasional and geographically confined policy gains to reversal or repeal is indicative of a role played by "affinity" or sympathy, rather than the exercise of meaningful political power by gays and lesbians.

Absence of Statutory Protection/Presence of *De Jure* Statutory Inequality

29. To date, there is no federal legislation prohibiting discrimination against gay men and lesbians in employment, education, access to public accommodations, or housing. Indeed, the history of the Employment Non-Discrimination Act (ENDA) provides a good example of gay men and lesbians' inability to compel policy outcomes for which they actively advocate. ENDA, which would extend employment protections on the basis of sexual orientation (and in some versions, gender identity) has been introduced regularly since 1994 (with earlier versions existing as far back as the 1970s), but has never passed both houses of Congress. It has failed to win passage in both Republican and Democratic controlled Congresses. While the legislation attracts many "co-sponsors," one cannot test the reliability or strength of this support in the absence of a recent and meaningful vote, or any realistic chance of its passage. The almost complete absence of legislative progress on the issue suggests

that, at the very least, it is not a legislative priority for most legislators or the leadership of either party and, at worst, that the "support" is rhetorical and without substance.

30. In 1996, Congress adopted the "Defense of Marriage Act," or DOMA which, among other things, prevented even legally married same-sex couples from filing joint tax returns, inheriting social security benefits, and obtaining all of the other rights afforded to married individuals by federal law. This preclusion of rights acquisition was signed into law by a Democratic president. Until recently, litigation against the Defense Marriage Act has been actively resisted by both Democratic and Republican administrations. Indeed, until February 2011, the Obama Justice Department defended the constitutionality of DOMA despite the administration's public support for its legislative repeal. And the recent decision by the Department of Justice to cease its defense of DOMA in court came only after one house of Congress passed into the control of the opposite party, thus allowing that body the opportunity to intervene in the litigation. In short, it was a change of course without immediate practical effect. Moreover, the Department of Justice continues to maintain that there are rational bases for DOMA, should the courts conclude that rational basis is the proper standard of review.

31. Despite a long-documented record of violence against gay men and lesbians, attempts to extend existing federal hate crimes to include violent crimes based on the perceived sexual orientation of the victim

reached fruition only in 2009, after more than a decade of advocacy by civil rights groups and supporters. Previously, gays and lesbians enjoyed virtually no such federal protection. The legislative process that produced even this positive outcome is illustrative of the political powerlessness of gay men and lesbians. To provide political cover, the bill extending hate crimes protections to gays and lesbians was attached to and adopted as part of a Defense Appropriations Bill. Even under these circumstances, 75% of Republican members of the Senate felt it necessary to vote against it. In the House of Representatives, 131 of 175 Republican members voting (again, 75%) also opposed the hate crimes provision, illustrating at once the depth of opposition to even ameliorative measures that benefit gay men and lesbians, as well as the fragility of the institutional support for such outcomes. It is again worth noting that the impetus for this legislation was the pattern of violence directed at gay men and lesbians, a circumstance that provides important context for why the adoption of such a provision need not represent an exercise of "power."

32. In 1993, Congress codified the military's "Don't Ask, Don't Tell" (DADT) policy, under which lesbians and gay men were required to conceal their sexual orientation in order to serve in the military, were investigated if suspected to be gay, and were discharged if they admitted or were found to be gay. Like the "Defense of Marriage Act," this legislation was signed by a Democratic president. In December 2010, Congress adopted a provision that contained an administrative mechanism that makes an end to this

policy possible. Even with this positive outcome however, the circumstances under which it was achieved highlighted the ultimate political powerlessness of gays and lesbians. The DADT policy has been in effect for over 17 years and, despite significant evidence of abuse—including discharges initiated based on unsubstantiated allegations and third-party accusations, and aggressive investigations beyond the bounds of the policy—and its cost to the military, repeal had not seriously been considered. Both Republican and Democratic administrations defended DADT in court. The current Democratic administration discouraged legislative attempts to attach legislation repealing DADT to the Defense Authorization bill in the summer of 2010, or indeed at any point prior to the November 2010 election. There was no legislative action on the policy for most of the 111th Congress, beyond committee hearings, and despite widespread shifts in public opinion on this issue, no final action was taken prior to the general election. When the matter was finally taken up during the lame-duck session, Republican members offered fierce opposition in both legislative chambers. Of 175 votes cast in the House by Republican Party members, 160 (or 91.4%) were against the provision to repeal DADT. In the Senate, 31 of 39 Republican senators (79.5%) opposed the repeal. Like the hate crimes legislation, the DADT repeal illustrates the limited access gay men and lesbians have to the legislative process because of the stalwart opposition of one party.

33. On the state level, there is no statutory protection against discrimination in employment or public

accommodations for gay men and lesbians in twenty-nine states.

34. *De jure* inequality also exists in state constitutional law. In 1990, there was not a single state constitutional provision that targeted gay men and lesbians for unequal treatment. Today, in three-fifths of the states there is now constitutionally-established inequality—that is, the exclusion of gay men and lesbians from a civil institution is formally written into the framework of government. Indeed, in many states, voters passed ballot initiatives to amend their state constitutions to prohibit same-sex couples from marrying even *after* the state legislature had already passed statutes barring same sex couples from marrying. An additional 11 states affirmatively exclude gay men and lesbians from civil marriage by statute but have not yet amended their constitutions.

Repeal or Pre-Emption of Legislative or Judicial Protections Through Ballot Initiatives

35. Evidence from the past two decades in particular has demonstrated that gay men and lesbians are especially vulnerable in the context of direct democracy. That is, positive legislative outcomes achieved at the state and local levels are often insecure. Initiatives and referenda frequently and effectively have been used to reverse or pre-empt the legislative grant at the state or local levels of policies benefiting or protecting gays and lesbians. These ballot initiatives can be broken into three groups: (1) those which overturn anti-discrimination policies, (2) anti-marriage initiatives, and (3) restrictions on adoption.

36. *Overturning anti-discrimination policies*—The first wave of ballot actions on gay and lesbian rights began in the early 1970s, but reached its peak in the 1990s. The most common form was citizen initiatives to overturn municipal, county, or state extensions of antidiscrimination policies to sexual orientation. These ballot actions were generally successful. Legislative enactments were overturned in cities and counties across the country, including Santa Clara County and the City of San Jose, California; Tacoma, Washington; Lewiston, Maine; Lansing, Michigan; St. Paul, Minnesota; Wichita, Kansas; and perhaps most famously, Miami-Dade County, Florida. A very small number of pro-gay votes also occurred and, not surprisingly, did not fare as well, including the defeat of a voter attempt to compel the Davis, California City Council to enact a gay rights ordinance. Haider-Markel and colleagues (2007) identified 143 votes from the 1970s through 2005, and found that gay and lesbian rights were defeated or overturned in more than 70% of the cases—with the opponents of those rights prevailing at about the same rate for local and state elections. The frequency of electoral and policy conflict over non-discrimination statutes declined once the focus of the struggle increasingly centered on preventing legal recognition of same-sex couples' relationships. It is worth noting that many anti-gay measures amended city charters or state constitutions to increase the burden on gays and lesbians and their supporters for accomplishing policy change, such as Colorado's Amendment 2, struck down by the Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996). The

general approach of such measures was to prohibit legislative action preemptively, and require that any change be through popular, majority vote (with all of the disadvantages for minority rights this implies).

37. *Anti-marriage initiatives*—In 2004 alone, anti-marriage equality ballot initiatives passed in 13 states. To date, gay and lesbian marriage rights have been voted on at the state level 34 times, most recently in Maine in November 2009. In only one instance did the pro-gay position win, when Arizona's Proposition 107 failed in 2006, only to be passed in slightly modified form in 2008. (A second proposition passed in Colorado, but that state had two provisions on the same ballot, with the more expansive of the two failing, while the more restrictive passed.) In Washington State in 2009, the pro-gay position also prevailed, but the vote was on domestic partner rights specifically defined to exclude the legal concept of marriage.

38. In Maine, the state legislature managed to adopt equality for same-sex couples through statute. That policy success was short lived, as a popular majority was able to overturn legislative action and reinstate the ban on marriage between same-sex couples through statewide ballot on "Question 1." This outcome was secured with massive intervention from national anti-gay organizations, such as the National Organization for Marriage, as well as substantial investment by religious organizations, including the Roman Catholic Church, whose role was documented and touted in Catholic media sources. Campaign materials used by interests opposing marriage equality

were, in some instances, identical to those used in the campaign to repeal marriage equality in California via Proposition 8, illustrating the vast and national reach of those interests working against the interests of gay men and lesbians.

39. *Adoption*—In 5 states, gay men and lesbians are prohibited from adopting children. Some of these bans were adopted recently. For example, in 2008, Arkansas voters adopted Arkansas' Act One, which prohibited adoption by unmarried cohabitating couples, an act conceived with regard to—and targeted at—same-sex couples. Act One was struck down in April 2011 as an unconstitutional infringement on the right to privacy by the Arkansas Supreme Court. That decision notwithstanding, it is possible, and I think likely, that these initiatives or legislative actions will appear elsewhere in the future. Indeed, Arizona recently enacted statutory preference for heterosexuals in the state's foster and adoption programs. In the 2008 American National Election Study, 47.6% of respondents nationwide felt that gay men and lesbians should be prohibited from adopting. Since that percentage varies widely across states, I and others expect initiatives to prohibit same-sex couples from adopting to start appearing in states where the level of opposition exceeds 50%.

40. Thus, beyond the obstacles gay men and lesbians face in the traditional legislative process, ballot initiatives further disadvantage them politically and have undone many of the benefits they have obtained through legislative action. The success of anti-gay

ballot initiatives, moreover, makes it less likely that legislatures will enact pro-gay policies in the first place (Lax and Phillips 2009), because elected officials will fear having their actions overturned by angry constituents. Moreover, many gay and lesbian activists' fear that the reactive post-initiative policies will be worse than the status quo, thereby forcing them to consider whether not seeking legislative policy change in the first instance is actually in the best interests of the group. For example, several successful anti-marriage ballot initiatives also prohibited civil unions and domestic partnerships, removing benefits that had existed prior to the enactment of the anti-gay ballot initiatives.

41. Ballot initiative campaigns are frequently polarizing, are built on enormous sums of money, and are waged primarily in the non-deliberative media of mass advertising. Small minorities are even less able to protect their interests in these kinds of contests than they are in the legislative process, which—as a result of legislative districts, institutional rules, coalitional politics, and other factors—tends to give smaller minorities more of an opportunity to prevent undesirable outcomes. The passage of Proposition 8 in California and Question 1 in Maine both illustrate that coalition politics are more easily broken down in popular vote situations where misleading messages can circumvent community leaders and political elites.

42. Although the use of the initiative process against gay and lesbian policy goals is a comparatively recent phenomenon, in the past, ballot initiatives were

used to undo legislative gains by immigrants, non-English speakers, African Americans, and minorities generally, including overturning fair housing statutes, affirmative action programs, bilingual education, and establishing English as an official language. Historians of the turn-of-the-century progressive movement, when these direct democracy processes were established and written into the laws of the western states, note the association of progressive reforms with anti-immigrant sentiment (among other factors). Indeed, the progressive movement created the initiative process in order to allow the majority to overturn decisions made by legislatures, which allow a greater role for bargaining and coalitional politics.

43. The initiative process has now been used specifically against gay men and lesbians more than against any other social group.

44. While there has been an increase in state and local jurisdictions with statutory anti-discrimination protections for gay men and lesbians over the last two decades, these legislative successes have been resisted strongly at the ballot box. Again, in three-fifths of the 50 states, voters have amended their state constitutions to establish formal political and social inequality for gays and lesbians. Similar proposals to amend the federal constitution have also been considered.

Underrepresentation in Political Office

45. Gay elected officials have risen to various offices around the country. These representatives may strive to advocate for gay and lesbian rights, but their numbers and limited legislative impact on issues concerning those rights continue to demonstrate significant under-representation and reliance on friendly, heterosexual representatives, over whom gay men and lesbians hold no direct political power. For example, 85 state legislators nationwide are openly gay, but the total number of state legislators nationwide is 7,382, so those 85 legislators represent only 1.2% of the total. A recent study by the Williams Institute estimated the gay, lesbian and bisexual population of the U.S. to be approximately 3.5%. Under even the most conservative estimates of gay and lesbian population share, this number indicates that gays and lesbians are substantially under-represented. Prior to 1990, only four openly gay men or lesbians were members of state legislatures.

46. There have been only seven openly gay members of Congress in history, and only four—considerably less than one percent of all members—serve today (.9% of the House, .75% of the entire Congress). Four of those seven were initially elected to the House with their sexual orientation not publicly known. Only three members were first elected to the House without the benefits of incumbency and with widespread public familiarity with their sexual orientation, Jared Polis (D-CO), Tammy Baldwin (D-WI), and David Cicilline (D-RI). The first two represent dis-

tricts that are home to the flagship campus of their state universities—districts that are typically more tolerant than others in the state. Gay and lesbian politicians are largely confined to a single political party. Gay Republicans face an extremely difficult time, and the few gay GOP elected officials who have emerged seldom last, most leaving power either through primary challenges or retirement in the face of pressure. There has never been an openly gay President, U.S. Senator, Cabinet level appointee, or Justice of the United States Supreme Court.

47. The percentages of gay and lesbian representation at the local level are lower still. In 2010, the Gay and Lesbian Leadership Institute identified 288 local elected gay or lesbian political officials serving on city councils, county commissions, school boards, and other local offices (http://www.glli.org/out_officials), which is an insignificant fraction of the total number of elected local officials. Over a decade ago, the Census Bureau reported that the number of elected officials nationwide was slightly over 511,000. Subtracting members of Congress and state legislatures, about whom I just reported, that leaves somewhat over 500,000 city, county, school, and local board officials, and only 288 (or .05%) were identified as openly gay. These officials are also concentrated in the coastal states and in Illinois. Some states have no openly-gay elected officials at all, and many more have just a very small handful.

B. Factors Contributing to Political Powerlessness

48. Numerous factors, often working in combination or in mutually reinforcing ways, contribute to the political powerlessness of gay men and lesbians. Furthermore, many of these factors—including public and political hostility, prejudice, censorship, and religious and moral condemnation—impose a political disability on gays and lesbians not suffered by groups of comparable size and geographic dispersion. I begin this section with demographic considerations and then discuss other, relational factors pointing to a degree of powerlessness that today is unique to gays and lesbians.

Small Population Size and Geographic Dispersion

49. The simplest way to secure political representation and exercise some degree of influence over the political process is through numerical strength. The population strength of gay men and lesbians is not close to being sufficient to obtain electoral predominance in a single jurisdiction, let alone change the composition of a legislature or Congress. There are no congressional districts with a majority population of gay and lesbian Americans. There are no municipalities of any size with a majority gay and lesbian population. Even in broadly identified gay-friendly communities, often places where migration to established lesbian and gay communities has significantly increased the gay population above the national average, gays and lesbians fail to reach majority status. A fair estimation of population suggests that gay men and lesbi-

ans have sufficient numbers to determine (or substantially influence) the outcome of only a few city council or county board seats, or state legislative districts, nationwide. At any level of aggregation above the precinct or neighborhood, there is no place with a gay majority.

Effect of HIV/AIDS Epidemic

50. The AIDS epidemic has set back the gay community's potential for political action, in ways that are both obvious and not obvious. Through 2005, the Centers for Disease Control reported that just over 300,000 MSMs (CDC term for men who have sex with men) had died of HIV/AIDS. Another 217,000 were living with AIDS. The loss of 300,000 potential voters, organizers, and leaders is a profound setback to a community whose population starts as a fairly small share of the society. Harder to calculate are the lost financial contributions to the political efforts of gay men and lesbians as a consequence of this epidemic. Gay men and lesbians have both raised substantial amounts of money for HIV-related research and social services, diverting resources that could otherwise be used to fight discrimination. Further, gay net wealth is negatively impacted by the loss of income on the part of those who have died, and the partial loss of income and expenditures on healthcare from those still living with the disease. Some political observers suggest that a decade or more of gay activism was lost to the cause of gay equality as gay men and lesbians turned their attention to the more immediate threat of the epidemic. While gay men and lesbians do not

have the resources—reliable allies, elected officials, votes, dollars, and organizational capacity—to be politically powerful, they have been further disadvantaged by the fact that HIV destroyed such a large segment of the community and consumed such a large portion of its resources. In addition to the direct resource and political costs, AIDS offered heterosexuals a new reason to stigmatize gay people and same-sex relations, and to resist political change that would have advanced gay equality.

Violence

51. A crime can be classified as a hate crime when the victim is targeted because of his or her identity—generally race, ethnicity, religious identity, gender, sexual orientation, or disability status. Hate crimes are unique in that the effects of the crime are understood—indeed intended—to reach beyond the person of the actual victim. The crime is best understood as an expression of animus toward an entire group, and is an attempt to intimidate other members of that group or otherwise constrain their future behavior. For example, racially motivated hate crimes against individual target-group-members can simultaneously express racial prejudice toward the individual, an entire group, and intimidate other group members from patronizing businesses, moving to neighborhoods, enrolling in schools, or otherwise exercising their personal liberties.

52. Though broad federal hate crimes protections for gays and lesbians came into existence only recently, the FBI has collected data on hate crimes commit-

ted on the basis of perceived sexual orientation for a number of years, at least from jurisdictions that have chosen to report them, and the numbers are substantial. In the last year for which statistics have been published, 2009, the total number of hate crime incidents was 6,604, and 1,482 (17.8%) of those were on the basis of sexual orientation. In terms of single groups, only African Americans endured more incidents, and since they are as much as twice the population share as gays and lesbians, the likelihood that any given gay or lesbian citizen experiences an attack (that is, the per capita number of attacks) is considerably higher.

53. Reported hate crime incidents range from simple assault to murder. According to the FBI's statistics, in 2008, 73 percent of all hate crimes committed against gays and lesbians included an act of violence; 71 percent of all hate-motivated murders in the United States were of gay men and lesbians; and fifty-five percent of all hate-motivated rapes were against gays and lesbians.

54. FBI Hate Crimes reports for 2009 show that gay men, along with Jewish Americans, are the most likely to be victimized by a bias crime. The Southern Poverty Law Center ("SPLC) also suggests that steps forward in the cause of gay and lesbian equality seem to be associated with a subsequent surge in antigay violence, pointing to data immediately in the wake of the Supreme Court's ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the Court struck down Texas' sodomy law. The intimidation effect of hate crimes serves to undermine the mobilization of gays and les-

bians and their allies and to limit their free exercise of simple economic and social liberties.

55. Recent years show no discernible decline in bias crimes against gays and lesbians. FBI statistics reporting the number of hate crimes against specific groups shows that anti-gay acts were as frequent in 2009 as they were in 2003.

Invisibility

56. A unique aspect of gay and lesbian identity that distinguishes gays and lesbians from other minority groups—to their political disadvantage—is their relative invisibility. The scholarship on passing and self-identification suggests that members of repressed or targeted groups who have the ability to pass unobserved in the majority population may choose to do so if the costs of self-identification, in the form of family disapproval, physical threat, discrimination, and their consequences, can be avoided. While this strategy avoids some risks of identification, passing itself has a personal and a political cost.

57. The unwillingness to identify has several important implications for the question of whether gay men and lesbians can meaningfully or effectively act on their own behalf politically. While not a panacea, social contact with gay men and lesbians is generally associated with more sympathetic policy preferences. Invisibility undermines community support.

58. With regard to the size of the gay population, the number of gays and lesbians perceived by the

general public, including those holding views hostile to gay and lesbian equality, is artificially low.

59. Mobilization levels among gay men and lesbians is lower than other groups but is erroneously perceived to be higher. Mobilization can reasonably be understood to be an act of self-identification, so those choosing to pass have foreclosed visible political action.

60. Since not all gay men and lesbians come out, the percentage of the gay and lesbian population that is mobilized seems higher than it really is. Likewise, since those gay and lesbian citizens who choose to self-identify are those whose economic and social position in society is more secure—making the act of coming out less risk inducing—the resulting self-selection bias results in a misperception of gays and lesbians as better educated, of higher income, and otherwise "privileged." This leads the public to believe—mistakenly—that gay men and lesbians are not in need of certain protections.

61. The public perception that gay men and lesbians are better educated or have higher incomes is not accurate. Statistically, gays and lesbians do not have higher levels of income and, when all gay men and lesbians are considered rather than only the self-identified, are no better educated then the public at-large. My analysis of the 2004 National Exit Polls demonstrates no difference between heterosexual voters and gay and lesbian voters on income and education.

62. Efforts on the part of gay men and lesbians—incorrectly perceived as less numerous and more privileged than they actually are—to gain statutory protection is characterized by opponents as both unjustified and transgressive. This misperception works both to mobilize opponents and to encourage complacency by potential allies.

63. In addition, the fact that sexual orientation is not directly visible may reduce the group's ability to attract allies. Invisibility means that potential heterosexual allies may reasonably fear being misidentified as gay or lesbian, reducing the chance that they will mobilize on behalf of gays and lesbians. The National Coalition of Anti-Violence Programs reported in 2008 that 9% of hate-crimes reported to their participating agencies on the basis of perceived sexual orientation victimize heterosexuals misidentified as gay or lesbian.

64. Finally, invisibility exacerbates the problem of geographic and social dispersion, making it more difficult for gay men and lesbians to find each other and mobilize politically.

Censorship

65. In a variety of ways, gay men and lesbians are pressured to remain invisible, and in several contexts, discussion of gay people and their relationships is prohibited or regulated. Examples include the military's "Don't Ask, Don't Tell" policy; legislation that prevented the National Endowment of the Arts from funding any art depicting homoeroticism; rules that

have prohibited federally funded AIDS education materials from "promoting" homosexuality, and requiring educators to advocate for abstinence from extramarital sex, including homosexual sex; and efforts in several states to forbid the mention of homosexuality in school health classes, or mandate the association of the term with descriptors suggesting that it is not acceptable. This year, Tennessee considered legislation banning the mention or discussion of homosexuality in primary grades, though action has been put on hold until the next legislative session. Even in the face of the HIV epidemic, Arizona, for example, prohibits any mention that same-sex intimacy could be made "safe."

Public Hostility and Prejudice

66. Gay men and lesbians face severe hostility from non-gay citizens in many parts of the country, and opinion data suggest that they are held in considerably lower regard than many groups currently receiving the protection of heightened scrutiny from the courts. Such low public regard makes it difficult for gay people to achieve significant political progress, implicitly justifies legislative and electoral actions against gay men and lesbians, and severely hampers their ability to attract donors, allies, coalition partners, or even public sympathy.

67. In each national election year, the American National Election Study (available at electionstudies.org or the ICPSR website) asks a representative sample of American citizens to gauge their "warmness" toward a particular group. Political scientists call

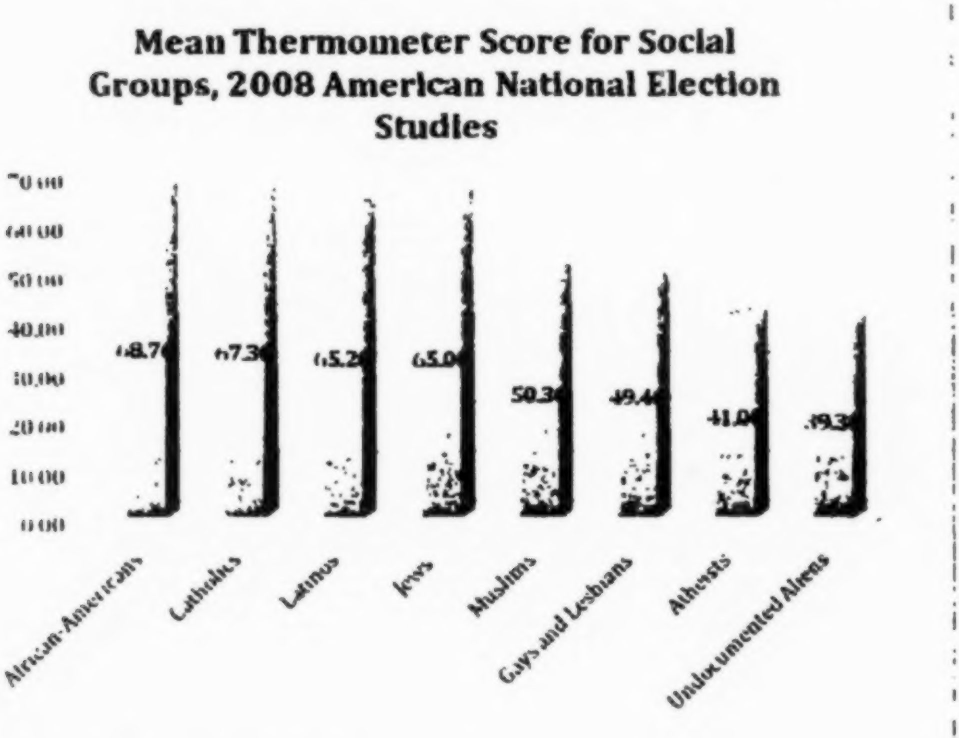
this instrument a "feeling thermometer" and the scale of each ranges from 0 to 100, with 100 indicating strong warmness/fondness/positive views.

68. For Hispanics, approximately 40% of respondents rated their warmness at 50 (midpoint) or less, and the average temperature was 65.2 (std.dev.21.0). For African Americans, only 33% of respondents were at or below 50, and the mean temperature was 68.76 (std.dev. 20.2). For Catholics, 37% were at or below the mid-point and the mean temperature was 67.3 (std.dev 19.9), and for Jews, 43.9% of respondents were at or below the mid-point and the mean warmth was 65.0 (std.dev.19.3). What is revealing about these summary numbers is their similarity. They do vary, of course, but the percentage below the mid-point all group between 33 and 43.9%, the means of each group is between 65 and 69 degrees on the "thermometer," and the standard deviations are between 19 and 20, indicating majority positive perception of each of these groups. Standard deviation is a statistical score that calculates how spread apart the responses are around the mean.

69. By contrast, gay men and lesbians fare far worse. Fully 65.4% of respondents rated gays at or below the mid-point of 50 and the mean temperature response was 49.4 (std.dev 27.7), indicating that a majority of respondents do not perceive gay men and lesbians positively. Almost two thirds of the respondents rate gays and lesbians at or below the mid-point, which is almost twice that for African Americans and substantially higher than for the other

groups. The mean sentiment towards gay men and lesbians is 16 points lower than for Jews and Hispanics, and 19 points lower than for African Americans. The standard deviation is also instructive, since its size (almost half again larger than for the other groups) illustrates the level of polarization in sentiment about gay men and lesbians.

70. The following chart is illustrative of this point:



Mean Thermometer Score for Social Groups, 2008 American National Election Studies

71. The trend in “warmness” toward gay men and lesbians has been positive over the last several decades (as it has, in fact, for many groups in society). Notwithstanding that trend, the relative placement of gay men and lesbians vis-à-vis other “outgroups” in society

suggest that public esteem remains a significant obstacle to political progress. By any estimation, the public is less fond of gay and lesbian Americans than racial and ethnic minorities and religious groups. In fact, the other groups with comparable levels of coolness include Muslims (mean=50.3), atheists (mean=41), and undocumented aliens (mean=39.3). It is revealing that 13.4% of respondents gave gay men and lesbians a score of zero, a percentage exceeded only by scores for undocumented immigrants (15.4%) and atheists (18.6%).

Political and Social Hostility

72. Gay men and lesbians face outspoken denunciation by elected officials in a manner that would be unthinkable if directed toward almost any other social groups. Hostility by public officials is often directly mirrored in the population. Furthermore, its public nature, even when articulated by only a small segment of office-holders and officials, serves as a signal to the broader population that these discriminatory attitudes are "acceptable" or reasonable within the bounds of mainstream political discourse.

73. Gay men and lesbians have been described by a sitting U.S. Senator as "the greatest threat to our freedom that we face today." Another sitting senator, during his successful campaign, openly called for gay men and lesbians to be banned from the classroom, a claim he repeated last year at a public rally. A third senator compared same-sex marriage to marrying "a box turtle." He was subsequently reelected with a large margin. Same-sex intimacy has been described

by a sitting senator as morally equivalent to incest and bestiality. In 2010, the GOP nominee for governor of New York responded to a question about marriage equality for same-sex couples by saying that "we should stop pandering to pornographers and perverts . . . " The social and political disadvantage that flows from these very public and derisive comments is palpable.

74. While there may be pockets of tolerance here or there at the state and local levels, and occasionally successful gay or lesbian candidates, in large swaths of the nation, political condemnations of gay men and lesbians are not electorally costly, they may even be used to gain electoral support. It is difficult to identify many cases where an elected official was so damaged by holding anti-gay positions that he or she lost public office on this basis, but there are countless cases across the country where candidates felt advantaged by taking a particularly harsh anti-gay viewpoint. In part, this is a consequence of the partisan and geographic distribution of views and the nature of our legislative representation regime, but in part this is also a reflection of the fact that pro-gay policies are a very low priority even among "allies" in the population who hold generally positive views. Public contempt extends beyond elected officials to prominent national religious leaders, who command the attention of political leaders as well as significant numbers of the electorate.

Unreliable Allies

75. The structure of the American party system is such that the path to pro-LGBT equality policy change lies exclusively through the actions of one party. The increasing power of evangelical Christians and self-styled "Tea Party" advocates in the GOP has shifted this party's social policy further to the right and all but eliminated its once sizable tradition of libertarianism. The Republican Party in office (and platform) is openly hostile to gay and lesbian rights. The complete disinterest of one party severely disadvantages gay men and lesbians, since gay men and lesbians can thus be understood as "captured" by the Democratic party, that is, unlikely to bolt from the party or abstain from voting for it in large numbers. Under these circumstances, the capturing party can take the political support of the group for granted.

76. Although the Democratic Party is more supportive in its rhetoric, Democrats have repeatedly shrunk from any extension of rights to gay men and lesbians at the federal level. Democrats controlled the White House from 1993 to 2001, and the Congress until 1994 and from 2006 to 2010. Nevertheless, non discrimination statutes and federal recognition of state-sanctioned marriages between same-sex couples remain undelivered. Again, "Don't Ask, Don't Tell" was passed in a Democratically controlled Congress, and both it and the federal "Defense of Marriage Act" were signed into law by a Democratic president.

77. Gay men and lesbians are disadvantaged by the circumstance of party capture. The almost com-

plete indifference or hostility of Republican elected officials to the political interest of gay men and lesbians confines their political opportunities for support and public office to a single party, the Democrats. Democratic leaders, mindful of this complete exclusion, are thus free to neglect and even occasionally set back gay and lesbian interests, secure in the knowledge that the other party does not represent a credible threat for peeling away voters. Gay men and lesbians may be disenchanted with the quality and intensity of representation they appear to receive from Democratic office-holders but, in a practical sense, have no alternative. Taken together, Republican hostility and Democratic capture significantly weaken the political voice of lesbians and gay men.

Moral and Political Condemnation

78. While the pluralist framework envisions shifting majorities and rotation in office, perceived Old Testament prohibitions of homosexuality serve to create, in many of America's religious communities, a permanent majority that believes homosexual conduct is sinful and immoral, and that it should be condemned and discouraged. The General Social Survey (http://www.norc.org/GSS+Website/) regularly asks a representative sample of Americans to evaluate whether homosexual relations are "wrong." In 2008, those data show that 51.5% of Americans still report that sex between two persons of the same sex is "always wrong," while another 10.3% agree that it is "sometimes" or "almost always" wrong. Moreover, the shift in the direction of tolerance is neither large nor rapid.

A decade ago, a module from the same survey showed comparable numbers, at 56% and 11.8% respectively.

Powerful, Numerous, and Well-Funded Opposition

79. The moral condemnation of homosexual acts fuels and supports political opposition to protections and benefits for gays and lesbians. Campbell and Robinson (2007) found that opposition to marriages between same-sex couples united leadership and core believers across religious traditions. Similarly, the *San Francisco Chronicle* reported that the campaign in favor of Proposition 8 was conceived and funded by a cooperative effort of the Roman Catholic Archbishop of San Francisco and the senior leadership of the Mormon Church. These reports were supported by documentary evidence and testimony introduced in the *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), trial in the Northern District of California, in particular evidence of interstate coordination and fundraising within and between global religious organizations. Churches provide a well-funded, widely spread, untaxed medium in which individuals opposed to gay and lesbian policy goals can disseminate political messages and campaign materials, as well as engage in fundraising. Moreover, national religious movements like Focus on the Family, the Traditional Values Coalition, the Family Research Council, the National Organization for Marriage and other groups provide a national network for pressuring elected officials, fundraising, message testing, media dissemination and publication, mobilization, and coordination across states and jurisdictions. This nationwide coor-

dination, for example, explains how 13 statewide initiatives concerning marriage for people in same-sex relationships appeared in a single year, 2004. Similarly, the coordination of campaigns from California to Maine illustrates the national nature of these efforts. Cahill (2007) documents the vast economic resources of these organizations and their willingness to provide them to political efforts to prevent or reverse rights, benefits, or protections for gay men and lesbians. Gay men and lesbians lack the political resources—including voting numbers, cash, elected officials from the group, reliable allies, reach, or a favorable political opportunity structure—to counter this kind of committed, organized opposition to their interests.

80. When scientific and learned societies have concluded that there is no evidentiary or scientific bases to justify anti-gay biases or policies—whether with respect to the practice of homosexuality or in evaluating gay men and lesbians as parents, as healthy, productive members of society, and so forth—forces opposed to their political and social incorporation have formed splinter or shadow organizations designed to give the appearance of scientific approval to positions without broad scientific and professional support. For example, the American Psychological Association long ago removed homosexuality from their diagnostic manual as a psychologically disordered behavior, as the consensus in psychological research is that there is little or no psycho-pathology associated with homosexual identity. Nevertheless, anti-gay forces have founded the National Association of Research and Therapy for Homosexuality (NARTH). Likewise, the

American Academy of Pediatrics has been publicly supportive of gay and lesbian parenting, and states on their website that "A growing body of scientific literature reveals that children who grow up with one or two gay and/or lesbian parents will develop emotionally, cognitively, socially, and sexually as well as children whose parents are heterosexual." In response, anti-gay activists have established the "American College of Pediatricians" which, despite their name, is actually an anti-gay organization with a fraction of the Academy's membership and no scientific or professional standing. These non-mainstream organizations, with names designed to evoke a false sense of scientific authority, exist principally to discredit the scientific consensus regarding gay people, unquestionably weakening their political power.

IV. Comparative Political Powerlessness

81. Gays and lesbians suffer an extreme degree of political vulnerability and powerlessness compared to most other groups in society. Even groups that have obtained the protection of heightened scrutiny from the Supreme Court possessed greater political power at the time those decisions were handed down than gays and lesbians do today.

Gender

82. When the Supreme Court held that women were a quasi-suspect class in 1970s, they were in a far superior political position compared to that held by lesbians and gays today. Women are and were a majority of the population and, if they so choose, could

theoretically determine most political outcomes. While women do not have the same level of political cohesion as many other groups, so that in many cases their majority status has not proved decisive, the magnitude of their numbers is a source of potential power that politicians cannot ignore. And in fact, by the time of their recognition as a quasi-suspect class by the Court, women had achieved important victories in the political process, including the 1963 Equal Pay Act, coverage in the 1964 Civil Rights Act and its subsequent amendments, and specific statutory and constitutional protection in several states.

83. Women have a number of other characteristics that enhanced their ability to organize and act politically when compared with gays and lesbians. While sexism certainly existed (and still exists), and political activism could be costly, identity as a woman was not socially controversial, did not attract familial scorn, and did not bar one from such a large range of social institutions, though some institutions were exclusively male. Women could freely identify one another, gather, coordinate, and act largely free of fear of repressive tactics. Both political parties sought the support of women.

Race

84. Immediately in the wake of the Civil War, three amendments to the federal 34 constitution established *de jure* legal equality for African-Americans and officially barred states from violating equal protection. Though this guarantee of equality had seldom been meaningfully enforced, it was nonetheless a *de jure*

status superior to that now held by lesbians and gay men. In addition, as early as 1941, President Roosevelt issued Executive Order 8803 prohibiting race discrimination in contracting and employment in companies doing business with the U.S. Through court action and the social movement of the 1950s and 1960s, African Americans (and later Latinos) achieved a rollback of Jim Crow segregation laws and established a statutory regime of equality in employment, education, and housing. Again, this was more promise than practice, but it was a statutory circumstance superior to that of lesbians and gay men today.

85. In the 1940s and 1950s, African Americans and other racial and ethnic minorities had similar disadvantages to gays in terms of resources and social sanction, but with far greater numbers (and in some instances majorities), they have been able to claim a meaningful share of political representation and policy responsiveness. Even before the passage of the Civil Rights Act of 1964 and Voting Rights Act of 1965, there were 5 black members of Congress and over 100 elected officials nationwide. Today, 73 people of color serve in the House of Representatives. African Americans, Latinos, and Asian Americans have been elected governors and big city mayors. They form outright majorities in dozens of jurisdictions and approximately 60 House districts. Rather than serve as an impediment, most (though admittedly not all) religious institutions express support for the principle of racial equality and the church in minority communities, rather than serving as an impediment to political progress, is a locus for identification and mobilization.

Signed under the penalty of perjury under the laws of the United States this 17th day of MAY, 2011

/s/ GARY M. SEGURA
GARY M. SEGURA

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 10-CV-8435 (BSJ)(JCF)
ECF CASE

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Aug. 1, 2011]

DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

PLEASE TAKE NOTICE that Defendant the United States of America, through undersigned counsel, respectfully submits this Motion to Dismiss Plaintiff's Amended Complaint to request that the Court rule on Plaintiff's challenge to the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7. As the President and the Attorney General have stated, the Department of Justice will no longer defend the constitutionality of Section 3 of DOMA as applied to legally married same-sex couples. Pursuant to the President's direction, however, Executive departments and agencies will continue to comply with Section 3 unless and until it is repealed by Congress or there is a definitive ruling by the Judicial Branch that Section 3 is unconstitutional. The Department of Justice represents the only defendant, the United States, in this litigation. Only a judgment against the United States could afford Plaintiff the relief she seeks, and only a judgment for or against the United States can definitively resolve the case or controversy between Plaintiff and the United States.

The Bipartisan Legal Advisory Group ("BLAG") of the United States House of Representatives has moved to intervene in this case for the limited purpose of defending the constitutionality of Section 3 of DOMA, ECF No. 12, and the Court granted that motion on June 3, 2011. ECF No. 26. We understand that on August 1, 2011, BLAG plans to move as an intervenor to dismiss Plaintiff's constitutional challenge to Section 3. Nevertheless, as Defendant previously explained in response to BLAG's motion to intervene, ECF No. 20, Congress's interest in the constitutional validity of a law does not itself confer standing to enter an action as a party. The Attorney General, however, is committed to providing Congress a full and fair opportunity to participate in this litigation. The continuing role of the Executive Branch in this litigation ensures the existence of a justiciable case or controversy. In addition, the Department of Justice will take the procedural steps necessary to enable BLAG to present arguments in support of the constitutionality of Section 3. Accordingly, although pursuant to this Court's Scheduling Order the Department intends to file a brief on August 19, 2011 that presents the government's position on Plaintiff's equal protection challenge, Defendant submits this motion as a procedural matter, to ensure that this Court can consider arguments on both sides of the constitutional issue and to ensure that this Court has jurisdiction to enter judgment on the basis of those arguments.

If this Court agrees with BLAG on the constitutionality of Section 3 of DOMA, it should dismiss Plaintiff's Amended Complaint and enter judgment for Defendants. If this Court agrees with Plaintiff and the United States as to the constitutionality of Section 3 of DOMA, it should not dismiss the First Amended Complaint, but rather should enter such relief as is appropriate given the procedural posture of this action at the time of such determination.

Dated: Aug. 1, 2011 Respectfully submitted,

TONY WEST
Assistant Attorney General

ARTHUR R. GOLDBERG
Assistant Branch Director

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 10-CV-8435 (BSJ)(JCF)

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Aug. 1, 2011]

INTERVENOR-DEFENDANT'S LOCAL RULE 56.1 RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 56.1, Intervenor-Defendant the Bipartisan Legal Advisory Group of the United States House of Representatives (the "House") submits this Response to Plaintiff's Statement Pursuant To Local Rule 56.1:

1. Undisputed.

2. Undisputed.

3. Whether the United States of America is a proper defendant in this action is not a question of fact, but is for the Court to determine as a matter of law. This is illustrated by the fact that Plaintiff cites no admissible evidence in support of this proposition.

4. Undisputed.

5. The House does not dispute that Plaintiff had a long-standing relationship with Thea Spyer. Aff. of Edith Schlain Windsor (June 24, 2011) (ECF No. 31) ("Windsor Aff.") ¶¶ 5, 7-9.

6. The House does not dispute the length of Plaintiff's and Spyer's engagement or that Plaintiff and Spyer participated in a ceremony in Toronto, Canada on May 22, 2007. Windsor Aff. ¶¶ 26-27 & Exs. A & B. The legal validity of that ceremony is not a question of fact, but is for the Court to determine as a matter of law.

7. Disputed. The legal validity of Plaintiff's marriage, and the status, responsibilities, and protections it entailed, are not questions of fact, but are for the Court to decide as a matter of law. This is illustrated by the fact that the only evidence cited by Plaintiff in support of her assertions in this regard is the affidavit of her attorney.

8. The House does not dispute that Plaintiff and Spyer continued their relationship until Spyer's death, or that her death occurred two years after their Canadian ceremony. Windsor Aff. ¶ 28 & Ex. D. Whether they were legally "a married couple" during that period is not a question of fact, but is for the Court to determine as a matter of law.

9. Any health problems suffered by Plaintiff are not relevant to the issues presented in this case, and thus would not be admissible in evidence. The House disputes Plaintiff's apparent implication that her

health problems somehow resulted from Spyer's death. Plaintiff offers no support for this proposition whatsoever. *See* Windsor Aff. ¶ 29.

10. Undisputed.

11. The House does not dispute that Plaintiff's Exhibit G is a copy of a genuine trust document. *See* Windsor Aff. ¶ 31. The legal significance of that document is not a question of fact, but is for the Court to determine as a matter of law.

12. The House does not dispute that Plaintiff's Exhibit H is a copy of a genuine trust document. *See* Windsor Aff. ¶ 32. The legal significance of that document is not a question of fact, but is for the Court to determine as a matter of law.

13. While the House agrees that, for federal purposes, DOMA states that marriage includes only opposite-sex relationships, the meaning of DOMA and whether it or any other statute precludes recognition of same-sex relationships as "marriages" for purposes of federal law is not a question of fact, but is for the Court to decide as a matter of law. This is illustrated by the fact that Plaintiff cites no admissible evidence in support of this proposition.

14. The House does not dispute that the IRS determined that Spyer's estate was not entitled to the marital deduction. *See* Windsor Aff., Ex. L. The House disputes that this determination was "[s]olely" due to DOMA. Plaintiff's evidence supports only that the IRS regarded DOMA as a *sufficient* reason for denying the deduction, not the *only* reason, and Plain-

tiff cites no additional evidence that would support a finding that there was no other reason for the IRS's action. *See id.* Whether any other federal statute actually would bar the deduction is not a question of fact, but is for the Court to decide as a matter of law.

15. Undisputed, except to the extent that the word "[c]onsequently" implies that the tax levied on Spyer's estate was "[s]olely" due to DOMA. In that respect the House incorporates by reference Paragraph 14, *supra*.

16. Undisputed.

17. The House does not dispute that Plaintiff is not eligible for a Social Security lump-sum death ben efit or widow's insurance benefits, although it notes that she has cited no admissible evidence in support of this proposition. Whether this is "a direct result of Section 3 of DOMA," or whether the same result would have occurred under federal law prior to DOMA, is not a question of fact but for the Court to decide as a matter of law. This is illustrated by the fact that Plaintiff also cites no admissible evidence in support of this proposition.

18. Disputed. In equal protection jurisprudence the question of whether a class of persons has suffered a "history of discrimination" is not a question of fact but is for the Court to decide as a matter of law. As a factual matter the House does not dispute that at various times some homosexual persons have been treated differently because of their sexual orientation, but Plaintiff's evidence is not sufficient to establish a

"history of discrimination" for purposes of equal protection. *See generally* Aff. of George Chauncey (June 24, 2011) (ECF No. 35) ("Chauncey Aff.").

19. Undisputed. However, colonial sodomy prosecutions were aimed not at homosexual persons or conduct *per se* but rather at non-procreative sexual conduct in general, including such conduct between persons of opposite sexes. Dep. of George Chauncey, Ph.D. (July 12, 2011) ("Chauncey Dep.") at 34:9-34:24, attached as Ex. A to Dugan Decl.

20. Undisputed. However, Plaintiff submits no evidence that medical views of homosexuality have themselves been based on bias, as opposed to past understandings of scientific knowledge. See Chauncey Aff. ¶¶ 26-27.

21. Undisputed.

22. Undisputed, on the understanding that the assertion refers to occurrences in the early 20th Century.

23. Undisputed.

24. Undisputed.

25. Undisputed.

26. Undisputed.

27. Undisputed.

28. Disputed. Whether federal legislation is "overtly discriminatory" is a question of law for the Court to decide not a question of fact.

29. Undisputed, on the understanding that the phrase "ever-present threat of anti-gay violence" does not mean that all or most homosexual persons fear violence every minute of every day.

30. The House does not dispute that many persons still oppose homosexual conduct and the homosexual lifestyle, and that gay and lesbian interest groups continue to regard some laws as against their interests. However, Plaintiff substantially understates the "social and legal progress" that gay men and lesbians have experienced. *See, e.g.*, evidence cited in ¶ 61, *infra*.

31. The mere facts that homosexual persons' rights are not unlimited, vary from place to place, and are subject to changing public opinion, are not relevant to any issue in this case and thus not admissible in evidence. Few if any classes of persons enjoy civil rights that are not "limited" in some way, or that are absolutely identical in every place in the county. And, all political gains, no matter the class at issue, are subject to the vicissitudes of public opinion. As a result, these characteristics cannot be relevant to whether a given class of people is a suspect class for equal protection purposes.

32. Undisputed. However, gay-rights groups have made great advances through the political process. *See* evidence cited in ¶ 61, *infra*.

33. Disputed. "Enduring" is not an accurate description of everyone's experience of sexual orientation. As evidence shows, a not insignificant number

of people who described themselves at one time as homosexual, later describe themselves as heterosexual. *See, e.g.*, Lisa M. Diamond, *New Paradigms for Research on Heterosexual and Sexual Minority Development*, 32 J. of Clinical Child and Adolescent Psychol. 492 (2003); Lisa M. Diamond & Ritch C. Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women*, 56 J. of Soc. Issues 297, 301 (2000) ("50% [of study's] respondents had changed their identity label more than once since first relinquishing their heterosexual identity."); Nigel Dickson, *et al.*, *Same Sex Attracting in a Birth Cohort: Prevalence and Persistence in Early Adulthood*, 56 Soc. Sci. & Med. 1607, 1612-13 (2003) (at age 21 "[t]en percent of men and nearly a quarter of the women [in the study group] reported same-sex attraction at any time, but this nearly halved for current attraction at age 26").

34. Disputed. In the equal protection context, the ability of a class of persons "to contribute to society" is not a question of fact, but is for the Court to decide as a matter of law.

35. The House does not dispute that many thousands of persons in modern society identify themselves as gay and lesbian, and that many people regard this as "normal." What is a "normal expression of human sexuality," however, is not a question of fact but a matter of unreviewable opinion.

36. Undisputed.

37. Undisputed.

38. Undisputed, except that whether any given relationship or type of relationship is or can be a "marriage" is a question of law rather than fact.

39. Undisputed. However, many persons experience fluidity or change in their sexual orientation in a manner that suggests that maintaining any particular sexual orientation may not be "essential" to their identities. *See* evidence cited in ¶ 33, *supra*.

40. Disputed. Numerous studies, including those relied upon by Plaintiff's expert, show that homosexual parenting studies are flawed because of sampling errors, a major focus on lesbian mothers rather than homosexual fathers, and other design flaws. Dep. of Michael Lamb, Ph.D. (June 24, 2011) ("Lamb Dep."), Ex. 6 at 327, attached as Ex. E to Dugan Decl. ("Studies of children raised by same-sex parents have almost *exclusively focused* on families headed by lesbian mothers rather than gay fathers.") (emphasis added); *Id.*, Ex. 8 at 526 ("We still have *relatively few studies* of adolescent offspring of lesbian or gay parents, however, and some have advised caution when generalizing the results of research conducted with young children to adolescents") (emphasis added); *Id.*, Ex. 9 at 254 ("Future research on gay and lesbian couples needs to address several key issues. One is sampling: Because most studies have used convenience samples of mostly white and well-educated partners, the extent to which findings generalized to the larger population of gay and lesbian couples is unknown. . . . Most studies on gay and lesbian couples have used self-report surveys. Future work could address some of

the *biases* associated with self-report data.") (emphasis added); *see also* studies cited in ***Lofton v. Sec. of Dept. of Children & Fam. Servs.***, 358 F.3d 804, 825 nn.24-25 (11th Cir. 2004) (demonstrating serious methodological problems in gay parenting studies); Ann Hulbert, ***The Gay Science: What Do We Know About the Effects of Same-Sex Parenting?***, Slate, March 12, 2004, http://www.slate.com/id/2097048/ (stating that both camps in the gay marriage debate "have converged lately on a very basic point: The existing science is methodologically flawed and ideologically skewed").

41. Disputed, as one would expect with regard to such a contentious issue. *See* evidence cited in ¶ 40, *supra*. Furthermore, Plaintiff does not define the term "adjustment."

42. The House does not dispute that these factors affect the "adjustment" of children and adolescents. The House disputes the assertion to the extent it is rooted in the assertions of the prior paragraphs. *See* evidence cited in ¶ 40, *supra*.

43. Disputed. *See* evidence cited in ¶ 40, *supra*.

44. Disputed. Homosexuals of course can be good parents, but the House disputes whether parents' sexual orientation has no effect on children. *See* evidence cited in ¶ 40, *supra*.

45. Disputed. *See* evidence cited in ¶ 40, *supra*.

46. The House does not dispute that certain organizations have stated that the evidence suggests that

same-sex parents are as effective as heterosexual parents in raising well-adjusted children and adolescents. *See also* evidence cited in ¶ 40, *supra*.

47. Disputed. *See, e.g.*, sources cited in *Irizarry v. Bd. of Educ. of Chi.*, 251 F.3d 604, 607 (7th Cir. 2001) ("[S]o far as heterosexuals are concerned, the evidence that" marriage "provides a stable and nourishing framework for child-rearing . . . refutes any claim that policies designed to promote marriage are irrational.") (namely, Linda J. Waite & Maggie Gallagher, *The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially* (2000); David Popenoe, *Life without Father: Compelling New Evidence That Fatherhood and Marriage Are Indispensable for the Good of Children and Society* (1996); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581 (1999)); *see also* source cited in *Bowen v. Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting) (noting that "considerable scholarly research . . . indicates that '[t]he optimal situation for the child is to have both an involved mother and an involved father'") (quoting H. Biller, *Paternal Deprivation* 10 (1974)); *Lofton*, 358 F.3d at 820 ("Although social theorists from Plato to Simone de Beauvoir have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model.").

48. Disputed. *See* evidence cited in ¶¶ 40 & 47, *supra*.

49. Disputed. The classes of "gay men" and "lesbians" are *defined* by a different experience of sexuality. Aff. of Letitia Anne Peplau, Ph.D. (June 24, 2011) (ECF No. 32) ("Peplau Aff.") ¶¶ 14, 15, 18. The issue of how "any member of society" would "experience and respond to life experiences" is not a question of fact but of unreviewable opinion.

50. In the equal protection context, whether a characteristic is immutable is not a question of fact but is for the Court to decide as a matter of law. In a non-legal sense, while the House does not dispute that sexual orientation is stable in many people, it disputes that "immutable" is an accurate descriptor for sexual orientation as a whole. Dep. of Letitia Anne Peplau, Ph.D. (June 17, 2011) ("Peplau Dep.") at 25:20-25:23, attached as Ex. B to Dugan Decl. ("[L]ooking at a newborn, I would not be able to tell you what that child's sexual orientation is going to be."); *id.* at 36:24-37:24; *id.*, Ex. 4 at 186 (over 12% of self-identified gay men and nearly one out of three lesbians reported that they experienced some or much choice about their sexual orientation); Lisa Diamond, New Paradigms for Research on Heterosexual and Sexual Minority Development, 32 J. of Clinical Child and Adolescent Psychol. 492 (2003); Lisa M. Diamond & Ritch C. Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women*, 56 J. of Soc. Issues 301 (2000) ("50% [of study's] respondents had changed their identity label more than once since first relinquishing their heterosexual identity."); Nigel Dickson, *et al.*, *Same Sex Attracting in a Birth Cohort: Prevalence and Per-*

sistence in Early Adulthood, 56 Soc. Sci. & Med. 1607, 1612-13 (2003) (at age 21 "[t]en percent of men and nearly a quarter of the women [in the study group] reported same-sex attraction at any time, but this nearly halved for current attraction at age 26").

51. The House does not dispute that sexual orientation is an individual characteristic. The House disputes whether it is as immutable or "essential" as sex or race. *See* evidence cited in ¶¶ 33 & 50, *supra*.

52. Undisputed.

53. Undisputed.

54. Undisputed. However, evidence indicates that a great many people who experience homosexual attraction at one period in their adult lives do not in another. *See* evidence cited in ¶ 33, *supra*.

55. The House does not dispute the absence of evidence for the effectiveness of such interventions. However, evidence does indicate that, even absent such interventions, changes in sexual orientation occur with some frequency. *See* evidence cited in ¶¶ 33 & 54, *supra*.

56. Undisputed, with the understanding that Plaintiff is not here asserting that the policies referenced in the Peplau Affidavit are correct on the current evidence or that future evidence might not emerge that would cause these policies to be changed.

57. Disputed. The fact that some people experience change in their sexual orientation is not fully understood. *See, e.g.*, Peplau Dep., Ex. 3 at 2, at-

tached as Ex. B to Dugan Decl. ("There is no consensus amongst scientists about the exact reasons that an individual develops a heterosexual, bisexual, gay, or lesbian orientation. . . . [N]o findings have emerged that permit scientists to conclude that sexual orientation is determined by any particular factor or factors."); Diamond & Savin-Williams, *supra* ¶ 50, at 301.

58. The House does not dispute that it likely would be psychologically harmful to force lesbians or gay men to take these steps or attempt to persuade them to do so against their will. The House disputes that every noncoercive, non-aggressive request will inherently be "psychologically harmful" to its recipient. To the extent Plaintiff's evidence suggests otherwise, it is wholly implausible and not entitled to be credited by the finder of fact. *See, e.g.*, Peplau Aff. ¶ 24.

59. Undisputed.

60. Undisputed.

61. Disputed. In the context of equal protection jurisprudence, whether a given class of persons has "political power" or is "politically vulnerable" is not a question of fact, but is for the Court to decide as a matter of law. Moreover, in this very case Plaintiff has demonstrated the *significant* political power that gays and lesbians hold. *See, e.g.*, Letter of Att'y Gen. Holder to Speaker Boehner of the U.S. House of Rep. (Feb. 23, 2011); *see also* Susan Page, *Gay Candidates Gain Acceptance*, USA Today, July 19, 2011,

http://www.usatoday.com/news/politics/2011-07-19-gay-candidates-politics_n.htm; MJ Lee; *Obama Backs Bill To End DOMA*, Politico, July 19, 2011, http://www.politco.com/politico44/perm/0711/all_due_respect_52655160-80d9-4749-a26a-3525888f615a.html; Michael Barbaro, *Behind N.Y. Gay Marriage, an Unlikely Mix of Forces*, N.Y. Times, June 25, 2011, http://www.nytimes.com/2011/06/26/nyregion/the-road-to-gay-marriage-in-new-york.html?pagewanted=all; Wyatt Buchanan, *New State Law Requires LGBT History in Textbooks*, S.F. Chron., July 15, 2011, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/07/14/BAL61KAHVQ.DTL; Abby Goodnough, *Rhode Island Lawmakers Approve Civil Unions*, N.Y. Times, June 29, 2011, http://www.nytimes.com/2011/06/30/us/30unions.html; Elisabeth Bumiller, *Obama Ends 'Don't Ask, Don't Tell' Policy*, N.Y. Times, July 22, 2011, http://www.nytimes.com/2011/07/23/us/23military.html.

62. In the equal protection context, the definition of "political power" is not a question of fact, but is to be decided by the Court as a matter of law. *See, e.g.*, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (deciding question of political powerlessness without reference to formally adduced evidence).

63. In the equal protection context, the definition of "political power" and the factors that evidence it are not questions of fact, but are to be decided by the Court as a matter of law.

64. Disputed. In the equal protection context, the quantum of political power possessed by a given

class of people is not a question of fact, but is to be decided by the Court as a matter of law. Moreover, gay and lesbian persons wield a very significant degree of political power. *See* evidence cited in ¶ 61, *supra*.

65. Disputed. In the equal protection context, the quantum of political powerlessness suffered by a given class of people is not a question of fact, but is to be decided by the Court as a matter of law. *See Lyng*, 477 U.S. at 638. Additionally, the Court may take judicial notice of the fact that gay and lesbian persons form a vastly smaller portion of the population than other groups that have received suspect class protection. Nevertheless, they have come to wield a degree of political power that is proportionately greater than those groups. *See* evidence cited in ¶ 61, supra.

66. Disputed. Gay men and lesbians are very frequently able to achieve their political goals. *See* evidence cited in ¶ 61, *supra*.

67. Disputed. In the equal protection context, the definitions of "political powerlessness" and "political power" are not questions of fact, but are to be decided by the Court as a matter of law.

68. Disputed. In the equal protection context, the definition of "political powerlessness" is not a question of fact, but is to be decided by the Court as a matter of law. Moreover, gay men and lesbians are very frequently able to achieve their political goals. *See* evidence cited in ¶ 61, *supra*.

69. Disputed. In the equal protection context, the definition and indicators of "political power" are not questions of fact, but are to be decided by the Court as a matter of law.

70. Undisputed, on the understanding that Plaintiff is not here asserting that gay men or lesbians have never secured more than "minimal protections," or that every "minimal protection" they have won has been "aggressively" repealed or even opposed. Moreover, the indicia of the political power of gays and lesbians are numerous and very strong. *See* evidence cited in ¶ 61, *supra*.

71. Disputed. Plaintiff has no reliable metric for determining how frequently direct democracy processes have been used against any "social group." *See* Aff. of Gary Segura (June 24, 2011) (ECF No. 36) ¶ 43.

72. Disputed. This is a question of law, not a question of fact.

73. The import of federal law is not a question of fact but is to be answered by the Court as a matter of law. However, the House does not dispute that there is no federal legislation prohibiting discrimination on the basis of sexual orientation.

74. The import of federal law is not a question of fact but is to be answered by the Court as a matter of law. However, the House does not dispute that no federal *legislation* had been passed prior to 2009 to protect people on the basis of sexual orientation.

75. Undisputed.

76. The import of state law is not a question of fact but is to be answered by the Court as a matter of law.

77. Undisputed.

78. Undisputed.

79. Undisputed. However, gay men and lesbians wield great political power, especially considering the relatively small share of the population they make up. *See* evidence cited in ¶ 61, *supra*.

80. Disputed, to the extent that whether a given set of conditions amounts to "severe hostility" is not a question of fact but of unreviewable opinion. It is also a vague and opaque assertion.

81. Disputed. The House does not dispute that many elected officials do not support expanded benefits for homosexual persons, but whether denunciation is "unthinkable" is not a question of fact but of unreviewable opinion. In any event, politicians not infrequently make offensive remarks about various social groups. *See, e.g.*, Tim Reid, *Barack Obama's "Guns and Religion" Blunder Gives Hillary Clinton a Chance*, The Times of London, April 14, 2008, http://www.timesonline.co.uk/tol/news/world/us_and_americas/us_elections/article3740080.ece (describing then-Senator Obama's comments concerning blue-collar voters in Pennsylvania and the Midwest); Xuan Thai & Ted Barrett, *Biden's Description of Obama Draws Scrutiny*, CNN, July 31, 2007, http://articles.cnn.com/2007-01-31/politics/biden.obama_1_braun-and-al-sharpton-african-american-presidential-candidates-

delaware-democrat?_s=PM:POLITICS (describing then-Senator Biden's comment concerning then-Senator Obama and how he differed from former black presidential candidates).

82. The meaning of this assertion is so vague that is does not qualify as a proper assertion of fact.

83. Disputed. The meaning of federal and state law governing marriage through the years is not a question of fact, but is a matter of law for the Court to decide. In any event, marriage has largely been a creature of state law, but the federal government has been involved with and injected itself into marriage law when states have deviated from the traditional definition. *See, e.g.*, Morrill Anti-Bigamy Act, ch. 126, § 1, 12 Stat. 501, 501 (1862) (codified as amended at U.S. Rev. Stat. § 5352) (repealed prior to codification in the U.S.C.) (punishing and preventing the practice of polygamy in the territories of the United States)[1]; *see also Reynolds v. United States*, 98 U.S. 145, 165-67 (1878) (holding that law banning polygamy did not violate the Constitution's guarantee of free exercise of religion); Aff. of Nancy F. Cott (June 24, 2011) (ECF No. 33) ("Cott Aff.") ¶ 77 (discussing the Freedmen's Bureau's work in supporting marriage); Dep. of Nancy F. Cott (July 6, 2011) ("Cott Dep.") at 17:20-18:1, attached as Ex. D to Dugan Decl. (stating that "in dealing with Indians . . . in federal territories and in certain states where the federal government was

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[1] The House cited statutes and caselaw as evidence of the historical fact of the enactment of provisions of federal law.

dealing . . . with native Americans through the Bureau of Indian Affairs, the form of marriage observed by these populations was of concern to that federal agency").

84. The House does not dispute that there have always been some variations in State marriage rules. Whether these variations are great enough to be described as a "patchwork quilt" is not a question of fact. Additionally, the Court may take judicial notice that for 228 years after the founding, no state law permitted same-sex marriage.

85. Undisputed.

86. Undisputed.

87. The House does not dispute that no state has ever placed upon an individual would-be spouse the burden of affirmatively proving that he or she individually is able to procreate. The Court, however, may take judicial notice of the fact that human procreation normally involves one man and one woman only, and that for more than two centuries after the Founding these parties and only these were permitted to enter marriage in every State. In addition, impotence has often been regarded as a ground for the dissolution of marriages. Cott Dep. at 20:13-21:18.

88. Whether one "variance" between the legal rules adopted by different States "resembles" or "is parallel to" another variance is not a question of fact but a matter of unreviewable legal opinion. In any event, the Court may take judicial notice of the fact that while other "divergences" noted in the Cott Affi-

davit have been repeated throughout history in numerous other places in the world, same-sex marriage is virtually unprecedented in all of human history. *See generally* Cott Aff.

89. Undisputed.

90. Undisputed. However, the federal government has certainly concerned itself with the definition of marriage in other contexts. *See* evidence cited in ¶ 83, *supra*.

91. Undisputed, so long as it is recognized that the Plaintiff's assertion does not answer the specific legal question in this case.

92. Undisputed.

93. Undisputed.

94. The House does not dispute that despite other federal efforts to ensure that the traditional definition of marriage would govern, *see supra* ¶ 83, prior to 1996 the federal government had never created a uniform definition of marriage for purposes of federal law. Whether DOMA amounted to a "dramatic" departure from this history is not a question of fact but of unreviewable opinion.

95. The House does not deny that DOMA prevents same-sex couples from being recognized as married for purposes of federal law. Whether this "reflects and perpetuates stigma" is not a question of fact. Instead, it is either a question of law in the equal-protection context for decision by the Court, or else is a matter of unreviewable opinion.

96. Whether a given statute causes a "stigma," let alone whether any such "stigma" causes "harm" to anyone, is not a question of fact but of unreviewable opinion, or else of law for the Court to decide.

97. Undisputed.

98. Disputed. The Congressional Budget Office Report is an estimate as stated in the report itself and this estimate assumes "that same-sex marriages are legalized in all 50 states and recognized by the federal government." Cong. Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, at 1 (June 21, 2004), http://cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf.

Respectfully submitted,

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Aug. 1, 2011

CERTIFICATE OF SERVICE

I certify that on August 1, 2011, I served one copy of Intervenor-Defendant's Local Rule 56.1 Response to Plaintiff's Statement of Material Facts by CM/ECF and by electronic mail (.pdf format) on the following:

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 10 Civ. 8435 (BSJ) (JCF)

EDITH SCHLAIN WINDSOR, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: Aug. 1, 2011

THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF PREPRESENTATIVES' AMENDED RESPONSE TO PLAINTIFF'S FIRST REQUESTS FOR ADMISSION

Pursuant to the Court's order of July 28, 2011, in this case, and to Rules 26 and 36 of the Federal Rules of Civil Procedure, Interventor-Defendant The Bipartisan Legal Advisory Group of the U.S. House of Representatives ("Defendant") makes the following supplemental response to Plaintiff's First Requests for Admission.

> **Request for Admission 1.** Admit that if, at the time of her, death, Thea Spyer had been married to a man instead of a woman, who was a U.S. citizen and who survived Thea Spyer's death, her estate would have qualified for the estate tax marital deduction,

26 U.S.C. § 2056(a), and would not have been liable for any federal estate tax.

Response: Defendant admits that Plaintiff has submitted documents that, if accurate, establish the eligibility of Spyer's estate for the estate tax marital deduction and that the estate would not have been liable for federal estate tax, if Spyer had been married to a surviving male U.S. citizen at the time of her death.

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Dated: Aug. 1, 2011

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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10 Civ. 8435 (BSJ) (JCF)
ECF Case

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Filed: June 24, 2011

PLANTIFF'S STATEMENT PURSUANT TO LOCAL RULE 56.1

Pursuant to Local Rule 56.1, Plaintiff Edith Schlain Windsor submits this statement of material facts as to which there can be no dispute:

I. Facts Relevant to Plaintiff's Claim

A. The Parties

1. Plaintiff, Edith Schlain Windsor ("Edie"), is a citizen of the United States. She resides in New York County, New York.

2. Plaintiff is the sole executor of the estate of her late spouse, Thea Clara Spyer ("Thea"). Affidavit of Edith Schlain Windsor ("Windsor Aff.") ¶ 1.

3. Defendant United States of America is a proper defendant in this action. Order and Mem. of June 2, 2011 at 9.

4. Defendant-Intervenor Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") has intervened in this action for the limited purpose of defending the constitutionality of the challenged legislation, Section 3 of the Defense of Marriage Act. Order and Mem. of June 2, 2011 at 10; Def.-Intervenor Mot. to Intervene at 1.

B. Edie and Thea Were Legally Married

5. Edie met her late spouse Thea in 1963 at a restaurant in New York City, and the two began a committed relationship that spanned five decades. Windsor Aff. ¶ 5.

6. After an engagement that lasted more than forty years, Edie and Thea were legally married in a ceremony performed in Toronto, Canada, on May 22, 2007. *Id.* ¶ 26; *id.* Ex. A (Marriage License No. E485225 (registered June 25, 2007, Ontario, Canada)); *id.* Ex. B (Marriage Certificate No. 2007-05-013109 (issued March 10, 2008, Ontario, Canada)).

7. Edie and Thea's marriage was valid in New York State and provided them with the same status, responsibilities, and protections as other married people. Affidavit of Andrew J. Ehrlich ¶ 10.

8. Edie and Thea spent two years as a married couple before Thea succumbed to complications from a heart condition on February 5, 2009, and died.

Windsor Aff. ¶ 28; *id.* Ex. D (Death Certificate of Thea Clara Spyer).

9. After Thea's passing, Edie was hospitalized with stress cardiomyopathy, an ailment commonly known as "broken heart syndrome," which required the insertion of an implantable cardioverter-defibrillator (ICD), and has resulted in serious, irreversible damage to her heart. *Id.* ¶ 29.

10. After Thea died, her Last Will and Testament, dated September 7, 2004, was admitted to probate by the Surrogate's Court of New York County (Index No. 2009-1162), and Edie was appointed as executor of Thea's estate on April 24, 2009. *Id.* ¶ 30; *id.* Ex. E (Last Will and Testament of Thea Clara Spyer); *id.* Ex. F. (Letters Testamentary).

11. In accordance with Article Third of Thea's Last Will and Testament, her executor is directed to distribute her entire estate to the TCS Revocable Trust created by Thea. *Id.* ¶ 31; *id.* Ex. G (TCS Revocable Trust).

12. In accordance with Article III of the trust agreement creating the TCS Revocable Trust, because Edie survived Thea, the trustees were directed to distribute the remaining trust property, after the payment of taxes and administration expenses, to the trustees of the ESW Revocable Trust created by Edie. Edie is a trustee and the sole beneficiary of the ESW Revocable Trust during her life, and she has the power, exercisable by her alone, to invade the trust property and to revoke the trust agreement in its entirety

at any time. *Id.* ¶ 32; *id.* Ex. H. (ESW Revocable Trust).

C. Edie and Thea's Marriage Was Not Recognized Under Federal Law Solely by Operation of Section 3 of the Defense of Marriage Act

13. Edie and Thea were not considered "married" under federal law because, pursuant to Section 3 of the Defense of Marriage Act ("DOMA"), the federal government refuses to recognize valid marriages of same-sex couples. 1 U.S.C. § 7 (2006).

14. Solely because of the operation of Section 3 of DOMA, the Internal Revenue Service ("IRS") determined that the estate of Thea, a decedent whose surviving spouse, Edie, is a person of the same sex as the decedent, was not entitled to the marital deduction under 26 U.S.C. § 2056(a). Windsor Aff. Ex. L (Ltr. from R.A. Mitchell, Internal Revenue Service, to Edith Schlain Windsor (May 26, 2010)).

15. Consequently, because Thea's taxable estate and adjusted taxable gifts exceeded the applicable exclusion amount, a federal estate tax was imposed on Thea's estate that would not otherwise have been imposed if Edie and Thea's marriage were recognized under federal law. *Id.*

16. As a direct result of the federal government's exclusion of same-sex surviving spouses like Edie from the protections of the estate tax marital deduction, $363,053 (three hundred sixty-three thousand fifty-three dollars) in federal estate tax was imposed Thea's estate. *Id.*

17. As a direct result of Section 3 of DOMA, Edie has also been prevented from being eligible for a Social Security lump-sum death benefit and Social Security widow's insurance benefits that would otherwise be available to her as a surviving spouse. 42 U.S.C. § 402 (2006).

II. Constitutional Facts Supporting Heightened or Strict Scrutiny

A. Gay men and lesbians have suffered a long history of purposeful discrimination

18. Gay men and lesbians have suffered a long history of discrimination at the hands of both governmental and private actors. Expert Affidavit of George Chauncey, Ph.D., ¶¶ 5, 6, 10–55, 65–86, 90–103.

19. In early colonial America, the strong influence of Puritanical clergy and the adoption of anti-sodomy legislation verbatim from the book of Leviticus led to the execution of several men for the crime of sodomy. *Id.* ¶ 19.

20. In the early twentieth century, the medical community condemned homosexuality as a "mental defect" or "disease," with this ostensibly scientific view (now rejected) helping to legitimize much anti-gay bias. *Id.* ¶¶ 26–27.

21. The early twentieth century also saw the promulgation and selective enforcement of state and local ordinances against disorderly conduct, vagrancy, lewdness, and loitering directed at lesbians and gay men who attempted to gather together. *Id.* ¶ 29.

22. In addition to subjecting lesbians and gay men to police harassment, states and localities embarked upon widespread censorship campaigns designed to suppress gay people's freedom of speech and ability to discuss gay issues. *Id.* ¶¶ 31–34.

23. During and after World War II, the military systematically attempted to screen out lesbians and gay men from the armed forces, and discharge and deny benefits to those that served and were "discovered" later. *Id.* ¶¶ 39–41.

24. By the middle of the twentieth century, all federal agencies were prohibited from hiring lesbians and gay men, and the federal government engaged in far-reaching surveillance and investigation to identify and purge supposed "homosexuals" from the federal civil service. *Id.* ¶¶ 42–50.

25. Lesbians and gay men were also demonized by the media between the late 1930s and late 1950s. *Id.* ¶¶ 51-53.

26. The modern anti-gay rights movements commenced as a response to the slightest advancements in the direction of equality for lesbians and gay men in the 1970s. *Id.* ¶¶ 66-68.

27. Campaigners against gay rights have spread false stereotypes of lesbians and gay men as child molesters, unfit parents, and threats to heterosexuals —stereotypes that linger to this day. *Id.* ¶¶ 68-74.

28. The anti-gay rights movement has endeavored to repeal and block even basic nondiscrimination pro-

tections for lesbians and gay men, and has contributed to the promulgation of overtly discriminatory legislation at the state and federal level, including restrictions on adoption by same-sex couples and marriage rights. *Id.* ¶¶ 75-86.

29. To this day, lesbians and gay men are subjected to continued public opprobrium from leading political and religious figures and the ever-present threat of anti-gay violence. *Id.* ¶¶ 91–102.

30. Despite social and legal progress in the past thirty years towards greater acceptance of homosexuality, gay men and lesbians continue to live with the legacy of historical antigay measures and the attitudes that motivated those measures; this legacy is evident both in laws that remain on the books and in the many legal protections that have not been enacted. *Id.* ¶¶ 7, 8.

31. Today, the limited civil rights enjoyed by gay and lesbian Americans vary substantially from region to region and are still subject to the vicissitudes of public opinion. *Id.* ¶ 9.

32. Like other minority groups, gay men and lesbians often must rely on judicial decisions to secure equal rights. *Id.*

B. Sexual orientation has no bearing on one's ability to contribute to or perform in society.

33. Sexual orientation refers to an enduring pattern of emotional, romantic, and/or sexual attractions to men, women or both sexes. Sexual orientation is

most often discussed in terms of three categories: heterosexual (having attractions to members of the opposite sex), gay or lesbian (having attractions to members of one's own sex), and bisexual (having attractions to both men and women). Expert Affidavit of Letitia Anne Peplau, Ph.D. ("Peplau Aff."), ¶¶ 14, 15.

34. Being gay or lesbian has no inherent association with a person's ability to lead a happy, healthy, and productive life or to contribute to society. *Id.* ¶¶ 11, 29-33.

35. Being gay or lesbian is a normal expression of human sexuality. *Id.* ¶¶ 11, 29.

36. Being gay or lesbian is not a mental illness. *Id.*

37. Empirical evidence and scientifically rigorous studies have consistently found that gay men and lesbians are as able as heterosexuals to form loving, committed relationships. *Id.* ¶¶ 22, 31.

38. Like their heterosexual counterparts, many lesbian, gay, and bisexual individuals form loving, long-lasting relationships, including marriage, with a partner of the same sex. *Id.* ¶ 12.

39. Sexual orientation is centrally linked to the most important human relationships that adults form with other adults in order to meet their basic human needs for love, attachment and intimacy, and is an essential part of an individual's personal identity. *Id.* ¶ 18.

40. Numerous studies of youths raised by same-sex parents conducted over the past 25 years by re-

spected researchers and published in peer-reviewed academic journals demonstrate that the children raised by same-sex parents are just as well-adjusted as those of heterosexual parents, including "biological" parents. Expert Affidavit of Michael Lamb, Ph.D., ¶¶ 12, 28-37.

41. Parental sexual orientation has no effect on children's and adolescents' adjustment. Expert Affidavit of Michael Lamb, Ph.D. ("Lamb Aff."), ¶¶ 12, 28–31.

42. The factors that best account for the adjustment of children and adolescents are the quality of the youths' relationships with their parents, the quality of the relationship between the parents or significant adults in the youths' lives, and the availability of economic and socio-economic resources. *Id.* ¶¶ 13, 18-20.

43. There is a scientific consensus that the same factors affect the adjustment of children, whatever the sexual orientation of their parents. *Id.* ¶¶ 28-37.

44. The parents' sex or sexual orientation does not affect the capacity to be good parents or their children's healthy development. *Id.* ¶¶ 13, 18-20.

45. There is consensus in the scientific community that parental sexual orientation has no effect on children's and adolescents' adjustment. *Id.* ¶ 31.

46. Numerous organizations representing mental health and child welfare professionals have issued statements confirming that same-sex parents are as effective as heterosexual parents in raising well-

adjusted children and adolescents and should not face discrimination. *Id.*

47. There is no empirical support for the notion that the presence of both male and female role models in the home promotes children's adjustment or well being. *Id.* ¶¶ 13, 21-27.

48. The absence of a male or female parent in the home does not impair a child's development because men and women both have the capacity to be good parents, it is not harmful to children when parents (male or female) do not assume traditional gender roles with respect to parenting styles, and society is replete with male and female role models. *Id.* ¶¶ 23-27.

49. Gay men and lesbians experience and respond to life experiences and events as any member of society would; this is despite the pervasive social stigma and unique social stresses lesbians and gay men must endure. Peplau Aff. ¶¶ 29-33; Lamb Aff. ¶¶ 12, 13, 20, 28-40

C. Sexual orientation is a defining or immutable characteristic for constitutional purposes

50. There is a scientific consensus that accepts that sexual orientation is a characteristic that is immutable. Peplau Aff. ¶¶ 19–28; Letter of Att'y Gen. Holder to Speaker Boehner of the U.S. House of Rep., at 3 (Feb. 23, 2011) (Docket Entry No. 10-2).

51. Sexual orientation is a characteristic of an individual, like their biological sex or race. It also is about relationships because sexual orientation is not merely about sexual behavior but also about building enduring intimate relationships. These relationships are an essential part of an individual's personal identity. Peplau Aff. ¶¶ 14, 18.

52. The factors that cause an individual to become heterosexual, gay or lesbian, or bisexual are not currently well understood. Most social and behavioral scientists view sexual orientation as resulting from the interplay of biological, psychological, and social factors. *Id.* ¶ 19.

53. Most adults are attracted to and form relationships with members of only one sex. *Id.* ¶¶ 10, 20.

54. The significant majority of adults exhibit a consistent and enduring sexual orientation. *Id.* ¶ 23.

55. Efforts to change a person's sexual orientation through religious or psychotherapy interventions have not been shown to be effective. *Id.* ¶¶ 10, 26, 27.

56. No major mental health professional organization has approved interventions to change sexual orientation, and virtually all of them have adopted policy statements cautioning professionals and the public about these treatments. *Id.* ¶ 27.

57. The fact that a small minority of people may experience some change in their sexual orientation over their lifetime does not suggest that such change is within their power to effect. *Id.* ¶ 23.

58. It is psychologically harmful to ask lesbians and gay men to deny a core part of their identity by ignoring their attraction to same-sex partners and instead marry a different-sex partner. *Id.* ¶ 24.

D. Gay men and lesbians are a relatively powerless political minority

59. Gay men and lesbians are a minority in the United States. *Id.* ¶ 40.

60. At any level above a local precinct or neighborhood, there is no geographic place in the United States with a gay majority. Expert Affidavit of Gary M. Segura, Ph.D., ¶ 49.

61. Gay men and lesbians do not possess a meaningful degree of political power and are politically vulnerable. *Id.* ¶¶ 9–85.

62. Political power means a person's or group's demonstrated ability to extract favorable or prevent unfavorable policy outcomes from the political system. *Id.* ¶ 13.

63. Traditional markers of political powerlessness include systematic disadvantages in the political process; the existence of significant prejudice, stigmatization, or *defacto* or *de jure* second-class status; or an inability, alone or in concert with reliable coalition partners, to secure basic rights or equal treatment from and within the political process. *Id.* ¶ 27.

64. Gay men and lesbians frequently lack the political power to secure basic rights within the normal

political processes or to defend themselves and their civil rights against a hostile majority. *Id.* ¶¶ 9, 26.

65. Gay men and lesbians are the subject of political exclusion and suffer political disabilities greater than other groups that have received suspect class protection from the courts. *Id.* ¶¶ 9, 81-85.

66. In the political arena, gay men and lesbians must rely almost exclusively on allies who are regularly shown to be insufficiently strong or reliable to achieve their goals or protect their interests. *Id.* ¶¶ 9, 75-77.

67. Positive policy outcomes that remediate or repeal express, *de jure* discrimination and bias against the group do not demonstrate a group's affirmative political power but should rather be viewed as a sign of political powerlessness. *Id.* ¶ 25.

68. The political powerlessness of gay men and lesbians is evidenced by their inability to bring an end to pervasive prejudice and discrimination, and to secure desired policy outcomes and prevent undesirable outcomes on fundamental matters that closely and directly impact their lives. *Id.* ¶ 28.

69. The demonstrated vulnerability of occasional and geographically confined policy gains to reversal or repeal is indicative of a role played by "affinity" or sympathy, rather than the exercise of meaningful political power by gay men and lesbians. *Id.* ¶ 28.

70. Even when gay men and lesbians have successfully secured minimal protections in state courts

and legislatures, opponents have aggressively used state ballot initiatives and referenda to repeal favorable laws and even amend state constitutions to preclude favorable court decisions. *Id.* ¶¶ 22-23, 34-44.

71. These direct democracy processes have been used against gay men and lesbians more than any other social group. *Id.* ¶ 43.

72. At the time the Supreme Court first began articulating the factors that call for heightened judicial scrutiny, women and racial minorities already had far more protection from discrimination than gay men and lesbians have today. *Id.* 81-85.

73. There is no federal legislation prohibiting discrimination on the basis of sexual orientation in employment, education, access to public accommodations, or housing. *Id.* ¶ 29.

74. Until sexual orientation was added to the federal hate crimes laws in 2009 (over significant opposition), no federal legislation had ever been passed to protect people on the basis of the sexual orientation. *Id.* ¶ 31.

75. Congress only recently authorized the repeal of the military's ban on gay and lesbian service members, and it did so only in a lame-duck session and after two courts had declared the policy unconstitutional. *Id.* ¶ 32.

76. On the state level, there is no statutory protection against discrimination in employment or public

accommodations for gay men and lesbians in twenty-nine states. *Id.* ¶ 33.

77. FBI statistics demonstrate that in 2009, almost one-fifth of all hate crime incidents for the previous year were committed because of sexual orientation, and that gay men, along with Jewish Americans, are most likely to be victimized by a bias crime. *Id.* ¶¶ 52, 54.

78. In 2008, seventy-three percent of all hate crimes committed against gay men and lesbians included an act of violence; seventy-one percent of all hate motivated murders in the United States were of gay men and lesbians; and fifty-five percent of all hate-motivated rapes were against gay men and lesbians. *Id.* ¶ 53.

79. The fact that sexual orientation is not a visible trait has undermined gay men and lesbians' ability to mobilize and exercise meaningful political power. *Id.* ¶¶ 56-64.

80. Gay men and lesbians face severe hostility from non-gay citizens in many parts of the country and opinion data shows that they are held in considerably lower regard than many groups currently receiving the protection of heightened scrutiny from the courts. *Id.* ¶¶ 66-71, 78.

81. Gay men and lesbians face outspoken denunciation by elected officials in a manner that would be unthinkable if directed toward almost any other social group. *Id.* ¶¶ 72-74.

V. History of Marriage and the Defense of Marriage Act

82. The institution of marriage in the United States is a particular, not a universal, form of the institution. Expert Affidavit of Nancy F. Cott, Ph.D., ¶ 8.

83. Marriage in the United States has been defined and controlled historically at the state level. *Id.* ¶¶ 24-28.

84. Since the founding of the United States, there has been a patchwork quilt of marriage rules across the country. *Id.* ¶¶ 24-28.

85. Marriage has been shaped by legislators and judges in the various states to adjust to changing needs from the founding of the nation until today. *Id.* ¶¶ 13-23.

86. State marriage laws have varied in accordance with political and economic environments, religious forces, changes in the ethnic composition of a state's residents, and many other local conditions. *Id.* ¶¶ 25-28.

87. The ability to procreate has never been an eligibility criterion to enter into marriage. *Id.* ¶¶ 19-23.

88. States' variances regarding the validity of marriages of same-sex couples resembles and is parallel to the history of states' divergences with respect to many other dimensions of marriage validity. *Id.* ¶¶ 32-64.

89. States have varied from one another in defining the basic elements of marriage, including whether

or not ceremonies are required for validation, age at marriage, what other "race" may marry a "white" person, how marriage may be dissolved, and other issues, and how spousal roles shall be defined and enforced. *Id.* ¶¶ 32-73.

90. There remains substantial variation in state rules on marriage to this day—including whether common law marriages will be recognized, minimum age required for marriage, "hygienic requirements" (such as degree of relatedness that will be permitted between spouses), and marriage dissolution rules—yet the federal government has never stepped in to create uniform requirements for purposes of federal law. *Id.* ¶¶ 32-44, 58-64.

91. Heated controversy often surrounded changes to the features of marriage on which state laws diverged in the past; the controversies today focusing on marriage between couples of the same sex, and state variance on the matter, resemble these past disagreements. *Id.* ¶¶ 36, 50-57, 60-61.

92. Since the Revolutionary War era, the federal government has used marriage as a vehicle to convey benefits to adult citizens and their dependents. *Id.* ¶ 81.

93. The extent of federal laws and policies using marriage in this way has grown to cover vast and important areas, including income tax, Social Security, and citizenship and naturalization privileges and limits. *Id.* ¶ 82.

94. DOMA represents a dramatic departure from the federal government's longstanding tradition of deferring to states' determinations of marital status, as prior to 1996 the federal government never stipulated a uniform definition of marriage for purposes of federal law, and instead relied upon states' determinations. *Id.* ¶¶ 38, 44, 57, 64, 83, 88.

95. By denying federal recognition to legally married same-sex couples, DOMA both reflects and perpetuates stigma against lesbians, gay men, and same-sex couples. Peplau Aff. ¶¶ 39-41.

96. The stigma and discrimination perpetuated by DOMA harm not only individuals in legal same-sex marriages, but gay men, lesbians, and bisexuals as a group. *Id.* ¶ 13.

97. According to the legislative history, DOMA's exclusion in 1996 of all same-sex couples who might one day get married from all federal marital protections and obligations was intended to: (a) "defend[] and nurtur[e] the institution of traditional, heterosexual marriage," (b) "promot[e] heterosexuality," (c) "encourag[e] responsible procreation and child-rearing," (d) "protect[] . . . democratic self-governance," (e) "preserve scarce government resources" by preventing marital benefits from "hav[ing] to be made available to homosexual couples and surviving spouses of homosexual marriages," and (f) promote a "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." H.R. Rep. No. 104-664, at 12, 13, 15, 17, 18 (1996).

98. The recognition of the marriages of same-sex couples would actually increase annual net federal revenue. Cong. Budget Office, U.S. Cong., *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, at 1 (June 21, 2004), http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf.

Dated: New York, New York
June 24, 2011

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 10 CV-8435 (BSJ)(JCF)
ECF CASE

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Filed: Aug. 19, 2011

DEFENDANT UNITED STATES' MEMORANDUM OF LAW IN RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND INTERVENOR'S MOTION TO DISMISS

INTRODUCTION

Plaintiff challenges the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7. Plaintiff brings this action as the executor of her late same-sex spouse's estate, seeking a refund of $363,053.00 of federal estate taxes that—but for DOMA—the estate would not have paid due to the marital deduction.

Section 3 of DOMA unconstitutionally discriminates. Section 3 treats same-sex couples who are legally married under their states' laws differently than similarly situated opposite-sex couples, denying them the status, recognition, and significant federal benefits otherwise available to married persons. Under well-established factors set forth by the Supreme Court to guide the determination whether heightened scrutiny applies to a classification that singles out a particular group, discrimination based on sexual orientation merits heightened scrutiny. Under this standard of review, Section 3 of DOMA is unconstitutional.

* * * * *

ARGUMENT

DOMA VIOLATES EQUAL PROTECTION

The Constitution's guarantee of equal protection of the laws, applicable to the federal government through the Due Process Clause of the Fifth Amendment, *see Bolling v. Sharpe*, 347 497, 500 (1954), embodies a fundamental requirement that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). DOMA Section 3 is inconsistent with that principle of equality, as it denies legally married same-sex couples federal benefits that are available to similarly situated opposite-sex couples. For the reasons set forth below, DOMA is subject to heightened scrutiny. Under that standard, Section 3 of DOMA cannot pass constitutional muster.

I. Plaintiffs' Equal Protection Challenge to DOMA Is Subject to Heightened Scrutiny under Supreme Court Precedent.

As a general rule, legislation challenged under equal protection principles is presumed valid and sustained as long as the "classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440. "[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the [government] has authority to implement," courts will not "closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Id.* at 441. Where, however, legislation classifies on the basis of a factor that "generally provides no sensible ground for differential treatment,"

* * * * *

CONCLUSION

For the foregoing reasons, Section 3 of DOMA fails heightened scrutiny, and this Court should deny the motions to dismiss Plaintiff's constitutional claim and grant Plaintiff's motion for summary judgment.

Dated: Aug. 19, 2011

Respectfully submitted,

TONY WEST
Assistant Attorney General

ARTHUR R. GOLDBERG
Assistant Branch Director

/s/ JEAN LIN
JEAN LIN (NY Bar No. 4074530)
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Amendment does not independently preclude the federal government from defining those relationships that qualify for federal benefits.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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10 Civ. 8435 (BSJ)(JCF)
ECF CASE

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Filed: Aug. 20, 2011

DECLARATION OF LISA M. DIAMOND

Lisa M. Diamond declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

1. I am Lisa M. Diamond.

2. I am an associate professor of developmental psychology at the University of Utah. My areas of specialty include the nature and development of affectional bonds and the nature and development of same-sex sexuality.

3. I have reviewed the papers submitted by the Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") in opposition to the Plaintiff's motion for summary judgment in the

above-referenced lawsuit. BLAG cites my work numerous times in those papers.

4. BLAG misconstrues and distorts my research findings, which do not support the propositions for which BLAG cites them. Specifically, on p. 11 of their opposition to the motion for summary judgement, BLAG quotes the following statement from one of my papers: " . . . there is currently no scientific or popular consensus on the exact constellation of experiences that definitively 'qualify' an individual as lesbian, gay, or bisexual"—as support for their claim that sexual orientation is not immutable. This is incorrect. My quoted statement concerns the scientific and popular debates over the defining characteristics of LGBT individuals and it says nothing whatsoever about the immutability of sexual orientation itself. Hence, BLAG has incorrectly characterized my research. BLAG goes on to state on page 11 that "according to multiple studies, a high number of persons who experience sexual attraction to members of the same sex early in their adult lives later cease to experience such attraction" and in support of this claim they provide the following quote from one of my articles: "50% [of respondents] had changed their identity label more than once since first relinquishing their heterosexual identity". This quoted statement refers to *sexual identity labels* (i.e., how individuals describe and interpret their sexuality), and *not* to sexual orientation. Neither this article nor any of my other published work supports BLAG's claim that "a high number of persons who experience sexual attraction to members of the same sex early in their adult lives later cease to

experience such attraction" (p. 11). Hence they have completely misrepresented my research.

4. Counsel for BLAG never requested that I serve as an expert witness for them in the above-referenced lawsuit. If they had so requested, I would not have agreed to do so.

5. I am providing these clarifications of my work on a scientific basis, and I have no other interest or involvement in this case. I have received no compensation for providing this affidavit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at 3:00 p.m. on this 20 day of Aug. 2011

/s/ [LISA M. DIAMOND]
LISA M. DIAMOND

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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10 CIV. 8435 (BSJ) (JFC) EFC CASE

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed: Sept. 15, 2011]

SUPPLEMENTAL AFFIDAVIT OF EDITH SCHLAIN WINDSOR

Edith Schlain Windsor, being duly sworn, states:

1. I am the plaintiff in this action seeking a refund of the federal estate tax levied on and paid by the estate of my late spouse, Thea Clara Spyer ("Thea").

2. I submit this affidavit, which contains additional details about my life experiences, in order to respond to certain issues raised by defendant-intervenor, the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") in its papers in opposition to the motion I made for summary judgment and in further support of my motion for summary judgment.

My First Marriage to Saul Weiner

3. I understand that BLAG argues in its papers that my first, brief marriage to Saul Weiner in 1951 demonstrates that I had a "choice" about my sexual orientation. As I explain below, that is certainly not the case. What my marriage to Saul Weiner shows is that although I tried to make a "choice" about my sexual orientation by getting married to a man, I was simply unable to do so. Thus, as a matter of fact, I really had no choice at all.

4. Before I met Thea, shortly after I graduated from Temple University in 1950, I married a man named Saul Weiner in Philadelphia.

5. Saul was my older brother's best friend, whom I had long looked up to and respected. He and my brother were friends throughout high school and "hung out" together at our house. They both served as soldiers in World War II—Saul in the Army in Europe; my brother in the Air Force. Saul often visited my family when he was on leave during the war. During all those years, he thought of and treated me as a "kid sister."

6. When the war ended, Saul and I started college together. By that time, I had matured into a woman, and Saul had noticed. He began asking me out on dates, and I accepted his offers. Although I had had the feeling that I was attracted to women, and not men, since I was a young girl, I never considered the possibility of consummating those feelings with anyone, and I didn't want to. In the context of the homophobia that was so prevalent in the 1950's, I certainly did not want to be a "queer." Instead, I wanted to live a "normal" life.

7. I cared very much for Saul, and I was able to convince myself that I could have a life together with him. He was exactly what most girls wanted in a man. He was big, handsome and strong, yet sweet. I think that if I had been straight, Saul would have been the love of my life. We went to all the dances together and did the things that couples did back then, which did not include physical intimacy prior to marriage.

8. During our third year of college, Saul asked me to marry him, and I accepted.

9. Soon after the engagement, I met and developed, for the first time in my life, strong romantic feelings for another person, a female classmate of mine at Temple University. I fell deeply in love with her.

10. I did not know what to do next, but I had such terribly strong feelings for this woman that I decided I needed to break off my engagement with Saul. I told Saul that I was not ready to get married. Inside, however, I knew that I needed to figure how to deal with my love for this woman.

11. Of course, times were very different then—people did not even talk about being gay or the possibility of having a life with someone of the same sex. I associated my same-sex attractions with shame, and I did not want to be "queer." In fact, people tried to reassure me that I wasn't destined to be "queer." I therefore tried to stick it out with Saul.

12. Although I would get jealous when I saw two women together on the street on a Saturday night, what I

thought I really wanted was to be like my older sister—to have a husband, children and lead a "normal" life. Because of the intense social pressure and homophobia, even the woman I fell in love with in college was not interested in staying together in a relationship with me.

13. Meanwhile, Saul persisted and kept asking me out. I loved him and so did my whole family; everyone thought we made a great pair. My time with Saul was wonderful in many ways, although not romantically, as I soon discovered after we were married in May 1951.

14. After the wedding, it did not take long for me to realize that I could not fulfill any of Saul's or my own expectations for the relationship. I couldn't love Saul the way a wife should love her husband, and, after a few months, I told him so. I also explained to Saul that I was yearning for women and that I needed something else in my life. I explained to Saul that he deserved much better, and that I wanted him to have someone in his life for whom he was the most desirable person imaginable.

15. And so, with a heavy heart, I moved back in with my mother. Saul and I soon divorced on March 3, 1952.

16. Saul and I parted on good terms. He later got married to another woman and had a family. He telephoned me on my 70th birthday in 1999 to wish me well.

The FBI Interview

17. I also understand that BLAG makes statements in its opposition papers seeking to minimize the seriousness of the discrimination that existed against gay men and lesbians in the twentieth century. As a result, I would like to tell a story about something that happened to me personally to add some context concerning what things were really like for gay men and lesbians when I was young.

18. After Saul and I got divorced, I moved to New York from Philadelphia, where, in 1955, I began working on a master's degree in applied mathematics at NYU.

19. In order to cover tuition, I worked as a secretary at NYU. I took some computer classes and later sought a technology-related job. I eventually got a job as a research assistant, programming NYU's Univac computer, which was devoted to United States Atomic Energy Commission work. Consequently, I had to get "Q" security clearance—a particularly high level of security clearance—in order to perform my duties.

20. While I was waiting to obtain this clearance, I received a letter from the FBI requesting that I attend a meeting with them. Although they explained that I did not need a lawyer for this meeting, it immediately occurred to me that the meeting was really about my homosexuality. In other words, I expected to be asked by the FBI if I was a "queer."

21. Not only did I worry that I might not get the necessary security clearance if the FBI found out that I

was "queer," but I was also very concerned that being "queer" was actually illegal. After I went to the trouble of doing some research, I came to understand that, for women, all that was illegal in New York at that time was impersonating a man. So, I went to the FBI interview dressed even more "feminine" than I usually did—wearing a dress with crinolines and high heels.

22. There was no question in my mind that I would be completely honest with the FBI, even though I knew doing so would likely mean that I would lose the job that I loved. At the time, I was especially frightened because the FBI had asked my building superintendent whether there were people coming and going from my apartment. My superintendent told me that he had told them in response: "just a bunch of college girls." As a result, I thought for sure that the FBI was "on to me."

23. As it turned out, the FBI was only following up on a false lead. Fortunately for me, and to my great relief, the FBI agents asked a series of questions about my sisters' friends in the teachers' union, but did not ask me any questions about whether I was a lesbian. And in the end, despite all my fears and anxiety, I received my "Q" security clearance.

/s/ EDITH SCHLAIN WINDSOR
EDITH SCHLAIN WINDSOR

Sworn to before me on this 15 day of
August, 2011

/s/ JENNIFER S. GARRETT
Notary Public
JENNIFER S. GARRETT

Notary Public, State of New York
No. 01GA6227723
Qualified in New York County Commission

Expires Sept. 7, 2014

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

10-cv-8435 (BSJ) (JCF)

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Filed: Sept. 9, 2011

SUPPLEMENTAL EXPERT AFFIDAVIT OF LETITIA ANNE PEPLAU, PH.D.

I, Letitia Anne Peplau, Ph.D., hereby depose and say as follows:

1. I have actual knowledge of the matters stated in this affidavit and could and would testify as to such matters if called as a witness.

2. I have already provided an expert affidavit dated May 19, 2011 (my "Original Affidavit") in this litigation. A complete explanation of my professional background, experience, publications, and compensation appears in my Original Affidavit.

3. I have been asked to respond to the discussion on pp. 10-12 of the Memorandum of Law in Support of

Intervenor-Defendant's Opposition to Plaintiff's Motion for Summary Judgment and paragraph 50 of Intervenor-Defendant's Local Rule 56.1 Response to Plaintiff s Statement of Material Facts, filed on August 1, 2011, by Defendant-Intervenor the Bipartisan Legal Advisory Group of the U.S. House of Representatives, and specifically to address an article cited therein: Nigel Dickson *et al.*, *Same-Sex Attraction in a Birth Cohort: Prevalence and Persistence in Early Adulthood*, 56 Soc. Sci. & Med. 1607 (2003).

4. In preparing this affidavit I reviewed these portions of the above referenced Memorandum of Law and Rule 56.1 Response as well as the scientific articles cited therein, including the Dickson *et al.* article.

5. Neither the Dickson *et al.* article nor any other studies cited in these portions of the Intervenor-Defendant's filings change, in any way, any of the expert opinions I expressed in my Original Affidavit, including my expert opinions that "[s]exual orientation refers to an enduring pattern of emotional, romantic, and/or sexual attractions to men, women, or both sexes", and that "the significant majority of adults exhibit a consistent and enduring sexual orientation" (Original Affidavit ¶¶ 10, 23).

6. Indeed, the Dickson, *et al.* article provides further evidence in support of these opinions. Among the participants in the Dickson study, the overwhelming majority of individuals who reported only opposite sex attraction at age 21 also reported only opposite sex attraction at age 26. Similarly, the vast majority of

those who reported major attraction to the same sex at age 21 reported this at age 26 as well. The data show that only 1/2 of 1% of the male participants and 1.3% of the female participants shifted from only opposite sex attraction to major attraction to the same sex or vice versa. The people who did shift in their reported attractions were virtually all individuals who shifted in or out of reporting that they were "more often attractted to the opposite sex" but "at least once" to their own sex. Dickson, *et al.*, at p. 1609 (explaining which responses were classified as "occasional same-sex attraction").

I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of Sept., 2011.

/s/ LETITIA A. PEPLAU
LETITIA ANNE PEPLAU, PH.D.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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10 Civ. 8435 (BSJ)(JCF)
ECF CASE

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Filed: Sept. 13, 2011

SUPPLEMENTAL EXPERT AFFIDAVIT OF MICHAEL LAMB, PH.D.

I, Michael Lamb, Ph.D., hereby depose and say as follows:

1. I am Professor of Psychology in the Social Sciences and Head of the Division of Social and Developmental Psychology in the Faculty of Social, Human and Political Science at the University of Cambridge.

2. On May 19, 2011, I submitted my expert affidavit in this matter, which set forth my relevant background and experience, and attached my curriculum vitae and a list of my publications from the last 10 years, at Exhibit A.

3. That affidavit set forth the principal opinion that I am offering in this case: that children and adolescents raised by same-sex parents are as likely to be well-adjusted as children raised by heterosexual parents, including "biological" parents.

4. I have read the relevant portions of the Rule 56.1 statement and memorandum of law filed by the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") in opposition to plaintiff's motion for summary judgment. More specifically, various statements on pages 23 and 24 of BLAG's memorandum suggest that the research on the psychological adjustment of children with gay and lesbian parents is not valid or reliable because it has "serious flaws." I submit this affidavit in order to respond to this statement, with which I strongly disagree.

There is No Basis for Dismissal of the Studies Referenced in My Affidavit as "Flawed".

5. First, BLAG asserts that studies referenced in my affidavit "comparing gay or lesbian parents to heterosexual parents have serious flaws," and as supposed support for this position, quote from three articles discussed at my deposition. (BLAG Opp. Br. at 23-24.)

6. This assertion is both misleading and false. When these quotations from other scholars' articles were presented to me at my deposition in this case, I explained how they had been taken out of context and that the scientific research on gay parent families is robust, meets accepted rigorous standards for re-

search in the field, and supports the central conclusion provided in my prior affidavit and reiterated here: that children with gay and lesbian parents are just as likely to be well-adjusted as those with heterosexual parents.

7. Specifically, in response to the first quotation from a report I had cited ["Studies of children raised by same-sex parents have almost exclusively focused on families headed by lesbian mothers rather than gay fathers" (BLAG Opp. Br. at 23)], I explained at my deposition:

> [I]t's a fact that there have been more studies that are focused on the adjustment of children raised by lesbians rather than by gay parents. It's a fact that results of studies that are focused on the children in both of those contexts are similar to one another. And it's a fact that in both contexts one finds that the adjustment of children is affected not by the sexual orientation or by the family structure but by the family process variables that we talked about earlier this morning.

(Dep. Tr. at 76:6-17.)[1] For example, Farr, Forsell and Patterson (2010) Parenting and child development in adoptive families: Does parental sexual orientation matter? *Applied Developmental Science, 14(3), 164-178* (referenced in my initial affidavit) studied a sample of children raised since infancy in families headed by gay male couples. The results were the same as in the lesbian family research—child outcomes did not vary depending on the parents' sexual orientation.

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[1] There are fewer studies of children raised by gay fathers than lesbian mothers largely because there have been fewer gay men than lesbians raising children in their own households presumably because, among other things, it is easier for lesbians to bring biological children into their families. Indeed, only quite recently have significant numbers of gay men begun to do so, too.

8. In other words, there is sufficient, indeed overwhelming, evidence that the adjustment of children is not affected by their parents' sexual orientation, and the fact that more studies have focused on children raised by lesbians, rather than by gay men, does nothing to undercut that conclusion.

9. In response to BLAG's second quotation—"We still have relatively few studies of adolescent offspring of lesbian or gay parents however, and some have advised caution when generalizing the results of research conducted with young children to adolescents" (BLAG Opp. Br. at 23)—I explained at my deposition as follows:

> There are fewer studies of adolescents than there are of younger children. I think that this statement here is part of a way of underscoring the importance of this research. And it is important research. But there are several other studies that have looked at adolescent offspring living with same-sex parents.
>
> Q. Does the fact that there are, I think you said, fewer studies on adolescents counsel us to be cautious about drawing conclusions about adolescents who are raised by same-sex parents?

> Well, I don't think it does because the results of those fewer studies are consistent with the results of other research that looks at children's adjustment and other research that looks at adolescents and the factors that are associated with their adjustment. Again, I think what's important to underscore is how important it is to look at any set of findings in context. In that context, the fact that studies like this show that children being raised by same-sex parents are as likely to be well adjusted as children raised by—sorry—as adolescents raised by heterosexual parents and that when one looks at the correlates of better or worse adjustment, that it's the same factors regardless of sexual orientation. It is the convergence between the findings and the broader body of literature that is really the key thing we want to look at.

(Dep. Tr. at 82:15-83:21.)

10. As I explained, although there is less research on adolescents than on younger children, there have been several studies involving adolescents and they have uniformly reported positive outcomes on the part of adolescents raised by gay parents. Further, the correlates of positive adolescent adjustment are the same regardless of the parents' sexual orientation.

11. The third quotation presented to me at my deposition and used by BLAG was the following statement by Lawrence Kurdek:

> Future research on gay and lesbian couples needs to address several key issues. One is sampling.

> Because most studies have used convenience samples of mostly white and well-educated partners, the extent to which findings generalize to the larger population of gay and lesbian couples is unknown. . . . Most studies on gay and lesbian couples have used self-report surveys. Future work could address some of the biases associated with self-report data. . . .

(BLAG Opp. Br. at 23-24.) When presented with this quote at my deposition, I explained as follows:

> Well, he's certainly correct in noting these issues in the literature on gay and lesbian couples, particularly research of the sort that he has done, which has painstakingly, and I think very usefully, shown that the dynamics of relationships in gay and lesbian couples are characterized by the same dimensions as those in heterosexual families and that clearly elaborating on that and doing more research may be helpful for those who are interested in further understanding couple dynamics. I do want to underscore that this, his research, is focused on gay and lesbian couples, mostly couples without children, and that these studies don't look at the relationship between the couple variables and the children's adjustment. They are nevertheless very useful because they do show that the research on the dynamics of those couples is subject to and has the same sorts of correlates and variables as do heterosexual couples, both those that are married as well as those who are cohabiting.

(Dep. Tr. at 85: 10-86:7.)

12. In other words, researchers typically identify areas for future research in their studies. This does not mean, as BLAG suggests, that the studies are invalid or unreliable. As I explained, Kurdek's research on same-sex couples' relationships is both rigorous and reliable. It is also important to note that he was not discussing research on gay parents, as BLAG incorrectly suggests.

13. Contrary to BLAG's misleading presentation, therefore, I have never suggested that the scientific research on gay parent families is flawed or deficient; rather, I made it clear that the research is not only robust, but reliably shows equally good outcomes for children of gay and heterosexual parents. None of the quotations that BLAG cites undercuts the validity of the research. BLAG fundamentally mischaracterizes the scientific evidence, more fully summarized in my affidavit to which an extended bibliography was appended.

The Sources BLAG Cites Do Not Reflect the Science

14. In further attempts to support its position that the gay parenting research should be dismissed because of methodological flaws, BLAG also made reference to a decision of the Eleventh Circuit Court of Appeals in the *Lofton* case (addressing a challenge to a Florida law banning adoption by gay people) and two articles, one written by Anne Hulbert, a writer, and one by George Dent, a law professor. Based on these writings, BLAG claims that, "Numerous studies have

pointed to methodological flaws in those studies comparing heterosexual and homosexual parents." (BLAG Opp. Br. at 24.)

15. That is not the case. The Hulbert and Dent materials are non-scientific sources and, thus, are fundamentally unreliable. As an initial matter, neither Anne Hulbert nor George Dent have professional expertise with respect to child development. In addition, their articles were not published in peer-reviewed scientific journals.[2] Indeed, the three page article by

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[2] Some of the "authorities" that Dent cites in his article were authored by individuals who have been discredited as biased with respect to the research on homosexuality. For example, Dent cites Paul Cameron, the founder of an anti-gay advocacy organization called the Family Research Institute, who reportedly had his membership in the American Psychological Association revoked. He also cites George Rekers and Walter Schumm. Two courts have found Rekers' testimony about gay parents to be biased. As a Florida court explained "[His] testimony was far from a neutral and unbiased recitation of the relevant scientific evidence. Dr. Rekers' beliefs are motivated by his strong ideological and theological convictions that are not consistent with science. Based on his testimony and demeanor at trial, the court cannot consider his testimony to be credible nor worthy of forming the basis of public policy." *In re Adoption of Doe*, 2008 WL 5006172, at *12 (Fla. Cir. Ct. Nov. 25, 2008); *see also Howard v. Child Welfare Agency Review Bd.*, 2004 WL 3154530 (Ark. Cir. 2004), aff'd, 238 S.W.3d 1 (Ark. 2006) ("It was apparent from both Dr. Rekers' testimony and attitude on the stand that he was there primarily to promote his own personal ideology. If the furtherance of such ideology meant providing the court with only partial information or selectively analyzing study results that was acceptable to Dr. Rekers . . . Dr. Rekers' willingness to prioritize his personal beliefs over his

Hulbert, which was published in a popular on-line magazine, www.slate.com, contains an errata footnote acknowledging her earlier misunderstanding of statistics presented in a study.[3]

16. The Eleventh Circuit's characterization of the gay parenting research also does not match reality. The sources cited by the *Lofton* court purporting to show that the research is flawed include: (1) a 1995 commentary by Baumrind calling for the very kinds of studies that have been published in the years since; (2) a booklet written by Lerner and Nagai that was published by the Marriage Law Project, an advocacy organization that opposes marriage for same-sex couples; and (3) a review article written by Stacey and Biblarz that, contrary to the Court's characterization, deems the research sufficiently strong and reliable to draw the following conclusion:

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function as an expert provider of fact rendered his testimony extremely suspect and of little, if any, assistance to the court in resolving the difficult issues presented by this case."). As for Walter Schumm, the same Florida court that criticized Rekers concluded that Schumm "integrates his religious and ideological beliefs into his research." *Id.*

[3] BLAG also cites in its motion to dismiss an article by Lynn Wardle as purported support for its argument that children raised by same-sex parents miss the benefits of being raised by men and women. (BLAG Mem. in Support of Mot. to Dismiss at 43.) Like Dent, Lynn Wardle is a law professor with no professional expertise in child development and his article, which was published in a law journal, is not a scientific publication.

> Because every relevant study to date shows that parental sexual orientation, per se, has no measurable effect on the quality of parent-child relationships or on children's mental health or social adjustment, there is no evidentiary basis for considering parental sexual orientation in decisions about children's best interest.[4]

17. Contrary to the conclusion of the *Lofton* court, the research on gay parent families is a robust body of research that meets the rigorous methodological standards demanded for publication in the leading academic journals. There is simply no basis on which to dismiss this body of research as invalid or unreliable due to methodological deficiencies.[5]

18. Of the two studies cited by the *Lofton* court to purportedly show worse outcomes for children with gay parents, the first, a publication by Paul Cameron, is worthless because, although it claims to show that

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[4] The Hulbert article from slate.com similarly misinterprets Stacey and Biblarz.

[5] In addition, while BLAG did not cite it in the *Windsor* case, in *Pedersen*, BLAG cited Norval Glenn's criticism of sampling in research on gay/lesbian parenting: *See* BLAG's opposition to summary judgment in *Pedersen*, pp. 31-32 (citing Glenn's article, "The Struggle for Same-Sex Marriage"). For the same reasons discussed above, Glenn's article is without merit. Although Glenn dismisses this body of research for using small convenience samples, such sampling is appropriate and routinely used in psychological research. Moreover, a number of the studies on gay parent families did use representative samples.

children are more likely to be molested by gay parents than heterosexual parents, it makes clear that the researchers did not even ask respondents about the sexual orientation of their parents. *See also* n.1, *supra.* Second, the Stacey and Biblarz review discussed above did not conclude that children with gay parents fared worse than children with heterosexual parents. In fact, it concluded that there is "no evidentiary basis for considering parental sexual orientation in decisions about children's best interest." As discussed more fully in my original affidavit, the research on children raised by gay parents consistently shows that parental sexual orientation has no bearing on child outcomes. There can be no reasonable doubt that this is a matter of scientific consensus.

19. Finally, BLAG attempts to refute my statement that "[t]here is no empirical support for the notion that the presence of both male and female role models in the home promotes children's adjustment or well being," by referencing studies cited in the case *Irizarry v. Bd. of Educ. of Chi.*, 251 F.3d 604, 607 (7th Cir. 2001). (BLAG Rule 56.1 Stmt. ¶ 47. As BLAG notes, those studies show only that so far as heterosexuals are concerned, the evidence that marriage "'provides a stable and nourishing framework for child-rearing . . . refutes any claim that policies designed to promote marriage are irrational." Significantly, the *Irizarry* court and these studies were not comparing families of heterosexual and gay couples—they were simply comparing married and nonmarried heterosexual couples. BLAG also cites a 1974 review by Biller extolling the positive impact that

heterosexual fathers can have on their children's development. The speculation nearly 40 years ago that that children needed to have both male and female parents in order to be well-adjusted has not been supported by the research. Research conducted since then has demonstrated that both mothers and fathers are important to their children *as parents*, not as males and females, and that the parents' genders do not affect children's adjustment.[6]

20. Finally, the sources cited by BLAG are not only unscientific and do not support their arguments, but were largely published prior to 2004. As discussed above and in my original affidavit, the body of scientific research pre-dating 2004 fully supported my opinion that child adjustment is not affected by the

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[6] In its motion to dismiss at 40-41, n.11, BLAG says that "In 2004, Congress extensively reviewed the evidence that children whose mother or father is absent are comparatively worse off," and references an article by Barbara Dafoe Whitehead published in the Atlantic magazine (http://www.theatlantic.com/magazine/archive/1993/04/dan-quayle-was-right/7015/) and a report by the organization Child Trends (http://www.childtrends.org/files/marriagerb602.pdf) as examples. These articles discuss the research on family dissolution and single parenthood among heterosexual parents, noting poorer average outcomes for children whose family lives are disrupted by divorce and those who do not have supportive relationships with both of their parents. These articles do not, as BLAG suggests, say anything to support the claim that parents' gender affects children's adjustment. And they have no relevance to gay parent families other than to suggest that children of gay parents would also be more likely to be well adjusted if their parents' relationships remained intact.

parents' sexual orientation. Since then, however, there has been much additional research exploring the psychological adjustment of children and adolescents raised by same-sex couples. (I cited forty-three academic articles published after 2004 in Exhibit B appended to my initial affidavit.) This more recent research only serves to underscore the established conclusion that child adjustment is not in any way affected by parental sexual orientation.

21. The conclusion stated in my affidavit—that children with gay, lesbian, and heterosexual parents are all as likely as one another to be well-adjusted because it is the quality of parenting and parent-child relationships, the quality of the parents' relationships with partners and other significant adults, and their social and economic resources, rather than their family structure or type that determines children's outcomes —is well supported by the empirical research literature, and is not undermined by the misleading assertions made by BLAG in opposing plaintiff's motion for summary judgment.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and accurate.

Executed this 13th day of Sept. 2011 at Washington, DC.

/s/ [MICHAEL E. LAMB]
MICHAEL E. LAMB, PH. D.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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10 Civ. 8435 (BSJ) (JCF)
ECF Case

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER
PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Filed: Sept. 15, 2011

SUPPLEMENTAL DECLARATION OF LISA M. DIAMOND

Lisa M. Diamond declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

1. My name is Lisa Diamond and I am an associate professor of developmental psychology at the University of Utah, where I have been teaching since 1999.[1]

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[1] I executed a declaration on August 20, 2011, which I understand Plaintiff submitted in support of her motion to strike in this action. This Supplemental Declaration contains additional information that the Court may find helpful in resolving the important issues that this case presents. For the Court's convenience, I will repeat here some of the statements I made in my August 20, 2011 declaration.

I received a Ph.D. from Cornell University in 1999 in Human Development *(i.e.*, developmental psychology). My areas of specialty include the nature and development of affectional bonds and the nature and development of same-sex sexuality.

2. I have reviewed the papers submitted by the Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") in opposition to the Plaintiff's motion for summary judgment in the above-referenced lawsuit. BLAG cites my work numerous times in those papers.

3. Counsel for BLAG never requested that I serve as an expert witness for them in the above-referenced lawsuit. If they had requested, I would not have agreed to do so because I do not think their position on immutability is warranted by the science.

4. I am providing these clarifications of my work on a scientific basis, and I have no other interest or involvement in this case. I have received no compensation for providing this affidavit.

5. BLAG misconstrues my research findings, which do not support the propositions for which BLAG cites them. Specifically, on page 11 of its memo in opposition to the motion for summary judgment, BLAG quotes the following statement from one of my papers: "There is currently no scientific or popular consensus on the exact constellation of experiences that definitively 'qualify' an individual as lesbian, gay, or bisexual"—as support for its claim that sexual orientation is not immutable. This is incorrect. My

quoted statement concerns the scientific and popular debates over the defining characteristics of LGBT individuals and it says nothing whatsoever about the immutability of sexual orientation itself. Hence, BLAG has incorrectly characterized my research.

6. BLAG goes on to state on page 11 that "according to multiple studies, a high number of persons who experience sexual attraction to members of the same sex early in their adult lives later cease to experience such attraction." In support of this claim BLAG provides the following quote from one of my articles: "50% [of respondents] had changed their identity label more than once since first relinquishing their heterosexual identity". This quoted statement refers to sexual identity labels *(i.e.*, how individuals describe and interpret their sexuality), not to sexual orientation. Neither this article nor any of my other published work supports BLAG's claim that "a high number of persons who experience sexual attraction to members of the same sex early in their adult lives later cease to experience such attraction." *See* BLAG Opp. Br. at 11-12. Hence, BLAG has completely misrepresented my research.

7. The other study cited by BLAG about changing sexual attractions is Nigel Dickson et al., *Same Sex Attraction in Birth Cohort: Prevalence and Persistence in Early Adulthood*, 56 Soc. Sci. & Med. 1607, 1611-12 (2003), an article with which I am familiar. *See* BLAG Opp. Br. at 11-12. BLAG misunderstands this article as well, conflating immutability of sexual orientation with perfect stability of its outward expres-

sion. This article does not speak to immutability of sexual orientation (which the authors themselves never claim to have measured), but to the expression of same-sex attraction and behavior over time.

8. Laypeople frequently presume that if a trait is immutable, it will express itself in a rigid deterministic fashion, but this is simply not time. For example, persons with the same genotype (genetic pattern) can have different phenotypes (expression of the genetic pattern). The different phenotypes (expressions) do not change the existence of a common genotype. By analogy in the context of sexual orientation, periodic changes over the life course in the conscious experience of same sex attraction are changes in the expression of sexual orientation, not in orientation itself *(i.e.*, the underlying capacity for same-sex attraction). The fact that some individuals may show different expressions of same-sex attraction over time does not change the fact that they belong to a meaningful, scientifically acknowledged class of individuals who share a fundamental and distinctive trait: the capacity for same-sex attractions.

9. Changes in the expression of same-sex attractions or behavior over the life course are also easily explained by the fact that bisexual patterns of same sex attraction (which includes a pattern such as "mostly but not completely attracted to the same-sex") are actually more common than most people think (especially among women). Edward O. Laumann et al., *The Social Organization of Sexuality: Sexual Practices in the United States* (1994). Individuals

with bisexual patterns of attraction often report differing degrees of same-sex versus other-sex attraction at different periods of time, depending on factors like their social environment and who they are involved with at the time. But the trait of capacity for same-sex attraction remains stable. I am aware of no research suggesting that a bisexual individual's capacity for same-sex attraction disappears even if its expression may vary over the life course.

10. If the question is whether gays, lesbians and bisexuals are a group of people with a distinct, immutable characteristic, my scientific answer to that question is yes. The fact that a characteristic expresses itself in different ways across the group does not mean that the group itself does not exist. BLAG is correct that for some individuals, same-sex attraction decreases over time. But for some individuals, same-sex attraction is consistent over time. For other individuals, same-sex attraction increases over time rather than decreasing. Such patterns have been documented in the scientific literature on sexual orientation for many years, and they are reviewed in my book, Lisa M. Diamond, *Sexual Fluidity: Understanding Women's Love and Desire* (2008). These patterns reflect naturally occurring variability in sexual expression over the life course; they do not constitute evidence against the existence of sexual orientation as a basic immutable trait.

I declare under penalty of perjury that the foregoing is true and correct

Executed at Salt Lake City, Utah on this [12th] day of Sept., 2011.

/s/ LISA M. DIAMOND
LISA M. DIAMOND

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 10-CV-8435 (BSJ) (JCF)

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: June 8, 2012

NOTICE OF APPEAL OF INTERVENOR-DEFENDANT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES

Intervenor-Defendant the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("House") hereby appeals to the U.S. Court of Appeals for the Second Circuit the District Court's Order (June 6, 2012) (ECF No. 93), and Judgment (June 7, 2012) (ECF No. 94), both insofar as they grant plaintiff's [. . .] Motion for Summary Judgment (June 24, 2011) (ECF No. 28) and deny the [House]'s Motion to Dismiss (Aug. 1, 2011) (ECF No. 52). Copies of the Order and Judgment are attached as Exhibits A and B, respectively.

The statutory basis for this appeal is 28 U.S.C. § 1291. The House is exempt from the filing fee requirement for this appeal. *See* 28 U.S.C. § 1913; Judicial Conference of the United States, Court of Appeals Miscellaneous Fee Schedule, *available at* http://www.uscourts.gov/FormsAndFees/Fees/CourtOfAppealsMiscellaneousFeeSchedule.aspx.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 10-CV-8435 (BSJ) (JCF)
ECF Case

EDITH SCHLAIN WINDSOR, ET AL.,PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: June 14, 2012

NOTICE OF APPEAL

TO THE CLERK OF THIS COURT AND ALL PARTIES OF RECORD:

NOTICE IS HEREBY GIVEN that Defendant the United States of America hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment dated June 7, 2012 [ECF No. 94] and the underlying Order dated June 6, 2012 [ECF No. 93].

Dated this 14th day of June, 2012.

Dated: June 14, 2012

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

ARTHUR R. GOLDBERG
Assistant Branch Director

/s/ JEAN LIN
JEAN LIN (NY Bar No. 4074530)
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20530

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 12-2335 & 12-2435

EDITH SCHLAIN WINDSOR, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT

BIPARTISAN LEGAL ADVISORY GROUP OF THE
U.S. HOUSE OF REPRESNTATIVES,
INTERVENOR-DEFENDANT-APPELLANT

EDITH SCHLAIN WINDSOR, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT

BIPARTISAN LEGAL ADVISORY GROUP OF THE
U.S. HOUSE OF REPRESENTATIVES,
INTERVENOR-DEFENDANT

MOTION OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES TO DISMISS APPEAL NO. 12-2435

INTRODUCTION

The Bipartisan Legal Advisory Group of the U.S. House of Representatives ("House") respectfully moves for an order dismissing No. 12-2435, the appeal filed by the Department of Justice ("DOJ") on behalf of defendant United States ("Executive Branch").

Although the Executive Branch nominally was a defendant in the district court, it actually supported the plaintiff in the district court and, along with the plaintiff, prevailed below. Accordingly, the Executive Branch's appeal should be dismissed because that appeal is not necessary to enable the House—the intervenor-defendant below after DOJ changed sides—to prosecute the House's earlier-filed appeal (No. 12-2335), and the Executive Branch's appeal is, therefore, superfluous. Moreover, because the Executive Branch prevailed below, it is not aggrieved. Thus, the House has standing to appeal here, and the Executive Branch does not.

Pursuant to Local Rule 27.1(b), counsel for the House has notified opposing counsel of its intent to file this motion. DOJ opposes the relief sought and plans to file a response. Plaintiff-appellee takes no position as to the relief sought in this motion.

BACKGROUND

As the Court is aware, it is the constitutional responsibility of the President to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and of * * *

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Ensure DOMA Constitutionality Is Determined by the Court (Mar. 9, 2011) ("House General Counsel has been directed to initiate a legal defense of [DOMA

Section 3]"), *available at* http://www.speaker.gov/News/DocumentSingle.aspx?DocumentID=228539.[2]

This Case Works Its Way Through the District Court and to This Court. Ms. Windsor originally filed suit on November 9, 2010, and then amended her complaint three months later. She sought, among other things, a declaration that DOMA Section 3 is unconstitutional. *See* Am. Compl. ¶¶ 82-85, Prayers for Relief ¶¶ 1,3, *Windsor v. United States*, No. 1:10-cv-08435 (S.D.N.Y. Feb. 2, 2011) (ECF No. 9).

Following the Attorney General's public announcement in February 2011, DOJ notified the district court that it no longer would defend the constitutionality of DOMA Section 3 in this case. *See* Notice . . . at 1, *Windsor v. United States*, No. 1:10-cv-08435 (S.D.N.Y. Feb. 25, 2011) (ECF No. 10). The district court then invited Congress to intervene, *see* Order, *Windsor v. United States*, No. 1:10-cv08435 (S.D.N.Y. March 15, 2011) (ECF No. 11), which the House did. *See* Unopposed Mot. of the [House] to Intervene for a Limited Purpose, *Windsor v.* * * *

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Paris Fifth Ave., Inc., 219 F.3d 104, 109-10 (2d Cir. 2000) (where defendant-appellees were granted relief via partial grant of summary judgment by the district court, they were not entitled to a cross-appeal from the denial of other parts of their motion for summary judgment).

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[2] At present, the House is defending DOMA Section 3 in 13 cases around the country (including this case)—four in the federal Circuit Courts (including one in which a decision already has been rendered), eight in federal district courts, and one in the Court of Appeals for Veterans Claims.

In this case, the Executive Branch plainly lacks standing to appeal the judgment entered below because, far from being aggrieved by that judgment, the Executive Branch got exactly what it sought. The Executive Branch affirmatively requested, and obtained, the judgment that the district court entered striking down DOMA. "A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Roper*, 445 U.S. at 333. The Executive Branch won below and, as a district court winner, it is not a proper appellant in this Court.

In another DOMA appeal in which this jurisdictional issue has arisen, DOJ claimed that "the interim invalidation of a statute itself causes recognized injury to the interests of the United States." Mot. to Consolidate and Expedite Appeals at 6-7, *Golinski v. OPM*, Nos. 12-15388 & 12-15409 (9th Cir. Mar. 26, 2012) (ECF No. 19) ("DOJ *Golinski* Mot.") (citing *Bowen v. Kendrick*, 483 U.S. 1304, 1304 (1987) (Rehnquist, J., in chambers); *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). But to the extent the United States government suffers any affront from the invalidation of a federal statute, the Executive Branch hardly can invoke that as a reason for appeal where, as here, it *requested* the invalidation. Because the House and not DOJ is defending DOMA's constitutionality, it is the House and not DOJ that represents the government's interests with respect to any harm arising from DOMA's "interim invalidation."

None of the cases DOJ cited in its Golinski pleading presented this dynamic. Instead, each involved Executive Branch defendants that were *actually defending* the statutes in question—and in fact were seeking a stay of an injunction against their enforcement.[5] The Executive Branch clearly is not aggrieved here in any reasonable sense of that word, having secured everything it sought below. Indeed, it acknowledges that it intends to file briefs with this Court in support of Ms. Windsor's claims, *see* Addendums A & B to [Form C], No. 12-2435 (2d Cir. June 25, 2012) (ECF No. 22-2), and, as an appellee in the House's appeal, No. 12-2335, it will have ample opportunity to do so.[6]

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[5] Moreover, all of these decisions were entered by a single justice and, therefore, lack precedential value. *E.g.*, Lois J. Scali, *Prediction-Making in the Supreme Court: The Granting of Stays by Individual Justices*, 32 UCLA L. Rev. 1020, 1046 (1985) ("In chambers opinions on stays have no precedential effect on either the lower courts or the Supreme Court.").

[6] *INS v. Chadha*, 462 U.S. 919 (1983), is not to the contrary. In that case, the Supreme Court held that the INS was "sufficiently aggrieved" to appeal a (*Continued* . .)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 12-2335 and 12-2435

EDITH SCHLAIN WINDSOR, IN HER OFFICIAL CAPACITY
AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT

BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
INTERVENOR-DEFENDANT-APPELLANT

On Appeal from the United States District Court For
the Southern District of New York,
Case No. 10-civ-8435

OPPOSITION OF THE UNITED STATES TO MOTION TO DISMISS APPEAL NO. 12-2435

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* * * * *

* * * be enforced by the Executive Branch" until "the judicial branch renders a definitive verdict against the law's constitutionality." Holder Letter at 5.

The Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") intervened in the district court and moved to dismiss plaintiff's equal protection claim. The United States argued that Section 3 violates the Constitution's guarantee of equal protection. The district court declared Section 3 of the DOMA to be invalid, and awarded judgment to Windsor in the amount of $363,053.00. The United States and BLAG both filed appeals, which are consolidated before this Court. *See* D. Ct. Docs. No. 95, 97. BLAG now argues that the appeal of the United States should be dismissed because it is "superfluous" and the Executive Branch lacks standing to appeal because it "prevailed below" and is "not aggrieved." BLAG Mot. to Dismiss at 1.

There is no basis for dismissing the government's appeal because the Executive Branch undeniably has standing to appeal under settled law. While the Executive Branch agrees with the constitutional ruling in the district court, it continues to enforce Section 3 of DOMA pending definitive judicial resolution of its constitutionality, and it was the Executive Branch against whom judgment was entered. Because that judgment prevents the Executive Branch from taking enforcement action it would otherwise take, it is aggrieved by the judgment and has standing to appeal.

The type of adverseness and individualized controversy envisioned by the Framers as a key component of Article III standing is manifestly present here. Because the Executive Branch has standing to appeal, it is unnecessary for the Court to resolve the constitutional issues regarding BLAG's independent standing to pursue its own appeal, No. 12-2335. The Court should follow the Supreme Court's approach in *INS v. Chadha*, 462 U.S. 919 (1983), and resolve the case in its current consolidated posture. Should the Court address the question, however, BLAG lacks standing to appeal the judgment.

STATEMENT

A. Statutory Background.

1. The Defense of Marriage Act ("DOMA") was enacted by Congress in 1996. Section 3 of DOMA defines the terms "marriage" and "spouse" for purposes of federal law:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a

> legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7. Section 3 thereby excludes same-sex relationships from the definition of "marriage" or "spouse" for purposes of federal law, even if that relationship is fully recognized under state law.

* * * * *

* * * guarantee of equal protection.[1] *See* D. Ct. Doc. No. 71, Response to Motion for Summary Judgment.

3. On June 6, 2012, the district court held that Section 3 violates the equal protection component of the Due Process Clause. D. Ct. Doc. No. 93, Order Granting Motion for Summary Judgment (hereinafter "Order"). The court therefore granted the motion for summary judgment and awarded Windsor judgment in the amount of $363,053.00. D. Ct. Doc. No. 94, Judgment; *see* Order at 25. BLAG filed a notice of appeal on June 8, 2012. D. Ct. Doc. No. 95. The United States ultimately agrees with the district court's constitutional ruling, but filed a notice of ap-

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[1] While opposing dismissal, the federal defendants filed a motion to dismiss plaintiff's equal protection claim to ensure the existence of a justiciable case or controversy for the district court to resolve. *See* D. Ct. Doc. No. 49, Motion to Dismiss Amended Complaint. This is consistent with past practice in comparable situations where the Executive Branch declined to defend an Act of Congress.

peal on June 14, 2012, D. Ct. Doc. No. 97, to ensure that the requirements of *Diamond v. Charles*, 476 U.S. 54, 63–64 (1986), are satisfied and that a party with a constitutional stake in the litigation has appealed.

4. The appeals are consolidated before this Court. In an order entered June 22, 2012, this Court expedited briefing and scheduled argument for the week of September 24, 2012. *See* Doc. No. 56. The government joins Windsor's request that the Court "maintain its so ordered briefing schedule" notwithstanding BLAG's motion to dismiss

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* * * the statute was unconstitutional); *see also United States v. Lovett*, 327 U.S. 773 (1946) (granting Solicitor General's petition for a writ of certiorari).

While the government concurs substantively with the district court's conclusion that Section 3 is unconstitutional, the President has directed federal agencies to continue to enforce DOMA "unless and until . . . the judicial branch renders a definitive verdict against the law's constitutionality." Holder Letter at 5. As the Attorney General has explained, "this course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised." *Ibid.* The Executive Branch defendant's briefs in the district court on the constitutional issue did not alter the defendant's decision to comply with the Act, and the district court's order enjoining it from doing so thus prevented it from taking steps it otherwise would have taken. The Executive Branch defendant accordingly is "aggrieved" by the district court judgment for purposes of establishing standing to take an appeal. *See Chadha*, 462 U.S. at 930, 939. And the Executive Branch defendant has suffered the same type of institutional injury that is always present when the federal government is a defendant. *See id.* at 939 ("INS's agreement with the Court of Appeals' decision that § 244(c)(2) is unconstitutional does not affect that agency's 'aggrieved' status for purposes of appealing that decision."); *id.* at 940 n.12 (explaining that in *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Court "found an adequate basis for jurisdiction in the fact that the government intended to enforce the challenged law against that party"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) ("[U]nder Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power.") (quotation marks and citation omitted).

As the *Chadha* Court explained, even "prior to Congress' intervention" in that case, the Executive's decision to comply with the challenged law, despite its view that the law was unconstitutional, created "adequate Art. III adverseness." 462 U.S. at 939. Thus, the Executive Branch defendant, who absent the court's order would enforce Section 3 pursuant to the President's directive, is "aggrieved by a judgment or order of a district court" and therefore "may exercise the statutory right to appeal therefrom." *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 333 (1980). The Executive Branch defendant therefore has standing to appeal, and BLAG's motion to dismiss the government's appeal should be denied.[2]

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[2] As *Chadha* noted, the fact that an agency may agree with the substance of the judgment against it does not "affect that agency's 'aggrieved' status" for purposes of appeal or eliminate the Article III case or controversy. *See* 462 U.S. at 939. And courts frequently hear appeals in cases in which the parties agree on the substance of the issues; in some such cases, the courts appoint amici to present arguments supporting or undermining the lower court's judgment. *See, e.g.*, *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (respondent agreed with petitioner that the lower court had erred, and Supreme Court appointed special counsel to defend judgment under review); *cf. United States v. Lovett*, 328 U.S. 303 (1964) (Supreme Court allowed argument by amicus on (continued . . .)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 12-2335 & 12-2435

EDITH SCHLAIN WINDSOR, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT

BIPARTISAN LEGAL ADVISORY GROUP OF THE
U.S. HOUSE OF REPRESNTATIVES,
INTERVENOR-DEFENDANT-APPELLANT

EDITH SCHLAIN WINDSOR, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT

BIPARTISAN LEGAL ADVISORY GROUP OF THE
U.S. HOUSE OF REPRESENTATIVES,
INTERVENOR-DEFENDANT

Filed: Aug. 14, 2012

REPLY IN SUPPORT OF MOTION OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES TO DISMISS APPEAL NO. 12-2435

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* * * * *

* * * Executive Branch's suggestion that the Court not act on the *independent* petitions of the House and the Senate. *See Chadha*, 454 U.S. 812. The Court granted each of those independent petitions, and never suggested that it would not have granted the one in the absence of the other. *See id.* The House's interest in defending a statute that it passed, with overwhelming bipartisan support only sixteen years ago, is independent of the interests of the Senate, just as it is independent of the interests of the Executive Branch.

2. To the extent it suggests that the House cannot litigate through the Bipartisan Legal Advisory Group, as the House has done for decades,[4] the Executive Branch in the same breath must concede that, in fact, "[t]he House may organize its internal affairs through a committee—or advisory group" as it wishes. Exec.

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[4] The House of Representatives has articulated its institutional position in litigation matters through a five-member bipartisan leadership group since at least the early 1980s (although the formulation of the group's name has changed somewhat over time). *See, e.g., In re Koerner*, 800 F.2d 1358, 1360 (5th Cir. 1986); *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 880 (3d Cir. 1986). Since 1993, the House rules have formally acknowledged and referred to the Bipartisan Legal Advisory Group, as such, in connection with its function of providing direction to the Office of General Counsel. *See, e.g.*, Rule I.11, Rules of the House of Reps., 103d Cong. (1993), attached as Ex. A; Rule II.8, Rules of the House of Reps., 112th Cong. (2011), attached as Ex. B. While the Advisory Group seeks consensus whenever possible, it functions on a majoritarian basis, like the institution it represents, when consensus cannot be achieved.

Br. Opp'n at 17-18. Indeed, it is for the House alone to determine how it will organize those affairs, including how it will appear in litigation.[5]

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[5] As noted, the Advisory Group is a creature of the House of Representatives and its Rules; it exists for the purpose of assisting the Speaker in providing direction to the House Office of General Counsel, which Office litigates on behalf of the House. *See* Ex. B (H.R. Rule II.8) ("The Office of the General Counsel shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships."); *cf.* 2 U.S.C. § 130f(a) (empowering House Office of General Counsel to appear in courts without regard to admission requirements).

The House Rule outlining the functioning of the Advisory Group (Rule II.8), like the other rules of the House, was adopted pursuant to the Rulemaking Clause of the Constitution, *see* U.S. Const. art. I, § 5, cl. 2, which is a "broad grant of authority," *Consumer's Union of U.S. v. Periodical Correspondent's Ass'n*, 515 F.2d 1341, 1343 (D.C. Cir. 1975), that sits "[a]t the very core of our constitutional separation of powers," *Walker v. Jones*, 733 F.2d 923, 938 (D.C. Cir. 1984) (MacKinnon, J., concurring in part and dissenting in part). The Supreme Court has made clear that while House Rules may not ignore constitutional restraints or violate fundamental rights, they otherwise are "absolute and beyond the challenge of any other body or tribunal." *United States v. Ballin*, 144 U.S. 1, 5 (1892).

It follows, therefore, that it is for the House, and the House alone, to determine the means by which it will appear in litigation to vindicate its institutional interests. Neither the Executive Branch nor this Court nor any other Court has the authority to second-guess the House's determination of the means by which it will advocate those interests. *See also, e.g.*, *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1433 (2012) (Sotomayor, J., concurring in part and in judgment) ("Because of the respect due to a coequal and independent department . . . , courts properly resist calls to

3. Finally, none of the additional cases cited by the Executive Branch are contrary to the plain holding of *Chadha*. In *Buckley v. Valeo*, 424 U.S. 1, 138 (1976), the Court made only the point that the House has repeated throughout this litigation: That it generally is the responsibility of the Executive Branch to enforce (including by defending) duly-enacted statutes. The House, pursuant to the Court's * * *

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question the good faith with which another branch attests to the authenticity of its internal acts."); *U.S. v. Munoz-Flores*, 495 U.S. 385, 409-10 (1990) (Scalia, J., concurring in judgment) ("Mutual regard between the coordinate branches, and the interest of certainty, both demand that official representations regarding . . . matters of internal process be accepted at face value.").

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 10-00257 JSW

KAREN GOLINSKI, PLAINTIFF

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT AND JOHN BERRY, DIRECTOR OF THE UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, IN HIS OFFICIAL CAPACITY, DEFENDANTS

Filed: Dec. 16, 2011
9:56 a.m.

TRANSCRIPT OF PROCEEDINGS

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JON W. DAVIDSON, ESQ.

* * * * *

[10] afforded to State marital status determinations. And I have this citing, *Elk Grove Unified School District versus Newdow* case, N-E-W-D-O-W, holding that "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." See also *Boggs v. Boggs*, B-O-G-G-S, holding that family law, including "declarations of status, for example, marriage, annulment, divorce, custody and paternity," is the archetypal area of local concern.

Question 1. a: As DOMA represents a stark departure from the federalist tradition and implicates a core State power to govern domestic relations, is there any authority for the Court to subject the statute to a more rigorous constitutional scrutiny?

1. b: The few unique examples cited by BLAG -B-L-A-G- when Congress legislated in the area of domestic relations occurred when Congress was explicitly acting in the role of state government. Are there any historical examples in which Congress legislated on behalf of the federal government, in the area of domestic relations?

Now, I usually don't do this much talking, ever, but certainly not in court, except when I'm giving jury instructions. But I think it's important because the parties have given the Court additional materials.

With respect to Question 1.a, and as interpreted by

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[17] further in response to what BLAG has stated?

MR. WEST: No, Your Honor.

THE COURT: All right.

MS. LIN: I'm sorry.

THE COURT: Let's go to Question 1.b, and I was going to put that question, in the first instance, to BLAG.

MS. BORELLI: Sure. And, just to tack on to what was discussed—

THE COURT: Yes.

MS. BORELLI: —we agree with the Court's reading of *De Sylva versus Ballentine.* In the majority opinion, the Court says: There is no federal law of domestic relations; it is a matter of state law. So we agree with the Court's reading on that.

THE COURT: All right.

MS. BORELLI: To turn to Question b—

THE COURT: Actually, I actually wanted BLAG to answer this in the first instance.

MS. BORELLI: I apologize.

THE COURT: I'll give you an opportunity, because I think the questions, the way I framed the question was to challenge one side or the other, and then give the other an opportunity to say, you know, whatever they want to say.

So I'll start with BLAG, and then you will have an a full opportunity.

[18] Counsel?

MR. DUGAN: Your Honor, our research hasn't shown that there are historical examples which Congress has legislated on behalf of the federal government in the area of domestic relations. We would, of course, go back to fact that the federal government today does, and has in the past, drawn lines about which particular relationships that states define that they'll recognize.

THE COURT: All right. Mr. West?

MR. WEST: But, what is not the case, we have not seen historically, is the federal government picking and choosing which set of legally married couples, similarly situated, may receive benefits and be denied benefits simply on the basis of sexual orientation or simply on the basis of something that might be unpopular. And so, we've not seen that historically, and that is why we think this case, which presents that question squarely, is particularly a good one for that analysis.

THE COURT: All right. Counsel?

MS. BORELLI: Your Honor, to the extent the Court is not aware of it, there was an amicus brief submitted on behalf of family law professors in the Commonwealth and Gill cases on appeal before the

First Circuit, and it addresses in great detail this particular question. And that brief actually takes

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[38] orientation, has declined to make this distinction between conduct and status. *Christian Legal Society, Lawrence,* the Court has declined to make that kind of distinction.

And if—if the Court were to entertain that distinction, perhaps this idea that a conjunctive analysis is required in order to find suspect classifications, then maybe that would be true. But we know from the Court's own analysis in the way that it deals with classifications, that that is not the case.

THE COURT: Anything further you want to say?

MS. BORELLI: We agree with those points, Your Honor. And the very cases that BLAG cites for its argument that each and everyone of these considerations must be looked at by a court, those very cases undercut BLAG's point. They all talk about these considerations with the disjunctive word "or," not the conjunctive word "and."

We can look at a body of cases that show us, for example, with respect to immutability, out of the six classifications that have been held to require some form of heightened scrutiny, at least three of them—religion, legitimacy, and alienage—are subject to change. That shows us exactly how flexibly the court has looked at these factors.

THE COURT: All right. Let's move on to Question No.5. I'm going to read the question, and then I want to make a comment about Question No. 5.

[39]

What is the statutory authority for an evidence of compliance with the role that Bipartisan Legal Advisory Group has assumed in this matter? Is this group actually bipartisan? Does BLAG have the support—and funding for the increasing cost of defending DOMA—from a majority of Congress, or just from the House of Representatives? See *Immigration and Naturalization Service versus Chadha*, C-H-A-D-H-A, holding that Congress is the proper party to defend the validity of a statute when an agency of the government charged with enforcing the statute agrees that the statute is unconstitutional.

Now, the additional authority cited by BLAG regarding the group's authority to support the statute in court are, for the most part, frankly, not helpful. The Court is not concerned about enforcement of the disciplinary rules of the House of Representatives. Rather, the Court is concerned about the authority of the House alone, rather than the majority of both houses of Congress, to defend this statute in court. This Court is also concerned whether the House followed correct protocol in hiring and continuing to fund the group that appears here.

And, I'll give you an opportunity to respond first.

MR. DUGAN: Thank you. Thank you, Your Honor. I think that question is probably most centrally directed to us, so I'll get to it.

There is no statutory authority. There's [40] constitutional authority, and that authority is the rulemaking clause that each house can make rules that determine its proceedings. And, under those rules, the House has—has established an Office of General Counsel for the purpose of providing legal assistance and representation to the House. And the Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with the Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships.

So, to answer your question, Your Honor, is it bipartisan? Yes, it is. It is made up of five members. And, in a three-to-two vote, BLAG decided to defend a law that the Department of Justice decided it wasn't going to defend anymore.

THE COURT: Let me ask you this. I'll let you finish your argument—

MR. DUGAN: Sure.

THE COURT: But, I read the cases that you cites. And, again, it is a little bit of an academic discussion, because the Court has granted BLAG's motion to intervene. The Court is going to consider the very eloquent arguments that Counsel has made. It is very helpful to the Court.

But, we're dealing with the three branches of government. And I think, as one of the coequal branches—some might not always agree with that, but we are a coequal [41] branch—I'm obliged to ask that.

And, I didn't see any case where—that you've cited that's right on point, where only the House which happens to have a majority in its favor on this question brings the action, and it is upheld on constitutional basis, that the House is the appropriate party to defend a statute in the absence of the Senate that is not supported by the executive branch.

So, that's really where the question comes from.

MR. DUGAN: And, Your Honor, there are several answers to that. First of all, the—the statute that requires notification from the Department of Justice when it's not going to defend a law that it's constitutionally obligated to defend contemplates that either the House or the Senate, alone or jointly, will be able to defend laws.

The one case that we cited, and I—Your Honor, I think maybe it's because the question wasn't actually answered there, but this *Coors* case, which the House went at it alone. The Senate was not involved; the House was.

And another thing I would like to address is just this idea of the bipartisanship. And, we can provide this to the Court. But, we have gone searching through the House briefs. We have discovered and we know of at least nine separate occasions when there's been a split vote in the BLAG—usually three to two, one time four to one—where the [42] House has still filed briefs.

THE COURT: All right. I don't know if the executive branch has a dog in this race, but I'll certainly give you an opportunity to respond.

MR. WEST: Your Honor, I just wanted to correct one thing—or probably several things, but I'll only take the opportunity to correct one—that BLAG made. And that is the Department of Justice, the Executive, is not constitutionally obligated to defend the statute that it believes is unconstitutional. And, we can certainly imagine cases where it would be important for both the House and the Senate to be of one mind if they were to take up the defense of the constitutionality of the statute.

We think, however, this is not a case where the Court needs to resolve that issue because the United States, which is the Defendant here, has taken steps to perfect the ability for BLAG to come in and make these arguments for the benefit of the Court, for the benefit of the Record. And certainly, no party has objected to BLAG's participation for the specific purpose of presenting arguments in defense of the Defense of Marriage Act.

THE COURT: Do you wish to say anything at this point?

MS. BORELLI: To be clear, Your Honor, BLAG does not represent the House. They are a five-member committee [43] operating here by a vote of three of their members, and I think it is important for that to be clarified.

THE COURT: Although, in fairness to them, the rules provide that, in effect, they are representing the House when they constitute this group, and there was a majority vote of that group, correct?

They may not, sort of in a macro sense, represent the entire House, each and every member. But that's the way democracy works. Isn't that true?

MS. BORELLI: You know, I have counsel here who's actually a bit more versed with the rules. And if the Court wanted to hear more, he would be happy to address it.

THE COURT: Well, I would, actually. I would like to complete the Record on this issue. Again, it's a little bit, one would say, academic, but I don't think so, given the important features implicated and the way this case has been litigated.

Counsel, would you identify yourself, also.

MR. DAVIDSON: Sure. John Davidson.

The rule of the House that refers to BLAG, and it's really the only thing that we've been able to find that describes BLAG in any fashion, it's—BLAG is not identified in any statute or in anything other than the one roll of Congress which was submitted by BLAG, refers to BLAG as an advisory committee to the Speaker, and says that the Speaker [44] may direct the House counsel to take action.

But it does not give any authority to BLAG to take any action, other than to advise the Speaker. So, I think that does raise a question about BLAG's authority to do anything on behalf of the House, itself.

But again, we, too, don't have much of a dog in this race. That is, we—we have not objected to BLAG intervening in this, before this Court, and that's because we do believe it's important to have a full-throated explanation of the position of even some members of Congress, on this position, so that the Court really considers all of the arguments that could be considered on this very important issue.

THE COURT: All right, fair enough. Let's move on. I have all I need on that question.

Let's move on to Question No. 6: How does BLAG distinguish the ruling in *Gill versus Office of Personnel*—that's G-I-L-L—*versus Office of Personnel Management*, which is obviously the District of Massachusetts case, which found that DOMA does not pass constitutional muster under even rational basis scrutiny?

Start with *you*, again.

MR. DUGAN: We get to start again, Your Honor, thank you.

THE COURT: You're on the hot seat.

MR. DUGAN: Well, we don't distinguish, and we think

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SUPREME COURT OF THE UNITED STATES

No. 71-1027

RICHARD JOHN BAKER, ET AL., APPELLANTS

v.

GERALD R. NELSON, APPELLEE

Filed: Feb. 10, 1972

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

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Attorneys for Appellants

INDEX

Page

JURISDICTIONAL STATEMENT

Opinions Below ....[1]
Jurisdiction ....[2]
Statutes Involved ....[2]
Questions Presented ....[3]
Statement of the Case ....[3]
How the Federal Questions Were Raised ....[6]
The Questions Are Substantial ....[6]
I. Respondent's refusal to sanctify appellants' marriage deprives appellants of liberty and property in violation of the due process and equal protection clauses ....[11]
II. Appellee's refusal to legitimate appellants' marriage constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments ....[18]
CONCLUSION ....[19]

APPENDIX

Statutes Involved

Chapter 517, Minnesota Statutes ....[1a]
Alternative Writ of Mandamus ....[10a]
Order Quashing the Writ ....[12a]
Amended Order, Findings and Conclusions ....[14a]
Opinion of the Minnesota Supreme Court, Hennepin County ....[18a]

TABLE OF AUTHORITIES

Cases:

Bates v. City of Little Rock, 361 U.S. 516 (1960) .... [12]
Boddie v. Connecticut, 401 U.S. 371 (1971) .... [11, 12, 13, 19]
Cohen v. California, 403 U.S. 15 (1971) .... [14]
Griswold v. Connecticut, 381 U.S. 479 (1965) .... [11, 12, 13, 14, 18, 19]

Jones v. Hallihan, W-152-70 (Ct. Apps. Ky. 1971) .... [10]
Loving v. Virginia, 388 U.S. 1 (1967) .... [11, 12, 13, 14, 15, 16, 18, 19]
McLaughlin v. Florida, 379 U.S. 184 (1964) .... [13,16,18]
Meyer v. Nebraska, 262 U.S. 535 (1923) .... [11,12,13]
Mindel v. United States Civil Service Commission,312 F. Supp. 485 (N.D. Cal. 1970) .... [18]
Reed v. Reed, 92 S. Ct. 251, 30 L. ed.2d 225 (1971) .... [13, 16, 17, 18]
Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) .... [17]
Shapiro v. Thompson, 394 U.S. 618 (1969) .... [16]
Shelton v. Tucker, 364 U.S. 479 (1960) .... [14]
Skinner v. Oklahoma, 316 U.S. 535 (1942) .. [11,12,13]
Street v. New York, 394 U.S. 576 (1969) .... [14]

Constitutional Provisions:

United States Constitution

First Amendment .... [5,6]

Eighth Amendment .... [5,6]

Ninth Amendment .... [3, 5, 6, 18, 19]

Fourteenth Amendment ..[3, 5, 6, 11, 13, 17, 18, 19]

Rule:

Minn. R. Civ. P. 52.01 .... [5]

Federal Statute:

28 U. S. C. §1257(2) .... [2]

State Statute:

Minnesota Statutes

Chapter 517 .... [2, 4, 6, 13]

Other Authorities:

Abrahamsen, Crime and the Human Mind 117 (1944) .... [9]

Churchill, Homosexual Behavior Among Males 19

(1969) .... [8]

Final Report of the Task Force on Homosexuality of the National Institute of Mental Health, October 10, 1969 .... [9]

Finger, *Sex Beliefs and Practices Among Male College Students*, 42 J. ABNORMAL AND SOCIAL PSYCH. 57 (1947) .... [7]

Freud, 107 Am. J. of Psychiatry 786 (1951) (reprinted) .... [10]

Hart, Law, Liberty and Morality 50 (1963) .... [9]

James, The Varieties of Religious Experience, lectures XI, XII, XIII (1902) .... [8]

KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948) .... [7]

Westermarck, 2 Origin and Development of the Moral Idea 484 (1926) .... [8]

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Minnesota, entered on October 15, 1971, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Court of Minnesota is reported at 191 N.W.2d 185. The opinion of the District Court for Hennepin County is unreported. Copies of the opinions are set out in the Appendix, *infra*, pp. 10a-17a and 18a-23a.

Jurisdiction

This suit originated through an alternative writ of mandamus to compel appellee to issue the marriage license to appellants. The writ of mandamus was quashed by the Hennepin County District Court on January 8, 1971. On appeal, the judgment of the Supreme Court of Minnesota affirming the action of the District Court was entered on October 15, 1971. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Minnesota on January 10, 1972. The time in which to file this Jurisdictional Statement was extended on January 12, 1972, by order of Justice Blackmun.

The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28 U.S.C., Section 1257(2).

Statutes Involved

Appellants have never been advised by appellee which statute precludes the issuance of the marriage license to them, and the Supreme Court of Minnesota cites only Chapter 517, Minnesota Statutes, in its opinion. Accordingly, the whole of Chapter 517 is reproduced in App., *infra*, pp. 1a-9a.

Questions Presented

1. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
3. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Statement of the Case[1]

Appellants Baker and McConnell, two persons of the male sex, applied for a marriage license on May 18,

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[1] T. refers to the trial transcript. A. refers to the Appendix to appellants' brief before the Minnesota Supreme Court.

1970 (T. 9; A. 2, 4) at the office of the appellee Clerk of District Court of Hennepin County[2] (T. 10).

Upon advice of the office of the Hennepin County Attorney, appellee accepted appellants' application and thereupon requested a formal opinion of the County Attorney (A. 7-8) to determine whether the marriage license should be issued. In a letter dated May 22, 1970, appellee Nelson notified appellant Baker he was "unable to issue the marriage license" because "sufficient legal impediment lies thereto prohibiting the marriage of two male persons" (A. 1; T. 11). However, neither appellant has ever been informed that he is individually incompetent to marry, and no specific reason has ever been given for not issuing the license.

Minnesota Statutes, section 517.08 states that *only* the following information will be elicited concerning a marriage license: name, residence, date and place of birth, race, termination of previous marriage, signature of applicant and date signed. Although they were asked orally at the time of application which was to be the bride and which was to be the groom (T. 15; T. 18), the forms for application for a marriage license did not inquire as to the sex of the applicants. However, appellants readily concede that both are of the male sex.

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[2] Appellant McConnell is also petitioner before this Court in *McConnell* v. *Anderson*, petit. for cert. filed, No. 71-978 in which he seeks review of the decision of the United States Court of Appeals for the Eighth Circuit, allowing the Board of Regents of the University of Minnesota to refuse him employment as head of the catalogue division of the St. Paul Campus Library on the grounds that "His personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University."

The efforts of appellants to get married evidently precipitated the Regents' decision not to employ Mr. McConnell.

Subsequent to the denial of a license, appellants consulted with legal counsel. On December 10, 1970, appellants applied to the District Court of Hennepin County for an alternative writ of mandamus (A. 2), and such a writ was timely served upon appellee. Appellee Nelson continued to refuse to issue the appellants a marriage license. Instead, he elected to appear in court, show cause why he had not done as commanded, and make his return to the writ (A. 4).

The matter was tried on January 8, 1971, in District Court, City of Minneapolis, Judge Tom Bergin presiding (T.1). Appellants Baker and McConnell testified on their own behalf (T. 9; T. 15) as the sole witnesses. After closing arguments, he quashed the writ of mandamus and ordered the Clerk of District Court "not to issue a marriage license to the individuals involved" (T. 19). An order was signed to that effect the same day (App. *infra*, p. 12a).

Subsequent to the trial, counsel for appellants moved the court to find the facts specially and state separately its conclusions of law pursuant to Minn. R. Civ. P. 52.01. Judge Bergin then made certain findings of fact and conclusions of law (App. *infra*, p. 14a) in an amended order dated January 29, 1971. Such findings and conclusions were incorporated into and made part of the order signed January 8, 1971. The Court found that the refusal of appellee to issue the marriage license was not a violation of M.S. Chapter 517, and that such refusal was not a violation of the First, Eighth, Ninth or Fourteenth Amendments to the U. S. Constitution.

A timely appeal was made to the Supreme Court of Minnesota. In an opinion filed October 15, 1971, the Supreme Court of Minnesota affirmed the action of the lower court.[3]

How the Federal Questions Were Raised

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[3] In early August, 1971, Judge Lindsay Arthur of Hennepin County Juvenile Court issued an order granting the legal adoption of Mr. Baker by Mr. McConnell. The adoption permitted Mr. Baker to change his name from Richard John Baker to Pat Lynn McConnell. On August 16, Mr. Michael McConnell alone applied for a marriage license in Mankato, Blue Earth County, Minnesota for himself and Mr. Baker, who used the name Pat Lynn McConnell. Under Minnesota law, only one party need apply for a marriage license. Since the marriage license application does not inquire as to sex, the bisexual name of Pat Lynn McConnell doubtless kept the clerk from making any inquiry about the sexes of the parties. Shortly after the license issued, Mr. McConnell's adoption of Mr. Baker was made public by Judge Arthur—contrary to Minnesota law. The County Attorney for Blue Earth County then discovered that a marriage license had issued to the appellants, and on August 31, he "declared the license void on statutory grounds." Nevertheless, on September 3, the appellants were married in a private ceremony in South Minneapolis. About a week later the license was sent to the Blue Earth County Clerk of District Court. It is not known whether he filed it, but under the Minnesota statute filing is not required. Further, filing does not affect validity.

Appellants contended that if Minnesota Statutes, Chapter 517, were construed so as to not allow two persons of the same sex to marry, then the Statutes were in violation of the First, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution in their Alternative Writ of Mandamus (App. *infra*, pp. 10a-11a), at the hearing before the Hennepin County District Court on January 8, 1971 (App. *infra*, p. 12a), and to the Supreme Court of Minnesota (App. *infra*, p. 18a). These constitutional claims were expressly considered and rejected by both courts below.

The Questions Are Substantial

The precise question is whether two individuals, solely because they are of the same sex, may be refused formal legal sanctification or ratification of their marital relationship.

At first, the question and the proposed relationship may well appear bizarre—especially to heterosexuals. But neither the question nor the proposed relationship is bizarre. Indeed, that first impulse provides us with some measure of the continuing impact on our society of prejudice against non-heterosexuals. And, as illuminated within the context of this case, this prejudice has severe consequences.

The relationships contemplated is neither grotesque nor uncommon. In fact, it has been established that homosexuality is widespread in our society (as well as all other societies). Reliable studies have indicated that a significant percentage of the total adult population of the United States have engaged in overt homosexual practices. Numerous single sex marital relationships exist de facto. See, e.g., A. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); Finger, *Sex Beliefs and Practices Among Male College Students*, 42 J. ABNORMAL AND SOCIAL PSYCH. 57 (1947). The refusal to sanction such relationships is a denial of reality. Further, this refusal denies to many people important property and personal interests.

This Jurisdictional Statement undertakes to outline the substantial reasons why persons of the same sex would want to be married in the sight of the law. Substantial property rights, and other interests, frequently turn on legal recognition of the marital relationship. Moreover, both the personal and public symbolic importance of legal ratification of same sex marriages cannot be underestimated. On the personal side, how better may two people pledge love and devotion to one another than by marriage. On the public side, prejudice against homosexuals, which tends to be phobic, is unlikely to be cured until the public acknowledges that homosexuals, like all people, are entitled to the full protection and recognition of the law. Only then will the public perceive that homosexuals are not freaks or unfortunate abberations, to be swept under the carpet or to be reserved for anxious phantasies about one's identity or child rearing techniques.

A vast literature reveals several hypotheses to explain the deep prejudice against homosexuals. One authority maintained that hostility to homosexual conduct was originally an "aspect of economics," in that it reflected the economic importance of large family groupings in pastoral and agricultural societies. E.

Westermarck, 2 Origin and Development of the Moral Idea 484 (1926). A second theory suggests that homosexuality was originally forbidden by the "early Hebrews" as part of efforts to "surround the appetitive drives with prohibitions." W. Churchill, Homosexual Behavior Among Males 19 (1969). Under this theory, opposition to homosexuality was closely related to religious imperatives, in particular the need to establish moral superiority over pagan sects. *Id.*, at 17; see also W. James, The Varieties of Religious Experience, lectures XI, XII, XIII (1902).

Whatever the appropriate explanation of its origins, psychiatrists and sociologists are more nearly agreed on the reasons for the persistence of the hostility. It is one of those "ludicrous and harmful" prohibitions by which virtually all sexual matters are still reckoned "socially taboo, illegal, pathological, or highly controversial." W. Churchill, *supra*, at 26. It continues, as it may have begun, quite without regard to the actual characteristics of homosexuality. It is nourished, as are the various other sexual taboos, by an amalgam of fear and ignorance. *Id.*, at 20-35. It is supported by a popular conception of the causes and characteristics of homosexuality that is no more deserving of our reliance than the Emperor Justinian's belief that homosexuality causes earthquakes. H. Hart, Law, Liberty and Morality 50 (1963).

There is now responsible evidence that the public attitude toward the homosexual community is altering. Thus, the Final Report of the Task Force on Homosexuality of the National Institute of Mental Health, October 10, 1969, states (pp. 18-19):

> "Although many people continue to regard homosexual activities with repugnance, there is evidence that public attitudes are changing. Discreet homosexuality, together with many other aspects of human sexual behavior, is being recognized more and more as the private business of the individual rather than a subject for public regulation through statute. Many homosexuals are good citizens, holding regular jobs and leading productive lives."

To a certain extent the new attitudes mirror increasing scientific recognition that homosexuals are "normal," and that accordingly to penalize individuals for engaging in such conduct is improper. For example, in D. Abrahamsen, Crime and the Human Mind 117 (1944), it is stated:

> "All people have originally bisexual tendencies which are more or less developed and which in the course of time normally deviate either in the direction of male or female. This may indicate that a trace of homosexuality, no matter how weak it may be, exists in every human being."

Sigmund Freud summed up the present overwhelming attitude of the scientific community when he wrote as follows in 1935:

> "Homosexuality is assuredly no advantage but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a

certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime and cruelty too." Reprinted in 107 Am. J. of Psychiatry 786-87 (1951).

In the face of scientific knowledge and changing public attitudes it is plainly, as Freud said, "a great injustice" to persecute homosexuals.

This injustice is compounded, we suggest, by the fact that there is no justification in law for the discrimination against homosexuals. Because of abiding prejudice, appellants are being deprived of a basic right—the right to marry. As a result of this deprivation, they have been denied numerous benefits awarded by law to others similarly situated—for example, childless heterosexual couples.

Since this action has been filed, others have been instituted in other states.[4] This Court's decision, therefore, would affect the marriage laws of virtually every State in the Union.

I.

Respondent's refusal to sanctify appellants' marriage deprives appellants of liberty and property in violation of the due process and equal protection clauses.

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[4] See, e.g., *Jones* v. *Hallihan*, W-152-70 (Ct. Apps. Ky. 1971).

The right to marry is itself a fundamental interest, fully protected by the due process and equal protection clauses of the Fourteenth Amendment. See *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942) ; *Meyer* v. *Nebraska*, 262 U.S. 535 (1923). In addition, significant property interests, also protected by the due process clause, flow from the legally ratified marital relationship. In his testimony at the trial, the appellant Baker enumerated six such interests which he cannot enjoy because of the State's refusal to recognize his marriage to the appellant McConnell:

1. The ability to inherit from one another by intestate succession.

2. The availability of legal redress for the wrongful death of a partner to a marriage.

3. The ability to sue under heartbalm statutes where in effect.

4. Legal (and consequently community) recognition for their relationship.

5. Property benefits such as the ability to own property by tenancy-by-the-entirety in states where permitted.

6. Tax benefits under both Minnesota and federal statutes. (Among others, these include death tax benefits and income tax benefits—even under the revised Federal Income Tax Code.)

There are innumerable other legal advantages that can be gained only in the marital relationship. Only a few of these will be listed for illustrative purposes. Some state criminal laws prohibit sexual acts between unmarried persons. Many government benefits are available only to spouses and to surviving spouses. This is true, for example, of many veterans benefits. Rights to public housing frequently turn on a marital relationship. Finally, when there is a formal marital relationship, one spouse cannot give or be forced to give evidence against the other.

The individual's interests, personal and property, in a marriage, are deemed fundamental. See, e.g., *Boddie* v. *Connecticut, supra; Loving* v. *Virginia, supra; Griswold* v. *Connecticut, supra; Skinner* v. *Oklahoma, supra; Meyer* v. *Nebraska, supra.* Thus marriage comprises a bundle of rights and interests, which may not be interfered with, under the guise of protecting the public interest, by government action which is arbitrary or invidious or without at least a reasonable relation to some important and legitimate state purpose. E.g. *Meyer* v. *Nebraska, supra.* In fact, because marriage is a fundamental human right, the state must demonstrate a subordinating interest which is compelling, before it may interfere with or prohibit marriage. Cf. *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960).

In a sense, the analysis presented here involves a mixing of both due process and equal protection doctrines. As they are applied to the kind of government disability at issue in this case, however, they tend to merge. Refusal to sanctify a marriage solely because both parties to the relationship are of the same sex is precisely the kind of arbitrary and invidiously discriminatory conduct that is prohibited by the Fourteenth Amendment equal protection and due process clauses. Unless the refusal to sanctify can be shown to further some legitimate government interest, important personal and property rights of the persons who wish to marry are arbitrarily denied without due process of law, and the class of persons who wish to engage in single sex marriates are being subject to invidious discrimination. With regard to the due process component, see *Boddie* v. *Connecticut, supra; Griswold* v. *Connecticut, supra* (all the majority opinions); *Meyer* v. *Nebraska, supra.* With regard to the equal protecttion component of this argument, see *Loving* v. *Virginia, supra; McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Skinner* v. *Oklahoma, supra;* cf. *Reed* v. *Reed,* 92 S. Ct. 251, 30 L. ed.2d 225 (1971).

Applying due process notions, in this case, the state has not shown any reason, much less a compelling one, for refusing to sanctify the marital relationship. Its action, therefore, arbitrarily invades a fundamental right.

Separately, each appellant is competent to marry under the qualifications specified in Minnesota Statutes Sections 517.08, subd. 3, 517.02-517.03. Compare *Loving* v. *Virginia, supra.* Why, then, do they become incompetent when they seek to marry each other?

The problem, according to the Minnesota Supreme Court, appears to be definitional or historical. The institution of marriage “as a union of a man and a woman, uniquely involving the procreation and rearing of children within a family, is as old as the Book of Genesis” (App., *infra*, pp. 20a-21a). On its face, however, Minnesota law neither states nor implies this definition. Furthermore, the antiquity of a restriction certainly has no bearing on its constitutionality, and does not, without anything additional, demonstrate that the state's interest in encumbering the marital relationship is subordinating and compelling. Connecticut's restriction on birth control devices had been on its statute books for nearly a century before this Court struck it down on the ground that it unconstitutionally invaded the privacy of the marital relationship. *Griswold* v. *Connecticut*, *supra*.

Surely the Minnesota Supreme Court cannot be suggesting that single sex marriages may be banned because they are considered by a large segment of our population to be socially reprehensible. Such a governmental motive would be neither substantial, nor subordinating nor legitimate. See, e.g., *Loving* v. *Virginia*, *supra*; *Cohen* v. *California*, 403 U.S. 15 (1971); *Street* v. *New York*, 394 U.S. 576 (1969).

Even assuming that government could constitutionally make marriageability turn on the marriage partners' willingness and ability to procreate and to raise children, Minnesota's absolute ban on single sex marriages would still be unconstitutional. “[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). There is nothing in the nature of single sex marriages that precludes procreation and child rearing. Adoption is quite clearly a socially acceptable form of procreation. It already renders procreative many marriages between persons of opposite sexes in which the partners are physically or emotionally unable to conceive their own children. Of late, even single persons have become eligible to be adoptive parents.

Appellants submit therefore, that the appellee cannot describe a legitimate government interest which is so compelling that no less restrictive means can be found to secure that interest, if there is one, than to proscribe single sex marriages. And, even if the test to be applied to determine whether the Minnesota proscription offends due process involves only questions of whether Minnesota has acted arbitrarily, capriciously or unreasonably, appellants submit that the appellee has failed under that test too. Minnesota's proscription simply has not been shown to be rationally related to any governmental interest.

The touchstone of the equal protection doctrine as it bears on this case is found in *Loving* v. *Virginia*, 388 U.S. 1 (1967). The issue before the Court in that case was whether Virginia's anti-miscegenation statute, prohibiting marriages between persons of the Caucasian race and any other race was unconstitutional. The Court struck down the statute saying:

> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. *Loving* v. *Virginia*, 388 U.S. at 11-12.

The Minnesota Supreme Court ruled that the *Loving* decision is inapplicable to the instant case on the ground that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex" (App., *infra*, p. 23a). It is true that the inherently suspect test which this Court applied to classifications based upon race (see, e.g., *Loving* v. *Virginia*, *supra*; *McLaughlin* v. *Florida*, *supra)*, has not yet been extended to classifications based upon sex (see *Reed* v. *Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971)). However, this Court has indicated that when a fundamental right—such as marriage—is denied to a group by some classification, the denial should be judged by the standard that places on government the burden of demonstrating a legitimate subordinating interest that is compelling. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

As we have already indicated neither a legitimate nor a subordinating reason for this classification has been or can be ascribed.

Even if we assume that the classification at issue in this case is not to be judged by the more stringent "constitutionally suspect" and "subordinating interest" standards, the Minnesota classification is infirm.

The discrimination in this case is one of gender. Especially significant in this regard is the Court's recent decision in *Reed* v. *Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971), which held that an Idaho statute, which provided that as between persons equally qualified to administer estates males must be preferred to females, is violative of the equal protection clause of the Fourteenth Amendment. There the Court said (30 L. ed.2d at 229):

> In applying that clause, this Court has consistently recognized that the Fourteenth amendment does not deny to States the power to treat different classes of persons in different ways. [Citations omitted.] The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objecttive of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be

> treated alike." *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).

Childless same sex couples, for example, are "similarly circumstanced" to childless heterosexual couples. Thus, under the *Reed* and *Royster* cases, they must be treated alike.

Even when judged by this less stringent standard, the Minnesota classification cannot pass constitutional muster. First, it is difficult to ascertain the object of the legislation construed by the Minnesota courts. Second, whatever objects are ascribed for the legislation do not bear any fair and substantial relationship to the ground upon which the difference is drawn between same sex and different sex marriages.[5]

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[5] The fact that the parties to the desired same sex marriage are not barred from marriage altogether is irrelevant to the constitutional issue. See *Reed* v. *Reed*, *supra*; *Loving* v. *Virginia*, *supra*; *McLaughlin* v. *Florida*, *supra*.

II.

Appellee's refusal to legitimate appellants' marriage constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments.

Marriage between two persons is a personal affair, one which the state may deny or encumber only when there is a compelling reason to do so. Marriage and marital privacy are substantial rights protected by the Ninth Amendment as well as the Fourteenth Amendment due process clause. By not allowing appellants the legitimacy of their marriages, the state is denying them this basic right and unlawfully meddling in their privacy.

> To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

Griswold v. *Connecticut*, 381 U.S. 479, 491-492 (Goldberg, J., concurring) ; see also, *Mindel* v. *United States Civil Service Commission*, 312 F. Supp. 485 (N.D. Cal. 1970). Accordingly, Minnesota's refusal to legitimate the appellants' marriage merely because of the sex of the applicants is a denial of the right to marry and to privacy reserved to them of the Ninth and Fourteenth Amendments. See *Griswold* v. *Connecticut*, *supra*; *Loving* v. *Virginia*, 388 U.S. 1 (1967); cf. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). Indeed, it is the most fundamental invasion of the privacy of the marital relationship for the state to attempt to scrutinize the internal dynamics of that relationship. Absent a showing of compelling interest, or an invitation from a party to the relationship, it is none of the state's business whether the individuals to the relationship intend to procreate or not. Nor is it the state's business to determine whether the parties intend to engage in sex acts or any particular sex acts. Cf., e.g., *Griswold* v. *Connecticut*, *supra*.

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted.

Respectfully submitted,

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[Appendix Omitted]

* * * * *

H. Res. 5

In the House of Representatives, U. S.,

January 3, 2013.

Resolved, That the Rules of the House of Representatives of the One Hundred Twelfth Congress, including applicable provisions of law or concurrent resolution that constituted rules of the House at the end of the One Hundred Twelfth Congress, are adopted as the Rules of the House of Representatives of the One Hundred Thirteenth Congress, with amendments to the standing rules as provided in section 2, and with other orders as provided in sections 3, 4, and 5.

* * * * *

SEC. 4. COMMITTEES, COMMISSIONS, AND HOUSE OFFICES.

(a) LITIGATION MATTERS.—

(1) CONTINUING AUTHORITY FOR THE BIPARTISAN LEGAL ADVISORY GROUP.—

(A) The House authorizes the Bipartisan Legal Advisory Group of the One Hundred Thirteenth Congress—

(i) to act as successor in interest to the Bipartisan Legal Advisory Group of the One Hundred Twelfth Congress with respect to civil actions in which it intervened in the One Hundred Twelfth Congress to defend the constitutionality of section 3 of the Defense of Marriage Act (1 U.S.C. 7) or related provisions of titles 10, 31, and 38, United States Code, including in the case of Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. June 6, 2012), aff'd, 699 F.3d 169 (2d Cir. Oct. 18, 2012), cert. granted, No. 12–307 (Dec. 7, 2012), cert. pending No. 12–63 (July 16, 2012) and 12–785 (Dec. 28, 2012);

(ii) to take such steps as may be appropriate to ensure continuation of such civil actions; and

(iii) to intervene in other cases that involve a challenge to the constitutionality of section 3 of the Defense of Marriage Act or related provisions of titles 10, 31, and 38, United States Code.

(B) Pursuant to clause 8 of rule II, the Bipartisan Legal Advisory Group continues to speak for, and articulate the institutional position of, the House in all litigation matters in which it appears, including in Windsor v. United States.

* * * * *

PETITIONER'S
BRIEF

No. 12-307

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES ON THE JURISDICTIONAL QUESTIONS

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QUESTIONS PRESENTED

1. Whether the Executive Branch's agreement with the court below that Section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, is unconstitutional deprives this Court of jurisdiction to decide this case.

2. Whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.

PARTIES TO THE PROCEEDING

Petitioner, the United States, was a defendant in the district court and an appellant in the court of appeals. The private individual respondent, Edith Schlain Windsor, was the plaintiff in the district court and an appellee in the court of appeals. Respondent Bipartisan Legal Advisory Group of the United States House of Representatives intervened in defense of the constitutionality of Section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 2
Statement 2
Summary of argument 6
Argument:
- I. This Court has jurisdiction to decide this case 9
  - A. The district court had jurisdiction over plaintiff's suit 10
  - B. The United States properly invoked the court of appeals' and this Court's jurisdiction 12
    - 1. The Department of Justice has constitutional and statutory authority to represent the full sovereign interests of the United States in this case 13
    - 2. The United States is aggrieved by the invalidation of Section 3 and the requirement to refund plaintiff's taxes 14
    - 3. The United States has Article III standing to seek further review 18
    - 4. The parties have a continuing controversy 20
- II. BLAG lacks Article III standing to seek review of the lower courts' decisions 27
  - A. BLAG does not represent the interests of the United States 27
  - B. BLAG has suffered no independent Article III injury 29
  - C. *Chadha* does not establish BLAG's standing to appeal 34

Conclusion 38
Appendix — Constitutional and statutory provisions 1a

TABLE OF AUTHORITIES

Cases: Page

Allen v. *Wright*, 468 U.S. 737 (1984) 11
Already, LLC v. *Nike, Inc.*, 133 S. Ct. 721 (2013) 11
Arizonans for Official English v. *Arizona*, 520 U.S. 43 (1997) 36
ASARCO, Inc. v. *Kadish*, 490 U.S. 605 (1989) 20, 23
Bob Jones Univ. v. *United States*, 461 U.S. 574 (1983) 27
Bowsher v. *Synar*, 478 U.S. 714 (1986) 32
Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962) 23
Buckley v. *Valeo*, 424 U.S. 1 (1976) 13, 14, 29, 33
Camreta v. *Greene*, 131 S. Ct. 2020 (2011) 15, 16, 18, 19
Cheng Fan Kwok v. *INS*, 392 U.S. 206 (1968) 37
City of Erie v. *Pap's A.M.*, 529 U.S. 277 (2000) 18, 19
Coleman v. *Miller*, 307 U.S. 433 (1939) 29
Confiscation Cases, 74 U.S. (7 Wall.) 454 (1869) 14, 28
Deposit Guaranty Nat'l Bank v. *Roper*, 445 U.S. 326 (1980) 15, 16, 18
Diamond v. *Charles*, 476 U.S. 54 (1986) 27, 31
FEC v. *NRA Political Victory Fund*, 513 U.S. 88 (1994) 31
Franchise Tax Bd. v. *Alcan Aluminum Ltd.*, 493 U.S. 331 (1990) 19
Gavett v. *Alexander*, 477 F. Supp. 1035 (D.D.C. 1979) 9
GTE Sylvania, Inc. v. *Consumers Union*, 445 U.S. 375 (1980) 25
Horne v. *Flores*, 557 U.S. 433 (2009) 19, 27
Hunt v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977) 29

Cases—Continued: Page

INS v. *Chadha*:
  462 U.S. 919 (1983) .... *passim*
  634 F.2d 408 (9th Cir. 1980) 11, 20
J.W. Hampton, Jr., & Co. v. *United States*, 276 U.S. 394 (1928) 28
Karcher v. *May*, 484 U.S. 72 (1987) 30
Kentucky v. *Indiana*, 281 U.S. 163 (1930) 26
League of Women Voters v. *FCC*, 489 F. Supp. 517 (C.D. Cal. 1980) 9
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 33
Maine v. *Taylor*, 477 U.S. 131 (1986) 19
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 13
Metro Broad., Inc. v. *FCC*, 497 U.S. 547 (1990) 9
Metropolitan Washington Airports Auth. v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) 28
Monsanto Co. v. *Geertson Seed Farms*, 130 S. Ct. 2743 (2010) 19
Moore v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47 (1971) 24, 26
Moore v. *United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985) 31
Morrison v. *Olson*, 487 U.S. 654 (1988) 34
Nevada Comm'n on Ethics v. *Carrigan*, 131 S. Ct. 2343 (2011) 30
North Carolina State Bd. of Educ. v. *Swann*, 402 U.S. 43 (1971) 25
Pope v. *United States*, 323 U.S. 1 (1944) 26
Powell v. *McCormack*, 395 U.S. 486 (1969) 29

Cases—Continued: Page

Princeton Univ. v. *Schmid*:

455 U.S. 100 (1982) 23, 24

423 A.2d 615 (N.J. 1980) 23

Raines v. *Byrd*, 521 U.S. 811 (1997) 30, 32, 36

Simkins v. *Moses H. Cone Mem'l Hosp.*, 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964) 9

Turner Broad. Sys. v. *FCC*, 819 F. Supp. 32 (D.D.C. 1993), vacated by 512 U.S. 622 (1994) 9

United States v. *Lovett*, 328 U.S. 303 (1946) 6, 8, 9, 10, 22, 26

United States v. *Nixon*, 418 U.S. 683 (1974) 14

United States v. *Providence Journal Co.*, 485 U.S. 693 (1988) 13, 14, 28

Young v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) 32, 34

Constitution, statutes and rules:

U.S. Const.:

Art. I:

§ 1 .... 28, 32

§ 2, Cl. 1 31

Art. II:

§ 2, Cl. 2 .... 29, 31

§ 3 .... 13, 28, 33

Art. III .... *passim*

Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 2

§ 3, 110 Stat. 2419 (1 U.S.C. 7) .... *passim*

28 U.S.C. 516 13

28 U.S.C. 518(a) 13

Statute and rules—Continued: Page

28 U.S.C. 518(b) 13

28 U.S.C. 519 13

28 U.S.C. 530D(a)(1)(B) 34

28 U.S.C. 1252 (1976) 15, 16, 17

28 U.S.C. 1254(1) 14, 16, 35

28 U.S.C. 1291 .... 14, 16, 17

28 U.S.C. 2403(a) 4

28 U.S.C. 2414 21

Fed. R. Civ. P. 24(a)(2) 4

Rule II.8, Rules of the House of Representatives, 112th Cong. (2011) 4, 29

Miscellaneous:

Letter from Andrew Fois, Assistant Att'y Gen., to Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary (Mar. 22, 1996) 9

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 26

H.R. Rep. No. 660, 100th Cong., 2d Sess. (1988) 17

H.R. Res. 5, 113th Cong., 1st Sess. (2013) 6

The Federalist No. 49 (James Madison) (Jacob E. Cooke ed. 1961) 33

In the Supreme Court of the United States

No. 12-307

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES ON THE JURISDICTIONAL QUESTIONS

OPINIONS BELOW

The opinion of the court of appeals (Supp. App. 1a-83a) is reported at 699 F.3d 169. The opinion of the district court (Pet. App. 1a-22a) is reported at 833 F. Supp. 2d 394. The district court's order granting the motion of the Bipartisan Legal Advisory Group of the United States House of Representatives to intervene (J.A. 218-229) is reported at 797 F. Supp. 2d 320.

JURISDICTION

The judgment of the district court was entered on June 6, 2012. Notices of appeal were filed on June 8, 2012, and June 14, 2012 (J.A. 522-525). The United States filed a petition for a writ of certiorari before judgment on September 11, 2012. The judgment of the court of appeals was entered on October 18, 2012, and the United States filed a supplemental brief pursuant to Rule 15.8 of the Rules of this Court on October 26, 2012. The petition for a writ of certiorari was granted on December 7, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

1. Respondent Edith Windsor (plaintiff) was married to her same-sex partner, Thea Spyer. J.A. 218-219. When Spyer passed away in 2009, she left her estate to plaintiff. Pet. App. 3a. Plaintiff, the estate's executor, sought a refund from the Internal Revenue Service (IRS) of $363,053, relying on a statute that generally exempts property passing to a "surviving spouse" from federal estate tax. 26 U.S.C. 2056(a); see J.A. 169-170. The IRS denied that claim on the ground that Section 3 of the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419, defines the term "spouse" to include only "a person of the opposite sex." 1 U.S.C. 7; see J.A. 245-252. Plaintiff then sued the United States for a refund of the tax, along with declaratory and injunctive relief, claiming that Section 3 unlawfully discriminates on the basis of sexual orientation. J.A. 173, 219.

2. The Attorney General subsequently notified Congress that he and the President had determined that Section 3 violates equal protection as applied to same-sex couples legally married under state law. J.A. 183-194. Although the Department of Justice had defended the constitutionality of Section 3 in circuits

that apply rational-basis scrutiny to classifications based on sexual orientation, the President and the Attorney General determined, in consideration of new suits in a circuit without binding precedent on the appropriate level of scrutiny, that this Court's precedents required heightened scrutiny and that Section 3 could not survive such scrutiny. J.A. 183-191.

The Attorney General additionally explained that, notwithstanding that determination, the Executive Branch would continue to enforce Section 3. JA. 191-192. "To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality." J.A. 192. "This course of action," the Attorney General continued, "respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised." *Ibid.*

In litigation concerning Section 3's constitutionality, however, the Department of Justice would present the President's constitutional views to the courts and decline to defend the statute. J.A. 191-193. The Department would "also notify the courts of [its] interest in providing Congress a full and fair opportunity to participate in the litigation of those cases" and would "remain parties to the case and continue to represent the interests of the United States throughout the litigation." J.A. 193.

3. Following the President's determination, the Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) moved to intervene

in this case in defense of Section 3. J.A. 195-198. BLAG is a five-member group of Representatives authorized by the then-current House rules to "consult" with the Speaker of the House about the direction of the Office of General Counsel. Rule II.8, Rules of the House of Representatives, 112th Cong. (2011). Three of BLAG's members voted in favor of intervention; two voted against it. J.A. 196 n.1.

The Department did not oppose limited intervention by BLAG, but explained that the "Executive Branch, through the Department of Justice, represents the only defendant, the United States, in this litigation." J.A. 207 (citing 28 U.S.C. 516 and *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam)). The Department also explained that "consistent with what [it] has done in prior cases in which the Executive Branch has taken the position that an Act of Congress is unconstitutional but announced its intention to enforce or comply with the law pending a final judicial determination of the constitutional issue," it would take all steps necessary to ensure that the courts could consider Section 3's constitutionality and that BLAG could argue in support of Section 3. J.A. 208.

The district court granted BLAG's intervention motion. J.A. 218-229. The court found no law "explicitly authorizing intervention by the House (or any subgroup or representative thereof)," J.A. 222 n.2, and it rejected BLAG's effort to intervene as the United States under 28 U.S.C. 2403(a), reasoning that "the United States of America is already a party to the litigation," J.A. 222. But the court concluded that BLAG could intervene as an interested party under Fed. R. Civ. P. 24(a)(2). J.A. 222-226. The court found it unnecessary to address whether BLAG had

Article III standing, because the case already presented "an ongoing case or controversy between the existing parties." J.A. 226-227.

4. The district court ultimately issued a judgment against the United States, declaring Section 3 unconstitutional as applied and awarding plaintiff $363,053 plus interest. Pet. App. 23a-24a; see J.A. 437-439 (United States' motion to dismiss if court agreed with BLAG on constitutionality of Section 3); J.A. 486-489 (United States' brief supporting summary judgment for plaintiff). Both the United States and BLAG filed notices of appeal. J.A. 522-525. BLAG moved to dismiss the United States' notice of appeal, contending that only "the House ha[d] standing to appeal." J.A. 527. The United States also filed a petition for a writ of certiorari before judgment. Pet. 1-13.

The court of appeals denied BLAG's motion to dismiss the United States' appeal. Supp. App. 4a-5a. Relying on *INS* v. *Chadha*, 462 U.S. 919, 931 (1983), the court reasoned that the United States was an aggrieved party with standing to appeal because "the United States continues to enforce Section 3," and Section 3's constitutionality "will have a considerable impact on many operations of the United States." Supp. App. 4a-5a. On the merits, the court of appeals affirmed the district court's judgment. *Id.* at 1a-31a; see Gov't C.A. Br. 45 (United States' brief requesting affirmance).

5. Following supplemental certiorari-stage briefing, this Court granted the United States' petition for a writ of certiorari. 12-307 Docket entry (Sup. Ct. Dec. 7, 2012). The Court directed the parties to brief the two jurisdictional issues addressed below. 12-307 Docket entry (Sup. Ct. Dec. 14, 2012).

On December 28, 2012, BLAG filed its own petition for a writ of certiorari. *BLAG* v. *Windsor*, petition for cert. pending, No. 12-785 (filed Dec. 28, 2012). On January 3, 2013, the House of Representatives authorized BLAG to speak for the institutional position of the House in litigation matters, including this case. H.R. Res. 5, 113th Cong., 1st Sess., § 4(a)(1)(B) (2013).

SUMMARY OF ARGUMENT

This Court has jurisdiction to decide the constitutionality of Section 3 of DOMA in this case. The United States may properly invoke this Court's jurisdiction because the judgments of the courts below preclude enforcement of a federal statute and require payment of federal Treasury funds to plaintiff. The United States thus satisfies both the statutory requirement that an appealing party be "aggrieved," and the Article III requirement that it be "injured," by a lower court's decision. This Court has twice reviewed, at the government's request, lower-court decisions invalidating federal statutes in circumstances where the Executive Branch agreed with the challenger that the statute was unconstitutional but continued to enforce it. See *INS* v. *Chadha*, 462 U.S. 919 (1983); *United States* v. *Lovett*, 328 U.S. 303 (1946). The United States has charted the same course here, and this Court can and should resolve the pressing question of undisputed national importance presented by this case.

I. No jurisdictional barrier prevents the Court from reaching the merits of the question presented. As an initial matter, the district court properly exercised jurisdiction over this case. Plaintiff had standing to sue the United States because she paid more than $360,000 in taxes; the tax bill resulted from the allegedly unconstitutional application of Section 3; and the Executive Branch's enforcement of Section 3 made a refund suit the only avenue for her to seek redress. The Executive Branch's ongoing enforcement also created Article III adverseness because resolution of the case would determine whether plaintiff would pay the tax or would receive a refund.

After the district court entered judgment against the United States, the United States—whose full sovereign interests the Department of Justice represents—properly invoked both the court of appeals' and this Court's jurisdiction. The Executive Branch's agreement with the lower courts' decisions on the constitutional merits eliminates neither the injury that those decisions inflict upon the United States nor the adverseness between the parties. The enforcement of Section 3 is equally precluded, and the federal Treasury equally depleted, whether or not the United States argues on appeal that the judgments below were incorrect. And the President's direction that the Executive Branch continue to enforce Section 3, notwithstanding his legal arguments, creates just as much of an Article III controversy on appeal as in the district court.

Contrary to the views of the Court-appointed amica curiae, nothing compels the United States to endure adverse judgment after adverse judgment in district courts across the Nation unless and until some court upholds the statute and the plaintiff decides to appeal. By the same token, nothing compels the Judiciary to bear the burden of adjudicating potentially thousands of challenges to Section 3 in the district courts, without any reliable avenue for definitive resolution of the provision's constitutionality. Rather, the United

States itself may properly seek further review of a federal statute's constitutionality, as it did in *Chadha* and *Lovett*. The United States' steps to secure further review, while continuing to enforce Section 3, respect the authority of the Congress that enacted DOMA and the authority of the Judiciary (with the assistance of briefing by BLAG) to say what the law is respecting the provision's constitutionality.

II. Because this Court has jurisdiction based on the United States' requests for appellate review, it need not address whether BLAG independently has standing to appeal. If the Court reaches that question, it should conclude that BLAG has no such standing. BLAG lacks any basis for supplanting the Executive Branch's exclusive role in representing the United States' interests in this litigation and has no interests of its own that would satisfy Article III.

The lower-court judgments do not impose any restraints or obligations upon BLAG. BLAG's members, who are individual legislators, have no standing to assert an interest in the constitutionality of a federal statute. BLAG was not authorized to represent the interests of the full House of Representatives when it appealed and petitioned for a writ of certiorari in this case, and, in any event, the House's position as one half of a bicameral legislature gives it no cognizable Article III interest in a case like this. Even Congress as a whole lacks Article III standing to appeal to defend the constitutionality of Section 3. In the federal system, the authority to assert in litigation the sovereign's interest in the constitutionality of its laws belongs to the Executive Branch alone. It is thus the Solicitor General's petition, filed on behalf of the

United States, that provides the basis for jurisdiction here.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO DECIDE THIS CASE

Notwithstanding the President's conclusion that Section 3 of DOMA is unconstitutional, he has directed the Executive Branch to continue to enforce the statute "unless and until * * * the judicial branch renders a definitive verdict against the law's constitutionality." J.A. 192. That course of action is consistent with past practice. The Executive Branch likewise affirmatively challenged in litigation, while continuing to enforce, the statutes at issue in *INS* v. *Chadha*, 462 U.S. 919 (1983), and *United States* v. *Lovett*, 328 U.S. 303 (1946). Additionally, it has either challenged or declined to defend agency action in circumstances in which an Executive or independent agency enforced or implemented a statute the Executive determined to be unconstitutional. See, *e.g.*, Letter from Andrew Fois, Assistant Att'y Gen., to Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary 3-7 (Mar. 22, 1996) (discussing, *inter alia*, *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547 (1990); *Chadha*, *supra*; *Lovett*, *supra*; *Simkins* v. *Moses H. Cone Mem'l Hosp.*, 323 F.2d 959 (4th Cir. 1963) (en banc), cert. denied, 376 U.S. 938 (1964); *Turner Broad. Sys.* v. *FCC*, 819 F. Supp. 32 (D.D.C. 1993), vacated by 512 U.S. 622 (1994); *League of Women Voters* v. *FCC*, 489 F. Supp. 517 (C.D. Cal. 1980); *Gavett* v. *Alexander*, 477 F. Supp. 1035 (D.D.C. 1979)).

The President's course of action here not only is fully consistent with past practice, but is also respectful of the responsibilities and prerogatives of all three

Branches. It carries out "the Executive's obligation to take care that the laws be faithfully executed," J.A. 192, including through the conduct of litigation for the United States, while assuring that the President's conclusion about the statute's unconstitutionality is made known to Congress and presented to the courts. It "respects the actions of the prior Congress that enacted" the statute, *ibid.*, and allows for the current Congress to present arguments in support of the statute's constitutionality in the context of an already pending case or controversy. And it "recognizes the judiciary"—and ultimately this Court—"as the final arbiter of the constitutional claims raised," *ibid.*, where the courts' jurisdiction is properly invoked. This Court has previously exercised jurisdiction in identical circumstances, see *Chadha*, *supra*; *Lovett*, *supra*, and it should do so again here.

A. The District Court Had Jurisdiction Over Plaintiff's Suit

The amica correctly acknowledges (Br. 23) that "[t]he district court plainly had jurisdiction" over plaintiff's lawsuit. The IRS denied plaintiff's claim for a tax refund based on Section 3; filing suit against the United States was the only remaining means for her to obtain relief; and the district court's exercise of jurisdiction was consistent with both Article III and prudential limitations on the authority of federal courts. See *Chadha*, 462 U.S. at 939 ("It would be a curious result if, in the administration of justice, a person could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments asserted by the individual.").

First, plaintiff demonstrated standing to sue by showing "a 'personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Already, LLC* v. *Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). She claimed a loss of over $360,000, based on the allegedly unconstitutional application of Section 3, and sought a refund in that amount (along with declaratory and injunctive relief). J.A. 149-173.

Second, this Court's decision in *Chadha* makes clear that the Executive Branch's enforcement of a federal statute creates an Article III controversy irrespective of whether the Executive expresses in court that the statute is unconstitutional. In *Chadha*, a statute authorized either House of Congress to overturn, through a single-House resolution colloquially known as a "legislative veto," a discretionary decision of the Attorney General to allow a deportable alien to remain in the country. 462 U.S. at 919. An alien (Chadha) who had been subject to such a legislative veto sought initial review of his deportation order in the court of appeals, contending that the legislative-veto procedure violated separation-of-powers principles. *Id.* at 928. The INS, while enforcing the statute against Chadha, agreed that the statute was unconstitutional. *Ibid.* This Court held that "adequate Art[icle] III adverseness" existed in the court of appeals, "even though the only parties were the INS and Chadha," agreeing "with the Court of Appeals that 'Chadha has asserted a concrete controversy, and our decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold [the statute], the INS will execute its order and deport him.'" *Id.* at 939 (quoting *Chadha* v. *INS*, 634 F.2d 408, 419 (9th Cir. 1980)). The Court reasoned that "the INS's agreement with Chadha's position does not alter the fact that the INS would have deported Chadha absent the Court of Appeals' judgment." *Ibid.* Similar reasoning applies here: without a final judgment in her favor, plaintiff—regardless of the Executive's agreement with her that Section 3 is unconstitutional—will have lost over $360,000.

Finally, the district court's jurisdiction over this case also satisfied any "prudential, as opposed to Art[icle] III, concerns about sanctioning the adjudication" of a constitutional dispute "in the absence of any participant supporting the validity of" the federal statute. *Chadha*, 462 U.S. at 940. The Court in *Chadha* found such concerns to be "dispelled * * * by inviting and accepting briefs from both Houses of Congress" as amici curiae. *Ibid.*; see *id.* at 928. BLAG's presentation of arguments in defense of Section 3 served the same function here.

B. The United States Properly Invoked The Court Of Appeals' And This Court's Jurisdiction

The district court's judgment against the United States injures the sovereign and financial interests of the United States by invalidating the application of a federal statute and requiring the payment of over $360,000 in federal Treasury funds to plaintiff. Contrary to the position of the amica, the United States was not required to accede to the district court's judgment, and to accept those injuries, by virtue of the Executive's belief that the statute is unconstitutional. Rather, the United States is entitled to seek further review of whether those injuries are constitutionally mandated. Such review satisfies the constitutional, statutory, and prudential limitations on appellate jurisdiction; follows the example set by past practice; and ensures that the Judicial Branch, and this Court in particular, will have the opportunity to "say what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

1. *The Department of Justice has constitutional and statutory authority to represent the full sovereign interests of the United States in this case*

The Constitution assigns to the Executive Branch the authority, and the duty, to represent all of the sovereign interests of the United States in court. The Take Care Clause "entrusts" to the President the "discretionary power to seek judicial relief." *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam); see U.S. Const. Art. II, § 3 (stating that the President "shall take Care that the Laws be faithfully executed"). Within the Executive Branch, the authority to represent the interests of the United States in litigation generally resides with the Department of Justice. See, *e.g.*, 28 U.S.C. 516 (generally reserving to Department of Justice "the conduct of litigation in which the United States * * * is a party"); 28 U.S.C. 518(b) (allowing Attorney General to "conduct and argue any case in a court of the United States in which the United States is interested"); 28 U.S.C. 519 (generally reserving to Attorney General authority to "supervise all litigation to which the United States * * * is a party"). The Attorney General and Solicitor General have exclusive authority over litigation by the United States in this Court. See 28 U.S.C. 518(a); *United States* v. *Providence Journal Co.*, 485 U.S. 693, 699-700 (1988).

The notice of appeal and petition for a writ of certiorari filed by the Department of Justice in this case are therefore requests for further review *by the Unit-*

ed States. They are not, as the amica appears at times to suggest (Br. 33-35), requests on behalf of the Executive Branch alone. This Court has made clear that, for purposes of litigation, the United States consists of a singular "sovereign composed of the three branches." *Providence Journal*, 485 U.S. at 701 (quoting *United States* v. *Nixon*, 418 U.S. 683, 696 (1974)). The Court has also long recognized that "litigation conducted in the courts of the United States[,] * * * 'so far as the interests of the United States are concerned, [is] subject to the direction, and within the control of, the Attorney-General.'" *Buckley*, 424 U.S. at 139 (quoting *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-459 (1869)). In this case, the Attorney General has exercised that authority by invoking the United States' right to seek appellate review of the judgments entered against it by the lower courts.

2. *The United States is aggrieved by the invalidation of Section 3 and the requirement to refund plaintiff's taxes*

a. The court of appeals had, and this Court has, statutory jurisdiction to review this case at the request of the United States. Congress has broadly granted to the courts of appeals the "jurisdiction of appeals from all final decisions of the district courts," subject only to certain exceptions not relevant here. 28 U.S.C. 1291. This Court enjoys similarly expansive statutory jurisdiction to review "[c]ases in the courts of appeals" by "writ of certiorari granted upon the petition of any party." 28 U.S.C. 1254(1). As this Court has recently recognized, the plain text of that statute "confers unqualified power" to grant certiorari regardless of how the petitioner fared in the court below. *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028 (2011).

b. Notwithstanding the textual breadth of those statutes, this Court has recognized a "rule * * * of federal appellate practice, * * * derived from the statutes granting appellate jurisdiction and the historic practices of the appellate courts," under which "only a party aggrieved by a judgment or order of a [lower] court may exercise the statutory right to appeal therefrom." *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980); see *Chadha*, 462 U.S. at 930 (quoting *Deposit Guaranty*, 445 U.S. at 333). Although the amica urges (Br. 38-40) application of that bar here, *Chadha* forecloses her suggestion. As *Chadha* makes clear, the sovereign interests of the United States are adversely affected whenever a court declares an Act of Congress unconstitutional and precludes its enforcement.

In *Chadha*, both the government and Chadha argued to the court of appeals that the legislative-veto statute was unconstitutional. 462 U.S. at 928. After the court of appeals invalidated the statute, the INS sought further review in this Court under a since-repealed statute that permitted "[a]ny party" in a proceeding involving the federal government to appeal a judgment "of any court of the United States * * * holding an Act of Congress unconstitutional." *Id.* at 929 (quoting 28 U.S.C. 1252 (1976)). This Court concluded that it had authority to decide the merits of that appeal, rejecting the contention that "the INS has already received what it sought from the Court of Appeals, is not an aggrieved party, and therefore cannot appeal." *Id.* at 930.

The Court determined that "[a]t least for purposes of deciding whether the INS is 'any party' within the grant of appellate jurisdiction in § 1252, * * * the INS was sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take." *Chadha*, 462 U.S. 930; see *ibid.* (observing that the court of appeals had "ordered the Attorney General to cease and desist from taking any steps to deport Chadha; steps that the Attorney General would have taken were it not for that decision"). The Court reasoned that "the INS brief to the Court of Appeals did not alter the agency's decision to comply with the" legislative-veto statute. *Ibid.* "When an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional," the Court concluded, "it is an aggrieved party for purposes of taking an appeal under § 1252," and its "status as an aggrieved party under § 1252 is not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional." *Id.* at 931; see *id.* at 939 ("[T]he INS's agreement with the Court of Appeals' decision * * * does not affect that agency's 'aggrieved' status for purposes of appealing that decision under 28 U.S.C. § 1252.").

c. A similar conclusion necessarily follows in this case. Although appellate jurisdiction here is based on 28 U.S.C. 1291 and 28 U.S.C. 1254(1), rather than on former Section 1252, the requirement that a party be "aggrieved" in order to appeal applies no more strictly under the current provisions. See *Deposit Guaranty*, 445 U.S. at 333 (discussing rule under Section 1291); *Camreta*, 131 S. Ct. 2028-2033 (discussing Court's authority under Section 1254(1) to grant certiorari on petition of a prevailing party).

The only part of the relevant discussion in *Chadha* that was particular to Section 1252 was a comment that "Congress intended that this Court take notice of cases that meet the technical prerequisites of § 1252; in other cases where an Act of Congress is held unconstitutional by a federal court, review in this Court is available only by writ of certiorari." 462 U.S. at 930-931. That observation about the difference between mandatory and discretionary jurisdiction is irrelevant to whether the United States is aggrieved here. Appellate jurisdiction in the courts of appeals under Section 1291 is just as mandatory as was appellate jurisdiction in this Court under former Section 1252. And Congress's repeal of Section 1252—which reduced this Court's docket by eliminating its direct and mandatory appellate jurisdiction over decisions invalidating federal statutes—did not reflect any congressional doubt about whether the United States is aggrieved when a federal statute is struck down. See H.R. Rep. No. 660, 100th Cong., 2d Sess. 11 & n.24 (1988) (stating that "the removal of direct appeal authority should not create an obstacle to the expeditious review of cases of great importance" and that "[p]rompt correction or confirmation of lower court decisions invalidating acts of Congress is generally desirable").

Indeed, in some ways, the United States may be more aggrieved here than the INS was in *Chadha*. The judgment not only precludes the United States from enforcing a statute, but also requires the payment of more than $360,000 in federal Treasury funds. Pet. App. 23a-24a. Although BLAG has previously argued that the aggrievement recognized in *Chadha* extends only to the "agency" that "administers" the invalidated statute, BLAG Br. in Opp. 22 (quoting *Chadha*, 462 U.S. at 931), the United States as a whole is surely no less aggrieved than an individual agency when a federal statute is held unconstitutional.

3. The United States has Article III standing to seek further review

The Article III standing of the United States to seek appellate review of the lower courts' decisions follows *a fortiori* from the United States' status as an aggrieved party for purposes of the statutory rule. An appealing party has a constitutionally sufficient "stake" in seeking further review so long as it can demonstrate that it was injured by the decision below and that further review could redress that injury. *Camreta*, 131 S. Ct. at 2028-2029. Both the statutory aggrieved-party rule and the Article III "injury" requirement examine the same thing: how the lower court's judgment affects the appealing party. Compare *Deposit Guaranty*, 445 U.S. at 333 (statutory rule), with *Camreta*, 131 S. Ct. at 2028-2029 (injury requirement). The statutory rule would serve no purpose if it demanded *less* than the injury that Article III already requires. Contrary to the amica's suggestion (Br. 26), therefore, a party that is sufficiently "aggrieved" under the more restrictive statutory rule is necessarily "injured" under Article III.

This Court's decisions, in any event, recognize that the same aspects of the lower-court decisions that aggrieve the United States—the requirement to pay money, the invalidation of a statute, and the prevention of enforcement actions that would otherwise occur—also constitute Article III injuries. See, *e.g.*, *Horne* v. *Flores*, 557 U.S. 433, 445 (2009) (finding standing where district court entered declaratory and injunctive relief against state official); *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 288 (2000) (finding "ongoing injury" where public entity was "barred from enforcing * * * provisions of its ordinance"); *Franchise Tax Bd.* v. *Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990) (finding standing based on threatened "actual financial injury"); *Maine* v. *Taylor*, 477 U.S. 131, 137 (1986) (concluding that State's "legitimate interest in the continued enforceability of its own statutes" gave it standing to appeal a ruling that invalidated a state statute).

Those injuries are directly traceable to the lower-court decisions, and they would be redressed by reversal of those decisions. See, *e.g.*, *Camreta*, 131 S. Ct. at 2028-2033 (concluding that an official had standing to seek certiorari based on adverse effect produced by appellate decision); *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743, 2752-2753 (2010) (concluding that injury caused by remedial order could be redressed by contrary appellate ruling); *City of Erie*, 529 U.S. at 288 ("If the challenged ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot.").

Contrary to the amica's assertions (Br. 31), the United States' injuries remain fully in place notwithstanding the President's conclusion that Section 3 cannot survive judicial scrutiny. The position adopted by the United States in its briefs can neither replenish the federal Treasury nor restore the United States' ability to enforce Section 3 against plaintiff. See

Chadha, 462 U.S. at 930-931. Only an appellate decision can do so.

4. The parties have a continuing controversy

The United States' requests for further review also satisfy the requirement of a continuing "case or controversy" between the parties. See, *e.g.*, *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 623-624 (1989) (requiring both standing to appeal from state supreme court and a continuing "case or controversy"). It is just as true on appeal as it was in the district court that a judicial decision "will have real meaning." *Chadha*, 462 U.S. at 939 (quoting *Chadha*, 634 F.2d at 419). A merits decision by this Court will not be an advisory opinion for potential future cases, but will determine the outcome of this very case. If the Court finds Section 3 unconstitutional, the United States will refund plaintiff's estate tax; if the Court upholds Section 3, the United States will continue to enforce the statute against plaintiff. J.A. 191-192; see *Chadha*, 462 U.S. at 939-940 ("[I]f we rule for Chadha, he will not be deported; if we uphold [the legislative-veto statute], the INS will execute its order and deport him.") (quoting *Chadha*, 634 F.2d at 419). And BLAG's presentation of arguments in defense of the statute continues to assuage any prudential concerns about adequate presentation of the legal issues. See *id.* at 940.

a. The amica acknowledges (Br. 23) that a case or controversy existed in the district court. She thus accepts that the President is under no constitutional compulsion to disregard the will of the enacting Congress—and cut the Judicial Branch completely out of the constitutional decisionmaking process—by refusing altogether to enforce a statute he has determined to be unconstitutional, such that the matter would never come before even a district court. But although she acknowledges the President's authority to await a decision by the Judiciary before ceasing to enforce Section 3, she contends that a case or controversy ceased to exist the instant the district court entered judgment against the United States. That is incorrect.

A district court's entry of judgment may change the status quo, but does not eliminate the adverseness between the parties that justified exercise of the judicial power in the first place. The amica errs in asserting that "the United States agrees it is obligated to pay" the district court's judgment and attempting to analogize this to a case in which the government settles or decides not to appeal at all. Br. 31-32 & n.21. As was made clear by the filing of a notice of appeal and then a petition for a writ of certiorari, the United States will not agree that it is "obligated" to comply with the district court's decree until all appellate avenues have been exhausted. See 28 U.S.C. 2414 (judgment becomes final only after Attorney General determines not to seek further review). Consistent with his "obligation to take Care that the Laws be faithfully executed," the President has directed the Executive Branch to enforce Section 3 unless and until he receives a definitive judgment from the Judicial Branch that the statute is unconstitutional. J.A. 192. The President considers that course of action to be the most appropriate way to fulfill his Take Care Clause responsibilities because it "respects the actions of the prior Congress that enacted DOMA" and "recognizes the judiciary as the final arbiter of the constitutional claims raised." *Ibid.* Because the rights and obligations of the United States and plaintiff will thus be affected by an appellate decision, the parties remain just as adverse as in the district court. See *Chadha*, 462 U.S. at 939-940.

b. Under the amica's approach, Article III would require the United States repetitively to suffer the same injury, an unlimited number of times over in district courts around the Nation, with no prospect for appellate review unless and until a district court potentially enters judgment in *favor* of the United States (in which event the *plaintiff* could elect to seek further review). And the Judiciary would be saddled with the obligation to resolve potentially thousands of challenges to Section 3 in the district courts, without any reliable avenue for a definitive resolution of the provision's constitutionality. On that understanding, the President's decision that the Executive Branch should continue enforcing a statute he has determined to be unconstitutional—out of respect for the Judiciary and Congress—would come at a considerable judicial, administrative, and financial cost. That impractical approach has little to recommend it, and nothing to compel it. To the contrary, not only *Chadha*, but also *Lovett*, demonstrates that the Solicitor General may seek review of a judgment against the United States in a case like this.

In *Lovett*, like *Chadha*, the United States, through the Solicitor General, obtained this Court's review of a decision invalidating a federal statute that the Department of Justice had declined to defend on the merits. See *Chadha*, 462 U.S. at 940 (citing *Lovett*). *Lovett* involved challenges by three federal employees to the constitutionality of a statute forbidding the use of appropriated funds to pay their salaries. 328 U.S. at 304-306. The Executive Branch agreed that the statute was unconstitutional, and a joint resolution of Congress authorized special counsel to defend the statute. *Id.* at 306. After the Court of Claims entered judgments for the employees, this Court granted the United States' petitions for a writ of certiorari, permitted amicus argument on behalf of Congress, and affirmed the lower court's judgments, notwithstanding the parties' agreement that the judgments had been correct. *Id.* at 304, 307-318; see Pet. Br. at 72, *Lovett*, *supra* (No. 45-809) (request by United States, as petitioner, "that the judgments below should be affirmed").

Nothing precludes the Court from following the same course here. It is true that the review sought in *Lovett* was from a non-Article III court (Amica Br. 25), but that did not relieve the United States of the need to satisfy Article III in order to obtain review in this Court. See *ASARCO*, 490 U.S. at 618 (party seeking this Court's review of state-court decision must establish Article III jurisdiction). And while the amica correctly points out (Br. 25) that decisions exercising but not discussing jurisdiction are not binding jurisdictional precedent, the Court should not lightly "disregard the implications of an exercise of judicial authority assumed to be proper for over 40 years." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 307 (1962). Tellingly, Congress itself supported the United States' petitions in *Lovett*. Br. for the Congress of the United States in Support of Pet. for Writs of Cert. at 2, *Lovett*, *supra* (No. 45-809).

c. None of the cases relied on by the amica (Br. 29-31) supports her position.

In *Princeton University* v. *Schmid*, 455 U.S. 100 (1982) (per curiam), a state supreme court reversed a defendant's conviction for trespassing on a private university because it found that application of the university's property regulations violated the "defendant's State constitutional rights of expression." *State* v. *Schmid*, 423 A.2d 615, 633 (N.J. 1980). The intervenor university appealed to this Court, asserting that the state-law invalidation of its regulations had infringed its federal constitutional rights to control the use of its property. Princeton Br. at 6, *Schmid*, *supra* (No. 80-1576); see *Schmid*, 455 U.S. at 101-102. This Court found the appeal to be moot because the university had modified its regulations. *Id.* at 102-103. The Court also found that the State's presence in the case did not create a justiciable dispute, noting that the State had not itself appealed, but had instead filed a brief requesting a decision without taking a position on the merits. *Ibid.* The Court's per curiam opinion observed that "if the State were the sole appellant and its jurisdictional statement simply asked for review and declined to take a position on the merits, we would have dismissed the appeal for want of a case or controversy," because the Court does "not sit to decide hypothetical issues or to give advisory opinions." *Id.* at 102.

That comment does not cast doubt on appellate jurisdiction here. *Schmid* did not address whether an Article III controversy exists when the Executive Branch agrees with a challenger that a federal statute is unconstitutional, but continues to enforce the statute. See New Jersey Mot. To Dismiss at 1-2, *Schmid*, *supra* (No. 80-1576) (stating that University and appellee had the "real interests" in the case). That distinct question was considered the following Term in *Chadha*, which squarely supports appellate jurisdiction here. This case, unlike *Schmid*, presents a concrete and ongoing controversy—namely, whether plaintiff should receive a refund of her tax—that this Court's decision will definitively resolve. See *Chadha*, 462 U.S. at 939.

Second, in *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971) (per curiam), the Court stated that no case or controversy existed between parties who had both argued to the district court that a state anti-busing statute was constitutional. *Id.* at 48. The Court dismissed the appeal, however, for lack of *statutory* appellate jurisdiction. See *ibid.* In a companion case decided the same day, the Court affirmed the underlying district-court judgment, which involved many additional parties, in an appeal involving some of those additional (and adverse) parties. See *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43 (1971).

The two-paragraph opinion in *Moore* arose out of unique circumstances and in a unique procedural posture, and says nothing about the circumstances here. The House of Representatives expressly argued in *Chadha* that *Moore* was controlling in a case like this. See U.S. House of Representatives Br. at 46-47, U.S. House of Representatives Reply Br. at 12-13, *Chadha*, *supra* (Nos. 80-1832, 80-2170, 80-2171). This Court did not accept that argument, but instead concluded that "adequate Art[icle] III adverseness" exists when the government enforces a challenged statute, even when it agrees with the challenger that the statute is unconstitutional. *Chadha*, 462 U.S. at 939.

Finally, in *GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, 445 U.S. 375 (1980), this Court *found* adequate Article III adverseness between the parties, notwithstanding their agreement about the requirements of a particular federal statute. See *id.* at 382-383. The amica cites *GTE* solely because it quoted *Moore* for the proposition that a case or controversy is absent "when the parties desire precisely the same result." *Id.* at 383 (quoting *Moore*, 402 U.S. at 48). But even the amica herself does not believe that statement to be absolute. If it were, then not only the appellate courts, but also the district court, would have lacked jurisdiction in this case.

Mere agreement on a question of law, or on the order that a court should enter, does not deprive a federal court of jurisdiction. It is, for example, "a judicial function and an exercise of the judicial power to render judgment on consent * * * or when the defendant is in default." *Pope* v. *United States*, 323 U.S. 1, 12 (1944) (citing cases). This Court has also found the exercise of its original jurisdiction to be proper in a circumstance where both parties agreed on the proper legal outcome, but the defendant insisted upon a judicial decision before proceeding. *Kentucky* v. *Indiana*, 281 U.S. 163, 169-180 (1930). And this Court has a longstanding practice of appointing amici when the parties to the case agree on the proper appellate disposition, as where the government confesses error. See Eugene Gressman et al., *Supreme Court Practice* 743 (9th ed. 2007).

The amica attempts (Br. 31 n.19) to distinguish this Court's amicus-appointment practice by noting that the parties in amicus-appointment cases are typically both challenging, rather than defending, the judgment below. But the substance of the parties' legal agreement is irrelevant for purposes of assessing their adverseness. So long as the party seeking further review is aggrieved by the judgment below (as the United States is here) and the parties retain adverse interests in the outcome of the underlying case (as the parties do with respect to Section 3's application to plaintiff's tax here), Article III is satisfied irrespective of whether the parties agree that the decision below was wrong (as in a confession-of-error case) or that it was right (as in *Chadha*, *Lovett*, and this case). As *Chadha* makes clear, disagreement on the merits is unnecessary to create adverseness in a case, like this one, in which the government "intend[s] to enforce [a] challenged law against [an opposing] party" in the absence of a judicial prohibition against doing so. 462 U.S. at 940 n.12 (describing *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 585 n.9 (1983)).

II. BLAG LACKS ARTICLE III STANDING TO SEEK REVIEW OF THE LOWER COURTS' DECISIONS

Because this Court has jurisdiction to reach the merits of this case based on the United States' petition, it need not address whether BLAG independently has standing to seek review. See, *e.g.*, *Horne*, 557 U.S. at 446. Should the Court consider the question, however, it should conclude that BLAG does not. BLAG's right to appeal "is contingent upon a showing * * * that [it] fulfills the requirements of Art[icle] III." *Diamond* v. *Charles*, 476 U.S. 54, 68 (1986). BLAG, which neither represents the interests of the United States nor can demonstrate any Article III injury of its own, cannot make that showing.

A. BLAG Does Not Represent The Interests Of The United States

This Court has made clear that only "one 'United States' * * * may appear before this Court."

Providence Journal, 485 U.S. at 701. As previously discussed, see Part I.B.1, *supra*, the Department of Justice is constitutionally and statutorily empowered to represent the interests of the United States in this litigation. BLAG is not.

BLAG is an entity located within the Legislative Branch. The Constitution assigns to that Branch only specifically enumerated "legislative Powers." U.S. Const. Art. I, § 1. "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement." *Buckley*, 424 U.S. at 139 (citation omitted). "[I]t is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Id.* at 138 (quoting U.S. Const. Art. II, § 3).

Although Congress (and the individual Houses) may create offices to assist with legislative tasks, the authority of such an office may not include the "discretionary power to seek judicial relief" on behalf of the United States. *Buckley*, 424 U.S. at 138-140. Such power "cannot possibly be regarded as merely in aid of the legislative function," *id.* at 138, and Congress "may not 'invest itself or its Members with * * * executive power,'" *Metropolitan Washington Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928)).

Rather, the "responsibility for conducting civil litigation in the courts of the United States for vindicating public rights * * * may be discharged only by persons who are 'Officers of the United States'" under the control of the President. *Buckley*, 424 U.S. at 140 (quoting U.S. Const. Art. II, § 2, Cl. 2). In particular, as this Court has recognized, "no counsel will be heard for the United States in opposition to the views of the Attorney General." *Confiscation Cases*, 74 U.S. (7 Wall.) at 458.

B. BLAG Has Suffered No Independent Article III Injury

The decisions below also do not cause BLAG any distinct Article III injury that it can assert on its own behalf. The injuries inflicted by the decisions below were injuries to the United States, not to BLAG.

1. BLAG is a group of five Members of the House of Representatives. See Rule II.8, Rules of the House of Representatives, 112th Cong. (2011). At the time of the relevant filings in this case (up to and including BLAG's petition for a writ of certiorari), BLAG's sole authority was to "consult" about the House's general counsel. *Ibid.* Nothing about the judgment in this case affects BLAG's performance of that function. Even assuming the district court's judgment could be interpreted to run against BLAG as well as the United States, see Pet. App. 23a-24a, it neither requires nor forecloses any action by BLAG. The judgment accordingly does not injure BLAG in any cognizable way.

Although an association can have standing based on an injury to its members, see *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 342 (1977), no such standing exists here. BLAG's members are individual legislators, who suffer no Article III injury upon the invalidation of a law. This case is far afield of the narrow circumstances in which this Court has recognized legislator standing: a Member's exclusion from the House of Representatives, see *Powell* v.

McCormack, 395 U.S. 486, 496, 512-514 (1969); an invocation of a procedural mechanism in a state legislature to nullify votes sufficient to defeat a constitutional amendment, where the state legislators' suit originated in state court, see *Coleman* v. *Miller*, 307 U.S. 433, 437-446 (1939); and a specific authorization by a State (unconstrained by federal separation-of-powers doctrine) for particular legislative officers, on behalf of the full legislature, to represent the State's interests in court, see *Karcher* v. *May*, 484 U.S. 72, 82 (1987).

In *Raines* v. *Byrd*, 521 U.S. 811 (1997), this Court concluded that individual Members of Congress lacked standing to challenge the President's then-existing statutory authority to "cancel" selected portions of duly enacted laws through a procedure known as the line-item veto. *Id.* at 813-814. The Court concluded that the legislators had "alleged no injury to themselves as individuals," *id.* at 829, and observed that they had "not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies," *id.* at 821. The Court also concluded that "the institutional injury they allege is wholly abstract and widely dispersed," *id.* at 829, and observed that the "claimed injury * * * runs (in a sense) with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power," *id.* at 821.

Both conclusions apply equally here. When a legislator casts a vote, "[t]he legislative power thus committed is not personal to the legislator but belongs to the people." *Nevada Comm'n on Ethics* v. *Carrigan*, 131 S. Ct. 2343, 2350 (2011). Legislators' "personal interest in full and unfettered exercise of their authority" is thus "no greater than that of all the citizens for whose benefit * * * the authority has been conferred." *Moore* v. *United States House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result), cert. denied, 469 U.S. 1106 (1985). A legislator's constituents cannot themselves elevate an abstract interest in a statute's constitutionality into an Article III injury, *Diamond*, 476 U.S. at 66-67, and a legislator thus cannot invoke his representative capacity as a basis for doing so.

2. BLAG also does not have standing in this case based on asserted interests of the House of Representatives as a whole. To begin with, the resolution authorizing BLAG to represent the House in this case was passed only after BLAG filed its notice of appeal and petition for a writ of certiorari. See p. 6, *supra*. BLAG therefore lacked authority to make the relevant filings on behalf of the House. A party may not invoke appellate jurisdiction in a capacity in which it has not previously participated in the case. *Karcher*, 484 U.S. at 78. And an "'after-the-fact' authorization" cannot cure a jurisdictional defect. *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 98-99 (1994) (concluding that Solicitor General could not retroactively authorize agency to file petition for a writ of certiorari).

More fundamentally, even had BLAG represented the full House at the relevant times, the House has suffered no more of a cognizable injury than BLAG itself. The House is "composed" of its individual "Members," U.S. Const. Art. I, § 2, Cl. 1, who themselves lack standing for reasons explained above. In addition, Congress "consist[s] of a Senate *and* House of Representatives." U.S. Const. Art. I, § 1 (emphasis added). The Framers consciously rejected a unicameral legislature, *Chadha*, 462 U.S. at 948-951; the powers of the House as an individual body are "narrowly and precisely defined" in the Constitution, *id.* at 955; and none of those powers is called into question by a judicial decision invalidating the application of a particular substantive law passed by both Houses of a previous Congress.

3. Finally, even assuming *arguendo* BLAG could be seen as representing the entire Congress, it would still lack Article III standing. "[O]nce Congress makes its choice in enacting legislation, its participation ends." *Bowsher* v. *Synar*, 478 U.S. 714, 733 (1986). Congress has no judicially cognizable interest in the "execution of the Act" it has enacted. *Id.* at 734. That is an "executive function," which Congress may affect only "indirectly," namely, "by passing new legislation." *Ibid.* This Court has made clear that Congress "is dependent on the Executive and the courts for enforcement of the laws it enacts." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 817 (1987) (Scalia, J., concurring in judgment).

From Congress's perspective, a judicial decree precluding enforcement of a federal statute on constitutional grounds is no different from a Presidential determination not to enforce the statute because he himself considers it unconstitutional. Either way, the law is not being enforced as written. Congress, however, has no standing to sue the President for nonenforcement of a law. See *Byrd*, 521 U.S. at 826-830 (noting the absence of direct suits between the Executive and Legislative Branches "on the basis of claimed injury to official authority or power"); see also *Young*, 481 U.S. at 817 (Scalia, J., concurring in judgment) ("Even complete failure by the Executive to prosecute law violators, or by the courts to convict them, has never been thought to authorize congressional prosecution and trial."). No principled basis exists for finding congressional standing simply because it is a decision of the Judicial Branch, rather than the Executive Branch, that precludes a law's enforcement.

Nor is the situation any different when the Executive Branch has declined to defend the law against a constitutional challenge. That infrequent practice is an example of the Constitution's separation of powers and checks and balances at work, not a license for congressional encroachment on the litigating authority that the Constitution vests in the President alone. See *Buckley*, 424 U.S. at 138-140. The Framers were fearful of "the tendency of republican governments * * * to an aggrandizement of the legislative, at the expense of the other departments," *The Federalist No. 49*, at 341 (James Madison) (Jacob E. Cooke ed. 1961), and separated legislative authority from enforcement authority to avoid such a result.

This Court has rejected the notion that Congress can diminish "the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,'" by authorizing courts to adjudicate individual suits based on an "undifferentiated public interest in executive officers' compliance with the law." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (quoting U.S. Const. Art. II, § 3). Direct litigation by Congress itself would, if anything, intrude even more deeply upon the President's prerogatives. It is, moreover, unclear that the intrusion would be limited to cases involving a statute's constitutionality. If Congress has independent standing when the Executive Branch contends that a statute cannot *constitutionally* be applied in certain circumstances, then Congress might also assert independent standing when the Executive Branch contends that a statute should not be *construed* to apply in certain circumstances.

All of this is not to say that Congress lacks any role in a situation where the Executive Branch has declined to defend a statute. The Attorney General is required to inform Congress of any such decision. 28 U.S.C. 530D(a)(1)(B). Presentation of arguments by Congress in an amicus-type role assures that both sides of the constitutional question will be before the court, where its jurisdiction is properly invoked. See *Chadha*, 462 U.S. at 940; see also, *e.g.*, *Morrison* v. *Olson*, 487 U.S. 654, 659 & n.* (1988) (Senate and House leadership appeared as amici). And Congress also has various tools at its disposal, including the power of the purse, to express any displeasure with the President's actions in a particular case. See, *e.g.*, *Olson*, 487 U.S. 654 at 711 (Scalia, J., dissenting); *Young*, 481 U.S. at 817-818 (Scalia, J., concurring in judgment). It neither needs nor possesses independent litigating authority as well.

C. *Chadha* Does Not Establish BLAG's Standing To Appeal

In the court of appeals, BLAG's argument for standing relied primarily on *Chadha*. See 12-2335 Docket entry 94-2, at 13-15 (2d Cir. July 19, 2012). BLAG's reliance on *Chadha* is misplaced.

1. In *Chadha*, the INS and Chadha initially were the sole parties, but the court of appeals invited amicus briefs from the House and Senate, which it consid-

ered before concluding that the legislative-veto statute was unconstitutional. 462 U.S. at 928. After the panel issued its decision, the House and Senate passed resolutions authorizing intervention as parties, and the court of appeals permitted them to intervene. *Chadha*, 462 U.S. at 930 n.5. In parallel with the INS's appeal to this Court under Section 1252, the congressional parties filed petitions for writs of certiorari under 28 U.S.C. 1254(1). *Id.* at 928. This Court, in addition to finding jurisdiction for the INS's appeal, also granted the House's and Senate's petitions. *Id.* at 928-931. The Court stated, without any sustained discussion of standing, that "Congress is both a proper party to defend the constitutionality of [the statute] and a proper petitioner under 28 U.S.C. 1254(1)." *Id.* at 939.

That conclusion does not control the issue of BLAG's standing here. For reasons already discussed, BLAG is not "Congress." See *Chadha*, 462 U.S. at 930 n.5 (noting that both Houses of Congress authorized intervention). Moreover, especially in light of the Court's consideration of legislative standing in subsequent decisions, see *Raines* v. *Byrd*, *supra*, that statement in *Chadha*, which was not necessary to the Court's resolution of the case, should not be understood to establish the proposition that Congress, or one of its Houses, would have independent standing to initiate a suit—as distinguished from intervening in an already-existing case or controversy between other parties (like plaintiff and the United States here). Nor should it be understood to establish that Congress or one of its Houses would have independent Article III standing to seek review of a court decision if another party (like the United States here), through its own appeal, had not already sought review. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 65 n.20 (1997) (describing *Chadha* as a case in which INS "appealed Court of Appeals ruling to this Court but declined to defend constitutionality of one-House veto provision" and this Court "held Congress a proper party to defend [legislative-veto] measure's validity where both Houses, by resolution, had authorized intervention"). Indeed, the Court in *Byrd* emphasized the absence of any history of judicial resolution of disputes between Congress and the Executive Branch. See 521 U.S. at 826-828. And while holding that the individual Members of Congress had no standing, the Court declined to decide whether the case would have been different if, *inter alia*, the Members' suit had been authorized by their respective Houses. *Id.* at 829-830.

In any event, *Chadha* involved an unusual statute that vested the House and the Senate themselves each with special procedural rights—namely, the right effectively to veto Executive action. 462 U.S. at 923. Even assuming Congress has standing to appeal in that situation, that would not mean that BLAG has standing to take an appeal to defend a statute like Section 3, which has no such effect on Congress, much less BLAG.

2. The *Chadha* opinion also stated, while discussing "prudential, as opposed to Art[icle] III concerns," that "[w]e have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." 462 U.S. at 940. The context, however, indicates that the Court's

statement concerned the participation of Congress as an amicus. The Court observed that the court of appeals had "properly dispelled any [prudential jurisdictional] concerns by inviting and accepting briefs from both Houses of Congress"—*i.e.*, amicus briefs. *Ibid.*; see *id.* at 929. And the Court cited examples involving arguments of amici, not cases in which Congress had brought a dispute before this Court as a party. *Id.* at 940 (citing *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 210 n.9 (1968) (invited amicus), and *Lovett*, *supra* (congressional amicus)). Those amicus examples do not establish that Congress, much less BLAG, has independent standing to seek further review of the lower-court decisions here.

Finally, *Chadha* twice noted that the presence of the congressional parties erased any doubt about the existence of Article III adverseness with respect to both the congressional petitions and the INS's appeal. See 462 U.S. at 931 n.6 ("[A] controversy clearly exists in [the INS appeal], as in the other two cases, because of the presence of the two Houses of Congress as adverse parties); *id.* at 939 ("[F]rom the time of Congress' formal intervention, * * * concrete adverseness is beyond doubt."). But the Court also expressly concluded that "adequate Art[icle] III adverseness" existed in the case even before Congress's intervention, when "the only parties were the INS and Chadha," *ibid.*, which was a sufficient basis for finding a case or controversy. Similar adverseness exists in this case between the United States and plaintiff, and the Court can and should adjudicate the merits of that dispute on the petition of the United States, the party injured by the decisions below.

CONCLUSION

For the foregoing reasons, this Court should reach the merits of this case based on the petition for a writ of certiorari filed by the United States.

Respectfully submitted.

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APPENDIX

1. Article III, Section 2, Clause 1 of the United States Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * [and] to Controversies to which the United States shall be a Party; * * * .

2. Section 1291 of Title 28 of the United States Code provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

3. Section 1254(1) of Title 28 of the United States Code provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree * * * .

APPENDIX

1. U.S. Const. Amend. V provides, in pertinent part:

No person shall * * * be deprived of life, liberty, or property, without due process of law * * * .

2. 28 U.S.C. 1738C (DOMA § 2) provides:

Certain acts, records, and proceedings and the effect thereof

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

3. 1 U.S.C. 7 (DOMA § 3) provides:

Definition of "marriage" and "spouse"

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

PETITIONER'S BRIEF

No. 12-307

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES ON THE MERITS QUESTION

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QUESTION PRESENTED

Section 3 of the Defense of Marriage Act (DOMA) defines the term "marriage" for all purposes under federal law, including the provision of federal benefits, as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. 7. It similarly defines the term "spouse" as "a person of the opposite sex who is a husband or a wife." *Ibid.* The question presented is:

Whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their state.

PARTIES TO THE PROCEEDING

Petitioner, who was a defendant in the district court and an appellant in the court of appeals, is the United States of America.

The private individual respondent, who was plaintiff in the district court and an appellee in the court of appeals, is Edith Schlain Windsor.

Respondent Bipartisan Legal Advisory Group of the United States House of Representatives intervened in this case in defense of Section 3 of DOMA.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 2
Statement 2
Summary of argument 12
Argument:
  Section 3 of DOMA violates equal protection 16
    A. Classifications based on sexual orientation should be subject to heightened scrutiny 18
      1. Gay and lesbian people have been subject to a history of discrimination 22
      2. Sexual orientation bears no relation to ability to perform or contribute to society 27
      3. Gay and lesbian people possess a distinguishing characteristic that defines them as a group 29
      4. Gay and lesbian people are minorities with limited political power 32
    B. Section 3 of DOMA fails heightened scrutiny 37
      1. Morality 38
      2. Traditional definition of marriage 39
      3. Procreation and child-rearing 41
      4. Sovereign choice 44
      5. Federal fisc 45
      6. Other interests asserted by BLAG 47
        a. Uniformity and administrability 47
        b. Proceeding with caution 50
    C. The government does not challenge the constitutionality of DOMA Section 3 under deferential rational-basis review, but Section 3 would fail a more searching form of that review 51
Conclusion 54
Appendix — Constitutional and statutory provisions 1a

TABLE OF AUTHORITIES

Cases: Page

Armour v. *City of Indianapolis*, 132 S. Ct. 2073 (2012) 51

Baehr v. *Lewin*, 852 P.2d 44 (Haw. 1993) 3

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Lawrence v. *Texas*, 539 U.S. 558 (2003) .... *passim*
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U.S. Const.:
    Art. I, § 8 (Spending Clause) 45
    Art. III 6
    Amend. V 4, 6, 54
        Due Process Clause 16
    Amend. X 45
    Amend. XIV:
        Due Process Clause 19
        Equal Protection Clause 19
Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 875 24
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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES ON THE MERITS QUESTION

OPINIONS BELOW

The opinion of the court of appeals (Supp. App. 1a-83a)[1] is reported at 699 F.3d 169. The opinion of the district court (Pet. App. 1a-22a) is reported at 833 F. Supp. 2d 394.

JURISDICTION

The judgment of the district court was entered on June 6, 2012. Notices of appeal were filed on June 8, 2012, and June 14, 2012 (Pet. App. 25a-26a, 27a-29a). A petition for a writ of certiorari before judgment was filed on September 11, 2012. The judgment of the court of appeals was entered on October 18, 2012. On

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[1] "Supp. App." refers to the appendix to the government's supplemental brief at the certiorari stage.

October 26, 2012, the United States filed a supplemental brief pursuant to Rule 15.8 of the Rules of this Court. The petition for a writ of certiorari was granted on December 7, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a.

STATEMENT

1. a. Congress enacted the Defense of Marriage Act (DOMA) in 1996. Pub. L. No. 104-199, 110 Stat. 2419. DOMA contains two operative provisions. The first, Section 2, provides that no State is required to give effect to any public act, record, or judicial proceeding of another State that treats a relationship between two persons of the same sex as a marriage under its laws. DOMA § 2, 110 Stat. 2419 (28 U.S.C. 1738C).

The second provision, Section 3, which is at issue in this case, defines "marriage" and "spouse" for all purposes under federal law to exclude marriages between persons of the same sex, regardless of whether a marriage is recognized under state law. Section 3 provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers

> only to a person of the opposite sex who is a husband or a wife.

DOMA § 3, 110 Stat. 2419 (1 U.S.C. 7).

b. Congress enacted DOMA in response to the Hawaii Supreme Court's decision in *Baehr* v. *Lewin*, 852 P.2d 44 (1993), which held that the denial of marriage licenses to same-sex couples was presumptively invalid under the Hawaii Constitution. H.R. Rep. No. 664, 104th Cong., 2d Sess. 2 (1996) (House Report). Hawaii ultimately did not permit same-sex marriage, but other states later recognized such marriages under their respective laws.

Section 3 of DOMA does not purport to invalidate same-sex marriages in those states that permit them. Section 3, however, excludes such marriages from recognition for purposes of more than 1000 federal statutes and programs whose administration turns in part on individuals' marital status. See U.S. Gen. Accounting Office, Report No. GAO-04-353R, *Defense of Marriage Act: Update to Prior Report* 1 (2004), http://www.gao.gov/assets/100/92441.pdf (identifying 1138 federal laws contingent on marital status or in which marital status is a factor). Section 3 thus denies to legally married same-sex couples many substantial benefits afforded to legally married opposite-sex couples under federal employment, immigration, public health and welfare, tax, and other laws. *Id.* at 16-18.

2. In 2007, plaintiff married Thea Spyer, her same-sex partner of more than 40 years, in Canada. The couple resided in New York. When Spyer died in 2009, she left her estate for plaintiff's benefit. Pet. App. 3a; J.A. 152 (Am. Compl. ¶¶ 10, 11).

In her capacity as executor of Spyer's estate, plaintiff paid $363,053 in federal estate taxes. She then filed a refund claim under 26 U.S.C. 2056(a), which provides that property that passes from a decedent to a surviving spouse may generally pass free of federal estate taxes. The Internal Revenue Service (IRS) denied the refund claim solely on the ground that plaintiff is not a "spouse" within the meaning of DOMA Section 3 and thus not a "surviving spouse" within the meaning of Section 2056(a). Pet. App. 3a-4a; J.A. 169-170 (Am. Compl. ¶¶ 72-78), 245-252 (IRS denial letter). The IRS did not identify or address any question concerning the recognition of plaintiff's marriage under New York law. J.A. 251-252.

Plaintiff filed this tax-refund suit challenging the constitutionality of Section 3 in the United States District Court for the Southern District of New York. She contended that, by treating legally married same-sex couples in New York differently from legally married opposite-sex couples in New York, Section 3, as applied by the IRS, violates the equal protection component of the Fifth Amendment. She sought declaratory and injunctive relief, as well as recovery of the $363,053 in federal estate taxes paid by Spyer's estate. Pet. App. 4a; J.A. 172 (Am. Compl. ¶¶ 82-85).

3. a. After plaintiff filed her complaint, the Attorney General sent a notification to Congress under 28 U.S.C. 530D that the President and he had determined that Section 3 of DOMA is unconstitutional as applied to same-sex couples who are legally married under state law. J.A. 183-194. The letter explained that, while the Department of Justice had previously defended Section 3 where binding precedent in the circuit required application of rational-basis review to classifications based on sexual orientation, the President and the Department of Justice had conducted a

new examination of the issue after two lawsuits (this one and *Pedersen* v. *OPM*, petition for cert. before judgment pending, No. 12-231 (filed Aug. 21, 2012)) had been filed in a circuit that had yet to address the appropriate standard of review. J.A. 184. The Attorney General explained that, after examining factors identified by this Court as relevant to the applicable level of scrutiny—including the history of discrimination against gay and lesbian individuals and the irrelevance of sexual orientation to legitimate policy objectives—the President and he had concluded that Section 3 warrants application of heightened scrutiny rather than rational-basis review. J.A. 185-189. The Attorney General further explained that the President and he had concluded that Section 3 fails that standard and is therefore unconstitutional. J.A. 189-191.

The Attorney General's letter reported that, notwithstanding this determination, the President had "instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality." J.A. 191-192. The Attorney General explained that "[t]his course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised." *Ibid.* In the interim, the Attorney General instructed the Department's lawyers to notify courts of the President's views and cease defense of Section 3. J.A. 191-193. Finally, the Attorney General noted that the Department's lawyers would take appropriate steps to "provid[e] Congress a full and fair opportunity to participate" in litigation concerning the constitutionality of Section 3. J.A. 193.

b. Following the Attorney General's announcement, the Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG), a five-member bipartisan leadership group, moved to intervene in this case in defense of Section 3.[2] The district court granted the motion. J.A. 218; see Pet. App. 4a.

Both the government and BLAG moved to dismiss plaintiff's challenge to the constitutionality of Section 3. While BLAG presented arguments in support of Section 3's constitutionality, the government explained that it was filing a motion to dismiss plaintiff's constitutional claim solely to ensure that the court had Article III jurisdiction to enter judgment for or against the United States. J.A. 437-439. The government's brief on the merits set forth its view that heightened scrutiny applies to Section 3 and that, under that standard, Section 3 violates the equal protection guarantee of the Fifth Amendment. J.A. 486-489.

4. The district court denied the motions to dismiss and granted summary judgment in favor of plaintiff, concluding that Section 3 of DOMA violates equal protection. Pet. App. 1a-22a. The court first rejected two threshold arguments advanced by BLAG: (1) the court concluded that New York law in 2009 (the relevant tax year) required recognition of same-sex marriages performed in other jurisdictions, thus ensuring Article III standing, *id.* at 6a-8a; and (2) the court held that this Court's summary dismissal of the appeal

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[2] Two of the group's five members declined to support intervention. J.A. 196 n.1.

in *Baker* v. *Nelson*, 409 U.S. 810 (1972), did not foreclose plaintiff's challenge because Section 3, unlike the statute at issue in *Baker*, "does not preclude or otherwise inhibit a state from authorizing same-sex marriage (or issuing marriage licenses)," Pet. App. 9a. Turning to the merits of plaintiff's challenge, the district court declined to decide whether heightened scrutiny or even "a more 'searching' form of rational basis scrutiny is required." *Id.* at 13a-14a. The court instead held that neither the legislative purposes articulated in support of Section 3 at the time of its enactment nor additional interests offered by BLAG bear a rational relationship to a legitimate governmental objective. *Id.* at 13a-22a.

5. The court of appeals affirmed. Supp. App. 1a-83a.

a. At the outset, the court of appeals rejected BLAG's argument that the government is not an aggrieved party that can take an appeal. Supp. App. 4a-5a. Relying on *INS* v. *Chadha*, 462 U.S. 919, 931 (1983), the court held that the government is aggrieved because "the United States continues to enforce Section 3" and Section 3's constitutionality "will have a considerable impact on many operations of the United States." Supp. App. 4a-5a.

b. The court of appeals then rejected BLAG's threshold request that it should certify to the New York Court of Appeals the question, which BLAG characterized as implicating plaintiff's standing, whether New York in 2009 recognized same-sex marriages entered into in other jurisdictions. Supp. App. 5a-7a. Relying on the "useful and unanimous" rulings of New York's intermediate appellate courts on that question, *id.* at 6a, the court of appeals agreed with the district court and concluded that New York recognized such marriages at the relevant time, *id.* at 6a-7a.

c. The court of appeals also rejected BLAG's argument that this Court's summary dismissal of the appeal in *Baker*, *supra*, controls plaintiff's equal protection challenge. Supp. App. 7a-11a. After noting the limited precedential force of summary dismissals, the court of appeals explained that the "question whether the federal government may constitutionally define marriage as it does in Section 3 of DOMA is sufficiently distinct from the question in *Baker*: whether same-sex marriage may be constitutionally restricted by the *states*." *Id.* at 8a. The court reasoned, moreover, that even if "*Baker* might have had resonance" when it was decided, "it does not today" because of the "manifold changes to the Supreme Court's equal protection jurisprudence" since *Baker*. *Id.* at 9a.

d. Turning to the constitutionality of Section 3, the court of appeals noted that "the existence of a rational basis for Section 3 of DOMA is closely argued," Supp. App. 12a, but concluded that it need not resolve that argument "if heightened scrutiny is available, as it is in this case," *id.* at 14a. In considering the applicable level of scrutiny, the court first looked to whether the class has historically been subjected to discrimination. *Id.* at 16a-17a. The court found "[i]t is easy to conclude that homosexuals have suffered a history of discrimination." *Id.* at 16a. "Perhaps the most telling proof of animus and discrimination," the court determined, "is that, for many years and in many states, homosexual conduct was criminal." *Ibid.* Noting that "BLAG concedes that homosexuals have endured discrimination in this country since at least the 1920s," the court concluded that "[n]inety years of discrimination is entirely sufficient." *Id.* at 17a.

The court of appeals then assessed whether sexual orientation, the distinguishing class characteristic, typically bears on a person's ability to contribute to society. Supp. App. 17a-18a. The court reasoned that, while "[t]here are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society," sexual orientation "is not one of them." *Id.* at 18a. The court determined that sexual orientation "has nothing to do with aptitude or performance." *Ibid.*

Next, the court of appeals examined the discernibility of sexual orientation, Supp. App. 19a-21a, explaining that "what matters here is whether the characteristic invites discrimination when it is manifest," *id.* at 21a. The court rejected the characterization of this factor as one confined to "immutability," finding that "the test is broader." *Id.* at 19a-20a. Analogizing to classifications based on alienage, illegitimacy, and national origin, *id.* at 19a-21a, the court concluded that "sexual orientation is a sufficiently distinguishing characteristic to identify the discrete minority class of homosexuals," *id.* at 21a.

Finally, the court evaluated the political power of gay and lesbian people. Supp. App. 21a-23a. The court acknowledged that "homosexuals have achieved political successes over the years." *Id.* at 21a. But the relevant question, the court explained, "is whether they have the strength to politically protect themselves from wrongful discrimination." *Ibid.* Pointing to "the seemingly small number of acknowledged homosexuals" in positions of power, among other evidence, *id.* at 22a, the court concluded that gay and lesbian people cannot "adequately protect themselves from the discriminatory wishes of the majoritarian public," *id.* at 23a.

Based "on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect," the court concluded that "the class is quasi-suspect" and thus calls for the application of intermediate scrutiny. Supp. App. 23a.

e. The court of appeals then held that Section 3 of DOMA fails under intermediate scrutiny. Supp. App. 23a-31a. The court concluded that the purposes advanced by BLAG and Congress in support of Section 3 do not bear a substantial relationship to an important governmental objective, *id.* at 24a-30a, noting that "BLAG's counsel all but conceded [at argument] that these reasons for enacting DOMA may not withstand intermediate scrutiny," *id.* at 24a.

The court first determined that an asserted interest in "maintaining a consistent federal definition of marriage" cannot withstand intermediate scrutiny. Supp. App. 24a. The court explained that, among other problems, "DOMA's sweep arguably creates more discord and anomaly than uniformity"; "[b]ecause DOMA defined only a single aspect of domestic relations law, it left standing all other inconsistencies in the laws of the states, such as minimum age, consanguinity, divorce, and paternity." *Id.* at 25a.

Nor could the court of appeals discern a substantial relationship between Section 3 and the interest in "sav[ing] government resources." Supp. App. 26a. "DOMA is so broad," the court concluded, *id.* at 27a, that it "transcends a legislative intent to conserve public resources," *id.* at 28a. And while "[f]iscal prudence is undoubtedly an important government interest," *id.* at 27a, the court noted, the "saving of welfare costs cannot justify an otherwise invidious classification," *ibid.* (quoting *Graham* v. *Richardson*, 403 U.S. 365, 375 (1971)).

Turning to the asserted interest in "preserving traditional marriage as an institution," Supp. App. 28a, the court explained that the "ancient lineage of a legal concept does not give a law immunity from attack," *ibid.* (quoting *Heller* v. *Doe*, 509 U.S. 312, 326 (1993) (brackets omitted)). The court concluded, moreover, that "[e]ven if preserving tradition were in itself an important goal, DOMA is not a means to achieve it"; "because the decision of whether same-sex couples can marry is left to the states, DOMA does not, strictly speaking, preserve the institution of marriage as one between a man and a woman." *Id.* at 29a (citation and internal quotation marks omitted).

Finally, the court determined that Section 3 does not advance an interest in the "encouragement of responsible procreation and child-rearing," *id.* at 30a, because "DOMA does not affect in any way" the incentives for opposite-sex couples to engage in such procreation and child-rearing, *id.* at 29a. "Incentives for opposite-sex couples to marry and procreate (or not)," the court concluded, "were the same after DOMA was enacted as they were before." *Id.* at 30a.

f. Judge Straub dissented in part. While he concurred with the parts of the court's opinion denying BLAG's motion to dismiss the government's appeal and declining to certify to the New York Court of Appeals the marriage-recognition issue, Supp. App. 31a, he would have held that *Baker* forecloses petitioner's equal protection challenge, *id.* at 40a-48a. Even if *Baker* did not control, Judge Straub would have upheld Section 3 applying rational-basis scrutiny. *Id.* at 48a-83a.

SUMMARY OF ARGUMENT

Section 3 of DOMA violates the fundamental constitutional guarantee of equal protection. The law denies to tens of thousands of same-sex couples who are legally married under state law an array of important federal benefits that are available to legally married opposite-sex couples. Because this discrimination cannot be justified as substantially furthering any important governmental interest, Section 3 is unconstitutional.

A. This Court has understandably reserved the application of heightened constitutional scrutiny to a small number of classifications. But the Court has yet to determine whether classifications based on sexual orientation qualify. Under the factors articulated by this Court, such classifications warrant heightened scrutiny.

First, gay and lesbian people have been subject to a significant history of discrimination in this country. Until *Lawrence* v. *Texas*, 539 U.S. 558 (2003), criminal laws in many states prohibited their private sexual conduct. In addition, gay and lesbian people have long suffered discrimination in employment, immigration, criminal violence, child custody, police enforcement, voter referenda, and other contexts.

Second, sexual orientation, unlike disability or age, generally bears no relation to ability to participate in and contribute to society. Rather than dispute that unassailable fact, BLAG seeks to avoid its force by inventing its own query untethered to this Court's precedents (Br. 54): whether the classification turns on a characteristic "relevant to the distinctions actually drawn." But that formulation would drain the constitutional inquiry of any real meaning by conflating the question whether a classification withstands heightened scrutiny in a particular case (the second step of the equal-protection analysis) with the antecedent question whether heightened scrutiny applies to that classification (the first step).

Third, discrimination against gay and lesbian people is based on an immutable or distinguishing characteristic. Sexual orientation is a core aspect of identity. Its expression, particularly in loving and committed relationships, is an "integral part of human freedom." *Lawrence*, 539 U.S. at 577. There is broad scientific and medical consensus that sexual orientation is typically not a voluntary choice, and that efforts to change an individual's sexual orientation are generally futile and potentially harmful. In any event, as long as it distinguishes a group, a characteristic may support application of heightened scrutiny even if—as with illegitimacy or alienage—it is subject to change or not readily visible.

Fourth, gay and lesbian people are a minority group with limited political power. Although some of the harshest and most overt forms of discrimination against gay and lesbian people have receded, that progress has hardly been uniform (either temporally or geographically), and has in significant respects been the result of judicial enforcement of the Constitution, not political action. *E.g.*, *Lawrence*, *supra*. The vast majority of state voter initiatives directed at gay and lesbian people, even within the last decade, have repealed protections against sexual-orientation discrimination or denied gay and lesbian people the ability to marry. In any event, as confirmed by the applicability of heightened scrutiny to classifications based on gender, the fact that gay and lesbian people have achieved some political gains does not tilt this factor against, let alone preclude, heightened scrutiny. See *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion).

B. Section 3 fails heightened scrutiny. None of Section 3's actual purposes as expressed in the House Report, or any of the additional interests now asserted by BLAG, substantially furthers an important governmental objective.

Congress's stated interest in asserting moral disapproval of homosexuality cannot justify Section 3. BLAG does not contend otherwise. As the Court has explained, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Lawrence*, 539 U.S. at 577 (citation omitted).

Congress's asserted interest in defending the institution of "traditional, heterosexual" marriage (House Report 12) fails for similar reasons. *E.g.*, *United States* v. *Virginia*, 518 U.S. 515, 535-536 (1996) (*VMI*). In any event, because Section 3 imposes no restriction on the ability of any state to provide for same-sex marriage, it does not substantially further any interest in preserving "traditional, heterosexual" marriage.

Nor can DOMA be justified based on the interest in promoting responsible parenting and child-rearing that BLAG identifies as the principal societal justification for recognizing marriage. Even apart from the expert consensus that children raised by gay and lesbian parents are as likely to be well adjusted as children raised by heterosexual parents, Section 3 does nothing to promote responsible opposite-sex parenting or to prevent irresponsible same-sex parenting. Denying federal benefits to married same-sex couples creates no additional incentive for heterosexual couples to marry, procreate, or raise children together; nor does it disturb any state-conferred parental rights for same-sex couples.

Congress's interest in "protecting state sovereignty and democratic self-governance" (House Report 12, 18) applies to Section 2, not Section 3, of DOMA. BLAG invokes a parallel sovereign interest in enabling the *federal* government to formulate its own definition of marriage for its own purposes. That asserted interest, however, simply begs the question in this case: whether the exercise of federal authority is consistent with equal protection.

Section 3 also cannot be justified based on an interest in preserving government resources. Even assuming that Section 3 actually saves the government money (a dubious assertion), that would not suffice under heightened scrutiny. *E.g.*, *Plyler* v. *Doe*, 457 U.S. 202, 227 (1982).

The related interests in national uniformity and administrability with respect to federal benefits eligibility are not "actual purposes" expressed either in DOMA itself or the accompanying House Report, and therefore cannot be considered for purposes of heightened scrutiny. *VMI*, 518 U.S. at 535-536. Those interests also fail because the federal government ordinarily has given effect to marriages lawfully recognized under state law despite a number of inconsistencies among state marriage laws. Section 3 breaks from that established practice in a way that creates administrative difficulties, *i.e.*, requiring the federal government to determine whether a valid state marriage involves individuals of the same sex.

Finally, the asserted interest in proceeding with caution pending state experimentation with the definition of marriage likewise lacks a basis in DOMA or the House Report. Section 3, at any rate, affects the institution of marriage, if at all, only "at the margin" (BLAG Br. 43). Section 3, moreover, is not framed as a temporary measure designed to facilitate further study.

C. If the Court declines to apply heightened scrutiny to Section 3 of DOMA, the government does not challenge the constitutionality of Section 3 under the highly deferential standard of rational-basis review. Insofar as the Court were to apply a "more searching form of rational basis review" (*Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in judgment)) because of the unique nature of the classification at issue, however, Section 3 would fail that analysis for largely the same reasons that it fails heightened scrutiny.

ARGUMENT

SECTION 3 OF DOMA VIOLATES EQUAL PROTECTION

The Constitution's guarantee of equal protection of the laws, applicable to the federal government through the Due Process Clause of the Fifth Amendment, see *Bolling* v. *Sharpe*, 347 U.S. 497, 500 (1954), embodies a defining constitutional ideal that "all persons similarly situated should be treated alike," *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Section 3 of DOMA stands at odds with that fundamental principle: it allows states to define the category of "similarly situated" persons—those who are legally married under state law—but it then denies federal benefits to legally married same-sex couples that are available to legally married opposite-sex couples.

The present case vividly illustrates the character of this discrimination: Section 3 of DOMA required the federal government to deny plaintiff a $363,000 reduction in estate taxes solely because her marriage, although fully recognized as a matter of state law, was with another woman. The statute inflicts a vast array of similarly severe harms upon the tens of thousands of legally married same-sex couples in this country. A same-sex spouse of an active-duty military servicemember is excluded from certain housing, health-insurance, and disability benefits that would be afforded to an opposite-sex spouse. A federal employee is denied leave under the Family and Medical Leave Act to care for a sick same-sex spouse, who is also ineligible for health-insurance coverage. A non-citizen same-sex spouse of a United States citizen cannot qualify as the citizen spouse's immediate relative for purposes of obtaining lawful permanent residence, subjecting the non-citizen spouse to the possibility of removal (if in the United States) or continued separation (if abroad). A same-sex surviving spouse is denied certain Social Security and pension benefits that would be available to an opposite-sex spouse. And a same-sex spouse of a military veteran is ineligible to be buried alongside his or her spouse in a national cemetery (absent a discretionary designation of eligibility by the Secretary of Veterans Affairs), or to receive certain survivor benefits upon a veteran's service-connected death. 38 U.S.C. 1310, 2402(a)(5) and (6); see also 38 U.S.C. 101(3) and (31) (defining "spouse" for Title 38 as a person of the opposite sex who is a wife or husband).

The question in this case is whether those results compelled by DOMA are consistent with equal protection. They are not.[3]

A. Classifications Based On Sexual Orientation Should Be Subject To Heightened Scrutiny

Legislation is generally presumed valid and sustained as long as the "classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440. When "individuals in the group affected by a law have distinguishing characteristics relevant to interests the [government] has the authority to implement," courts will not "closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Id.* at 441-442. But when legislation classifies on the basis of a factor that "generally provides no sensible ground for differential treatment"—such as race or gender—equal protection imposes a greater burden on the government to justify the classification. *Id.* at 440-441.

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[3] BLAG asserts in a footnote (Br. 24 n.6) that "[b]efore it can consider DOMA's constitutionality, this Court must resolve a threshold issue of Article III standing," in that plaintiff "only has standing to challenge DOMA * * * if New York would have recognized her 2007 Ontario marriage certificate" at the time of Thea Spyer's death. As explained in our certiorari reply (at 3-4 & nn.1-2), however, both courts below concluded that New York recognized plaintiff's marriage at the relevant time (Supp. App. 5a-7a; *id.* at 31a (Straub, J., dissenting); Pet. App. 6a-8a)—a conclusion entitled to controlling deference by this Court. See, *e.g.*, *Bishop* v. *Wood*, 426 U.S. 341, 346 (1976). Notably, BLAG makes no affirmative argument for disturbing the Second Circuit's and district court's common understanding of New York law, instead contending only that the issue is "not free from doubt." In any event, because IRS's denial of plaintiff's tax-refund claim was based solely on Section 3 of DOMA, without questioning the validity of her marriage under either Ontario or New York law (see p. 4, *supra*), BLAG's objection in fact goes to the merits rather than to standing.

Such suspect or quasi-suspect classifications are subject to heightened scrutiny, under which the government must show, at a minimum, that the classification drawn is "substantially related to an important governmental objective." *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988). That more stringent standard enables courts to ascertain whether the government has employed the classification for a significant and proper purpose, and provides a heightened measure of protection in circumstances where there is a greater danger that the classification results from impermissible prejudice or stereotypes. See, *e.g.*, *City of Richmond* v. *J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion); *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (*VMI*).

This Court has yet to resolve the appropriate level of scrutiny for classifications based on sexual orientation. In *Romer* v. *Evans*, 517 U.S. 620 (1996), the Court held that the state law at issue, which repealed existing—and prohibited future—legal protections for gay and lesbian people, failed "even" rational-basis review under the Equal Protection Clause. *Id.* at 632. In *Lawrence* v. *Texas*, 539 U.S. 558 (2003), the Court invalidated a state criminal ban on homosexual sodomy under the Due Process Clause of the Fourteenth Amendment because the law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 578. The Court accordingly had no need in either case to decide whether heightened scrutiny applies for purposes of equal-protection review of sexual-orientation classifications. Nor did the Court decide the question in its one-line summary dismissal in *Baker* v. *Nelson*, 409 U.S. 810 (1972), of an appeal as of right from a state supreme court decision denying a same-sex couple the right to marry under state law. See Supp. App. 7a-11a. As BLAG acknowledges (Br. 25-26), the Court's summary order unsurprisingly gives no indication that it considered, much less resolved, the applicable level of scrutiny.

The Court has, however, established a set of factors that guide the determination of whether to apply heightened scrutiny to a classification that singles out a particular group: (1) whether the class in question has suffered a history of discrimination, *e.g.*, *Bowen* v. *Gilliard*, 483 U.S. 587, 602 (1987); (2) whether the characteristic prompting the discrimination "frequently bears no relation to ability to perform or contribute to society," *Cleburne*, 473 U.S. at 440-441 (quoting *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion)); (3) whether the discrimination against members of the class is based on "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Gilliard*, 483 U.S. at 602 (citation omitted); and (4) whether the class is "a minority or politically powerless," *ibid.*

The first two considerations—a history of discrimination and the distinguishing characteristic's lack of relation to an individual's capabilities—are at the core of the inquiry and are common to every class this Court has deemed suspect. That is fully understandable: those factors provide direct and powerful reasons to be suspicious of a classification. Though relevant, neither immutability nor political powerlessness is a precondition or sufficient to warrant heightened scrutiny. See, *e.g.*, *Cleburne*, 473 U.S. at 443 n.10 ("[T]here's not much left of the immutability theory, is there?") (quoting John Hart Ely, *Democracy and Distrust* 150 (1980)); *id.* at 472 n.24 (Marshall, J., concurring in part and dissenting in part) ("The 'political powerlessness' of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates."). At any rate, as the court of appeals correctly determined (Supp. App. 16a-23a), all four of the factors demonstrate that classifications based on sexual orientation should be subject to heightened scrutiny.[4]

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[4] The decisions of other courts of appeals concluding that rational-basis review applies to sexual-orientation classifications are flawed. Many of those courts relied in whole or in part on *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), which this Court overruled in 2003. *Lawrence*, 539 U.S. at 578. They reasoned that "[i]f homosexual conduct may constitutionally be criminalized," as *Bowers* held, "then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes." *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); see *Equality Found.* v. *City of Cincinnati*, 54 F.3d 261, 266-267 & n.2 (6th Cir. 1995), vacated by, 518 U.S. 1001 (1996); *Steffan* v. *Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994) (en banc); *High Tech Gays* v. *Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); see also *Richenberg* v. *Perry*, 97 F.3d 256, 260 (8th Cir. 1996) (citing reasoning of prior appellate decisions based on *Bowers*), cert. denied, 522 U.S. 807 (1997); *Thomasson* v. *Perry*, 80 F.3d 915, 928 (4th Cir.) (same), cert. denied, 519 U.S. 948 (1996).

1. Gay and lesbian people have been subject to a history of discrimination

Gay and lesbian people have suffered a significant history of discrimination in this country. No court to consider the question has concluded otherwise, and any other conclusion would be insupportable. Supp. App. 16a; see, *e.g.*, *Massachusetts* v. *United States Dep't of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012) ("[G]ays and lesbians have long been the subject of discrimination."), petitions for cert. pending, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012), and 12-97 (filed July 20, 2012); *High Tech Gays* v. *Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) ("[W]e do agree that homosexuals have suffered a history of discrimination."); *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 465 (7th Cir. 1989) ("Homosexuals have suffered a history of discrimination and still do, though possibly now in less degree."), cert. denied, 494 U.S. 1004 (1990).

Perhaps most stark is the history of criminal prohibitions on the sexual intimacy of gay and lesbian people: that history ranges from colonial laws ordering the death of "any man [that] shall lie with mankind, as he lieth with womankind," Public Statute Laws of the State of Connecticut, 1808 tit. LXVI, ch. 1, § 2, 294-295 & n.1 (enacted 1642; rev. 1750), to state laws that, until very recently, "demean[ed] the[] existence" of gay and lesbian people "by making their private sexual conduct a crime," *Lawrence*, 539 U.S. at 578. "[T]hat declaration in and of itself [wa]s an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Id.* at 575. The federal government, state and local governments, and private parties all have contributed to a regrettable history of discrimination against gay and lesbian people in a variety of contexts:

- *Employment*: By the 1950s, based on Presidential and other directives, the federal government investigated its civilian employees for "sexual perversion," *i.e.*, homosexuality. Until 1975, "[t]he regulations of the Civil Service Commission for many years ha[d] provided that * * * immoral or notoriously disgraceful conduct, which includes homosexuality or other types of sex perversion, are sufficient grounds for denying appointment to a Government position or for the removal of a person from the Federal service." *Employment of Homosexuals and Other Sex Perverts in Government, Interim Report submitted to the Committee by its Subcommittee on Investigations pursuant to S. Res. 280*, S. Doc. No. 241, 81st Cong., 2d Sess. 8 (1950). Intrusive investigations by the FBI and other agencies forced thousands of federal employees out of their jobs based on the suspicion that they were gay or lesbian. See, *e.g.*, *id.* at 6-8; Brad Sears et al., The Williams Institute, *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment*, ch. 5 at 7, Sept. 2009, http://williamsinstitute.law.ucla.edu/research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment. The same was true on the state and local government level, *id.* at 18-

34, and pervasive employment discrimination persists to this day in the private sector, *id.* at 8-9.[5]

- *Immigration*: For decades, gay and lesbian noncitizens were categorically subject to exclusion from the United States on the ground that they were "persons of constitutional psychopathic inferiority," "mentally . . . defective," or sexually deviant. *Lesbian/Gay Freedom Day Comm., Inc.* v. *INS*, 541 F. Supp. 569, 571-572 (N.D. Cal. 1982) (quoting Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 875), see *Boutilier* v. *INS*, 387 U.S. 118, 120 (1967) ("The legislative history of the [Immigration and Nationality] Act indicates beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals."). That exclusion remained in effect until June 1, 1991. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

- *Hate crimes*: After racial minorities, gay and lesbian people are the most frequent victims of reported hate crimes. See FBI, *Hate Crime Statistics 2011*, http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/tables/table-1 (hate crimes motivated by victim's sexual orientation constituted second highest category reported with 1508 offenses or over 20% of total). From 2007 to 2011 (the latest year for which data has been reported), hate crimes motivated by sexual orientation *increased* 3%, even as hate crimes overall *decreased* 19%. Compare *ibid.*

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[5] Until September 2011, open military service by gay and lesbian people was prohibited first by regulation and then by statute, 10 U.S.C. 654.

with FBI, *Hate Crime Statistics, 2007*, http://www2.fbi.gov/ucr/hc2007/table_01.htm.

- *Child custody*: States and localities have denied child custody and visitation rights to gay and lesbian parents based on their intimate relationships. See, *e.g.*, *Ex parte H.H.*, 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J., concurring) (concurring in denial of custody to lesbian mother on ground that "[h]omosexual conduct is * * * abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God * * * [and] an inherent evil against which children must be protected"); *Bowen* v. *Bowen*, 688 So. 2d 1374, 1381 (Miss. 1997) (holding that trial court did not err in granting father custody based on public rumor that son's mother was involved in lesbian relationship); *Bottoms* v. *Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (noting that while "a lesbian mother is not *per se* an unfit parent," "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth" and "that conduct is another important consideration in determining custody").

- *Police enforcement*: Liquor licensing laws were used to raid establishments patronized by gay and lesbian people long before the Stonewall riots of 1969. See William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 Fla. St. U. L. Rev. 703, 761-766 (1997). Police similarly relied on laws prohibiting lewdness, vagrancy, and disorderly conduct to harass gay and lesbian people when congregating in public. See, *e.g.*, *Pryor* v. *Municipal Court*, 599 P.2d 636, 644 (Cal. 1979); Steven A. Rosen, *Police Harassment of Homosexual Women and Men in New York City,* *1960-1980*, 12 Colum. Hum. Rts. L. Rev. 159, 162-164 (1980); Florida State Legislative Investigation Committee, *Report: Homosexuality and Citizenship in Florida* 14 (1964).

- *Voter referenda*: Efforts to combat discrimination have engendered significant political backlash, as evidenced by a series of successful state and local ballot initiatives, starting in the 1970s, repealing anti-discrimination protections for gay and lesbian people. See Robert Wintemute, *Sexual Orientation and Human Rights* 56 (1995) ("From 1974 to 1993, at least 21 referendums were held on the sole question of whether an existing law or executive order prohibiting sexual orientation discrimination should be repealed or retained. In 15 of these 21 cases, a majority voted to repeal the law or executive order."). The voter initiatives at issue in *Romer*, *supra*, and *Equality Foundation* v. *City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995), vacated by, 518 U.S. 1001 (1996), are two of a number of more recent examples. See also pp. 33-34, *infra* (discussing success of state ballot measures prohibiting marriage of same-sex couples).

BLAG offers two responses to that well-documented history of discrimination. First, BLAG observes (Br. 57) that gay and lesbian people, unlike certain other protected classes, have never been denied the right to vote. But this Court has never enumerated political disenfranchisement as a separate factor, let alone a requirement, for according heightened scrutiny, and it would make little sense to do so. Citizens born out of wedlock, for instance, have never been denied the right to vote, but the Court has treated them as a quasi-suspect class for equal-protection purposes. See *Lalli* v. *Lalli*, 439 U.S. 259, 265 (1978).

Second, BLAG contends (Br. 57) that, unlike other protected classes, gay and lesbian people have not suffered discrimination "for longer than history has been recorded." Of course, that is not the relevant inquiry; as the court of appeals noted (Supp. App. 17a), "whether such discrimination existed in Babylon is neither here nor there." In any case, in addition to the colonial-era criminal prohibitions on homosexual conduct, BLAG concedes that gay and lesbian people have endured discrimination in this country since the 1920s. Any perceived shortage of evidence of overt or officially sanctioned discrimination before that time is likely attributable to the fact that gay and lesbian people, by and large, kept their sexual orientation hidden for fear of discrimination or persecution. In any event, given its breadth and depth, the undisputed twentieth-century discrimination has lasted long enough.

2. *Sexual orientation bears no relation to ability to perform or contribute to society*

A pivotal consideration distinguishing classifications that call for application of heightened scrutiny from classifications that do not is whether the characteristic in question generally bears on an "individual's ability to participate in and contribute to society." *Cleburne*, 473 U.S. at 441 (quoting *Mathews* v. *Lucas*, 427 U.S. 495, 505 (1976)). When the characteristic is ordinarily one that "the government may legitimately take into account," *id.* at 446, this Court declines to apply heightened scrutiny even if other factors would support its application. See *id.* at 442-447 (mental disability); *Massachusetts Bd. of Ret.* v. *Murgia*, 427 U.S. 307, 312-315 (1976) (per curiam) (age). Conversely, "what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." *Frontiero*, 411 U.S. at 686 (plurality opinion).

The same is true of sexual orientation. Historically, discrimination against gay and lesbian people had nothing to do with ability or performance, but rested instead on the view that they are, for example, sexual deviants, mentally ill, or immoral. See pp. 22-27, *supra*. As the American Psychiatric Association concluded some forty years ago, however, "homosexuality *per se* implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." American Psychiatric Ass'n, *Position Statement on Homosexuality and Civil Rights* (1973), *reprinted in* 131 Am. J. Psychiatry 497 (1974). Like gender, race, or religion, sexual orientation bears no inherent relation to a person's ability to participate in or contribute to society.

That fact is evident throughout all aspects of society, including military service. "[V]alor and sacrifice are no more limited by sexual orientation than they are by race or by gender or by religion or by creed," and gay and lesbian Americans have served with honor "to protect this nation and the ideals for which it stands." *Remarks by the President and Vice President at Signing of the Don't Ask, Don't Tell Repeal Act of 2010*, Dec. 22, 2010, http://www.whitehouse.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-dont-ask-dont-tell-repeal-a.

Gay and lesbian people have made similar contributions beyond the military, even when they could not live openly with regard to their sexual orientation. Plaintiff's own pathbreaking career as a computer programmer, while she kept her long-term relationship with Spyer "invisible," is but one example. J.A. 154, 156-157 (Am. Comp. ¶¶ 19, 27).

BLAG cannot dispute any of this. Instead, BLAG would prefer to transform the inquiry into a markedly different, case-specific one (Br. 54): whether the classification turns on a characteristic "relevant to the distinctions actually drawn," *i.e.*, "whether a married couple is of the opposite sex is relevant to the government's interests in recognizing marriage." This Court has never framed the inquiry in that way, and for good reason. As the court of appeals explained, this Court's decisions make clear that the relevance of the classification to the "distinctions actually drawn" by a particular law "bear[s] upon whether the law withstands scrutiny (the second step of analysis) rather than upon the level of scrutiny to apply" in the first place. Supp. App. 18a (citing *Clark*, 486 U.S. at 461). When the inquiry is properly framed, the answer is clear. Sexual orientation—like gender—"frequently bears no relation to ability to perform or contribute to society." *Frontiero*, 411 U.S. at 686 (plurality opinion).

3. Gay and lesbian people possess a distinguishing characteristic that defines them as a group

Sexual orientation is a sufficiently discernible characteristic to define a discrete minority group. BLAG (Br. 54-56) and its amici contend that sexual orientation is not necessarily fixed, suggesting that it may change over time and vary along a spectrum. That contention is both irrelevant and incorrect.

a. As the Court's precedents indicate, this factor is broader than "immutability" or "obviousness"; it asks whether there are "obvious, immutable, *or* distinguishing characteristics that define * * * a discrete group." *Gilliard*, 483 U.S. at 602 (emphasis added; citation omitted); *Lyng* v. *Castillo*, 477 U.S. 635, 638 (1986). A classification may be constitutionally suspect even if it rests on a characteristic, such as illegitimacy or alienage, that is not readily visible or is subject to change. See *Mathews*, 427 U.S. at 504, 506 ("[I]llegitimacy does not carry an obvious badge, as race or sex do."); *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971) (alienage). As the court of appeals explained (Supp. App. 19a-20a), the salient question "is whether the characteristic of the class calls down discrimination when it is manifest."

Sexual orientation is such a "distinguishing characteristic," and that is true even though so many gay and lesbian people have been forced for so long to hide their identities in order to avoid discrimination. As this Court has recognized, sexual orientation is a core aspect of human identity, and its expression is an "integral part of human freedom." *Lawrence*, 539 U.S. at 562, 576-577; see also *Hernandez-Montiel* v. *INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (Sexual orientation is "fundamental to one's identity" and gay and lesbian individuals "should not be required to abandon" it.).

BLAG also contends (Br. 55) that sexual orientation differs from other suspect or quasi-suspect classes because it is defined "by a propensity to engage in a certain kind of conduct." This Court has squarely rejected such a status/conduct distinction. See *Lawrence*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination."); *id.* at 583 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."); *Christian Legal Soc'y* v. *Martinez*, 130 S. Ct. 2971, 2990 (2010) (rejecting contention that the organization "does not exclude individuals because of sexual orientation, but rather 'on the basis of a conjunction of conduct and the belief that the conduct is not wrong'" because the Court's "decisions have declined to distinguish between status and conduct in this context"); cf. *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

b. In any event, the broad consensus in the scientific community is that, for the vast majority of people (gay and straight alike), sexual orientation is not a voluntary choice.[6] There is likewise a medical consensus that efforts to change an individual's sexual orientation are generally futile and potentially dangerous to an individual's well-being.[7] Accordingly, sexual orientation readily constitutes an "obvious, immutable, or distinguishing characteristic" for purposes of equal-protection law.

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[6] See, *e.g.*, Gregory M. Herek et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample*, 7 Sexuality Res. & Soc. Pol'y 176, 186-188 (2010), http://www.springerlink.com/content/k186244647272924/fulltext.pdf (in national survey of more than 650 self-identified lesbian, gay, and bisexual adults, 95% of gay men and 83% of lesbian women reported "no choice at all" or "a small amount of choice" when asked "How much choice do you feel you had about [your self-described sexual orientation]?"); Am. Psychological Ass'n et al. (APA) C.A. Amicus Br. 6-8 ("Homosexuality is a normal expression of human sexuality, is generally not

4. Gay and lesbian people are minorities with limited political power

The final consideration is whether gay and lesbian people are "a minority or politically powerless." *Giliard*, 483 U.S. at 602 (quoting *Lyng*, 477 U.S. at 638). They are both. It is undisputed that gay and lesbian

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chosen, and is highly resistant to change."); see also *Hernandez-Montiel*, 225 F.3d at 1093 ("Sexual orientation and sexual identity are immutable."); *Watkins* v. *United States Army*, 847 F.2d 1329, 1347-1348 (9th Cir. 1988) ("Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation."), rev'd en banc, 875 F.3d 699 (9th Cir. 1989).

[7] See, *e.g.*, Am. Psychological Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, at v (2009), http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf ("[E]fforts to change sexual orientation are unlikely to be successful and involve some risk of harm."); see also Richard A. Posner, *Sex and Reason* 101 n.35 (1992) (describing "failure of treatment strategies * * * to alter homosexual orientation"); Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. Consulting & Clinical Psychol. 221, 226 (1994) (describing "lack of empirical support for conversion therapy").

Every major mental health organization has adopted a policy statement cautioning against the use of so-called "conversion" or "reparative" therapies to change the sexual orientation of gay and lesbian people. Those policy statements are reproduced in a 2008 publication of the American Psychological Association, *Just the Facts about Sexual Orientation and Youth*, http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf.

people are a minority group, and, for much of the history of discrimination against them (see pp. 22-27, *supra*), they lacked any ability to protect themselves through the political process. To be sure, that has begun to change. But in critical respects that change has resulted from judicial enforcement of constitutional guarantees, *e.g.*, *Lawrence*, *supra*, not political action. And efforts to combat discrimination against gay and lesbian individuals frequently have sparked successful voter referenda or legislative action scaling back protections. See p. 26, *supra* (noting numerous examples including referendum at issue in *Romer*). As one recent example, in May 2011, the Tennessee legislature repealed local ordinances prohibiting discrimination on the basis of sexual orientation and barred future enactment of such ordinances. Tenn. House Bill No. 600, Pub. Ch. No. 278, http://state.tn.us/sos/acts/107/pub/pc0278.pdf.

The recent history of marriage initiatives confirms that gay and lesbian people continue to lack any consistent or widespread "ability to attract the [favorable] attention of the lawmakers." *Cleburne*, 473 U.S. at 445. BLAG notes (Br. 52) that voters in three states (Maine, Maryland, and Washington) approved same-sex marriage this past November—something that had never happened before at the ballot box. Focusing on this extremely recent progress, BLAG ignores the broader context, which overwhelmingly demonstrates the political challenges faced by the gay and lesbian minority. In 1996, at the time DOMA was enacted, only three states had laws expressly restricting marriage to opposite-sex couples. See Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38 Loy. U. Chi. L.J. 265, 265-266 (2007). Today, 39 states have such laws, including voter-approved constitutional amendments in 30 states barring same-sex marriage.[8] Only six states, by comparison, have conferred marriage rights to same-sex couples through the political process; the other three have through judicial decision.[9] That is not a convincing record of political power rendering protection unnecessary.[10]

In any event, BLAG can find no justification in this Court's precedents for its assertion (Br. 54) that "the political strength of gays and lesbians in the political process should be outcome determinative here." When the Court recognized in 1973 that gender-based classifications were subject to heightened scrutiny, *Frontiero*, 411 U.S. 682-688 (plurality opinion), women already had achieved major political victories, including a constitutional amendment granting them the right to vote and protection against employment discrimination under Title VII.[11] See *id.* at 685-686 (plurality opinion) ("It is true, of course, that the position of women in America has improved markedly in recent decades," but "women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena.").

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[8] Two other states (New Mexico and Rhode Island) have no express constitutional or statutory ban on marriage for same-sex couples, but those state governments do not permit same-sex couples to marry there. Both states, as a matter of comity, do recognize validly entered out-of-state marriages of same-sex couples.

[9] Connecticut (judicial decision), Iowa (judicial decision), Maine (ballot), Maryland (legislature, approved by ballot), Massachusetts (judicial decision), New Hampshire (legislature), New York (legislature), Vermont (legislature), and Washington (legislature, approved by ballot).

[10] By way of example, in May 2008, the California Supreme Court held that the state was constitutionally required to recognize same-sex marriage. *In re Marriage Cases*, 183 P.3d 384, 419-420 (Cal. 2008). In November 2008, California's voters passed Proposition 8, which amended the state constitution to restrict marriage to opposite-sex couples. (The constitutionality of Proposition 8 is now before this Court. *Hollingsworth* v. *Perry*, No. 12-144 (cert. granted Dec. 7, 2012).) In November 2010, Iowa voters recalled all three Iowa state supreme court justices up for reelection after that court's unanimous decision legalizing same-sex marriage. A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. Times, Nov. 4, 2010, at A1. On May 8, 2012, North Carolina became the thirtieth state to amend its constitution to prohibit same-sex marriages. National Conference of State Legislatures, *State Same-Sex Marriage Laws: Legislatures and Courts*, http://www.ncsl.org/issues-research/human-services/same-sex-marriage-laws.aspx (last updated Feb. 14, 2013).

As *Frontiero* and the subsequent cases applying heightened scrutiny to gender-based classifications demonstrate, any limited measure of political progress achieved by gay and lesbian people in no way compels declining to apply heightened scrutiny. To the contrary, their status as a minority, and one with a relative lack of political power, reinforces the applicability of heightened scrutiny based on all of the relevant considerations.

* * * * *

This Court understandably has been reluctant to recognize new suspect (or quasi-suspect) classes. See *Cleburne*, 473 U.S. at 441-442, 445-446. The government has not lightly concluded that the Court's decisions dictate that heightened scrutiny applies to classifications based on sexual orientation. This is the rare circumstance in which a faithful application of the Court's established criteria compels applying heightened scrutiny to an additional classification. While those criteria have appropriately and reliably proved, and will continue to prove, difficult to satisfy, none of the Court's reasons for rejecting heightened scrutiny for other classifications—*e.g.*, age,[12] mental disability,[13] kinship,[14] and poverty[15]—applies to sexual orientation. Rather, sexual orientation falls squarely in the limited category of classifications for which heightened scrutiny is designed.

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[11] Notably, Congress has enacted no similar laws to protect gay and lesbian people from employment discrimination, and most states provide no such protection either. See Teresa Welsh, *Should Employers Be Able to Fire Someone for Being Gay?*, U.S. News, May 14, 2012, http://www.usnews.com/opinion/articles/2012/05/14/should-employers-be-able-to-fire-someone-for-being-gay.

B. Section 3 Of DOMA Fails Heightened Scrutiny

Because a classification based on sexual orientation calls for the application of heightened scrutiny, BLAG must establish that DOMA Section 3, at a minimum, is

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[12] *Murgia*, 427 U.S. at 313 (rejecting heightened review for classifications based on age because such persons "have not experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities") (internal quotation marks omitted).

[13] *Cleburne*, 473 U.S. at 442-443 (rejecting heightened review for mentally disabled persons because they have "a reduced ability to cope with and function in the everyday world" and "[h]ow this large and diversified group is to be treated under the law is a difficult and often a technical matter").

[14] *Lyng*, 477 U.S. at 638 (rejecting heightened review for kinship classification because it meets none of the four factors).

[15] *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973) (rejecting heightened review for classifications based on poverty because such a class would be too "large, diverse, and amorphous").

"substantially related to an important governmental objective." *Clark*, 486 U.S. at 461.[16] And under heightened scrutiny, a statute must be defended by reference to the "actual [governmental] purposes" behind it, not different "rationalizations." *VMI*, 518 U.S. at 535-536. A classification does not withstand heightened scrutiny when "the alleged objective" of the classification differs from the "actual purpose." *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 730 (1982).

The House Report—the only congressional committee report on DOMA—sets forth the specific governmental interests purportedly advanced by DOMA:

> (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources.

House Report 12. Other than a cursory footnote (Br. 57 n.10), BLAG makes no argument that any of those interests, or any of the other interests BLAG now asserts, could satisfy heightened scrutiny. See Supp.

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[16] BLAG states in passing, in a footnote (Br. 25 n.7), that "[b]y its terms, DOMA does not classify based on a married couple's sexual orientation." Whether or not DOMA "by its terms" classifies on the basis of sexual orientation, it is plainly a law that classifies based on sexual orientation. Congress left no doubt that the sole and overriding purpose of Section 3 was to exclude "homosexual couples" from the federal definition of marriage. House Report 2. Section 3 denies recognition of a class of marriage into which, as a practical matter, only gay and lesbian people enter. As discussed above, the Court has rejected such distinctions between the status and conduct of gay and lesbian people. See pp. 30-31, *supra* (citing *Lawrence*, *Christian Legal Society*, and *Bray*).

App. 24a ("BLAG's counsel all but conceded that these reasons for enacting DOMA may not withstand intermediate scrutiny.") (citing C.A. Oral Arg. Tr. 16:24-17:6; reproduced at Pl. Resp. in Supp. of Writ of Cert. Before J. App. a16). The following analysis of the proffered justifications for Section 3 demonstrates why any such argument would fail.

1. Morality

The House Report claims that DOMA upholds "traditional notions of morality," but does so by condemning homosexuality and expressing disapproval of the intimate, loving and committed relationships of gay and lesbian people. *E.g.*, House Report 15-16 (relying on "moral disapproval of homosexuality" and "a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality"); *id.* at 16 (referring to "a union that many people . . . think is immoral") (citation omitted); see also *id.* at 16 n.54, 33 (invoking holding of *Bowers* v. *Hardwick*, 478 U.S. 186, 196 (1986), that criminal prohibition served the purpose of expressing "the presumed belief * * * that homosexual sodomy is immoral and unacceptable"). The House Report also invokes an interest in extending legal preferences to heterosexual couples to "promot[e] heterosexuality" and discourage homosexuality. *Id.* at 15 n.53 ("Closely related to this interest in protecting traditional marriage is a corresponding interest in promoting heterosexuality.").

BLAG makes no effort to defend Section 3 on the basis of this asserted interest, and for good reason. Moral opposition to homosexuality, though it may reflect deeply held personal views, is not a legitimate policy objective that can justify unequal treatment of gay and lesbian people. See *Lawrence*, 539 U.S. at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.") (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)); *id.* at 582-583 (O'Connor, J., concurring in judgment) ("Moral disapproval of [gay and lesbian people], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."); see also *Romer*, 517 U.S. at 635 (noting that law cannot disfavor gay and lesbian people because of "personal or religious objections to homosexuality").

That is not to suggest that Section 3 of DOMA necessarily or universally resulted from hostile animus. "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). Disapproval may also be the product of longstanding traditions or sincerely held beliefs. Cf. *Massachusetts*, 682 F.3d at 16 ("[M]any of our own traditions rest largely on belief and familiarity."). Still, while "[p]rivate biases may be outside the reach of the law, * * * the law cannot, directly or indirectly, give them effect." *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

2. Traditional Definition of Marriage

The House Report also articulated an interest in "defending and nurturing the institution of traditional, heterosexual marriage." House Report 12-15; see also

BLAG Br. 43. Marriage is, of course, a vitally important institution, and one supported by the federal government through benefits and other programs that rely on marital status. An interest in preserving marriage as limited to heterosexual persons, however, does not justify Section 3.

Tradition, no matter how long established, cannot by itself justify a discriminatory law under equal protection principles. See *VMI*, 518 U.S. at 535-536 (invalidating longstanding tradition of single-sex education at Virginia Military Institute); see also *Lawrence*, 539 U.S. at 577-578 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)); *Heller* v. *Doe*, 509 U.S. 312, 326 (1993) ("Ancient lineage of a legal concept does not give [a law] immunity from attack for lacking a rational basis.").

In any event, Section 3 of DOMA cannot plausibly be thought to advance any interest in protecting "traditional" marriage limited to opposite-sex couples. States decide what marriages to recognize without any reference to DOMA. As the court of appeals reasoned, "because the decision of whether same-sex couples can marry is left to the states, DOMA does not, strictly speaking, 'preserve' the institution of marriage as one between a man and a woman." Supp. App. 29a (citation omitted). Instead, Section 3 denies benefits to individuals, legally married under state law, on the basis of their sexual orientation. As a result, "[t]his is not merely a matter of poor fit of remedy to perceived problem, but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage." *Massachusetts*, 682 F.3d at 15 (citation omitted).

Even BLAG acknowledges (Br. 43) that "the federal government does not have the same direct effect on the institution of marriage as the sovereigns that directly issue marriage certificates," and that any effect of a federal definition of marriage on the institution is only "at the margin." Any such effects (if they exist at all) are so attenuated that they cannot be said to "substantially further" the interest in preserving tradition.

3. Procreation and child-rearing

The House Report identified "responsible procreation and child-rearing" not as a separate rationale for Section 3 of DOMA, but as a basis for Congress's general interest in defending "the institution of traditional, heterosexual marriage." *E.g.*, House Report 14 ("Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship."); see also BLAG Br. 44-49. Even accepting this blinkered understanding of the moral and emotional foundations of marriage, see *Turner* v. *Safley*, 482 U.S. 78, 95-96 (1987), Section 3 does not substantially further any such interest.

First, no sound basis exists for concluding that same-sex couples who have committed to marriage are anything other than fully capable of responsible parenting and child-rearing. To the contrary, many leading medical, psychological, and social-welfare organizations have issued policy statements opposing restrictions on gay and lesbian parenting based on their conclusions, supported by numerous scientific studies,[17] that children raised by gay and lesbian parents are as well adjusted as children raised by heterosexual parents.[18] Against this weight of expert authority, BLAG offers (Br. 48) only what it calls the "[c]ommon sense" notion that children benefit more from opposite-sex parents than from same-sex parents. That is (at best) uninformed speculation, and cannot satisfy heightened scrutiny. Consequently, even assuming Section 3 had the effect of encouraging opposite-sex parenting at the expense of same-sex parenting (but see pp. 43-44, *infra*), there would be no adequate interest in doing so.

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[17] The weight of the scientific literature strongly supports the view that same-sex parents are just as capable as opposite-sex parents. See, *e.g.*, Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 72 J. Marriage & Family 3 (2010), http://www.squareonemd.com/pdf/Does%20the%20Gender%20of%20Parents%20Matter%202010.pdf; see also APA C.A. Amicus Br. 5-6, 15-23 (concluding, based on a rigorous review of the literature, that "there is no scientific basis for concluding that gay and lesbian parents are any less fit or capable than heterosexual parents, or that their children are any less psychologically healthy and well adjusted").

[18] See, *e.g.*, Am. Acad. of Pediatrics, *Coparent or Second-Parent Adoption by Same-Sex Parents*, Feb. 2002, http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/339; Am. Psychological Ass'n, *Sexual Orientation, Parents, & Children*, July 2004, http://www.apa.org/about/governance/council/policy/parenting.aspx; Am. Acad. of Child & Adolescent Psychiatry, *Gay, Lesbian, Bisexual, or Transgender Parents Policy Statement*, 2009, http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement; Am. Med. Ass'n, *AMA Policies on GLBT Issues*, http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding-sexual-orientation.shtml; Child Welfare League of Am., *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults*, http://www.cwla.org/programs/culture/glbtqposition.htm.

Second, any debate over the relative merits of same-sex parenting is beside the point: Section 3 neither promotes responsible opposite-sex parenting nor prevents irresponsible same-sex parenting. The legislative record contains no evidence that denying federal benefits to same-sex couples legally married under state law in any way serves to encourage responsible procreation or child-rearing, whether by opposite-sex or same-sex couples; and it is hard to imagine what such evidence would be. Congress did express the view that marriage plays an "irreplaceable role" in child-rearing. House Report 14. But it defies reason to suggest that Section 3 makes it any more likely that heterosexual individuals will marry or raise children together. See Supp. App. 29a ("DOMA does not affect in any way" these "incentives for heterosexual couples."). Nor does it deprive gay and lesbian individuals married under state law of the ability to raise children. See *Massachusetts*, 682 F.3d at 14 ("DOMA cannot preclude same-sex couples in Massachusetts from adopting children or prevent a woman partner from giving birth to a child to be raised by both partners."). If anything, the denial of federal benefits otherwise accorded to married individuals undermines the efforts of same-sex couples to raise their children, hindering rather than advancing any interest in promoting child welfare.

BLAG defends (Br. 44-47) the procreation/child-rearing rationale primarily on the ground that the traditional definition of marriage rationally relates to the government's interest in addressing "unplanned and unintended offspring"—a problem unique to opposite-sex relationships. But Section 3 bears no relationship to that interest at all. If a state elects to limit marriage to opposite-sex couples because they alone present a risk of unintended offspring, Section 3 does not disturb that choice. Conversely, if a state elects to permit same-sex couples to marry, Section 3 does not preclude that choice either. Section 3 therefore does not further the end of providing a special institution at the state level to address unintended offspring. And Section 3 thus can bear no rational, let alone substantial, connection to any governmental interest in responsible parenting. See Supp. App. 30a ("Other courts have likewise been unable to find even a *rational* connection between DOMA and encouragement of responsible procreation and child-rearing.") (citing *Massachusetts*, 682 F.3d at 14-15; Pet. App. 18a-19a; *Pedersen* v. *OPM*, No. 3:10-cv-1750, 2012 WL 3113883, at *40-43 (D. Conn. July 31, 2012)).

4. Sovereign Choice

The House Report states an interest in "protecting state sovereignty and democratic self-governance." As the House Report's discussion of that interest makes clear, Congress was concerned with "protect[ing] the right of the people, acting through their *state* legislatures, to retain democratic control over the manner in which the *States* will define the institution of marriage." House Report 18 (emphasis added). But Congress sought to serve that interest through Section 2, not Section 3. See p. 2, *supra*; see also *Massachusetts*, 682 F.3d at 14 (interest in protecting state sovereign choices "was not directed to section 3" but "was concerned solely with section 2, which reserved a state's power not to recognize same-sex marriages performed in other states"). BLAG agrees (Br.

31), observing that "Section 2 preserved each state's ability to define marriage as it preferred."

BLAG attempts to justify Section 3 based on a parallel *federal* sovereign interest (Br. 30-33), *i.e.*, that the federal government has the "same latitude" as the states to define marriage for its own purposes. It is, of course, true that the federal government has an interest in defining marriage for purposes of federal law. That is why the government has vigorously (and successfully) defended against Tenth Amendment and Spending Clause challenges to Section 3. See *Massachusetts*, 682 F.3d at 12. But that authority cannot be exercised in a manner that runs afoul of equal protection. Just as the federal government could not invoke its "federal sovereign interest" in defining marriage to refuse to recognize a lawful state marriage between individuals of a different race (cf. *Loving* v. *Virginia*, 388 U.S. 1 (1967)), it cannot refuse to recognize a lawful state marriage between individuals of the same sex—at least to the extent that exclusion would violate equal protection. BLAG's reliance on the federal interest in defining marriage for federal purposes thus does no more than beg the question presented by this case.

5. Federal fisc

The House Report also identifies preservation of scarce government resources as an interest underlying Section 3's denial of federal benefits to same-sex couples married under state law. House Report 18; see also BLAG Br. 37-41. Many of the rights and obligations affected by Section 3, such as spousal evidentiary privileges and nepotism rules, involve no expenditure of federal funds. In other cases, exclusion of state-recognized same-sex marriages *costs* the government money by preserving eligibility for certain federal benefits (*e.g.*, an individual who marries a higher-earning spouse might otherwise lose federal assistance). As the court of appeals concluded, "DOMA transcends a legislative intent to conserve public resources," such that the law is "not substantially related to the important government interest of protecting the fisc." Supp. App. 28a; see ***Romer***, 517 U.S. at 635 (rejecting "interest in conserving resources" because "breadth of the amendment is so far removed from" that interest).

Even assuming that DOMA Section 3 saves the government money overall,[19] that interest cannot satisfy heightened scrutiny. The government may not single out a group for exclusion from a benefits program solely to conserve public resources. See, *e.g.*, *Plyler* v. *Doe*, 457 U.S. 202, 227 (1982) ("[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."); ***Graham***, 403 U.S. at 374-375 (rejecting "interest in preserving the fiscal integrity of [governmental] programs" through alienage-based exclusions) (citation omitted); ***Massachusetts***, 682 F.3d at 14 (rejecting the preservation of scarce government resources as a basis for DOMA because "where the distinction is drawn against a historically disadvantaged group and has no other basis, Supreme

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[19] But see ***Massachusetts***, 682 F.3d at 14 & n.9 ("[M]ore detailed recent analysis indicates that DOMA is more likely on a net basis to cost the government money.") (citing Cong. Budget Office, ***The Potential Budgetary Impact of Recognizing Same-Sex Marriages***, 2004, http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5559/06-21-samesexmarriage.pdf).

Court precedent marks this as a reason undermining rather than bolstering the distinction").

6. Other Interests Asserted by BLAG

The "actual purposes" advanced for Section 3—and hence the only purposes relevant in applying heightened scrutiny—are those identified in the House Report and discussed above. But because BLAG essentially defends Section 3 only under a rational-basis standard, it offers two additional possible rationales: promoting national uniformity for purposes of federal benefits eligibility (Br. 33-37) and proceeding cautiously with a change in the definition of marriage (Br. 41-43). Those additional rationalizations, even if considered, would fail under heightened scrutiny.

a. Uniformity and administrability

BLAG contends that Section 3 can be justified based on interests in promoting national uniformity and administrability of federal benefits. Those related interests, articulated solely in floor statements of individual legislators,[20] are not properly considered as justifications under heightened scrutiny. They fail application of such scrutiny in any event.

i. Floor statements of individual legislators, without more, do not evidence the "actual purposes" of a law. The "actual purposes" of a statutory classification are most evident when set forth in the statute itself. See *Zobel* v. *Williams*, 457 U.S. 55, 61 n.7 (1982) ("These purposes were enumerated in the first section of the Act * * * . Thus we need not speculate as to the objectives of the legislature."). When a statute lacks an express statement of its purposes, as with Section 3 of DOMA, this Court has supported looking to congressional committee reports. See, *e.g.*, *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) ("[W]e have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'") (quoting *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969) (bracket in original)); see also, *e.g.*, *Jimenez* v. *Weinberger*, 417 U.S. 628, 634 & n.3 (1974) (citing Conference Committee Report for "primary purpose" of scheme challenged under heightened scrutiny); BLAG Br. 6-11 (assuming House Report sets forth congressional purposes).

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[20] See BLAG Br. 8-9 (citing 142 Cong. Rec. 22,459 (1996) (Sen. Ashcroft); *id.* at 22,453 (Sen. Murkowski)).

Statements of individual legislators, by contrast, generally shed little light on a statutory classification's actual purposes. In determining legislative intent, this Court has "eschewed reliance on the passing comments of one Member" of Congress and "casual statements from the floor debates." *Garcia*, 469 U.S. at 76. Such comments and statements "reflect at best the understanding of individual Congressmen," not that of Congress. *Zuber*, 396 U.S. at 186. For purposes of heightened scrutiny, therefore, BLAG cannot rely solely on floor statements to defend DOMA under a uniformity/administrability rationale.

ii. That rationale fails in any event. While the federal government possesses the authority to set the terms of its own benefits and obligations (p. 45, *supra*), its longstanding traditional practice has been to recognize (with narrow, context-specific exceptions, see BLAG Br. 5 n.2) any marriage lawfully recognized under state law. The federal government has consistently adhered to that practice in the face of inconsistencies among state marriage laws with respect to consanguinity, minimum-age, divorce, and other requirements and limitations concerning marriage. See Family Law Professors C.A. Amicus Br. 5-14. DOMA Section 3 sharply breaks from that established tradition of deference to state marriage laws, thereby trading one form of uniformity (consistent reliance on state marriage laws) for another (exclusion of a particular type of marriage, *i.e.*, that between same-sex couples) without providing a sufficient justification for preferring one to the other. See Supp. App. 26a ("Because DOMA is an unprecedented breach of longstanding deference to federalism that singles out same-sex marriage as the only inconsistency (among many) in state law that requires a federal rule to achieve uniformity, the rationale premised on uniformity is not an exceedingly persuasive justification for DOMA.").

The latter form of "uniformity," moreover, creates its own administrative complications that make federal law less, not more, straightforward. For individuals from states that permit same-sex couples to marry, Section 3 places an administrative burden on government officials to look beyond a simple declaration of marriage or license—something many federal agencies had not typically done before DOMA—to determine whether the marriage involves individuals of the same sex. See *Golinski* v. *OPM*, 824 F. Supp. 2d 968, 1001-1002 (N.D. Cal. 2012) ("The passage of DOMA actually undermined administrative consistency by requiring that the federal government, for the first time, discern which state definitions of marriage are entitled to federal recognition and which are not."). Congress gave no thought to that administrative burden relative to the potential burden associated with evaluating a change in domicile potentially affecting a same-sex couple's marital status. Accordingly, even assuming the asserted interests in uniformity and administrability were sufficiently important, BLAG has not met its burden of showing that Section 3 substantially furthers those interests. Cf. *Califano* v. *Goldfarb*, 430 U.S. 199, 220 (1977) (Stevens, J., concurring in judgment) ("administrative convenience was not the actual reason for the discrimination").

b. Proceeding with caution

BLAG contends (Br. 42) that Congress "rationally could have concluded that any experimentation with [marriage] should proceed first at the state level." BLAG cites no law for the proposition that an interest in "proceeding with caution" is sufficiently important to justify denying a benefit to a suspect or quasi-suspect class. Similar arguments could have been made with respect to racial integration and gender equality. See, *e.g.*, *Watson* v. *City of Memphis*, 373 U.S. 526, 528 (1963) (rejecting city's attempt to "justify its further delay in conforming fully and at once to constitutional mandates by urging the need and wisdom of proceeding slowly and gradually in its desegregation efforts"). In any event, BLAG's contention overlooks that DOMA operates only for purposes of determining federal benefits. As BLAG itself acknowledges (Br. 43), because DOMA takes state law as a given, the federal definition affects the institution of marriage, if at all, only "at the margin."

There is, moreover, nothing temporary or provisional about Section 3. It contains no sunset provision and no provision for any further study of the issue. See *Massachusetts*, 682 F.3d at 15 ("[T]he statute was not framed as a temporary time-out; and it has no expiration date, such as one that Congress included in the Voting Rights Act. The House Report's own arguments—moral, prudential and fiscal—make clear that DOMA was not framed as a temporary measure.") (citations omitted). Section 3 thus does not substantially further any interest in proceeding cautiously pending further analysis or study.

C. The Government Does Not Challenge The Constitutionality Of DOMA Section 3 Under Deferential Rational-Basis Review, But Section 3 Would Fail A More Searching Form Of That Review

In the event the Court declines to apply heightened scrutiny, the question would be whether Section 3 satisfies rational-basis review. The Court generally applies rational-basis review in a highly deferential manner—for example, when "ordinary commercial transactions are at issue." *Armour* v. *City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (citation omitted); see, *e.g.*, *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-488 (1955). Under such review, the Court will uphold a legislative classification if it bears a "rational relationship" to "some legitimate governmental purpose." *Heller*, 509 U.S. at 320. The "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," including post-hoc rationalizations that did not actually motivate its adoption. *Ibid.* (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). The statute generally must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," and "a legislative choice * * * may be based on rational speculation unsupported by evidence or empirical data." *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313-314, 315 (1993).

The government has concluded that heightened scrutiny governs classifications based on sexual orientation and that DOMA Section 3 cannot be sustained under that standard. If the Court disagrees and applies rational-basis review, the government has previously defended Section 3 under rational-basis review, and does not challenge the constitutionality of Section 3 under that highly deferential standard.

Some have understood a line of this Court's decisions, however, to apply rational-basis review with added focus in certain circumstances. In her opinion concurring in the judgment in *Lawrence*, in considering a law "directed toward gay persons as a class," Justice O'Connor stated that "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." 539 U.S. at 580, 583 (citing *Romer*, *supra*; *Cleburne*, *supra*; *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528 (1973)); see also, *e.g.*, *Massachusetts*, 682 F.3d at 10 ("Without relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications.") (citing *Romer*, *supra*; *Cleburne*, *supra*; *Moreno*, *supra*).

In the government's view, those considerations are best taken into account through the established framework of heightened scrutiny. Insofar as this

Court were instead to apply rational-basis review with added focus, laws targeted at gay and lesbian people would be a particularly strong candidate for that approach. As explained, classifications based on sexual orientation—unlike other classifications for which the Court has denied suspect or quasi-suspect status—distinctively implicate each of the considerations this Court has identified for application of heightened scrutiny. To the extent sexual orientation may be considered to fall short in some dimension, the history of discrimination and the absence of relation to one's capabilities associated with this particular classification would uniquely qualify it for scrutiny under an approach that calls for a measure of added focus to guard against giving effect to a desire to harm an "unpopular group." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in judgment).

Section 3 would fail to satisfy any such analysis, largely for the reasons it fails heightened scrutiny. Like the law struck down in *Romer*, Section 3 is "at once too narrow and too broad." *Romer*, 517 U.S. at 633. It imposes a "broad and undifferentiated disability" (*id.* at 632) on the same narrow class of people at issue in *Romer*—gay and lesbian people—by denying effect to their state-recognized marital relationships across the entire spectrum of federal law. And the asserted rationales are sufficiently "far removed from" the effect of the law—particularly given its breadth—that they should not be credited as valid justifications. *Id.* at 635; see *Massachusetts*, 682 F.3d at 15 ("We conclude, without resort to suspect classifications or any impairment of *Baker*, that the rationales offered do not provide adequate support for section 3 of DOMA.").

* * * * *

BLAG (Br. 58-59) makes an appeal to this Court to allow the democratic process to run its course. That approach would be very well taken in most circumstances. This is, however, the rare case in which deference to the democratic process must give way to the fundamental constitutional command of equal treatment under law. Section 3 of DOMA targets the many gay and lesbian people legally married under state law for a harsh form of discrimination that bears no relation to their ability to contribute to society. It is abundantly clear that this discrimination does not substantially advance an interest in protecting marriage, or any other important interest. The statute simply cannot be reconciled with the Fifth Amendment's guarantee of equal protection. The Constitution therefore requires that Section 3 be invalidated.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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RESPONDENT'S BRIEF

No. 12-307

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR
AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF ON THE MERITS FOR RESPONDENT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDING

The Bipartisan Legal Advisory Group of the United States House of Representatives intervened as a defendant in the district court and was an appellant and appellee in the court of appeals.[*]

Edith Schlain Windsor was the plaintiff in the district court and an appellee in the court of appeals.

The United States of America was a defendant in the district court and an appellant and appellee in the court of appeals.

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[*] The United States House of Representatives has articulated its institutional position in litigation matters through a five-member bipartisan leadership group since at least the early 1980's (although the formulation of the group's name has changed somewhat over time). Since 1993, the House rules have formally acknowledged and referred to the Bipartisan Legal Advisory Group, as such, in connection with its function of providing direction to the Office of the General Counsel. *See, e.g.*, Rule I.11, Rules of the House of Representatives, 103rd Cong. (1993); Rule II.8, Rules of the House of Representatives, 112th Cong. (2011). While the group seeks consensus whenever possible, it, like the institution it represents, functions on a majoritarian basis when consensus cannot be achieved. The Bipartisan Legal Advisory Group currently is comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. The Democratic Leader and the Democratic Whip have declined to support the position taken by the Group on the merits of DOMA Section 3's constitutionality in this and other cases.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

- A. The Defense of Marriage Act 2
- B. The Justice Department Stops Defending DOMA and Starts Attacking It 12
- C. Ms. Windsor's Challenge to DOMA 14

SUMMARY OF THE ARGUMENT 19

ARGUMENT 22

I. Rational Basis Review Applies To DOMA. 24

II. Multiple Rational Bases Support DOMA And Its Decision To Retain The Traditional Definition Of Marriage For Federal-Law Purposes 28

- A. DOMA Rationally Preserves Each Sovereign's Ability to Define Marriage for Itself at a Time When States Are Beginning to Experiment with the Traditional Definition 30

  - B. DOMA Ensures National Uniformity in Eligibility for Federal Benefits and Programs Based on Marital Status 33
  - C. DOMA Preserves Past Legislative Judgments, Conserves Financial Resources, and Avoids Uncertain and Unpredictable Effects on the Federal Fisc 37
  - D. Congress Rationally Proceeded with Caution When Faced with the Unknown Consequences of an Unprecedented Redefinition of Marriage, a Foundational Social Institution, by a Minority of States 41
  - E. The Federal Government Could Rationally Retain the Traditional Definition for the Same Reasons States Can Rationally Retain that Definition 43
    - *1. Providing a Stable Structure to Raise Unintended and Unplanned Offspring* 44
    - *2. Encouraging the Rearing of Children by Their Biological Parents* 47
    - *3. Promoting Childrearing by Both a Mother and a Father* 48
- III. The Longstanding List Of Suspect And Quasi-Suspect Classes Should Not Be Expanded To Include Sexual Orientation 49

A. Gays and Lesbians Are Far from Politically Powerless 51

B. Whether a Married Couple Is of the Opposite Sex Is Relevant to the Government's Interests in Recognizing Marriage 54

C. Sexual Orientation Is Not an "Immutable" Characteristic....................... 54

D. The Histories of Discrimination Based on Race, Ethnicity, Sex, and Legitimacy Are Different 56

CONCLUSION 59

STATUTORY APPENDIX

U.S. Const. amend. V 1a

Defense of Marriage Act, § 3, 1 U.S.C. § 7 .... 2a

Defense of Marriage Act, § 2, 28 U.S.C. § 1738C 3a

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. Howerton,
486 F. Supp. 1119 (C.D. Cal. 1980) 5, 38

Adams v. Howerton,
673 F.2d 1036 (9th Cir. 1982) 5

Armour v. City of Indianapolis,
132 S. Ct. 2073 (2012) 29

Baehr v. Lewin,
852 P.2d 44 (Haw. 1993) 2

Baker v. Nelson,
409 U.S. 810 (1972) 16, 25

Ben-Shalom v. Marsh,
881 F.2d 454 (7th Cir. 1989) 13, 51, 55

Bowen v. Owens,
476 U.S. 340 (1986) 41

Bowers v. Hardwick,
478 U.S. 186 (1986) 27

Citizens for Equal Prot. v. Bruning,
455 F.3d 859 (8th Cir. 2006) 13, 46, 54

City of Cleburne, Tex.
v. Cleburne Living Ctr.,
473 U.S. 432 (1985) ....*passim*

City of Dallas v. Stanglin,
490 U.S. 19 (1989) 29

Clark v. Jeter,
486 U.S. 456 (1988) 25

Conaway v. Deane,
932 A.2d 571 (Md. 2007) 46

Cook v. Gates,
528 F.3d 42 (1st Cir. 2008) 13

Dandridge v. Williams,
397 U.S. 471 (1970) 41

Davis v. Prison Health Servs.,
679 F.3d 433 (6th Cir. 2012) 13

Dean v. District of Columbia,
653 A.2d 307 (D.C. 1995) 5

FCC v. Beach Commc'ns, Inc.,
508 U.S. 307 (1993) 28, 29, 30, 49

Frontiero v. Richardson,
411 U.S. 677 (1973) 56

Godfrey v. Spano,
920 N.E.2d 328 (N.Y. 2009) 14, 24

Helvering v. Davis,
301 U.S. 619 (1937) 36

Hernandez v. Robles,
855 N.E.2d 1 (N.Y. 2006) 2, 46

High Tech Gays
v. Def. Indus. Sec. Clearance Office,
895 F.2d 563 (9th Cir. 1990)................. 13, 51, 55

Holloway v. Arthur Andersen & Co.,
566 F.2d 659 (9th Cir. 1977) 56

Hunt v. Ake,
No. 04-cv-1852
(M.D. Fla. Jan. 20, 2005) 12

In re Kandu,
315 B.R. 123 (Bankr. W.D. Wash. 2004).......... 12

Jimenez v. Weinberger,
417 U.S. 628 (1974) 24

Johnson v. Johnson,
385 F.3d 503 (5th Cir. 2004) 13

Johnson v. Robison,
415 U.S. 361 (1974) 49

King v. Smith,
392 U.S. 309 (1968) 45

Lawrence v. Texas,
539 U.S. 558 (2003) 27, 28, 57

Lehnhausen v. Lake Shore Auto Parts Co.,
410 U.S. 356 (1973) 29

Lofton v. Sec'y of Dep't of Children & Family Servs.,
358 F.3d 804 (11th Cir. 2004) 13

Lyng v. Castillo,
477 U.S. 635 (1986) 50

Mandel v. Bradley,
432 U.S. 173 (1977) 26

Marsh v. Chambers,
463 U.S. 783 (1983) 42

Mass. Bd. of Ret. v. Murgia,
427 U.S. 307 (1976) 50

Massachusetts v. U.S. Dep't of HHS,
682 F.3d 1 (1st Cir. 2012) ....*passim*

Mathews v. Diaz,
426 U.S. 67 (1976) 29

Murphy v. Ramsey,
114 U.S. 15 (1885) 10

Nat'l Fed. Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 43

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) 42

Nguyen v. INS,
533 U.S. 53 (2001) 47

Padula v. Webster,
822 F.2d 97 (D.C. Cir. 1987) 13

Price-Cornelison v. Brooks,
524 F.3d 1103 (10th Cir. 2008) 13

Regan v. Time, Inc.,
468 U.S. 641 (1984) 23

Romer v. Evans,
517 U.S. 620 (1996) 26, 27

Rostker v. Goldberg,
453 U.S. 57 (1981) 23

San Antonio Indep. Sch. Dist. v. Rodriguez,
411 U.S. 1 (1973) 50

Santosky v. Kramer,
455 U.S. 745 (1982) 47

Schweiker v. Wilson,
450 U.S. 221 (1981) 29

Smelt v. Cnty. of Orange,
374 F. Supp. 2d 861 (C.D. Cal. 2005) 12

Smelt v. Cnty. of Orange,
447 F.3d 673 (9th Cir. 2006) 3, 12

Smelt v. Cnty. of Orange,
549 U.S. 959 (2006) 3

Smith v. Org. of Foster Families for Equal. & Reform,
431 U.S. 816 (1977) 47

Thomasson v. Perry,
80 F.3d 915 (4th Cir. 1996) 13

U.S. Dep't of Agric. v. Moreno,
413 U.S. 528 (1973) 23, 24

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 37

United States v. Carolene Prods. Co.,
304 U.S. 144 (1938) 58

United States v. Five Gambling Devices,
346 U.S. 441 (1953) 23

United States v. Turley,
352 U.S. 407 (1957) 36

United States v. Virginia,
518 U.S. 515 (1996) 48

Vance v. Bradley,
440 U.S. 93 (1979) 28

Village of Belle Terre v. Boraas,
416 U.S. 1 (1974) 30

Walters v. Nat'l Ass'n of Radiation Survivors,
473 U.S. 305 (1985) 22

Washington v. Glucksberg,
521 U.S. 702 (1997) 59

Wilson v. Ake,
354 F. Supp. 2d 1298 (M.D. Fla. 2005) 12

Woodward v. United States,
871 F.2d 1068 (Fed. Cir. 1989) 13, 55

Yarborough v. Yarborough,
290 U.S. 202 (1933) 44

Zablocki v. Redhail,
434 U.S. 374 (1978) 44

Constitutional Provision

U.S. Const. art. II, § 3 12

Statutes & Regulations

5 U.S.C. § 8101 5

5 U.S.C. § 8341(a) 5

8 U.S.C. § 1186a(b)(1) 5

22 U.S.C. § 4081 3

26 U.S.C. § 2(b)(2) 5

26 U.S.C. § 6013(a) 5

26 U.S.C. § 7703(b) 5

38 U.S.C. § 101(31) 5

42 U.S.C. § 416 5

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 699 F.3d 169, and reproduced in the Appendix to the Supplemental Brief for the United States ("Supp. App.") at 1a. The opinion of the District Court on the merits is reported at 833 F. Supp. 2d 394, and reproduced in the Appendix to the Petition for a Writ of Certiorari Before Judgment ("App.") at 1a. The district court's opinion on intervention is reported at 797 F. Supp. 2d 320, and reproduced in the Joint Appendix ("JA") at JA 218.

JURISDICTION

The district court's judgment was entered on June 7, 2012. App. 23a. The Bipartisan Legal Advisory Group of the United States House of Representatives ("the House") filed a notice of appeal on June 8, 2012. App. 27a-29a. The United States filed its own notice of appeal on June 14, 2012. App. 25a-26a. On September 11, 2011, while the case was pending in the court of appeals, the United States filed a petition for certiorari before judgment, invoking this Court's jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(e). The court of appeals rendered its judgment on October 18, 2012. Supp. App. 1a. On December 7, 2012, this Court granted the United States' petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the Fifth Amendment to the Constitution and Sections 2 and 3 of the Defense of Marriage Act are reproduced in the Appendix to this brief at 1a.

STATEMENT OF THE CASE

A. The Defense of Marriage Act

For more than two centuries after our Nation's Founding, every state and the federal government defined marriage as the legal union of a woman and a man. Indeed, "[u]ntil a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006).

By 1996, however, a Hawaii Supreme Court decision had called that uniform approach into question. *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (indicating that same-sex marriage licenses may have been required by Hawaii's constitution). The *Baehr* decision raised the novel question of whether one state's redefinition of marriage should automatically extend to other states via full faith and credit principles or to the federal government when it came to federal programs linked to marriage.

Congress addressed this question by passing the Defense of Marriage Act of 1996 ("DOMA"), which "was enacted with strong majorities in both Houses [of Congress] and signed into law by President Clinton." *Massachusetts v. U.S. Dep't of HHS*, 682 F.3d 1, 6 (1st Cir. 2012), *petitions for cert. pending*, Nos. 12-13 & 12-15. DOMA passed in the House of Representatives by a vote of 342-67, *see* 142 Cong. Rec. 17094-95 (1996), and in the Senate by a vote of 85-14, *see id.* at 22467. In the Senate supporters included then-Senator Biden; then-Minority Leader

Daschle; current Majority Leader Reid; and current Judiciary Committee Chairman Leahy. In the House, Rep. Hoyer, the Current Minority Whip, supported DOMA.

DOMA reflected Congress' determination that each sovereign should be able to determine for itself how to define marriage for purposes of its own law. DOMA does not override or invalidate any sovereign's decision to modify the definition of marriage, but it does preserve that prerogative for each sovereign. Section 2 of DOMA allows each state to decide for itself whether to retain the traditional definition without having another jurisdiction's decision imposed upon it via full faith and credit principles. And Section 3 preserves the federal government's ability to use the traditional definition of marriage for purposes of federal law and programs. It does so not by singling out any category of relationships for specific exclusion, but rather by clarifying what marriage *means* for purposes of federal law: It clarifies that, for purposes of federal law, "marriage" means the legal union of one man and one woman, and "spouse" means a person of the opposite sex who is a husband or wife. 1 U.S.C. § 7.

DOMA does not "preclude Congress or anyone else in the federal system from extending benefits to those who are not included within [its] definition." *Smelt v. Cnty. of Orange*, 447 F.3d 673, 683 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006). Thus, some federal statutes provide benefits for "families," *see, e.g.*, 22 U.S.C. § 4081 (extending certain financial benefits to Foreign Service members "and their families"), and the President has interpreted that term, which is not defined by DOMA, to include same-sex couples. *See* Presidential Mem., *Extension of Benefits to Same-Sex Domestic Partners of Federal Employees*, 75 Fed. Reg. 32,247 (June 2, 2010) (directing the Office of Personnel Management to "clarify that, for purposes of employee assistance programs, same-sex domestic partners and their children qualify as 'family members'").

DOMA's definitions apply for federal-law purposes only: DOMA does not bar or invalidate any state-law marriage, but leaves states free to decide whether they will recognize same-sex marriages. DOMA simply asserts the federal government's right as a separate sovereign to provide its own definition for purposes of its own federal programs and funding.

Historically, the federal government often has found it convenient to accept the marital determinations made by the several states (which for the most part have varied only in the particulars) for purposes of federal law—just as the states typically recognize marriages licensed by other states for purposes of their own law. But Congress also has a long history, when it sees fit, of supplying its own definitions of marriage for various federal purposes. These longstanding federal definitions sometimes provide marital benefits to couples who a state may not recognize as married,[1] and sometimes decline to extend federal regulation or benefits to couples despite a state-issued marriage certificate.[2]

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[1] *See, e.g.*, 42 U.S.C. § 1382c(d)(2) (recognizing common-law marriage for purposes of social security benefits without regard to state recognition).

Similarly, even before DOMA was enacted, federal-law references to marriage employed the traditional definition, as Congress, the Executive Branch, and the courts have recognized. *See, e.g.*, Revenue Act of 1921, § 223(b), 42 Stat. 227 (permitting "a husband and wife living together" to file a joint tax return; *cf.* 26 U.S.C. § 6013(a) ("A husband and wife may make a single return jointly of income taxes")); 38 U.S.C. § 101(31) (for purposes of veterans' benefits, "'spouse' means a person of the opposite sex"); U.S. Dep't of Labor, Final Rule, *The Family and Medical Leave Act of 1993*, 60 Fed. Reg. 2,180, 2,190-91 (Jan. 6, 1995) (rejecting, as inconsistent with congressional intent, proposed definition of "spouse" that would have included "same-sex relationships"); *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) ("Congress, as a matter of federal law, did not intend that a person of one sex could be a 'spouse' to a person of the same sex for immigration law purposes"), *aff'd*, 673 F.2d 1036 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307, 314 (D.C. 1995) (Congress, in enacting the District of Columbia's 1901 marriage statute, intended "that

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[2] *See, e.g.*, 5 U.S.C. §§ 8101(6), (11), 8341(a)(1)(A)-(a)(2)(A) (federal employee-benefits statutes defining "widow" and "widower" restrictively); 8 U.S.C. § 1186a(b)(1) (denying recognition to some state-law marriages in immigration law context); 26 U.S.C. § 2(b)(2) (tax law provision deeming persons unmarried who are separated from their spouse or whose spouse is a nonresident alien); 26 U.S.C. § 7703(b) (excluding some couples "living apart" from federal marriage definition for tax purposes); 42 U.S.C. § 416 (defining "spouse," "wife," "husband," "widow," "widower," and "divorce," for social-security purposes).

'marriage' is limited to opposite-sex couples").

Congress explained that, in defining the terms "marriage" and "spouse," Section 3 of DOMA "merely restates the current understanding of what those terms mean for purposes of federal law." H.R. Rep. No. 104-664, at 30 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905 ("House Rep."); *see also id.* at 10 ("[I]t can be stated with certainty that none of the federal statutes or regulations that use the words 'marriage' or 'spouse' were thought by even a single Member of Congress to refer to same-sex couples."); 142 Cong. Rec. 16969 (1996) (Rep. Canady) ("Section 3 changes nothing; it simply reaffirms existing law."); *id.* at 22446 (Sen. Byrd) ("[A]ll this bill does is reaffirm for purposes of Federal law what is already understood by everyone.").

Congress emphasized that "[t]he most important aspect of Section 3 is that it applies to federal law only" and does not "have any effect whatsoever on the manner in which any State might choose to define these words." House Rep. 30 (parenthetical omitted). Section 3 defines "these two words only insofar as they are used in federal law." *Id.* Congress thus reaffirmed the federal government's ability to make its own decision regarding whether to recognize same-sex relationships as marriages, without having its hand forced by a minority of the states or forcing any state to follow the federal definition for purposes of its own state law.

In addition, Congress wanted to preserve the right of each state—like the federal government—to define marriage within its own sphere. DOMA Section 2 prevents a decision by one state to re-define marriage from trumping the decisions of other states via full faith and credit principles. Section 3 similarly prevents such a state re-definition from being automatically picked up for federal-law purposes. *See* 142 Cong. Rec. 17079 (1996) (Rep. Bryant) ("Certainly we should not allow one State, whether it be Hawaii or any other State, to, in effect, establish what the Federal law will be in regards to what a marriage is."); *id.* at 17089 (Rep. Hyde) ("[A]s to defining marriage in the Federal code, who else should define it except this Congress, the Federal legislature."); *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. at 2 (1996) ("Senate Hrg.") (Sen. Hatch) (DOMA "ensures that each State can define for itself the concept of marriage and not be bound by decisions made by other States. [DOMA] also makes clear that no Federal law should be read to treat a same-sex union as a 'marriage.'"); *id.* at 41 (statement of Prof. Lynn Wardle) ("Section 3 protects Congress' authority to control federal laws, programs and agencies. It prevents the imposition of same-sex marriage upon federal law without the approval of Congress. That, too, protects our federalism."); 142 Cong. Rec. 22438 (1996) (Sen. Lott) (DOMA "will ensure that each State can reach its own decision about this extremely controversial matter: The legal status of same-sex unions. [DOMA], likewise, ensures that for the purposes of Federal programs, marriages will be defined by Federal law."); *id.* at 22440 (Sen. Nickles) (Without DOMA, "if Hawaii, or any other State, gives new meaning to the words 'marriage' and 'spouse,' reverberations may be felt throughout the Federal Code."); *id.* at 22452 (Sen. Mikulski) ("[This bill] puts in the Federal law books what has always been the definition of a marriage" and "allows each State to determine for itself what is considered a marriage under that State's laws."); *id.* at 22453 (Sen. Hatfield) ("The bill would restrict the effect of any state law that allows same-sex marriage to that state only."); *id.* (Sen. Murkowski) ("By defining the term marriage, Congress is protecting the sovereignty of each State" and avoiding "the ramifications of the absence of a definition of marriage in Federal law.").

Members of Congress also stressed that conflicting state definitions of marriage should not be permitted to create geographical disparities in the eligibility for *federal* benefits. As Senator Ashcroft stated, having a uniform federal definition of marriage "is very important, because unless we have a Federal definition of what marriage is, a variety of States around the country could define marriage differently ... [and] people in different States would have different eligibility to receive Federal benefits, which would be inappropriate." 142 Cong. Rec. 22459 (1996). Federal benefits, he observed, "should be uniform for people no matter where they come from in this country. People in one State should not have a higher claim on Federal benefits than people in another State." *Id.* It would be "irrational and inconsistent," he said, if "citizens of one State [were given] higher benefits or different benefits than citizens of another State." *Id.* "[I]t is entirely appropriate for us, as a Congress, to say that we want a Federal benefits structure that follows a uniform definition of 'marriage.'" *Id.; see also id.* at 22453 (Sen. Murkowski) (DOMA establishes "uniformity in federal benefits, rights and privileges for married persons."); *id.* at 22448 (Sen. Byrd) ("Without a Federal definition ... every department and every agency of the Federal Government that administers public benefit programs would be left in the lurch.").

Congress additionally noted that DOMA helped to preserve the public fisc and avoid the unpredictable effects of changing traditional federal definitions that governed eligibility for federal benefits and taxes. "Government currently provides an array of material and other benefits to married couples," and those benefits "impose certain fiscal obligations on the federal government." House Rep. 18. Congress believed that DOMA would "preserve scarce government resources, surely a legitimate government purpose." *Id.* As Senator Gramm observed, without DOMA, state recognition of same-sex marriage will create

> a whole group of new beneficiaries—no one knows what the number would be—tens of thousands, hundreds of thousands, potentially more—who will be beneficiaries of newly created survivor benefits under Social Security, Federal retirement plans, and military retirement plans.... [I]t will impose ... a whole new set of benefits and expenses which have not been planned or budgeted for under current law.

142 Cong. Rec. 22443 (1996). If the federal government were forced to recognize same-sex marriages, Sen. Byrd noted, "it is [not] inconceivable that the costs associated with such a change could amount to hundreds of millions of dollars, if not billions ... of Federal taxpayer dollars." *Id.* at 22448;

see also id. at 22454 (Sen. Burns) ("Given the budget difficulties we are currently facing, it would be an understatement to say that this [federal recognition of same-sex marriages] could have an enormous financial impact on our country.").

In retaining the traditional definition for federal-law purposes, Congress also emphasized "'[t]he enormous importance of [traditional] marriage for civilized society.'" House Rep. 13 (quoting Council on Families in America, *Marriage in America: A Report to the Nation* 10 (1995)). The House Report quoted approvingly from this Court's decision in *Murphy v. Ramsey*, which referred to "*the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony*; the sure foundation of all that is stable and noble in our civilization." House Rep. 12 (quoting 114 U.S. 15, 45 (1885)) (emphasis in House Rep.). Congress recognized that the institution of marriage has traditionally been defined in American law as the union of one man and one woman, and was cognizant of the need for caution in changing such an important institution. *See* House Rep. 3 ("[T]he uniform and unbroken rule has been that only opposite-sex couples can marry."); 142 Cong. Rec. 22463 (1996) (Sen. Bradley) ("[W]hen we contemplate giving state sanction to same-sex marriages, we need to proceed cautiously.").

Congress further explained that the institution of marriage is a response to the unique social concerns surrounding the inherently procreative nature of heterosexual relationships—specifically, that "society recognizes the institution of marriage and grants married persons preferred legal status" because it "has a deep and abiding interest in encouraging responsible procreation and child-rearing." House Rep. 12, 13. Congress recognized the basic biological fact that only a man and a woman can beget a child together without advance planning, which means that opposite-sex couples have a unique tendency to produce unplanned and unintended offspring. Congress sought to encourage the raising of such children by both their biological parents in a stable family structure. *See* 142 Cong. Rec. 22446 (Sen. Byrd); *id.* at 22262 (Sen. Lieberman) (DOMA "affirms another basic American mainstream value, ... marriage as an institution between a man and a woman, the best institution to raise children in our society.").

While Congress was considering DOMA, it requested the opinion of the Department of Justice on the bill's constitutionality, and the Department three times reassured Congress that DOMA was constitutional. *See* Letters from Andrew Fois, Asst. Att'y Gen., to Rep. Canady (May 29, 1996), *reprinted in* House Rep. 34; to Rep. Hyde (May 14, 1996), *reprinted in* House Rep. 33-34; and to Sen. Hatch (July 9, 1996), *reprinted in* Senate Hrg. 2. Congress also received and considered other expert advice and concluded that DOMA was "plainly constitutional." House Rep. 33; *see also* Senate Hrg. 1, 2 (Sen. Hatch) (DOMA "is a constitutional piece of legislation" and "a legitimate exercise of Congress' power"); *id.* at 23-41 (testimony of Professor Wardle); *id.* at 44 n.1 (statement of Professor Cass Sunstein) (opining that DOMA Section 3 would be upheld as constitutional); *id.* at 56-59 (letter from Professor Michael McConnell).

B. The Justice Department Stops Defending DOMA and Starts Attacking It

Following DOMA's enactment, the Department of Justice discharged its constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and successfully defended Section 3 of DOMA against several constitutional challenges, prevailing in every case to reach final judgment.[3] The Department continued to defend DOMA during the first two years of the current Administration.

In February 2011, however, the Administration abruptly reversed course and abdicated its duty to defend DOMA's constitutionality. *See* Letter from Att'y Gen. Eric H. Holder, Jr., to the Hon. John A. Boehner, Speaker of the House (Feb. 23, 2011) ("Holder Letter"), http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. Attorney General Holder announced that he and President Obama were now of the view "that a heightened standard [of review] should apply [to DOMA], that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3." *Id.*

The Attorney General acknowledged that, in light of "the respect appropriately due to a coequal branch of government," the Department "has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense." *Id.* He did not, however, apply that standard to DOMA. On the contrary, he conceded that every federal court of appeals to have considered the issue by that point in time (eleven of the thirteen circuits) had applied rational basis review to sexual orientation classifications and that "a reasonable argument for Section 3's constitutionality may be proffered under [the rational basis] standard." *Id.* [4]

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[3] *See Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part and vacated in part for lack of standing*, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *Hunt v. Ake*, No. 04-cv-1852 (M.D. Fla. Jan. 20, 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

Although the Holder Letter had said only that the Department would "cease defense" of DOMA Section 3, the Department did not merely bow out of DOMA litigation. Instead, it affirmatively assailed DOMA in court—arguing that Section 3 violates equal protection and urging courts to render judgment in favor of plaintiffs challenging the law even in Circuits in which rational basis was binding circuit law. The Department even went so far as to accuse the Congress that enacted DOMA—many of whose Members still serve—of being motivated by "animus." Br. for United States 25, *Windsor*, Nos. 12-2335 & 12-2435 (2d Cir. Aug. 10, 2012), ECF 120.

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[4] *See, e.g., Cook v. Gates*, 528 F.3d 42, 61-62 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 927-928 (4th Cir. 1996); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-867 (8th Cir. 2006); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-574 (9th Cir. 1990); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

In response to the Department's remarkable "about face" on DOMA, *Massachusetts*, 682 F.3d at 7, the House intervened as a party-defendant in more than a dozen cases (fifteen to date), around the country, in which one or more plaintiffs challenged the constitutionality of DOMA Section 3; the House did so to ensure that a duly-enacted federal statute would have an adequate constitutional defense. No court denied intervention.

C. Ms. Windsor's Challenge to DOMA

Respondent Edith Schlain Windsor and another woman, Thea Clara Spyer, obtained a certificate of marriage from the province of Ontario, Canada in 2007. At that time, their home state of New York did not issue marriage licenses to same-sex couples.

Ms. Spyer died in 2009, naming Ms. Windsor the executor and sole beneficiary of her estate. Nine months after Ms. Spyer's passing, the New York Court of Appeals expressly reserved the question of whether New York law recognized foreign, same-sex marriage certificates. *See Godfrey v. Spano*, 920 N.E.2d 328, 337 (N.Y. 2009). New York did not itself begin issuing marriage licenses to same-sex couples until 2011.

After paying more than $363,000 in federal estate taxes, Ms. Windsor, as executor, sought a refund on the theory that the estate was entitled to the marital deduction, even though both Ms. Windsor and Ms. Spyer continued to file individual income tax returns after obtaining an Ontario marriage certificate in 2007. Recognizing that federal law offers this deduction only when the beneficiary of the estate is a "spouse" within the meaning of federal tax law and

DOMA, Ms. Windsor claimed that the failure to extend this favorable treatment to her violated her equal protection rights. The IRS denied the refund, and Ms. Windsor filed this suit in her capacity as executor of the estate. Ms. Windsor's constitutional challenge is premised on the notion that New York would have recognized the 2007 Canadian marriage certificate, even though New York did not issue marriage certificates to same-sex couples until after Ms. Spyer's death.

After the Justice Department abandoned DOMA's defense in early 2011, the district court *sua sponte* invited Congress to intervene in the litigation, and the House did so. The district court followed the First Circuit's lead and invalidated DOMA under a variant of rational basis it labeled "intensified scrutiny." 682 F.3d at 10.

On appeal, the Second Circuit first found that the Department had appellate standing and then addressed Ms. Windsor's standing. It recognized that, "[a]t the time of Spyer's death in 2009, New York did not yet license same-sex marriage itself" and therefore "decisive for standing in this case" is "whether in 2009 New York recognized same-sex marriages entered into in other jurisdictions." Supp. App. 5a. The Second Circuit declined to certify this sensitive question of state law, reasoning that the New York Court of Appeals had "signaled its disinclination to decide this very question" in *Godfrey*. Supp. App. 6a. Instead, the panel "'predict[ed]'" that "Windsor's marriage would have been recognized under New York law at the time of Spyer's death," based on three New York lower court rulings, two of which pre-dated *Godfrey*. App. 6a-7a.

On the merits, the panel majority recognized that this Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), "held that the use of the traditional definition of marriage for a state's own regulation of marriage status did not violate equal protection." Supp. App. 3a. Yet the panel majority concluded that "*Baker* does not control equal protection review of DOMA" because DOMA is a federal law and there had been "doctrinal changes" in equal protection law since 1971. Supp. App. 8a, 10a.

In its equal protection analysis, the panel majority explained that "a party urging the absence of any rational basis takes up a heavy load" and "[t]hat would seem to be true in this case—the law was passed by overwhelming bipartisan majorities in both houses of Congress" and "the definition of marriage it affirms has been long-supported and encouraged." Supp. App. 12a-13a. Indeed, the panel majority did not dispute Judge Straub's conclusion that DOMA survives rational basis review. *See* Supp. App. 14a. It also declined to apply "rational basis plus" review, because this Court "has not expressly sanctioned such modulation in the level of rational basis review." Supp. App. 13a.

The panel majority ultimately determined—in conflict with eleven other circuits—that heightened scrutiny applies to classifications based on sexual orientation. Supp. App. 15a. The panel majority acknowledged that homosexuals "clearly have" attained "political successes over the years," but deemed that they cannot "adequately protect themselves from the discriminatory wishes of the majoritarian public." Supp. App. 21a-23a.

Finally, the panel majority concluded that Section

3 of DOMA could not survive heightened scrutiny. The Court recognized Congress' concern with ensuring "uniform eligibility for federal marital benefits," but found it "suspicious" that Congress would attempt to define the word "marriage" when it had traditionally deferred to the states. Supp. App. 24a-25a. It also recognized the budgetary concerns motivating DOMA, but held them insufficient to satisfy intermediate scrutiny. Supp. App. 26a-28a. The panel majority "agree[d] that promotion of procreation can be an important government objective," but held that DOMA does not further that objective because it affected only federal benefits. Supp. App. 30a. Thus, although it acknowledged "that same-sex marriage is unknown to history and tradition," the panel majority nonetheless invalidated DOMA. Supp. App. 29a-31a.

Judge Straub dissented on the merits, noting that DOMA reflects "the understanding of marriage ... throughout our nation's history," and that, "[i]f this understanding is to be changed,... it is for the American people to do so." Supp. App. 31a-32a. Judge Straub found that this Court's decision in *Baker* resolved "the essentially identical challenge we have here," because although *Baker* involved a state law, "the equal protection component of the Fifth Amendment is identical to and coextensive with the Fourteenth Amendment guarantee." Supp. App. 32a, 45a.

Even apart from *Baker*, Judge Straub concluded that "routine respect for extant precedent" requires the application of rational-basis review to sexual-orientation classifications. Supp. App. 81a. He observed that this Court has warned the lower courts "to be wary of" creating new suspect or quasi-suspect classifications, that it has not itself recognized any such classifications "in decades," and that this Court applied rational-basis review in *Romer* "despite having the opportunity to apply heightened review." Supp. App. 33a, 78a, 81a.

Applying rational basis review, Judge Straub found that "DOMA centers on legitimate state interests that go beyond mere moral disapproval of an excluded group." Supp. App. 33a. He noted that DOMA promotes uniformity in *federal* marital benefits "and does nothing to strip the status that states confer on couples they marry." Supp. App. 63a-64a. He concluded that it is rational for Congress to "limit the national impact of state-level policy development" and to "take an approach that attempts to create uniformity across the states" in matters governed by federal law. Supp. App. 67a-68a, 69a.

Judge Straub also noted that this Court "has continued to view the biological link of parents to children as deserving of special recognition and protection." Supp. App. 71a. He therefore concluded that DOMA furthers the legitimate government interest in encouraging heterosexual relationships, with their unique tendency to produce unintended offspring, to be channeled into an institution designed to facilitate the raising of such offspring. Supp. App. 55a-62a.

Judge Straub therefore concluded that "[w]hether connections between marriage, procreation, and biological offspring recognized by DOMA and the uniformity it imposes are to continue is ... an issue for the American people and their elected representatives to settle through the democratic process." Supp. App. 83a. He noted the "robust political debate" on this topic and expressed regret that striking down DOMA "poisons the political well" by "interven[ing] in this robust debate only to cut it short." *Id.*

SUMMARY OF THE ARGUMENT

Although the passions that surround the issue of same-sex marriage undoubtedly run high, the issue before this Court is quite narrow. Assuming that states remain free either to recognize same-sex marriages or retain the traditional definition, the question here is whether the federal government retains the same latitude to choose a definition for federal-law purposes, or whether instead it must borrow state-law definitions as its own, recognizing same-sex marriages of U.S. citizens residing in Massachusetts (because Massachusetts does) but not same-sex relationships of U.S. citizens residing in Virginia (because Virginia does not). Bedrock principles of federalism make clear that the federal government has the same latitude as the states to adopt its own definition of marriage for federal-law purposes and has a unique interest in treating citizens across the nation the same.

To be sure, the federal government also has the option of borrowing state-law definitions, as it did during the long period when the states uniformly employed the traditional definition. But in 1996 when it appeared that states soon would begin experimenting with changing the traditional definition, the federal government was under no obligation to follow suit. Congress could, and did, rationally decide to retain the traditional definition as the uniform rule for federal-law purposes. Congress could, and someday may, adopt a different approach and either incorporate varying state approaches or uniformly extend rights to same-sex couples even in states that retain the traditional definition. But under our system of government those decisions are wisely left to Congress and the democratic process.

In considering DOMA's constitutionality, the Court should apply rational basis review as it previously has done when considering classifications on the basis of sexual orientation. And under that deferential standard, there is little question that DOMA rationally furthers multiple legitimate government interests. In 1996, Congress confronted an unprecedented dynamic with at least one state on the verge of experimenting with a fundamental change to the traditional definition of marriage. In DOMA, Congress acted to ensure that no one state's decision to adopt a new definition would dictate the result for other sovereigns either via full faith and credit principles or by federal law borrowing state definitions. In our federal system, there is certainly nothing irrational about allowing each sovereign—including the federal government—to make this important decision for itself. Indeed, the justly celebrated ability of states to act as "laboratories of democracy" necessarily assumes the ability of each sovereign to run its own experiments.

And it was certainly rational for the federal government to retain the traditional definition as the governing definition for federal-law purposes. The federal government has a unique interest in ensuring that federal benefits and tax burdens are distributed equally such that a same-sex couple in Virginia is treated no differently for federal-law purposes from one in Massachusetts. And if the federal government can rationally favor a uniform rule, it was eminently rational to choose the traditional definition, which was the uniform state-law rule in 1996 and remains the majority approach today. That decision also was rational because it accurately reflected the intent of the prior Congresses that created the multitude of programs that tie benefits and burdens to the institution of marriage as traditionally understood. It also avoided the uncertain and unpredictable fiscal impact of expanding the class of federal beneficiaries in unintended ways.

And wholly apart from these unique federal interests that fully justify DOMA, Congress could rationally decide to retain the traditional definition for the same basic reasons that states adopted the traditional definition in the first place and that many continue to retain it: There is a unique relationship between marriage and procreation that stems from marriage's origins as a means to address the tendency of opposite-sex relationships to produce unintended and unplanned offspring. There is nothing irrational about declining to extend marriage to same-sex relationships that, whatever their other similarities to opposite-sex relationships, simply do not share that same tendency. Congress likewise could rationally decide to foster relationships in which children are raised by both of their biological parents.

Finally, the Second Circuit erred when it became the first court of appeals to treat sexual orientation as a quasi-suspect class. Creating new suspect classes takes issues away from the democratic process, and this Court has wisely refrained from recognizing new suspect classes over the last four decades. Homosexuality would be a particularly anomalous place to eschew that reluctance, as gays and lesbians have substantial political power, which has grown exponentially with each election cycle. Nor do the other factors this Court has looked to support recognizing a new suspect class here. To the contrary, with an issue as divisive and fast-moving as same-sex marriage, the correct answer is to leave this issue to the democratic process. In that process, there is a premium on persuading opponents, rather than labeling them as bigots motivated by animus. And the democratic process allows compromise and way-stations, whereas constitutionalizing an issue yields a one-size-fits-all-solution that tends to harden the views of those who lose out at the courthouse, rather than the ballot box. In the final analysis, the democratic process is at work on this issue; there is no sound reason to constitutionalize it.

ARGUMENT

As a statute duly enacted by Congress and signed by the President, DOMA is entitled to a strong presumption of validity. "Judging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (quotation marks omitted). "The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." *Rostker v. Goldberg*, 453 U.S.

57, 64 (1981). Furthermore, "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). Therefore, "[t]his Court does and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is" constitutional. *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953) (plurality). And "[t]he customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Rostker*, 453 U.S. at 64; *see supra* at 11.

The deference owed to the coordinate branches of government is at its zenith when it comes to rational basis review. It is one thing to conclude that a coordinate branch has crossed one of the sometimes murky lines that delineate the protections of the Bill of Rights, but it is quite another thing for this Court to declare that the two coordinate branches of the national government have acted not just imprudently, but wholly without rational basis. For that reason, it is perhaps no surprise that this Court has on only one occasion (at most two) invalidated an Act of Congress while applying rational basis review. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).[5] And even then, this Court invalidated only a single obscure amendment added in conference. *Id.* at 534 n.6. Striking down as irrational a statute like DOMA that was debated in both chambers, viewed as constitutional by the Justice Department, passed by large bipartisan majorities and then signed into law by the President would be wholly unprecedented.[6]

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[5] *Moreno* is readily distinguishable. The classification there could not further the interests identified by the government because the vast majority of individuals excluded could easily rearrange their affairs to become eligible, while only the

I. Rational Basis Review Applies To DOMA.

Ms. Windsor and the Justice Department contend that Section 3 of DOMA classifies based on sexual orientation and that therefore heightened scrutiny applies. But this Court has never classified sexual

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neediest people could not. *See Moreno*, 413 U.S. at 538. There are no analogous difficulties with DOMA. The only other even arguable example is *Jimenez v. Weinberger*, 417 U.S. 628 (1974), in which the Court found a classification based on illegitimacy invalid under any standard of review when the Court was in the process of recognizing illegitimacy as a quasi-suspect classification.

[6] Before it can consider DOMA's constitutionality, this Court must resolve a threshold issue of Article III standing. New York law did not recognize same-sex marriage until after Ms. Spyer's passing. Thus, Ms. Windsor only has standing to challenge DOMA and the denial of a marital exemption from the estate tax if New York would have recognized her 2007 Ontario marriage certificate at a time when New York did not itself issue marriage certificates to same-sex couples. *See* Supp. App. 5a (recognizing that this question is "decisive for standing in this case"). That question is not free from doubt; the New York Court of Appeals expressly reserved that state-law question in its 2009 *Godfrey* decision, nine months *after* Ms. Spyer's passing. *See Godfrey*, 920 N.E.2d at 337. Both courts below predicted that New York would have recognized the Ontario marriage certificate, which presumably does not obviate the need for this Court to assure itself of its Article III jurisdiction.

orientation as a suspect or quasi-suspect class, and indeed has gone out of its way to apply rational basis review. This Court should do the same here and apply rational basis review to DOMA.[7]

Under this Court's equal protection cases, there are only three levels of scrutiny. Strict scrutiny is reserved for laws that classify based on "race, alienage, or national origin." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Classifications based on "sex or illegitimacy" are quasi-suspect and receive "intermediate scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). All other classifications trigger only rational basis review. This Court has never considered sexual orientation to be a suspect or quasi-suspect classification and instead has repeatedly applied rational basis review to such classifications.

This Court considered a classification similar to DOMA in *Baker v. Nelson*, 409 U.S. 810 (1972). The *Baker* Court rejected "for want of a substantial federal question" an equal protection challenge to Minnesota's statute defining marriage as a union between persons of the opposite sex. *Baker*, 409 U.S. at 810. Although the Court's summary disposition did not specify the level of scrutiny it applied, subsequent decisions, discussed in the paragraphs immediately below, make clear that the Court applied only rational basis review to the Minnesota statute's limitation of marriage to opposite-sex couples. Such a summary dismissal is, of course, a decision on the merits and, while it does not have the same force before this Court as a decision reached after plenary review, it carries precedential effect. "Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam); *see also Massachusetts*, 682 F.3d at 8 (*Baker* is "precedent binding" on lower courts and thus forecloses arguments that "presume or rest on a constitutional right to same-sex marriage").

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[7] By its terms, DOMA does not classify based on a married couple's sexual orientation. Rather, DOMA classifies based on whether a marriage is (i) a legal union (ii) between two persons (iii) of the opposite sex. A marriage between a man and a woman would fall within DOMA's definition even if one or both spouses were homosexual. Similarly, the marriage of two men would fall outside the definition even if both were heterosexual. There is no question, however, that DOMA has a disproportionate impact on individuals with a homosexual orientation.

This Court subsequently considered an equal protection challenge to a sexual orientation classification on plenary review and applied rational basis review. *See Romer v. Evans*, 517 U.S. 620 (1996). *Romer* involved a voter-enacted referendum in Colorado known as Amendment 2, which "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect the named class" of "homosexual persons or gays and lesbians." *Id.* at 624. The Colorado Supreme Court applied strict scrutiny to invalidate Amendment 2. *Id.* at 625.

Despite the Colorado Supreme Court's application of strict scrutiny, this Court reviewed Amendment 2 under the rational basis test, which applies when a law "neither burdens a fundamental right nor targets a suspect class." *Id.* at 631. Under that test, legislation is upheld "so long as it bears a rational relation to some legitimate end." *Id.* This Court held that Amendment 2 "fails, indeed defies, even this *conventional inquiry.*" *Id.* at 632 (emphasis added). *See also id.* at 635 (concluding that "a law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not." (citation omitted)). Thus, even in the face of the protestations of the dissent that it was applying something other than rational basis review, *see id.* at 651 (Scalia, J., dissenting), the Court made clear that it was applying conventional rational basis review, not any form of heightened scrutiny, to the sexual orientation classification before it in *Romer*.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), this Court once again declined to apply heightened scrutiny. *Lawrence* struck down a Texas statute that criminalized intimate sexual conduct between two persons of the same sex, while not reaching opposite-sex couples engaging in the same conduct. Rather than addressing that differential treatment under the Equal Protection Clause, the Court decided the case under the Due Process Clause and invalidated the Texas statute and overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986). The *Lawrence* Court emphasized the limited nature of that due process holding and specified that it was not holding that "the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578.

Justice O'Connor preferred to decide the case under the Equal Protection Clause and, consistent with *Romer*, applied rational basis review. She explained that her analysis of the Texas law "does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as ... *preserving the traditional institution of marriage.*" *Id.* at 585 (O'Connor, J., concurring in the judgment) (emphasis added).

Although the court of appeals here applied heightened scrutiny to DOMA, the traditional factors this Court looks to in ascertaining the appropriate level of equal protection scrutiny do not support that conclusion. *See* Part III, *infra.* Rather, the proper result under this Court's precedents and the law of every other Circuit to consider the question is that rational basis review applies. As shown next, multiple rational bases support Congress' decision to employ the traditional definition of marriage for federal-law purposes.

II. Multiple Rational Bases Support DOMA And Its Decision To Retain The Traditional Definition Of Marriage For Federal-Law Purposes.

Rational basis review "is a paradigm of judicial restraint." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). "[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic process." *Cleburne*, 473 U.S. at 440. Thus, "judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). The judicial role is modest precisely because rational basis is "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). The statute enjoys "a strong presumption of validity," and the challenger bears "the burden 'to negative every conceivable basis which might support it'" without regard to "whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach*, 508 U.S. at 314-15 (*quoting Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)); *see also Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080-81 (2012).

As noted, deference is particularly strong when it comes to reviewing the work of the two coordinate political branches of the federal government. And deference is at its zenith when it comes to statutory definitions and other line-drawing exercises such as DOMA Section 3. This Court has recognized that in formulating definitions or establishing categories of beneficiaries, "Congress had to draw the line somewhere," *Beach*, 508 U.S. at 316, which "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." *Mathews v. Diaz*, 426 U.S. 67, 83 (1976); *see Schweiker v. Wilson*, 450 U.S. 221, 238 (1981) (prescribing extra deference for statutory distinctions that "inevitably involve[] the kind of line-drawing that will leave some comparably needy person outside the favored circle" (footnote omitted)). The Court has applied this deferential approach not just to economic legislation, but also to benefits legislation, *e.g.*, *Schweiker*, and even to government determinations of who or what constitutes a family, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (upholding on rational basis review zoning regulation defining unmarried couples as "families" permitted to live together, but prohibiting cohabitation by larger groups). In such cases, Congress' decision where to draw the line is "virtually unreviewable." *Beach*, 508 U.S. at 316.

Applying this deferential review to DOMA, it is clear that Congress, when confronting the unprecedented phenomenon of states beginning to experiment with the traditional definition of marriage, had and maintains multiple rational bases to retain the traditional definition as the operative definition for purposes of federal law.

A. DOMA Rationally Preserves Each Sovereign's Ability to Define Marriage for Itself at a Time When States Are Beginning to Experiment with the Traditional Definition.

When Congress enacted DOMA in 1996, it confronted a unique phenomenon. Up until that point, every state in the nation defined marriage in traditional terms as a union between a man and a woman. There was little doubt that when Congress used terms like "marriage," "married," and "spouse" in federal statutes, it too had the traditional definition in mind. But Congress did not even need to consider whether it preferred a uniform federal definition of marriage or instead preferred to defer to the states, because every state adopted the same, traditional approach. Only as that began to change did Congress consider DOMA.

The Hawaii Supreme Court's decision in *Baehr* raised the prospect that some states would begin to experiment with the traditional definition and expand it to include same-sex couples. At least in

Hawaii, the impetus for this change came not from the democratic process, but from the state courts' interpretation of the state constitution. And in our federalist system, the prospect that one state would alter the traditional definition raised the distinct prospect that one state could effectively change the law for other states via full faith and credit principles—and for the federal government to the extent federal law simply borrowed the state's definition.

DOMA's two operative provisions responded to this unprecedented dynamic in a manner that preserved each sovereign's ability to define marriage for itself. Section 2 preserved each state's ability to define marriage as it preferred by ensuring that any one state's definition would not trump another state's judgment by operation of full faith and credit principles. In a similar fashion, Section 3 ensured that federal law would not simply borrow whatever definition or redefinition a state chose to adopt, but instead that the federal government would distinctively define marriage for federal-law purposes only and would retain the traditional definition.

Congress' approach in DOMA was a balanced one that fully reflects and respects our federalist system. Congress did not attempt to override any state's decision to experiment with the definition of marriage or deem any particular redefinition of marriage irrational. But at the same time Congress recognized that states could rationally decide to expand the traditional definition of marriage to include same-sex couples, it also recognized that other jurisdictions, including the federal government for uniquely federal purposes, could rationally decide to retain the traditional definition. DOMA permitted states to perform their role as "laboratories of democracy," while at the same time ensuring that no one state's experiment would be imposed on other states or on the federal government.

DOMA thus reflects an interest in ensuring that, at a time of unprecedented reconsideration of the traditional definition of marriage, each sovereign in our federal system may decide this important issue for itself. That surely is a rational—indeed an important and vital—basis for action in our system of dual federalism.

And the federal government's decision to retain the traditional definition as its own also surely was a rational one. As shown in more detail below, at the time of DOMA's enactment every state retained the traditional definition and that remains the approach of the majority of the states. It plainly was rational for Congress to adopt the majority definition as its own, especially when that traditional definition was the underlying assumption of countless past federal legislative decisions, and when altering that definition would have unpredictable fiscal effects and would undermine uniquely federal interests in the uniformity of federal benefits and burdens. Further, Congress could rationally retain the traditional definition for all the reasons a state could rationally retain the traditional definition. While the federal definition of marriage does not have the same direct impact on the institution as a state decision, it has some effect. Assuming that states continue to have the flexibility to retain the traditional definition, there is no reason why the federal government does not have the same latitude.

B. DOMA Ensures National Uniformity in Eligibility for Federal Benefits and Programs Based on Marital Status.

As long as all the states retained the traditional definition of marriage, there was no need for the Congress to choose between having a uniform federal definition for federal benefits and burdens and simply borrowing the state definition of marriage. But when Hawaii was on the verge of becoming the first state to experiment with altering the traditional definition, Congress had to choose between retaining a uniform federal rule or continuing simply to borrow state definitions in a manner that would create the possibility of disparities in federal benefits across jurisdictions. Congress chose the former, and that decision was eminently rational.

In a nation where some states would recognize same-sex marriage and other states would not, Congress rationally could desire to maintain uniformity in the federal approach to this question, rather than adopting a patchwork of disparate state-law rules. DOMA Section 3 accomplishes exactly that, ensuring that similarly-situated couples will have the same federal benefits regardless of the state in which they happen to reside. The uniform federal rule reaffirmed by DOMA also avoids a confusing situation in which same-sex couples would lose (or gain) federal marital status simply by moving between states with different policies on recognition of same-sex marriages. *See, e.g.*, 142 Cong. Rec. 10468 (1996) (Sen. Nickles) (DOMA "will eliminate legal uncertainty concerning Federal benefits"); *id.* at 22459 (Sen. Ashcroft) (finding it "very important" to prevent "people in different States [from having] different eligibility to receive Federal benefits"). Likewise, a uniform federal rule also avoids the prospect that a federal employee—military or civilian—would resist moving from one jurisdiction to another for fear it would affect his or her federal benefits or tax status.

The adoption of a uniform federal rule also serves the government's rational interest in easing administrative burdens. While it may seem a simple matter to determine which jurisdictions have recognized same-sex marriage, this case illustrates that the issue is far more complicated. Ms. Windsor's claim to a marital exemption from the estate tax does not turn on New York's very public adoption of laws permitting same-sex marriage in 2011 but, rather, on obscure, and as-yet not definitively settled, choice-of-law principles concerning New York's recognition of foreign marriage certificates in 2009. Ms. Windsor filed her claim here before New York recognized same-sex marriage, and her success depends on whether New York courts would have recognized a Canadian marriage certificate issued to a same-sex couple at a time when New York would not issue such a certificate itself. If her claim is successful, the federal government would have to confront similar choice-of-law questions in all the jurisdictions that retain the traditional definition. It was certainly rational for the federal government to prefer a uniform federal rule to the vagaries and difficulties of undertaking a multitude of such complex choice-of-law determinations.

When Hawaii threatened to break up the uniformity of the states' definition of marriage, Congress essentially had two decisions to make. First, it had to decide between adopting a uniform federal rule or borrowing state definitions in a way that would produce a disparity in federal benefits. It was clearly rational for Congress, with its unique concern for treating citizens in Oklahoma the same as citizens in Hawaii, to choose the former. Second, once Congress decided to adopt a uniform rule, it had to decide whether to retain the traditional definition and the approach of all 50 states at the time, or to alter the traditional definition to include same-sex couples. While either choice would have been rational, adopting the overwhelming majority approach surely was a permissible option. By the same token, if at some future point all but a handful of jurisdictions recognize same-sex marriages, it would be entirely rational for Congress to change the law and adopt that majority approach as the uniform rule. In short, the rationality of the federal government interest in uniformity is independent of the rule adopted.

Despite the rationality of preferring a uniform federal rule and adopting the majority approach as the federal rule, the courts below regarded Congress' interest in a uniform federal-law definition of marriage as at best "suspicious," Supp. App. 24a, and at worst an illegitimate "intrusion" into state authority over marriage, Supp. App. 25a-26a. But such suspicions ignore both the unprecedented situation Congress confronted and basic tenets of federalism. Suspicion of Congress' adoption of a uniform definition seems to stem from Congress' traditional willingness to borrow state law definitions. But when state definitions of marriage vary only in the details, it is understandable and commendable for federal law to borrow those definitions. On the other hand, when a state is on the verge of making a fundamental change to the definition, that creates a need for Congress to choose between uniformity and borrowing (a need that simply did not exist before), and as demonstrated above, it is certainly rational to choose the former.

The suggestion that states somehow have special constitutional authority to define what the words "marriage" and "spouse" mean for purposes of *federal* law runs entirely counter to our basic constitutional structure. Indeed, the presumption is the opposite. It is well established that, unless Congress plainly manifests an "intent to incorporate diverse state laws into a federal statute, the meaning of [a] federal statute should *not* be dependent on state law." *United States v. Turley*, 352 U.S. 407, 411 (1957); *see also Helvering v. Davis*, 301 U.S. 619, 645 (1937) ("When money is spent to promote the general welfare, the concept of welfare ... is shaped by Congress, not the states."); *see also Massachusetts*, 682 F.3d at 12 ("Congress surely has an interest in who counts as married. The statutes and programs that section 3 governs are federal regimes ... and their benefit structure requires deciding who is married to whom. That Congress has traditionally looked to state law to determine the answer does not mean that the Tenth Amendment or Spending Clause require it to do so.").

The "genius" of the framers was in "establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Thus, when it comes to defining marriage for purposes of *state* law, the states may well enjoy constitutional power to make such determinations without federal interference. But DOMA does not interfere with or override state law, and Section 2 affirmatively promotes each state's interest in deciding this important issue for itself. At the same time, nothing in "our federalism" prevents the federal sovereign from exercising its authority to independently determine the meaning of words in *its own* law. To be sure, Congress may choose to borrow state-law definitions as a matter of cooperative federalism—and it historically has done so in many, but far from all, contexts with respect to marriage definitions. *See supra* at 4-6. But the notion that Congress is somehow constitutionally *required* to do so—that state law can "reverse preempt" contrary federal statutes in this area, and eliminate what otherwise would be the legitimate federal interest in uniform federal legal rules of nationwide applicability—is wholly unprecedented and foreign to our constitutional tradition.

C. DOMA Preserves Past Legislative Judgments, Conserves Financial Resources, and Avoids Uncertain and Unpredictable Effects on the Federal Fisc.

Congress' decision to retain the traditional federal definition as the uniform federal rule in 1996 was supported by a number of other rational bases that are uniquely federal in nature. First, retaining the traditional definition preserved the legislative judgments of earlier Congresses. Congress recognized that whatever the future held for the definition of marriage, the multitude of federal statutes already on the books that used the terms "marriage" or "spouse" intended to incorporate the traditional definition of marriage. In some cases, that intent was explicit as statutes included references to "husband and wife" or other terms clearly incorporating the traditional definition. In other cases, the legislative judgment reflected the traditional definition implicitly, because the definition was uniformly applied. *See, e.g.*, *Adams*, 486 F. Supp. at 1122 ("The term 'marriage' ... necessarily and exclusively involves a contract, a status, and a relationship between persons of different sexes. That is the way the term 'marriage' is defined in every legal source that I have examined, starting with Black's Law Dictionary."). But in every case, the Congress that enacted DOMA in 1996 knew that each of the existing references to marriage in the United States Code, many of which were the product of legislative compromise, reflected the traditional definition. Against that backdrop, it certainly was rational for Congress to preserve those past legislative judgments and expressly adopt the traditional definition as an accurate reflection of past Congresses' intent when they used the defined terms in federal law.

Congress' retention of the traditional definition of marriage also rationally avoided uncertain and unpredictable (but presumed negative) effects on the federal fisc. In enacting DOMA, Congress recognized that a great many financial benefits from the government turn on whether one is "married" for purposes of federal law. *See* House Rep. 18. In DOMA, Congress made the conscious decision not to expand the category of beneficiaries just because a state chose to expand its definition of marriage. *See id.* (stating that DOMA will "preserve scarce government resources, surely a legitimate government purpose"); 142 Cong. Rec. 22443 (1996) (Sen. Gramm) (DOMA prevents a "new set of benefits and expenses which have not been planned or budgeted for under current law").

Congress operated on the assumption that expanding the definition of marriage would have a substantial net negative effect on the federal fisc. *See id.* at 22448 (Sen. Byrd) (changing definition of marriage could cost federal government "hundreds of millions of dollars, if not billions"); *see also supra* at 9-10. The exact net effect is uncertain because although some benefits are extended exclusively to married couples, other laws operate as a "marriage penalty" or save the federal government funds if a marriage makes individuals ineligible for means-tested programs based on joint income. But Congress could rationally conclude that the net effect would be negative (if for no other reason than couples with a financial disincentive to do so might be less inclined to officially tie the knot), and in all events Congress could rationally decide to avoid a potentially large and uncertain effect that would have radically different impacts across federal agencies. *See Massachusetts*, 682 F.3d at 9 (explaining that under "rational basis standard," challenge to DOMA "cannot prevail" because "Congress could rationally have believed that DOMA would reduce costs").[8] Since DOMA would preserve the status quo ante of providing federal benefits only to couples married under the traditional definition, Section 3 would avoid this uncertain and unpredictable effect.[9] This Court has recognized that when Congress declines to extend benefits to those not previously eligible—as it did in DOMA—such actions are supported by the government's rational interest in proceeding "cautiously" and protecting the fisc. *Bowen v. Owens*, 476 U.S. 340, 348 (1986).

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[8] Ms. Windsor disputes DOMA's cost savings, pointing to a Congressional Budget Office report published in 2004 (eight years after DOMA's enactment). *See* Cong. Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (2004), http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5559/06-21-samesexmarriage.pdf. But the Second Circuit correctly concluded that it was Congress' "prerogative" to find that DOMA "will achieve a net benefit to the Treasury." App. 27a. The First Circuit likewise concluded that avoiding an uncertain impact on the federal fisc provides a rational basis for DOMA despite the CBO report. *See Massachusetts*, 682 F.3d at 9. Furthermore, the cursory ten-page CBO report—which acknowledged that its "estimates are highly uncertain" (at 3)—appears to make a critical analytical error: In claiming that many same-sex couples would become ineligible for federal means-tested benefits after their incomes were combined (as marriage would require), the report seemingly neglects to consider that many couples likely would avoid this financial hit simply by not marrying. *Cf. id.* ("how many same-sex partners would marry if allowed is unknown").

[9] The Second Circuit viewed DOMA not as preserving the status quo, but as "a benefit withdrawal" because "it functionally eliminated longstanding federal recognition of all marriages that are properly ratified under state law." Supp. App. 27a. But that plainly is wrong because it ignores the state of the world in which Congress acted in 1996 in which the federal government had never extended a federal marital benefit to a same-sex couple. It also largely begs the question (and ignores Congress' bipartisan judgment in DOMA) by assuming that Congress' dominant intent had always been to borrow state law whatever its content rather than employ the traditional definition, notwithstanding the numerous federal statutes that by their terms apply only to opposite-sex couples, *see supra* at 4-6.

"[T]he Constitution does not empower this Court to second-guess ... officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). And here, there is no denying that a redefinition of marriage by a substantial number of states would have a significant, if not entirely predictable, effect on the federal budget. Thus, it is not surprising that the First Circuit recognized that DOMA satisfies traditional rational basis review because "Congress could rationally have believed that DOMA would reduce costs." *Massachusetts*, 682 F.3d at 9.

D. Congress Rationally Proceeded with Caution When Faced with the Unknown Consequences of an Unprecedented Redefinition of Marriage, a Foundational Social Institution, by a Minority of States.

In enacting DOMA and adopting the traditional definition as the uniform federal rule, Congress recognized that the institution of marriage as between a man and a woman is, to borrow this Court's words from another context, "deeply embedded in the history and tradition of this country" and "has become part of the fabric of our society." *Marsh v. Chambers*, 463 U.S. 783, 786, 792 (1983). Congress rationally could have regarded any significant change in the definition of this bedrock institution as having potentially significant consequences. Congress thus rationally could have concluded that any experimentation with such a longstanding institution should proceed first at the state level, while the federal government retains the traditional definition for its own purposes. *See* House Rep. 15.

Virtually no society anywhere has had even a single generation's worth of experience with treating same-sex relationships as marriages. There thus is ample room for a wide range of rational predictions about the likely effects of such recognition—on the institution of marriage, on society as a whole, and on distinctly federal interests. As two supporters of same-sex marriage put it, "whether same-sex marriage would prove socially beneficial, socially harmful, or trivial is an empirical question .... There are plausible arguments on all sides of the issue, and as yet there is no evidence sufficient to settle them." William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 Future of Children 97, 110 (2005), http://futureofchildren.org/futureofchildren/publications/docs/15_02_06.pdf (endorsing "limited, localized experiment" at state level). One of the great benefits of federalism is that it allows states to adopt "novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310 (1932) (Brandeis, J., dissenting). In light of the uncertainty about the consequences of changing such a long-established institution, it certainly was rational for Congress to decide to allow states to act as laboratories of democracy, while the federal government awaited the results of such state experiments.

E. The Federal Government Could Rationally Retain the Traditional Definition for the Same Reasons States Can Rationally Retain that Definition.

Given its role in our federalist system, the federal government has unique interests in adopting the traditional definition as the uniform national rule for federal-law purposes. The national government has a distinct interest in treating citizens in different states similarly for federal-law purposes, without regard to the vagaries of states' treatment of foreign judgments, and has a distinct interest in making a federal employee indifferent between working in Maryland or Virginia. But in addition to such uniquely national interests, Congress has the same reasons for retaining the traditional definition as the substantial majority of states that have done so. Although the federal government does not have the same direct effect on the institution of marriage as the sovereigns that directly issue marriage certificates, federal law and federal definitions can still effect such institutions at the margin. *See Nat'l Fed. Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) ("[T]he Federal Government [has] considerable influence even in areas where it cannot directly regulate."). Thus, the federal government can retain the traditional definition based on a rational belief that doing so will rationally further the institution of marriage in the long run. Indeed, the burden on the challengers to DOMA is to explain why, if states can rationally choose either to expand the traditional definition to include same-sex couples or retain the traditional definition, the federal government cannot rationally make the same choice.

1. *Providing a Stable Structure to Raise Unintended and Unplanned Offspring*

Many states have chosen to retain the traditional definition because of the intrinsic connection between marriage and children. In enacting DOMA, Congress recognized that, "[s]imply put, government has an interest in marriage because it has an interest in children." House Rep. 13. Similarly, this Court has repeatedly recognized that marriage's importance is derived from its intrinsic connection to procreation. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) ("[A] decision to marry and raise the child in a traditional family setting must receive [constitutional] protection.").

The link between procreation and marriage itself reflects a unique social difficulty with opposite-sex couples that is not present with same-sex couples—namely, the undeniable and distinct tendency of opposite-sex relationships to produce unplanned and unintended pregnancies. Government from time immemorial has had an interest in having such unintended and unplanned offspring raised in a stable structure that improves their chances of success in life and avoids having them become a burden on society. *See Yarborough v. Yarborough*, 290 U.S. 202, 221 (1933) ("In order that children may not become public charges, the duty of maintenance is one imposed primarily upon the parents"); *King v. Smith*, 392 U.S. 309, 330 (1968) (biological parents have legal duties of support that government fills when abdicated). Particularly in an earlier era when employment opportunities for women were at best limited, the prospect that unintended children produced by opposite-sex relationships and raised out-of-wedlock would pose a burden on society was a substantial government concern. Thus, the core purpose and defining characteristic of the institution of marriage always has been the creation of a social structure to deal with the inherently procreative nature of the male-female relationship. Specifically, the institution of marriage represents society's and government's attempt to encourage current and potential mothers and fathers to establish and maintain close, interdependent, and permanent relationships, for the sake of their children, as well as society at large. It is no exaggeration to say that the institution of marriage was a direct response to the unique tendency of opposite-sex relationships to produce unplanned and unintended offspring.

Although much has changed over the years, the biological fact that opposite-sex relationships have a unique tendency to produce unplanned and unintended offspring has not. While medical advances, and the amendment of adoption laws through the democratic process, have made it possible for same-sex couples to raise children, substantial advance planning is required. Only opposite-sex relationships have the tendency to produce children without such advance planning (indeed, *especially* without advance planning). Thus, the traditional definition of marriage remains society's rational response to this unique tendency of opposite-sex relationships. And in light of that understanding of marriage, it is perfectly rational not to define as marriage, or extend the benefits of marriage to, other relationships that, whatever their other similarities, simply do not have the same tendency to produce unplanned and potentially unwanted children. Indeed, Congress recognized as much. *See* House Rep. 14 ("Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship.").

Court decisions upholding traditional marriage laws on the state level have employed similar reasoning. *See, e.g., Hernandez*, 855 N.E.2d at 7 ([The Legislature] could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who [marry]. The Legislature could find that this rationale for marriage does not apply with comparable force to same-sex couples."); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006) (upholding Nebraska's marriage law based a "government interest in 'steering procreation into marriage'"; noting that the statute "confer[s] the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot"); *Conaway v. Deane*, 932 A.2d 571, 630-31 (Md. 2007).

DOMA's definition of marriage as between a woman and a man is rational—and constitutional—because it is tailored to fit the social issue that the institution of marriage addresses. The equal protection guarantee "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne*, 473 U.S. at 439. Opposite-sex couples and same-sex couples, whatever their other similarities, are not similarly situated with regard to their propensity to result in unplanned pregnancies. "Principles of equal protection do not require Congress to ignore this reality." *Nguyen v. INS*, 533 U.S. 53, 66 (2001).

2. Encouraging the Rearing of Children by Their Biological Parents

One of the strongest presumptions known to our culture and law is that a child's biological mother and father are the child's natural and most suitable guardians and caregivers, and that this family relationship should be encouraged. *See Santosky v. Kramer*, 455 U.S. 745, 760 n.11, 766 (1982); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843-47 (1977); Supp. App. 72a-73a & n.11. To be sure, our tradition offers the same protections for an adoptive parent-child relationship, once it is formed. But nonetheless when both biological parents want to raise their child, the law has long recognized a distinct preference for the child to be raised by those biological parents. *Cf. Smith*, 431 U.S. 816 at 823. And this bedrock assumption is grounded in common sense and human experience: Biological parents have a genetic stake in the success of their children that no one else does. *See* Kristin Anderson Moore *et al.*, *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?*, Child Trends Research Brief 1-2 (2002), http://www.childtrends.org/files/marriagerb602.pdf.

Of course, only relationships between opposite-sex couples can result in children being raised by both of their biological parents. Therefore, when government offers special encouragement and support for relationships that can result in mothers and fathers jointly raising their biological children, it rationally furthers its legitimate interest in promoting this type of family structure in a way that extending similar regulation to other relationships would not.

3. Promoting Childrearing by Both a Mother and a Father

Finally, biological differentiation in the roles of mothers and fathers makes it rational to encourage situations in which children have one of each. As this Court has recognized, "the two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quotation marks omitted). Men and women are different. So are mothers and fathers. Common sense, and the experience of countless parents, informs us that children relate and often react differently to mothers and fathers. It is thus rational for governments to offer special encouragement for family structures in which these differing parental roles can complement each other. Moreover, the different challenges faced by boys and girls as they grow to adulthood make it at least rational to think that children benefit from having parental role models of both sexes.

* * *

The court of appeals concluded that reserving a special set of federal marital regulations and incentives for opposite-sex couples has nothing to do with the government interests in procreation and childrearing, because extending the same regime to same-sex couples would not change the availability of benefits to opposite-sex couples. Supp. App. 29a-30a. But that is not obviously correct in a world of limited resources and, in any event, is not the proper inquiry under rational basis review. In an equal protection challenge, a classification is rational if "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Even if extending the definition of marriage to same-sex couples would not harm opposite-sex couples in the least, the question remains whether it was rational for Congress to draw the line where it did. And because the institution of marriage arose in large measure in response to a unique social difficulty that opposite-sex couples, but not same-sex couples, posed, it was rational for Congress to draw the line where it did.

III. The Longstanding List Of Suspect And Quasi-Suspect Classes Should Not Be Expanded To Include Sexual Orientation.

While rational basis review is "a paradigm of judicial restraint," *Beach*, 508 U.S. at 314, the recognition of quasi-suspect and suspect classes has the opposite effect. It extracts certain issues from the normal democratic process and limits the ability of states and the federal government to address those issues through their political branches. Accordingly, this Court has cautioned that the judiciary must be "very reluctant" to establish new suspect (or quasi-suspect) classes given "our federal system and ... our respect for the separation of powers." *Cleburne*, 473 U.S. at 441. In keeping with that admonition, this Court has not added to the short list of suspect or quasi-suspect classes in the last forty years, and indeed has rejected every proposed such class during that span, including mental disability, *id.* at 442-47, kinship, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986), age, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976), and poverty, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

This Court has had opportunities to declare sexual orientation a suspect class and has declined to do so. *See Massachusetts*, 682 F.3d at 9 (noting that this Court "conspicuously failed to do so in *Romer*—a case that could readily have been disposed by such a demarche"); App. 31a. The Second Circuit's holding in this case that sexual orientation classifications are quasi-suspect is truly an outlier—it is contrary to the thrust of this Court's decisions and directly conflicts with the decisions of eleven other circuits holding that such classifications are not subject to any heightened scrutiny. *See supra* at 13 n.4.

This Court has identified four relevant factors in determining whether a class is suited for suspect or quasi-suspect treatment. None of these factors adequately supports adding sexual orientation to the list, and perhaps the most important—the political power to participate in the democratic process—tips decisively against making sexual orientation the first new suspect or quasi-suspect class in forty years.

A. Gays and Lesbians Are Far from Politically Powerless.

More than twenty years ago, the Seventh and Ninth Circuits recognized that "homosexuals ... are not without growing political power," and that "[a] political approach is open to them" to pursue their objectives. *Ben-Shalom*, 881 F.2d at 466; *accord High Tech Gays*, 895 F.2d at 574. Whatever the limits of that conclusion two decades ago, there can be no serious doubt that the political power of gays and lesbians has increased exponentially since then.

Today, same-sex marriage is supported by President Obama (who has called for DOMA's repeal), Vice President Biden (who voted for DOMA as a Senator in 1996 but has since changed his view), and the Senate majority leader, the House minority leader, and the Democratic Party's 2012 platform. One-third of the Members of the U.S. House of Representatives filed a brief in the court below attacking both the wisdom and constitutionality of DOMA.

Polling indicates that by 2011, the proportion of Americans supporting same-sex marriage had increased from 27% to 53% in a span of only 16 years. *See* Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, Gallup.com (May 20, 2011), http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx. The November 2012 elections witnessed "a record number of openly gay candidates" for Congress, and the election of the first openly gay U.S. Senator. Charles Mahtesian, *A Record Number of Gay Candidates*, POLITICO.com (Oct. 2, 2012), http://www.politico.com/blogs/charlie-mahtesian/2012/10/a-record-number-of-gay-candidates-137289.html. In that same election cycle, voters in Maine, Maryland, and Washington state passed measures allowing same-sex marriage, and Minnesota voters defeated a proposed traditional marriage amendment to the state constitution. The Maine result demonstrates the capacity for the give and take of the political process to change voters' minds, as the Maine referendum effectively reversed the result of a 2009 referendum. *See* Michael Falcone, ***Maine Vote Repeals Gay Marriage Law***, POLITICO.com (Nov. 4, 2009), http://www.politico.com/news/stories/1109/29119.html. In all, nine states and the District of Columbia now permit same-sex marriage. Although the initial process of recognizing same-sex marriage was prompted by judicial decisions interpreting state constitutions (as Congress foresaw in 1996), more recent gains have come via legislatures and at the polls through referenda.

Nor have the successes been limited to the marriage issue, as dramatically illustrated by the repeal of the military's Don't Ask Don't Tell policy. *See* Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515, 10 U.S.C. § 654 note. Even more broadly, the Human Rights Campaign, one of the nation's leading gay-rights organizations, has been "ranked the second most successful political organization in the entire country by National Journal." ***Human Rights Campaign Lauds 2008 Election Results***, HRC.org (Nov. 4, 2008), http://www.hrc.org/press-releases/entry/human-rights-campaign-lauds-2008-election-results (citing Bara Vaida and Neil Munro, ***Interest Groups*** -

Reversal of Fortunes, Nat'l J., Nov. 11, 2006). And gays and lesbians represent nearly 20% of President Obama's top fundraisers. Michelle Garcia & Andrew Harmon, *Obama's Power Gays*, Advocate.com (Oct. 24, 2011), http://www.advocate.com/news/daily-news/2011/10/24/obamas-power-gays; Dan Eggen, *The Influence Industry: Same-Sex Marriage Issue Shows Importance of Gay Fundraisers*, Wash. Post (May 9, 2012), http://www.washingtonpost.com/politics/same-sex-marriage-debate-many-of-obamas-top-fundraisers-are-gay/2012/05/09/gIQASJYSDU_story.html.

Last but not least, the decision of the President and Attorney General to stop defending and start attacking DOMA itself demonstrates the remarkable political clout of the same-sex marriage movement. As the Chief Judge of the Second Circuit remarked to the Department's representative at oral argument, "your presence here is like an argument against your argument." Appendix to Response in Support of Writ of Certiorari Before Judgment, No. 12-307, 37a (Oct. 10, 2012).

In short, gays and lesbians are one of the most influential, best-connected, best-funded, and best-organized interest groups in modern politics, and have attained more legislative victories, political power, and popular favor in less time than virtually any other group in American history. Characterizing such a group as politically powerless would be wholly inconsistent with this Court's admonition that a class should not be regarded as suspect when the group has some "ability to attract the attention of the lawmakers." *Cleburne*, 473 U.S. at 445. Gays and lesbians not only have the attention of lawmakers, they are winning many legislative battles. And the importance of this factor in the analysis cannot be gainsaid. This Court has never definitively determined which of the four factors is necessary or sufficient, but given that the ultimate inquiry focuses on whether a group needs the special intervention of the courts or whether issues should be left for the democratic process, the political strength of gays and lesbians in the political process should be outcome determinative here.

B. Whether a Married Couple Is of the Opposite Sex Is Relevant to the Government's Interests in Recognizing Marriage.

This Court has also looked to the question whether a group has "distinguishing characteristics" relevant to the distinctions actually drawn. Whatever the relevance of homosexuality in any other context, the relevant distinguishing characteristic of same-sex couples is their propensity to engage in relationships that do not produce unplanned and unintended offspring. *Citizens for Equal Prot.*, 455 F.3d at 866-67 (quoting *Cleburne*, 445 U.S. at 441). And, as explained *supra*, the evolution of marriage as a response to the unique social concerns of the unintended and unplanned offspring of opposite-sex relationships makes this distinguishing characteristic of same-sex relationships highly relevant. *Id.* at 867; *see supra* at 44-47.

C. Sexual Orientation Is Not an "Immutable" Characteristic.

Sexual orientation differs in multiple dimensions from any previously recognized suspect or quasi-suspect class. It is defined by a propensity to engage in a certain kind of conduct; the cause of that propensity is not well understood by science; sexual orientation is not determinable at birth; for at least some, sexual orientation is a fluid characteristic capable of changing over a person's lifetime; and the proposed class is difficult to define.

As courts have recognized, homosexuality "differs fundamentally from those [characteristics] defining any of the recognized suspect or quasi-suspect classes .... The conduct or behavior of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups." *Woodward*, 871 F.2d at 1076; *Ben-Shalom*, 881 F.2d at 464; *accord High Tech Gays*, 895 F.2d at 573-74. There is no precedent for creating a suspect class that is based on the class' propensity to engage in a certain kind of conduct.

Not only is sexual orientation different from every recognized suspect class in that it is based on a propensity to engage in certain conduct, the cause of that propensity is not well understood. According to Ms. Windsor's own expert, Dr. Letitia Peplau:

> Currently, the factors that cause an individual to become heterosexual, homosexual, or bisexual are not well understood. Many theories have been proposed but no single theory has gained prominence or is definitively established by scientific research. Today, most social and behavioral scientists view sexual orientation as resulting from the interplay of biological, psychological, and social factors.

JA 500.

Thus, while "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality), the same cannot be said of sexual orientation. For some persons, sexual orientation is fluid. And, as Dr. Peplau admits, a person's sexual orientation often cannot "be readily categorized as heterosexual, homosexual, or perhaps bisexual. In fact, human experience often defies such clear-cut categories." Linda D. Garnets & Letitia Anne Peplau, *A New Paradigm for Women's Sexual Orientation: Implications for Therapy*, 24 Women & Therapy 111, 113 (2001). Instead, according to the American Psychological Association, sexual orientations form a "continuum, from exclusive attraction to the other sex to exclusive attraction to the same sex." Am. Psychological Ass'n, *Answers to Your Questions: For a Better Understanding of Sexual Orientation & Homosexuality*, http://www.apa.org/topics/sexuality/ orientation.aspx/. Finally, when considering homosexuality as a potential suspect class, "the complexities involved merely in defining the term ... would prohibit a determination of suspect classification." *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) (declining to recognize transsexuals as a suspect class).

D. The Histories of Discrimination Based on Race, Ethnicity, Sex, and Legitimacy Are Different.

Finally, each of the recognized suspect and quasi-suspect classes—racial minorities, aliens, women, and those born out of wedlock—have suffered discrimination for longer than history has been recorded. In contrast, as this Court noted in *Lawrence*, "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter." 539 U.S. at 568. Indeed, "the concept of the homosexual as a distinct category of person did not emerge until the late 19th century." *Id.* As Ms. Windsor's own expert, Dr. George Chauncey, has written, although "antigay discrimination is popularly thought to have ancient roots, in fact it is a unique and relatively short-lived product of the twentieth century." George Chauncey, *Why Marriage?: The History Shaping Today's Debate Over Gay Equality* 14 (2004). According to Dr. Chauncey, "[m]ost of the [discrimination] was put in place between the 1920s and 1950s, and most was dismantled between the 1960s and the 1990s." Owen Keehnen, *The Case for Gay Marriage: Talking with* Why Marriage? *Author George Chauncey*, GLBTQ.com (2004), http://www.glbtq.com/sfeatures/interviewgchauncey.html.

More important, unlike racial minorities and women, homosexuals as a class have never been politically disenfranchised—the kind of pervasive official discrimination that most clearly supports suspect class treatment by the courts. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).[10]

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[10] Although heightened scrutiny is clearly inappropriate, DOMA could survive even under that more demanding standard. In our federalist system, it is surely an important interest for each sovereign to be able to address an issue as divisive and fast-moving as same-sex marriage for itself.

* * *

In sum, the traditional factors this Court has assessed in determining whether to recognize a new quasi-suspect or suspect class are absent when it comes to gays and lesbians. Perhaps most critically, gays and lesbians have substantial political power, and that power is growing. Victories at the ballot box that would have been unthinkable a decade ago have become routine. To be sure, those victories have not been uniform and have come first in "blue" states rather than "red" ones, but that is the nature of the political process. There is absolutely no reason to think that gays and lesbians are shut out of the political process to a degree that would justify judicial intervention on an issue as divisive and fast-moving as same-sex marriage. As Judge Straub observed, the definition of marriage is "an issue for the American people and their elected representatives to settle through the democratic process." Supp. App. 83a.

Indeed, the democratic process has substantial advantages over constitutionalizing this issue. Same-sex marriage is being actively debated in legislatures, in the press, and at every level of government and society across the country. That is how it should be. These fora require participants on both sides to persuade those who disagree, rather than labeling them irrational or bigoted.

By contrast, courts "can intervene in this robust debate only to cut it short," Supp. App. 83a, and only

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DOMA is narrowly tailored to accomplish this important government interest by preventing one state's decision from dictating the result for other states or the federal government.

by denouncing the positions of hundreds of Members of Congress who voted for DOMA, of the President who signed it, and of a vast swath of the American people as not just mistaken or antiquated, but as wholly irrational. That conclusion is plainly unwarranted as a matter of constitutional law, and judicially constitutionalizing the issue of same-sex marriage is unwarranted as a matter of sound social and political policy while the American people are so actively engaged in working through this issue for themselves. This Court should "permit[] this debate to continue, as it should in a democratic society." *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 22, 2013

RESPONDENT'S
BRIEF

No. 12-307

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR
AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF ON JURISDICTION FOR RESPONDENT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES

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QUESTIONS PRESENTED

This brief addresses the two jurisdictional questions that this Court has directed the litigants to address:

1. Whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.

2. Whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case.

PARTIES TO THE PROCEEDING

The Bipartisan Legal Advisory Group of the United States House of Representatives intervened as a defendant in the district court and was an appellant and appellee in the court of appeals.*

Edith Schlain Windsor was the plaintiff in the district court and an appellee in the court of appeals.

The United States of America was a defendant in the district court and an appellant and appellee in the court of appeals.

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* The Bipartisan Legal Advisory Group articulates the institutional position of the House in all litigation matters in which it appears. The Group currently is comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. While the Democratic Leader and the Democratic Whip have declined to support the position taken by the Group on the merits of DOMA Section 3's constitutionality in this and other cases, they support the Group's Article III standing.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW AND JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

- A. The Defense of Marriage Act 1
- B. The Department of Justice Stops Defending DOMA and Starts Attacking It 2
- C. Proceedings in This Case 5
- D. House Resolution 5 8

SUMMARY OF THE ARGUMENT 8

ARGUMENT 11

I. The House Of Representatives, Acting Through Its Bipartisan Legal Advisory Group, Has Standing 11

- A. The House Has Standing to Defend a Statute Against a Constitutional Challenge When the Executive Branch Refuses to Do So 11
- B. *Amica*'s Arguments That the House Lacks Standing Are Mistaken 20

II. The House's Participation As A Party Ensures This Court's Article III Jurisdiction, But The Executive's Lack Of Appellate Standing Requires Dismissal Of Its Petition 32

  A. If the House Lacks Standing, This Court Lacks Jurisdiction to Decide This Case 32

  B. Because the Executive Branch Received Precisely the Result It Sought Below, It Lacks Appellate Standing 35

CONCLUSION 38

APPENDIX

  Appendix A

    Relevant Constitutional Provisions

      U.S. Const. art. I, § 5, cl. 2 .... 1a

      U.S. Const. art. I, § 7, cl. 2 .... 2a

      U.S. Const. art. II, § 3 .... 3a

      U.S. Const. art. III, § 2, cl. 1 .... 4a

  Appendix B

    House Resolution 5, 113th Cong. § 4(a) (2013) 5a

  Appendix C

    Rules of the House of Representatives, Rule I.11, 103d Cong. (1993) 9a

Rules of the House of Representatives, Rule II.8, 112th Cong. (2011) 10a

Rules of the House of Representatives, Rule II.8, 113th Cong. (2013) 11a

Rules of the House of Representatives, Rule IX, 113th Cong. (2013) 12a

TABLE OF AUTHORITIES

Page(s)

Cases

Adolph Coors Co. v. Brady,
944 F.2d 1543 (10th Cir. 1991) 17, 25

Am. Fed'n of Gov't Emps. v. United States,
634 F. Supp. 336 (D.D.C. 1986) 25

Ameron, Inc. v. U.S. Army Corps of Eng'rs,
787 F.2d 875 (3d Cir. 1986) 17, 25

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 11, 18

Bowsher v. Synar,
478 U.S. 714 (1986) 17, 20, 25

Buckley v. Valeo,
424 U.S. 1 (1976) 20

Bunting v. Mellen,
541 U.S. 1019 (2004) 35

Burke v. Barnes,
479 U.S. 361 (1987) 17, 21, 25

Camreta v. Greene,
131 S. Ct. 2020 (2011) 11, 13

Cheng Fan Kwok v. INS,
392 U.S. 206 (1968) 16

City of Boerne v. Flores,
521 U.S. 507 (1997) 19

Coleman v. Miller,
307 U.S. 433 (1939) 13, 17, 18, 19

Corning v. Troy Iron & Nail Factory,
56 U.S. (15 How.) 451 (1853) 35

Deposit Guar. Nat'l Bank v. Roper,
445 U.S. 326 (1980) 35

GTE Sylvania
v. Consumers Union of the U.S.,
445 U.S. 375 (1980) 32

Hayburn's Case,
2 U.S. (2 Dall.) 409 (1792) 34

Hunt v. Ake,
No. 04-cv-1852 (M.D. Fla. Jan. 20, 2005) 2

In re Benny,
812 F.2d 1133 (9th Cir. 1987) 17, 25

In re Kandu,
315 B.R. 123 (Bankr. W.D. Wash. 2004) 2

In re Koerner,
800 F.2d 1358 (5th Cir. 1986) 17, 25

In re Moody,
46 B.R. 231 (M.D.N.C. 1985)..............................25

In re Prod. Steel, Inc.,
48 B.R. 841 (M.D. Tenn. 1985)..........................25

In re Tom Carter Enters., Inc.,
44 B.R. 605 (C.D. Cal. 1984) 25

INS v. Chadha,
462 U.S. 919 (1983) ....*passim*

Jinks v. Richland Cnty., S.C.,
538 U.S. 456 (2003) 15

Jones v. Coughlin,
45 F.3d 677 (2d Cir. 1995)..................................14

Karcher v. May,
484 U.S. 72 (1987) 18

Lear Siegler, Inc., Energy Prods. Div. v. Lehman,
893 F.2d 205 (9th Cir. 1989) 17, 25

Lord v. Veazie,
49 U.S. (8 How.) 251 (1850) 32

Los Angeles v. Lyons,
461 U.S. 95 (1983) 12

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 11, 16, 18

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 30

Marshall Field & Co. v. Clark,
143 U.S. 649 (1892) 28

Mass. Bd. of Ret. v. Murgia,
427 U.S. 307 (1976) 14

Massachusetts v. U.S. Dep't of Health & Human Servs.,
682 F.3d 1 (1st Cir. 2012) 5, 7

McGrain v. Daugherty,
273 U.S. 135 (1927) 20

Moore v. Charlotte-Mecklenberg Bd. of Educ.,
402 U.S. 47 (1971) 32, 33

Muskrat v. United States,
219 U.S. 346 (1911) 30, 34, 37

Myers v. United States,
272 U.S. 52 (1926) 16

N.Y. Tel. Co. v. Maltbie,
291 U.S. 645 (1934) 35

Nixon v. United States,
506 U.S. 224 (1993) 28

North v. Walsh,
656 F. Supp. 414 (D.D.C. 1987) 25

Princeton University v. Schmid,
455 U.S. 100 (1982) 33

Pub. Serv. Comm'n
v. Brashear Freight Lines, Inc.,
306 U.S. 204 (1939) 35

Raines v. Byrd,
521 U.S. 811 (1997) 13, 19

Raygor v. Regents of Univ. of Minn.,
534 U.S. 533 (2002) 16

Reed v. County Comm'rs of Del. Co., Pa.,
277 U.S. 376 (1928) 29

Schweiker v. Wilson,
450 U.S. 221 (1981) 14

Sixty-Seventh Minn. State Senate v. Beens,
406 U.S. 187 (1972) 22

Smelt v. Cnty. of Orange,
374 F. Supp. 2d 861 (C.D. Cal. 2005) 2

Smelt v. Cnty. of Orange,
447 F.3d 673 (9th Cir. 2006) 2

Sullivan v. Bush,
No. 04-cv-21118 (S.D. Fla. Mar. 16, 2005) 2

Torres-Barragan v. Holder,
Nos. 08-73745 & 09-71226
(9th Cir. 2010) 31

United States v. Ballin,
144 U.S. 1 (1892) 28

United States v. Johnson,
319 U.S. 302 (1943) 32, 34

United States v. Lovett,
328 U.S. 303 (1946) 16

United States v. Munoz-Flores,
495 U.S. 385 (1990) 28

United States v. Smith,
286 U.S. 6 (1932) 29

Wilson v. Ake,
354 F. Supp. 2d 1298 (M.D. Fla. 2005) 2

Zivotofsky v. Clinton,
132 S. Ct. 1421 (2012) 28

Constitutional Provisions

U.S. Const. art. I, § 1 14

U.S. Const. art. I, § 5, cl. 2 28

U.S. Const. art I, § 7, cl. 2 ....13, 21, 22

Statutes

1 U.S.C. § 7 2

Don't Ask Don't Tell Repeal Act of 2010,
Pub. L. No. 111-321, 124 Stat. 3515,
10 U.S.C. § 654 note 23

28 U.S.C. § 530D(a)(1)(B)(ii) 24

28 U.S.C. § 1252 36

28 U.S.C. § 1637(d) 15

28 U.S.C. § 2403(a) 16, 24

Rules

Rule I.11, Rules of the House of
Representatives 103d Cong. (1993) 25

Rule II.8, Rules of the House of
Representatives, 112th Cong. (2011).................25

Rule II.8, Rules of the House of
Representatives, 113th Cong. (2013).................25

Rule IX, Rules of the House of
Representatives, 113th Cong. (2013).................27

Other Authorities

123 Cong. Rec. 21007 (1977) 22

136 Cong. Rec. 4997 (1990) 27

137 Cong. Rec. 29968 (1991) 27

159 Cong. Rec. H13 (daily ed. Jan. 3, 2013) 25

A. Bickel,
Politics and the Warren Court (1965) 4

Br. for Respondents, *Torres-Barragan v. Holder*, Nos. 08-73745 & 09-71226
(9th Cir. Aug. 12, 2010) (ECF 41-2)......................3

Br. for United States as *Amicus Curiae*
Supporting Pet'r, *Stern v. Marshall*,
131 S. Ct. 2594 (2012) (No. 10-179),
2010 WL 4717271 16

Br. for United States, *Windsor*, Nos. 12-2335 & 12-2435 (2d Cir. Aug. 10, 2012) (ECF 120) 4

H. Rep. No. 95-1756 (1978) 22

H. Res. 49, 97th Cong. (1981) 24

H. Res. 362, 101st Cong. (1990) 27

H. Res. 268, 102d Cong. (1991) 27

H. Res. 5, 113th Cong. (2013) 8, 26, 30

Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 Yale L.J. 970 (1983) 21

R. Stern & E. Gressman, *Supreme Court Practice* (8th ed. 2002) 36

OPINIONS BELOW AND JURISDICTION

The Bipartisan Legal Advisory Group of the United States House of Representatives (the "House") incorporates its statements of the Opinions Below and Jurisdiction set forth in its Brief on the Merits.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of Articles I, II, and III of the United States Constitution; Rules II.8 and IX of the Rules of the House of Representatives for the 113th Congress; Rule I.11 of the Rules of the House of Representatives for the 103d Congress; and House Resolution 5, 113th Cong. (2013) are reproduced in the Appendix to this brief at 1a.

STATEMENT OF THE CASE

The House incorporates its Statement of the Case in its Brief on the Merits. The Statement below highlights the procedural events most relevant to the jurisdictional issues addressed in this brief.

A. The Defense of Marriage Act

The Defense of Marriage Act ("DOMA") was enacted in 1996 with strong majorities in both Houses of Congress and signed into law by President Clinton. DOMA reflected Congress' determination that each sovereign should be able to determine for itself how to define marriage for purposes of its own law. Section 2 allows each state to decide for itself whether to retain the traditional definition without having another jurisdiction's decision imposed upon it via full faith and credit principles. And Section 3 preserves the federal government's ability to use the traditional definitions of marriage and spouse for purposes of federal law and programs. It clarifies that, for purposes of federal law, "marriage" means the legal union of one man and one woman, and "spouse" means a person of the opposite sex who is a husband or wife. 1 U.S.C. § 7. But DOMA does not "preclude Congress or anyone else in the federal system from extending benefits to those who are not included within [its] definition," provided only that the extension of benefits is not predicated on the definition of "marriage" or "spouse." *Smelt v. Cnty. of Orange*, 447 F.3d 673, 683 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006).

B. The Department of Justice Stops Defending DOMA and Starts Attacking It

Following DOMA's enactment, the Department of Justice successfully defended Section 3 of DOMA against several constitutional challenges, prevailing in every case to reach final judgment.[1] The Department continued to defend DOMA during the first two years of the current Administration, even while advertising disagreement with DOMA as a policy matter, with the following disclaimer:

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[1] *See Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part and vacated in part for lack of standing*, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *Hunt v. Ake*, No. 04-cv-1852 (M.D. Fla. Jan. 20, 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004); *see also Sullivan v. Bush*, No. 04-cv-21118 (S.D. Fla. Mar. 16, 2005) (granting voluntary dismissal after Department moved to dismiss).

> [T]he Administration does not support DOMA as a matter of policy .... Consistent with the rule of law, however, the Department of Justice has long followed the practice of defending federal statutes as long as reasonable arguments can be made in support of their constitutionality, even if the Department disagrees with a particular statute as a policy matter, as it does here. This longstanding and bipartisan tradition accords the respect appropriately due to a co-equal branch of government and ensures that subsequent administrations will faithfully defend laws with which they may disagree on policy grounds.

Br. for Respondents 52 n.30, *Torres-Barragan v. Holder*, Nos. 08-73745 & 09-71226 (9th Cir. Aug. 12, 2010) (ECF 41-2).

In February 2011, however, the Administration abruptly reversed course and ceased defending DOMA's constitutionality. The Attorney General announced that he and the President were now of the view "that a heightened standard [of review] should apply [to DOMA], that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3." JA 193.

The Attorney General acknowledged the Department's "longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense," *id.*, but did not apply that standard to DOMA. On the contrary, the Attorney General conceded that every federal court of appeals to have considered the issue (eleven of the thirteen circuits) had applied rational basis review to sexual orientation classifications and that "a reasonable argument for Section 3's constitutionality may be proffered under [the rational basis] standard." *Id.*[2]

Although the Attorney General advised Congress only that the Department would "cease defense" of DOMA Section 3, the Department did not merely bow out of DOMA litigation. Instead, it immediately and consistently attacked DOMA in court. It argued that Section 3 violates equal protection, advocated a heightened-scrutiny standard that would imperil other duly-enacted statutes, and urged courts to render judgment in favor of plaintiffs challenging the law even where rational basis review was binding Circuit law. The Department even went so far as to accuse the Congress that enacted DOMA—many of whose Members still serve—and implicitly the President who signed the bill of being motivated by "animus." Br. for United States 25, *Windsor*, Nos. 12-2335 & 12-2435 (2d Cir. Aug. 10, 2012) (ECF 120).

On March 9, 2011, the Speaker of the House, pursuant to House Rule II.8, convened a meeting of the House's Bipartisan Legal Advisory Group. After a full airing of views on how the House should respond to the executive's remarkable "about face," *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 7 (1st Cir. 2012), the Group voted 3–2 to recommend that the Speaker direct the House General Counsel to take such steps as he considered appropriate, including intervention, to protect the interests of the House in litigation. Thereafter, the Speaker directed the General Counsel to represent the Group, on behalf of the House, as intervenor in cases in which DOMA Section 3's constitutionality was challenged, and where the Attorney General refused to defend the statute. The Speaker did so to protect the House's institutional interests; to ensure that the federal judiciary—rather than the executive branch unilaterally—ultimately would decide whether Section 3 is constitutional; and to ensure that the federal judiciary, in making that determination, would have the benefit of a full and vigorous defense of the statute.

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[2] The timing of the executive's announcement on DOMA was not prompted by any developments within the courts of appeals or the legislative sphere. In fact, the decision to abandon the defense of DOMA came shortly after the *end* of a two-year period in which the President's party controlled both houses of Congress, which might have made repeal possible through the normal legislative process. *Cf.* A. Bickel, *Politics and the Warren Court* 134 (1965) (Supreme Court not the place "for replaying of the [political] game").

To date, the House has intervened in fifteen DOMA Section 3 cases, including this case. (One additional motion to intervene is pending in a recently-filed case.) No court has denied intervention.

C. Proceedings in This Case

Respondent Edith Schlain Windsor and Thea Clara Spyer obtained a certificate of marriage from the province of Ontario, Canada in 2007. Ms. Spyer died in 2009, naming Ms. Windsor the executor and sole beneficiary of her estate. At that time, New York did not issue marriage licenses to same-sex couples.

After paying federal estate taxes, Ms. Windsor, as executor, sought a refund on the theory that the estate was entitled to the marital deduction. The IRS denied the refund, and Ms. Windsor filed this suit in her capacity as executor.

In light of the Department's refusal to defend DOMA, the district court invited "Congress ... to intervene in this matter ... by motion pursuant to Fed. R. Civ. Pro. 24(a), consistent with 28 U.S.C. § 530D." Order, No. 10-8435 (S.D.N.Y. Mar. 15, 2011) (ECF 11). The House did so, and the court granted the House intervention as of right under Rule 24(a)(2). JA 221–25. The court found that the House "has a cognizable interest in defending the enforceability of statutes the House has passed when the President declines to enforce them" and that its "interests are not currently being adequately represented in this action." JA 223, 224.

Neither the Department nor Ms. Windsor opposed the House's intervention, JA 221, although the Department suggested that the House be limited to presenting arguments in defense of DOMA while the Department alone would "file all procedural motions, including notices of appeal and petitions for certiorari." JA 225. The House objected that this "would relegate it to the status of amicus curiae," and the district court agreed. JA 221. It refused to "circumscribe[]" the House's role in the case and granted the House the status of a "full party." JA 226. The district court also ruled that the House "has standing to intervene in this litigation to defend the constitutionality of Section 3 of DOMA." JA 227.

Although the Department nominally represented the defendant in this case, it urged the district court to strike down DOMA and enter judgment ordering the government to issue a refund to Ms. Windsor. *See* JA 488 ("Section 3 of DOMA fails heightened scrutiny, and this Court should ... grant Plaintiff's motion for summary judgment."). To this end, the Department filed a "Motion to Dismiss"—surely one of the strangest documents ever to bear that label—that did not, in fact, seek dismissal of Ms. Windsor's suit. *See* JA 437–39. On the contrary, the Department's so-called motion to dismiss *itself* stated that, if the district court "agrees with Plaintiff *and the United States* ..., it should *not* dismiss" the complaint. JA 439 (emphases added).

The district court invalidated DOMA under a variant of rational basis review it labeled "intensified scrutiny." 682 F.3d at 10. The House appealed the district court's decision. Soon thereafter, the Department noticed its own appeal. The House moved to dismiss the Department's separately-numbered appeal, arguing that, because the Department had urged the district court to strike down DOMA and enter judgment for the plaintiff, and the district court had done exactly that, the Department lacked standing to appeal.

The Second Circuit denied the House's motion to dismiss the Department's appeal, even though the executive had "prevailed in the result it advocated in the district court," because the executive "continues to enforce Section 3 of DOMA, which is indeed why Windsor does not have her money." App. to Supp. Br. for U.S. 4a. On the merits, the Second Circuit determined—in conflict with eleven other circuits—that heightened scrutiny applies to classifications based on sexual orientation. *Id.* at 15a. And the court concluded that Section 3 of DOMA could not survive heightened scrutiny.

Following the Second Circuit's decision, on December 7, 2012, this Court granted the Department's petition, which had been filed before the Second Circuit's judgment issued. In doing so, this Court ordered the parties to address the two jurisdictional questions addressed in this brief.

On December 28, 2012, the House filed its own petition for a writ of certiorari to the Second Circuit. The House's petition, No. 12-785, is currently pending before this Court.

D. House Resolution 5

On January 3, 2013, the opening day of the 113th Congress, the House adopted H. Res. 5, 113th Cong. (2013), App.5a. House Resolution 5 expressly "authorize[d] the Bipartisan Legal Advisory Group ... to defend the constitutionality of Section 3 of [DOMA] ... including in the case of Windsor v. United States." *Id.* § 4(a)(1)(A)(i), App.5a. And it affirmed that "the Bipartisan Legal Advisory Group continues to speak for, and articulate the institutional position of, the House in all litigation matters in which it appears, including in Windsor v. United States." *Id.* § 4(a)(1)(B), App.6a.

SUMMARY OF THE ARGUMENT

The House, speaking through its Bipartisan Legal Advisory Group, has standing to intervene to defend the constitutionality of DOMA Section 3 when, as here, the executive declines to do so. Indeed, without the House's participation, it is hard to see how there is any case or controversy here at all. Both Ms. Windsor and the executive agree that DOMA is unconstitutional and that Ms. Windsor was entitled to a refund. And the lower courts granted them all the relief they requested. Only the House's intervention provides the adverseness that Article III demands.

I. The House certainly has a concrete interest in ensuring that its passage of DOMA is not completely nullified by a binding judicial determination. Such a judicial determination of unconstitutionality imposes a distinct injury on the House that is directly traceable to the decision and redressable by the decision's reversal. Article III requires no more.

All of this is obvious in the familiar situation where the executive discharges its traditional duty to defend the constitutionality of an Act of Congress. But when the executive refuses to discharge that function, as it has here, the House clearly has standing to intervene and defend the constitutionality of legislation it has passed pursuant to its core lawmaking powers. This Court held as much in *INS v. Chadha*, 462 U.S. 919, 940 (1983). *Amica*'s efforts to distinguish *Chadha*, or otherwise suggest the House lacks standing, are unavailing.

II. The House's standing is both necessary and sufficient for this Court's Article III jurisdiction. Without the House's participation, there is no ongoing controversy between Ms. Windsor and the executive. Their shared desire to have their Second

Circuit victory embraced by this Court would not satisfy Article III, absent the House as an adverse litigant.

Indeed, even with the House's participation as a party, the executive lacks appellate standing to seek this Court's review of a Second Circuit decision that entered the precise relief the executive sought on the precise ground the executive advocated. The executive and Ms. Windsor can obtain no relief from this Court they are not already entitled to under the Second Circuit's judgment. The desire for greater precedential impact *on other cases* is not sufficient to create appellate standing *in this one*.

Fortunately, there is a party aggrieved by the decision below that can obtain greater relief if the judgment below is reversed. That party is, of course, the House. Thus, if this Court agrees with the House's argument in Section I that the House has Article III standing, and with its argument in Section II that the executive lacks appellate standing, the proper course is clear: This Court should dismiss the executive's petition in No. 12-307, grant the House's petition in No. 12-785, and use the latter petition as the vehicle to resolve the question of DOMA's constitutionality.

ARGUMENT

I. The House Of Representatives, Acting Through Its Bipartisan Legal Advisory Group, Has Standing.

A. The House Has Standing to Defend a Statute Against a Constitutional Challenge When the Executive Branch Refuses to Do So.

Although questions of Article III standing most often concern plaintiffs, standing to intervene or to "defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess a direct stake in the outcome." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (internal quotation marks omitted). Such a direct stake is present when a party "has 'suffered an injury in fact' that is caused by 'the conduct complained of,' and that 'will be redressed by a favorable decision.'" *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The House undeniably has a direct stake in this litigation. Ms. Windsor and the executive seek relief that would harm the House's concrete interests by permanently nullifying its passage of DOMA and subjecting future legislative action to a heightened standard of equal protection review. Those harms flow directly from the relief sought and granted in the courts below. And reversal by this Court will provide a complete remedy.

1. The House clearly has standing to intervene to defend DOMA's constitutionality when the executive

will not. Indeed, without the House's participation as a party, it is hard to understand how there is any case or controversy at all. Both Ms. Windsor and the executive agreed in the district court that DOMA was unconstitutional, that Ms. Windsor should receive a refund, and that the courts should order exactly that result. Parties that agree on a legal issue and the appropriate relief normally do not go to court, let alone have a justiciable controversy. The "concrete adverseness which sharpens the presentation of issues" is a core requirement of Article III, and the requirements of standing, along with justiciability doctrines, are designed to ensure adversary presentation and avoid feigned controversies or efforts to obtain advisory opinions. *Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (internal quotation marks omitted).[3]

Here, however, the executive took the position that it would issue Ms. Windsor a refund only if the district court declared DOMA unconstitutional. Such a judicial declaration affects the House very differently from an executive decision to issue a refund on the ground that a particular administration views DOMA as unconstitutional and will not enforce it. The latter decision—although also an affront to Congress—at least would mean that DOMA would remain on the books and could be enforced by subsequent administrations. The former, by invoking the powers of the third branch of government, would if successful render the House's exercise of its core lawmaking function "completely nullified." *Raines v. Byrd*, 521 U.S. 811, 823 (1997).

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[3] The situation here before the House's intervention is distinguishable from the circumstances of *Chadha* where the executive initiated deportation proceedings and the issue on which the executive and Chadha ultimately agreed arose only as a defense asserted by Chadha.

The executive's effort to procure permanent judicial nullification of DOMA Section 3 clearly implicates the House's interests. And, *a fortiori*, once the executive obtained that relief from the lower courts, the House clearly had standing to appeal. The House has "a plain, direct and adequate interest in maintaining the effectiveness of" its passage of a law. *Coleman v. Miller*, 307 U.S. 433, 438 (1939). The House is a constitutionally necessary participant in the lawmaking process; DOMA could not become law without passage by the House. *See* U.S. Const. art I, § 7, cl. 2. Thus, the lower court's invalidation of DOMA Section 3 at the executive's urging inflicts a concrete, particularized institutional injury on the House. There is no doubt that such harm is "fairly traceable" to the lower court's decision, which expressly held the law to be unconstitutional on its face. Nor can it be doubted that the harm will be redressed by a favorable decision from this Court.

But the institutional harm to the House's core constitutional authority does not end there. The decision below, if not reversed, will permanently diminish the House's legislative power by imposing a heightened standard of review for legislation that classifies on the basis of sexual orientation. *Cf. Camreta*, 131 S. Ct. at 2029 (public officials have standing to challenge qualified immunity "judgment [that] may have prospective effect on the parties"). This new limit on the House's lawmaking powers follows from the Second Circuit's decision, and reversal by this Court would directly remedy that harm. *See, e.g.*, *Jones v. Coughlin*, 45 F.3d 677, 679 (2d Cir. 1995) ("A decision of a panel of this Court is binding unless and until it is overruled by the Court *en banc* or by the Supreme Court.").

The House's interests in this case are concrete and particularized, not generalized grievances. The House has a distinct, concrete institutional interest in ensuring that its legislative acts have substantive effect and are not "completely nullified" by a judicial decision procured with executive branch acquiescence. The damage suffered by virtue of a permanent judicial invalidation of duly-enacted legislation is unique to the House. It is not, as *amica* suggests (at 8), "widely shared by the people at large." The legislative power is constitutionally vested in the House and Senate. *See* U.S. Const. art. I, § 1. And because legislation often has the effect of limiting the autonomy of its subjects, the House's interest in the scope of its legislative powers is not widely shared by the populace at large. That is particularly true of legislation alleged to run afoul of equal protection principles. "[T]he drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Schweiker v. Wilson*, 450 U.S. 221, 234–35 (1981) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976)).

Thus, the lower court's nullification of DOMA Section 3 and its application of heightened scrutiny "peculiarly" affect the House's legislative conduct and prerogatives. Judicial invalidation of the law at the behest of the executive permanently undoes the

House's constitutionally mandated role in the passage of a law, and heightened scrutiny will constrict the scope of the *House*'s ability to legislate with practical effect going forward.[4] The House must have standing to defend these interests when the executive ceases to defend a duly-enacted statute.

All of this is second nature when it comes to the executive's standing to intervene to defend the constitutionality of Acts of Congress in cases in which the federal government is not otherwise a party. Here, the executive branch was the named defendant because of its role as the withholder of the claimed refund. But even in cases involving disputes between private parties concerning federal statutes for which the executive has no enforcement role, no one doubts that the executive has standing to intervene to defend the statutes with full party status and to appeal an adverse decision. Thus, for example, when a litigant challenges the constitutionality of a federal statute like 28 U.S.C. § 1637(d), which implicates the filing deadlines for private party cases in state court and implicates no direct enforcement role for the federal executive, it is commonplace for the executive to intervene as a party. *See, e.g.*, *Jinks v. Richland Cnty., S.C.*, 538 U.S. 456, 457 (2003); *Raygor v.*

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[4] This Court's decisions, of course, do not *formally* constrain the House and Senate from proposing new legislation, but judicial decisions do determine the practical effect of legislative enactments, and that *practical* reality is surely relevant to whether the House suffers harm sufficient for Article III purposes.

Regents of Univ. of Minn., 534 U.S. 533, 535 (2002).[5] At least in the unusual circumstances in which the executive refuses to shoulder its traditional responsibility to defend the constitutionality of federal legislation, there is no reason the House cannot play the same role to prevent an injury to its institutional interests and to ensure that an Act of Congress receives an adequate defense.

2. This Court has "long held" that the House has standing to defend a duly enacted statute when the executive "agrees with plaintiffs that the statute is ... unconstitutional." *Chadha*, 462 U.S. at 940.[6] In *Chadha*, each chamber of Congress separately

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[5] Because a statute cannot confer standing where it does not otherwise exist, *see Lujan*, 504 U.S. at 576–77, it is irrelevant to the Article III analysis that the Department has statutory authority to defend legislation, *see* 28 U.S.C. § 2403(a)

[6] At times, congressional interests have been represented by *amici curiae*. *See, e.g.*, *United States v. Lovett*, 328 U.S. 303, 304 (1946); *Cheng Fan Kwok v. INS*, 392 U.S. 206, 210 n.9 (1968); *Myers v. United States*, 272 U.S. 52, 176 (1926). The executive branch likewise has participated as an *amicus* in private party cases in which an Act of Congress has been called into question. *See, e.g.*, Br. for United States as *Amicus Curiae* Supporting Pet'r 2, *Stern v. Marshall*, 131 S. Ct. 2594 (2012) (No. 10-179), 2010 WL 4717271 ("The United States also has a substantial interest in this case because ... the court's analysis calls into question the scope of Congress's constitutional authority ...."). In neither circumstance, however, is the fact of *amicus* participation in some cases inconsistent with the House's Article III standing here. That much certainly is clear from *Chadha*, where the two houses presented briefs as *amici* before the court of appeals panel, then separately intervened and participated as full parties before the *en banc* Ninth Circuit and in this Court. *See* 462 U.S. at 930 n.5.

intervened and participated as a party defending the constitutionality of the statute in question. *See id.* at 930 n.5. The court of appeals granted their intervention, and this Court agreed that the two chambers were "proper parties," *id.* (quotation marks omitted), to satisfy this Court's statutory and Article III jurisdiction, *see id.* at 931 n.6 (holding that an Article III "controversy clearly exists ... because of the presence of the two Houses of Congress as adverse parties"); *id.* at 939 ("Congress is ... a proper party to defend the constitutionality of [the statute]."). Both houses similarly participated as parties to defend the constitutionality of legislative actions in cases like *Burke v. Barnes*, 479 U.S. 361 (1987) (House and Senate participated separately), and *Bowsher v. Synar*, 478 U.S. 714 (1986) (House and Senate participated separately).[7]

More broadly, this Court has consistently recognized the standing of legislative actors to prevent nullification of their acts. In *Coleman v.*

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[7] The lower courts also have recognized each house's standing to defend a statute's constitutionality when the executive has declined to do so. *See, e.g.*, *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1546 (10th Cir. 1991); *Lear Siegler, Inc., Energy Prods. Div. v. Lehman*, 893 F.2d 205, 206 (9th Cir. 1989); *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 888 & n.8 (3d Cir. 1986) ("There is no dispute that the Congressional intervenors were proper parties for the purpose of supporting the constitutionality of the [statute]."). In at least two lower court cases, involving disputes between private parties, the House and Senate were allowed to intervene as parties to defend the constitutionality of a statute after the Department intervened to attack the law. *See In re Benny*, 812 F.2d 1133, 1135 (9th Cir. 1987); *In re Koerner*, 800 F.2d 1358, 1360 (5th Cir. 1986).

Miller, this Court addressed a challenge brought by Kansas state legislators to prevent formal ratification of the proposed Child Labor Amendment, on the grounds that the Lieutenant Governor's tie-breaking vote in favor of the amendment was unconstitutional. *See* 307 U.S. at 438. The plaintiffs included twenty state legislators whose votes would have been sufficient to defeat the amendment, absent the Lieutenant Governor's vote. This Court held that the legislators had standing because their "votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification." *Id.*

More recently, in *Karcher v. May*, 484 U.S. 72, 80–81 (1987); *id.* at 84 (White, J., concurring in the judgment), and *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997), this Court has reaffirmed that legislative bodies have standing to defend against, and appeal from, judicial invalidation of their legislative acts.[8] Here, the House possesses a similarly "plain, direct and adequate interest in maintaining the effectiveness of [its] votes." *Coleman*, 307 U.S. at 438. The decision below has "overridden and virtually held for naught" the House's passage of DOMA Section 3, but if the House's constitutional defense is correct, then its legislative actions will be preserved. *Id.*

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[8] In *Karcher* and *Arizonans for Official English*, this Court seemed to suggest that a state legislative body is a proper party when state law authorizes it to defend. *See* 484 U.S. at 82; 520 U.S. at 65. But this requirement (if it exists) can be only a prudential check on legislative participation because state law authorization to litigate cannot itself create the requisite elements of Article III standing. *See, e.g.*, *Lujan*, 504 U.S. at 576–77. Thus, *Karcher* and *Arizonans for Official English* necessarily rest on the premises that a legislative body suffers a cognizable injury when its legislative acts are nullified by judicial invalidation and that statutory authorization overcomes any prudential obstacle.

Although *amica* invokes *Raines v. Byrd*, 521 U.S. 811 (1997), that case is inapposite for multiple reasons. As an initial matter, here, the House itself (through its Bipartisan Legal Advisory Group) has intervened to defend its institutional interests, while *Raines* concerned the claims of only a handful of individual plaintiff legislators who could not, and did not purport to, speak for the House or Senate as an institution. *See id.* at 814. Nor were the legislators in *Raines* defending against nullification of legislative action, as were the legislators in *Coleman* and the House here. *Id.* at 823–24. Rather, "[t]hey simply lost th[e] vote" over the legislation they attacked. *Id.* at 824. Here the situation is just the opposite: The House seeks to *defend* legislation actually *enacted*; *i.e.*, the vote was won, not lost. And unlike the circumstances in *Raines*—where "a majority of Senators and Congressmen c[ould] vote to repeal the Act, or to exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act," *id.*—the House cannot remedy the harms that will result from judicial invalidation of DOMA or the imposition of heightened scrutiny. *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) ("[I]t must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed."). Finally, there is a fundamental difference between individual legislators as plaintiffs enlisting the courts to invalidate a law passed by a majority of their colleagues and the House intervening as an institution to defend a statute against attacks from private parties and a co-equal branch of government. *See Chadha*, 462 U.S. at 940.

B. *Amica's* Arguments That the House Lacks Standing Are Mistaken.

1. *Amica* is wrong to suggest that standing is limited to the defense of some small set of "distinct, statutorily created powers of the Houses of Congress," or "distinct legislative prerogative[s]." That putative distinction fails on its own terms. In this case, the House has intervened to defend its legislative authority to pass DOMA. And the House's lawmaking authority *is* a "distinct legislative prerogative." Indeed, it is the House's *core* legislative prerogative under Article I. It would be more than passing strange for the House to possess standing to defend the constitutionality of ancillary legislative powers, like its powers to investigate, *see Buckley v. Valeo*, 424 U.S. 1, 137 (1976), and subpoena documents, *see McGrain v. Daugherty*, 273 U.S. 135, 175 (1927), or to defend extra-constitutional assertions of power, like the one-house legislative veto, *see Chadha*, 462 U.S. 919, and congressionally-controlled agencies, *see Bowsher*, 478 U.S. 714, but lack standing to defend its core legislative power against nullification. Indeed, *Chadha* categorically held that the House and Senate are proper parties "to defend the validity of a statute when" the executive

"agrees with plaintiffs that the statute is ... unconstitutional." 462 U.S. at 940. Nothing in the Court's reasoning depended on the type of statute being defended.

2. *Amica* is also wrong that the two houses of Congress are required to intervene and litigate together. *Chadha* confirms this. *See* 462 U.S. at 919 n.* (noting separate appeals by House and Senate); *id.* at 922 (noting separate counsel for House and Senate); *id.* at 930 n.5 (noting separate interventions by House and Senate). This Court never suggested that either house's participation was in any way dependent on the participation of the other. *See also Burke,* 479 U.S. at 362 (House and Senate participated separately).[9]

Amica's proposed rule would make no sense. Each body is an independent, constitutionally-necessary actor in the legislative process. *See* U.S. Const. art. I, § 7, cl. 2; Note, *Executive Discretion and the Congressional Defense of Statutes,* 92 Yale L.J. 970, 983 n.43 (1983) ("Defense of a statute by one house of Congress (as opposed to a defense undertaken by Congress as a whole) is consistent with the constitutionally independent roles of each house with respect to the other."). Any challenge to a federal statute is thus necessarily a challenge to the actions of *each* chamber, and the harm resulting from judicial invalidation of a duly-enacted statute falls independently on *each* chamber.[10]

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[9] To suggest otherwise, *amica* quotes selectively (at 15–16) from portions of *Chadha* referring to the two houses collectively as "Congress." But this Court's convenient shorthand did not change the fact that the two chambers acted independently of one another at all times. Likewise, *amica* is wrong to imply (at 16) that this Court's brief description of *Chadha* in *Arizonans for Official English* somehow changed the facts, reasoning, or scope of the earlier opinion.

Moreover, our basic constitutional arrangement does not allow either house acting alone to nullify a law previously enacted with the concurrence of both chambers. Neither house of Congress can repeal a statute on its own. *See* U.S. Const. art. I, § 7, cl. 2; *Chadha*, 462 U.S. at 954 ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I" of the Constitution.). But allowing one house to prohibit the other from defending a statute would have the same practical effect by empowering the non-consenting house to facilitate the permanent nullification of a duly-enacted statute. *See Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972) ("A group of senators ... had the right to intervene. The concurrence of the house was not necessary as it would have been to enact legislation.").[11]

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[10] *Amica*'s suggestion that Article I's bicameral lawmaking requirements demand the House and Senate to act in concert when intervening to defend a statute is wrong on its own terms. Article I also requires the President to approve legislation passed by Congress, but the President quite obviously did not assent to the House and Senate's shared position in *Chadha*, just as he consciously rejects the House's position in this case.

[11] The House and Senate previously considered, but consciously rejected, the creation of a joint litigation authority. *See* 123 Cong. Rec. 21007, 21010 (1977) (proposed "Congressional Legal Counsel"); H. Rep. No. 95-1756, at 80 (1978) (explaining House's decision against joint Congressional Legal Counsel).

3. *Amica* is also wrong that the House's participation in this case encroaches on executive power. The House is not asking this Court to compel the executive to enforce DOMA Section 3. Indeed, the whole reason the House is here is the executive's puzzling decision to *enforce* a law that its chief law enforcement officer believes is unconstitutional and will not *defend*.[12]

To be sure, in a typical case, the Department takes the lead in defending Acts of Congress, sometimes even those it does not directly or indirectly enforce. In such cases, there may be prudential reasons to limit congressional participation and, in many instances, the issue does not even arise because Congress assumes that the executive will protect Congress' interests. The House and Senate certainly have not proven eager to intervene when the executive does its job and defends challenged statutes. The statutory provisions addressing constitutional challenges to statutes reflect this preference. While Congress has required the Department to be notified by courts and private litigants whenever the constitutionality of an Act of

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[12] If anything raises separation of powers concerns, it is the executive's attempt to nullify DOMA outside the constitutionally prescribed procedures for repeal. In contrast to the constitutionally proper legislative repeal of the "don't ask, don't tell" policy, *see* Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515, 10 U.S.C. § 654 note, the Administration seeks to invalidate DOMA through Article III—by enforcing the law, while affirmatively attacking it in court, and asking each level of the federal judiciary to declare it unconstitutional in a manner that will constrain future legislative action.

Congress has been called into question, 28 U.S.C. § 2403(a), it has required notification of both houses (independently) only when the Attorney General declines to defend, 28 U.S.C. § 530D(a)(1)(B)(ii).[13] However, in the relatively rare case when the executive refuses to defend, this Court's decisions make clear that each house of Congress has standing to defend the effectiveness of its votes. And in the three decades since *Chadha*, intervention motions by the House and Senate have hardly overwhelmed the lower courts. *See infra*.

4. Finally, *amica* is wrong that the Bipartisan Legal Advisory Group does not speak for the House. The Group is fully authorized to speak for, and does in fact speak for, the House in this litigation.

The Group has articulated the institutional interests of the House in litigation matters since the early 1980s (although the precise formulation of the Group's name has changed somewhat over time). After the conclusion of the *Chadha* case in 1983, where the House by privileged resolution specifically authorized the Speaker to participate as intervenor on behalf of the House, *see* H. Res. 49, 97th Cong. (1981) (voice vote), the House leadership, on a bipartisan basis, created a five-member leadership group (the Speaker, majority leader, majority whip, minority leader, and minority whip) to conduct litigation on behalf of the House without the need for full House authorization. Over the next decade, the

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[13] One obvious purpose of this statute is to permit the House and/or Senate to intervene in litigation to defend challenged statutes when the executive refuses to do so.

Group intervened on behalf of the House in at least twelve cases.[14] During that same period of time, the Group appeared as *amicus curiae* in a number of other cases. *See* 159 Cong. Rec. H13 (daily ed. Jan. 3, 2013) (collecting cases). In all these cases, the Group litigated on behalf of the House without any authorizing vote by the full House.

In 1993, the House amended its rules to formally refer to the Bipartisan Legal Advisory Group in connection with its function of providing direction to the Office of General Counsel, which is charged with providing legal assistance and representation to the House. *See, e.g.*, Rule I.11, Rules of the House of Representatives 103d Cong. (1993), App.9a.[15] Since then, the Group has continued to litigate on behalf of the House without any authorizing votes by the full House, mostly as *amicus*, *see* 159 Cong. Rec. H13 (daily ed. Jan. 3, 2013) (collecting cases), but also as intervenor in the DOMA cases.

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[14] *See Burke*, 479 U.S. at 362; *Bowsher*, 478 U.S. 714; *Adolph Coors*, 944 F.2d at 1545; *Lear Siegler*, 893 F.2d 205; *In re Benny*, 812 F.2d at 1135; *In re Koerner*, 800 F.2d at 1359; *Ameron*, 787 F.2d at 877; *North v. Walsh*, 656 F. Supp. 414, 415 n.1 (D.D.C. 1987); *Am. Fed'n of Gov't Emps. v. United States*, 634 F. Supp. 336, 337 (D.D.C. 1986); *In re Prod. Steel, Inc.*, 48 B.R. 841, 842 (M.D. Tenn. 1985); *In re Moody*, 46 B.R. 231, 232 (M.D.N.C. 1985); *In re Tom Carter Enters., Inc.*, 44 B.R. 605 (C.D. Cal. 1984).

[15] The House has readopted this rule in substantially the same form in every succeeding Congress. *See, e.g.*, Rule II.8, Rules of the House of Representatives, 112th Cong. (2011), App.10a; Rule II.8, Rules of the House of Representatives, 113th Cong. (2013), App.11a.

The recently-adopted rules package for the 113th Congress confirms the Group's long-standing authority sanctioned by House precedent: "[T]he Bipartisan Legal Advisory Group *continues* to speak for, and articulate the institutional position of, the House in all litigation matters in which it appears, including in Windsor v. United States." H. Res. 5, 113th Cong. § 4(a)(1)(B) (2013), App.6a (emphasis added). It is of no moment that House Resolution 5 was adopted after the beginning of this suit. The Resolution affirms that the Group "continues" to represent the House in litigation, including in this case. And the word "continues" confirms that the full House understands its rules to authorize the Bipartisan Legal Advisory Group to speak for the House at every stage of this case. Indeed, the House's Minority Leader and Minority Whip, while they disagree with the House's position on the merits of DOMA Section 3's constitutionality, expressly agree that the Bipartisan Legal Advisory Group has Article III standing in this case to articulate that position on behalf of the House. *See supra* n.*. In any event, the House's Article III standing turns on the impairment of its interests occasioned by the executive's decision to join Ms. Windsor in seeking the permanent and complete nullification of DOMA. Whether and when the House confirmed the Group's authority to litigate on behalf of the House to vindicate those interests has no impact on the Article III question here.

All of this is further buttressed by the fact that the House has not voted to countermand the Group's intervention—or any litigation decision made after intervention—in this or any other DOMA case. The

House has an effective procedural mechanism, which has existed in the House Rules since 1880, that enables it to countermand any such decision. *See* Rule IX, Rules of the House of Representatives, 113th Cong. (2013) (Members may bring to floor of House for vote "questions of privilege"), App. 12a–13a; *id.* Rule IX.2(a)(1) (question of privilege, when brought by Majority or Minority Leader, "shall have precedence of all other questions"); *id.* (question of privilege brought by other Members "shall have precedence of all other questions ... within two legislative days after the day on which the proponent announces to the House an intention to offer the resolution and the form of the resolution"). And the House knows how to use Rule IX to force a vote on litigation decisions made by the Group, if the House so chooses.[16] But it has not so chosen in this or any other DOMA case.

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[16] In 1990, the House Minority Leader brought to the floor a resolution seeking the withdrawal of a brief the Group had filed in *United States v. Eichman*, Nos. 89-1433, 89-1434 (U.S.), "pending a full and proper review by the Bipartisan Legal Advisory Group." H. Res. 362, 101st Cong. (1990); 136 Cong. Rec. 4997 (1990). The Chair ruled that this resolution raised a question of privilege under Rule IX, *see* 136 Cong. Rec. at 4997, and thereafter the full House adopted the resolution. *Id.* at 5005-06. *See also* H. Res. 268, 102d Cong. (1991); 137 Cong. Rec. 29968, 30526-27 (1991) (treating as privileged resolution concerning brief prepared by House Counsel on behalf of Member and filed with Florida Supreme Court; resolution tabled).

Finally and significantly, the adoption, interpretation, and application of the House's internal rules are constitutionally committed to the House alone. "Each House may determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. And rules adopted pursuant to the Rulemaking Clause, within constitutional limits, are "absolute and beyond the challenge of any other body or tribunal." *United States v. Ballin*, 144 U.S. 1, 5 (1892). The judiciary is not empowered to second-guess the House's interpretation and application of its own rules, including the rules by which the Bipartisan Legal Advisory Group has intervened and litigated on behalf of the House in this and many other cases. Just as the courts will not look behind an enrolled bill to determine whether its text is precisely the law assented to by both houses of Congress and signed by the President, "[t]he respect due to coequal and independent departments requires the judicial department to act upon th[e] assurance" that each chamber of Congress properly interprets its own rules. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892); *see also Nixon v. United States*, 506 U.S. 224, 237–38 (1993) (upholding Senate's interpretation of Impeachment Clause permitting holding of trials by committee); *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1433 (2012) (Sotomayor, J., concurring in part and in judgment) ("Because of the respect due to a coequal and independent department ..., courts properly resist calls to question the good faith with which another branch attests to the authenticity of its internal acts."); *United States v. Munoz-Flores*, 495 U.S. 385, 410 (1990) (Scalia, J., concurring in judgment) ("Mutual regard between the coordinate branches, and the interest of certainty, both demand that official representations regarding ... matters of internal process be accepted at face value.").[17]

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[17] *Amica* is wrong to suggest (at 17 n.6) that the Court may disregard the House's interpretation and application of its own rules here because "the rights of those outside" the House "are at stake." The only "right" that turns on the House's internal rules is the Group's authority to speak for the House in this litigation. The House rules, and the House's interpretation of those rules, have no bearing on Ms. Windsor or the executive. Thus, this case is not remotely analogous to *United States v. Smith*, where the Senate's interpretation of its internal rule would have deprived an executive officer of his commission. *See* 286 U.S. 6, 30 (1932).

Similarly, *Reed v. County Comm'rs of Del. Co., Pa.*, 277 U.S. 376 (1928), does not support *amica*'s contentions (at 17) that the Group lacks "authority to intervene as a party," and that courts should disregard the House's interpretation of its own rules and practices. The issue in *Reed* was whether the federal courts had jurisdiction to hear a subpoena enforcement case brought by a Senate committee under a statute that provided "that the District Courts shall have original jurisdiction 'of all suits of a civil nature ... brought by the United States, or by any officer thereof authorized by law to sue,'" and the Senate resolution that created the committee authorized it to "do such other acts as may be necessary in the matter of said investigation." 277 U.S. at 386–87. The Court held that the Senate resolution creating the committee was insufficiently explicit to render the committee "authorized by law to sue" *within the meaning of the statute*. *Id.* at 389. This case is distinguishable because the issue here is not whether some House action satisfies statutory language that limits the Court's jurisdiction, but rather whether the House has Article III standing. In resolving that issue, the Court is bound by the House's determination that the Group speaks for the House and is authorized to intervene and defend DOMA.

Given the House's plenary authority to interpret its own rules; its unbroken practice over nearly thirty years of articulating its institutional position in litigation matters through a five-member leadership group; and the full House's recent, explicit confirmation that the Bipartisan Legal Advisory Group "continues to speak for, and articulate the institutional position of, the House in all litigation matters in which it appears, including in Windsor v. United States," H. Res. 5, 113th Cong. § 4(a)(1)(B), there is no sound basis for this Court to look behind the Group's intervention in this case.

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Both practical considerations and the bedrock Article III requirement of adverseness strongly support the House's standing here. This Court's "right to declare an act of Congress unconstitutional, c[an] only be exercised when a proper case between opposing parties [i]s submitted for judicial determination." *Muskrat v. United States*, 219 U.S. 346, 357 (1911) (discussing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). But Ms. Windsor and the executive both argue that DOMA is unconstitutional and that Ms. Windsor should receive a refund. It is the House's intervention that ensures the adversarial presentation that Article III demands. As already demonstrated, the House is no interloper; it has a concrete interest in not having its legislation permanently nullified. Thus, the House is not only a proper litigant, but a constitutionally necessary one.

The alternative suggested by the executive has little to recommend it. In the executive's view, when it agrees with a private party that an Act of Congress is unconstitutional, the House has no ability to intervene and file dispositive motions, to take depositions or obtain other discovery, or to take appeals. This is not a problem, the executive maintains, because it stands ready to file the necessary motions on the House's behalf. In the district court, the executive even went so far as to file a "motion to dismiss" which made clear that the executive opposed the relief it nominally sought. That makes no sense. Our Article III judicial system, which values adversary presentation, should not countenance such Alice-in-Wonderland filings. And a constitutional system that respects co-equal and coordinate branches of government should not require the spectacle of one branch litigating for another like a ventriloquist.

In addition to flunking the test of commonsense, the executive's position, if accepted, would significantly skew the separation of powers in favor of the executive and away from Congress *and the courts*. Implicit in the executive's insistence that only it can file dispositive motions and appeals is the notion that its willingness to do so is necessary to facilitate this Court's review. That, of course, would allow the executive, by withholding its favor, to control which cases the courts review.[18] But neither this Court's ability to review constitutional issues nor the House's ability to prevent permanent nullification of its legislation should depend on acts of executive grace—or the executive's strategic decision making.

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[18] Indeed, that is precisely what the executive has done. In some DOMA cases, like this one, the Department has pursued expedited appeals. In others, particularly when district courts applied existing precedent to uphold DOMA, the Department delayed review and actively sought to prevent the appellate courts from reviewing DOMA. *See, e.g., Torres-Barragan v. Holder*, Nos. 08-73745 & 09-71226 (9th Cir. 2010) (Department

II. The House's Participation As A Party Ensures This Court's Article III Jurisdiction, But The Executive's Lack Of Appellate Standing Requires Dismissal Of Its Petition.

A. If the House Lacks Standing, This Court Lacks Jurisdiction to Decide This Case.

It is elementary that Article III of the Constitution permits the judiciary to resolve only "Cases" or "Controversies." An essential element of that constitutional limitation is that "there must be an actual controversy, and adverse interests." *Lord v. Veazie*, 49 U.S. (8 How.) 251, 255 (1850). Without truly adverse parties, "a court may not safely proceed to judgment, especially when it assumes the grave responsibility of passing upon the constitutional validity of legislative action." *United States v. Johnson*, 319 U.S. 302, 304 (1943) (per curiam). And "there is no Art. III case or controversy when the parties desire 'precisely the same result.'" *GTE Sylvania v. Consumers Union of the U.S.*, 445 U.S. 375, 383 (1980) (quoting *Moore v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 47, 48 (1971) (per curiam)).

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sought remand of case to Board of Immigration Appeals, urged Board to close case, and urged Ninth Circuit to dismiss appeal).

If this Court finds that the House lacks standing, then there is no Article III case or controversy to resolve because there is no genuine adversity between Ms. Windsor and the executive. Both parties agree that DOMA Section 3 is unconstitutional and Ms. Windsor should receive a refund. Thus, like the parties in *Moore*, Ms. Windsor and the executive requested "precisely the same result" in the proceedings below and do so again now before this Court. *See* 402 U.S. at 47–48 ("At the hearing both parties argued to the three-judge court that the anti-busing law was constitutional and urged that the order of the District Court adopting the Finger plan should be set aside."). And both received precisely the results they requested. When "confronted with th[is] anomaly," *Moore* expressly held that there was "no case or controversy within the meaning of Art. III of the Constitution" and dismissed the appeal. *Id.*

Similarly, in *Princeton University v. Schmid*, 455 U.S. 100 (1982) (per curiam), where the State of New Jersey encouraged this Court to decide a constitutional question, but declined to take a position adverse to the defendant it successfully prosecuted in the courts below, the Court dismissed the case, reiterating that it "do[es] not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us." *Id.* at 102. If the House is denied standing, the same result must occur here.

Chadha does not assist the executive, especially given its opposition to the House's standing. In *Chadha*, the House and Senate *did* have standing and filed their own petitions. And the Court expressly relied on those facts to assure itself of Article III jurisdiction. *See* 462 U.S. at 931 n.6, 939. Thus, *Chadha* did not confront the question of its Article III jurisdiction in the absence of a proper legislative defendant. The Court's "case or controversy" analysis relied chiefly upon the House and Senate's presence in the case, except to the extent that a genuine controversy existed between Chadha and the executive *before* the Ninth Circuit's decision invalidating the executive's deportation order. *See id.* at 939–40. Once the court cancelled that order, the executive's interests became squarely aligned with Chadha's and the House and Senate immediately intervened as parties.

Without the House's participation as the sole adverse party in this suit, this Court would be left issuing an advisory opinion on a novel question of constitutional law concerning a hotly contested matter of social policy. But Article III's prohibition against advisory opinions is central. *See, e.g.*, *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.* (1792). This Court has not hesitated to find itself without jurisdiction when it becomes "evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress." *Muskrat*, 219 U.S. at 361. And that is precisely what this litigation would be without the House's participation. Both this Court and the Second Circuit lack judicial power to grant that request. *Cf. Johnson*, 319 U.S. at 305 ("Whenever in the course of litigation such a defect in the proceedings is brought to the court's attention, it may set aside any adjudication thus procured and dismiss the cause without entering judgment on the merits.").

B. Because the Executive Branch Received Precisely the Result It Sought Below, It Lacks Appellate Standing.

The House, unlike *amica* and the executive, believes that its participation is both necessary and sufficient to satisfy Article III. But even assuming the House's standing eliminates any Article III problem, the Department still lacks appellate standing to seek this Court's review of a decision accepting the Department's position *in toto* and ordering relief that it thinks is appropriate. Simply put, it prevailed completely below and had no business seeking review of that favorable decision.

This Court's decisions make clear that the executive lacks appellate standing here. "Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980). And "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Id.* (citing *Pub. Serv. Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939); *N.Y. Tel. Co. v. Maltbie*, 291 U.S. 645 (1934); *Corning v. Troy Iron & Nail Factory*, 56 U.S. (15 How.) 451 (1853)). Though this rule does not derive from Article III, it is firmly rooted in "the statutes granting appellate jurisdiction and the historic practices of the appellate courts." *Roper*, 445 U.S. at 333–34; *see also Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from denial of certiorari) (This Court's "practice reflects a 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed." (quoting R. Stern & E. Gressman, *Supreme Court Practice* 79 (8th ed. 2002))).

Moreover, the Court's analysis of the executive's appellate standing in *Chadha* focused entirely on *statutory* jurisdiction under 28 U.S.C. § 1252, a provision that is not relevant here (and in fact has been repealed). *See* 462 U.S. at 931 (painstakingly tying each sentence of analysis to § 1252—*e.g.*, "aggrieved party for purposes of taking an appeal *under § 1252*"; "aggrieved party *under § 1252*" (emphases added)); *see also id.* at 931 n.6 (relying exclusively on the presence of the House and Senate to assure the Court of its own Article III jurisdiction). In short, this Court in *Chadha* held its usual prudential standing requirements displaced by the mandatory nature of § 1252 review: "It is apparent that Congress intended that this Court take notice of cases that meet the technical prerequisites of § 1252; in other cases where an Act of Congress is held unconstitutional by a federal court, review in this Court is available only by writ of certiorari." *Id.* at 930–31. Here, the Court's prudential standing jurisprudence applies with full force.

Plainly, the executive was a prevailing party below. It obtained the precise relief it believed was appropriate based on the precise theory (heightened scrutiny) it advocated. The executive can fare no better before this Court. While this Court's affirmance would have a greater precedential impact, the executive cannot ground its appellate standing on a desire for an opinion with the identical effect *on this case and controversy*, but a broader precedential scope *for other cases*. *See, e.g.*, *Muskrat*, 219 U.S. at 361. The executive may not base its appellate standing on the desire to expand the geographic reach of its victory.[19]

* * *

If the House lacks standing to defend the constitutionality of an Act of Congress when the executive declines to do so, all manner of jurisdictional conundrums follow. Without the participation of the House and the adverseness it provides, it is not clear why there was a case or controversy once the executive abandoned DOMA's defense. Both Ms. Windsor and the executive—the plaintiff and nominal defendant—agreed that DOMA was unconstitutional and that Ms. Windsor was entitled to a refund. Without the House, it is unclear who could move to dismiss the complaint, depose a witness, or oppose summary judgment. And without the House, it is even less clear why the executive would have appellate standing to seek not reversal, but affirmance of a judicial decision that accepted its arguments and ordered the relief it requested.

---

[19] This argument equally suggests that the executive lacked appellate standing to file its own appeal in the Second Circuit, but that issue is of no moment because the House filed its own appeal which independently justified the Second Circuit's appellate jurisdiction. In similar fashion, recognition that the Department lacks appellate standing to file the petition in No. 12-307 need not delay this Court's resolution of DOMA's constitutionality. This Court can grant the House's petition in No. 12-785 and issue its merits decision in that case without the need for further briefing and argument.

Recognition of the House's standing solves these conundrums and respects the separation of powers. With the House, there was a clear case and controversy. With the House, there was adverseness and no doubt that the House was the proper party to move to dismiss, take depositions, and oppose summary judgment. And with the House, it is clear which party should appeal (*i.e.*, seek reversal of) a decision that rejects the House's arguments. In short, without the House, it is hard to understand this case as anything other than an elaborate effort to procure an advisory opinion from this Court. With the House, there is a case or controversy on a constitutional issue of the greatest importance.

CONCLUSION

For the foregoing reasons, this Court should recognize that the House of Representatives, acting through its Bipartisan Legal Advisory Group, has Article III standing to defend the constitutionality of DOMA Section 3, and that the executive lacked appellate standing to file the petition in No. 12-307. This Court should dismiss the petition in No. 12-307, grant the House's petition in No. 12-785, and definitively resolve the constitutionality of DOMA Section 3 without the need for re-briefing or re-argument.

Respectfully submitted,

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February 22, 2013

APPENDIX

TABLE OF APPENDICES

Appendix A

Relevant Constitutional Provisions

U.S. Const. art. I, § 5, cl. 2 .... 1a

U.S. Const. art. I, § 7, cl. 2 .... 2a

U.S. Const. art. II, § 3 .... 3a

U.S. Const. art. III, § 2, cl. 1 .... 4a

Appendix B

House Resolution 5,
113th Cong. § 4(a) (2013) 5a

Appendix C

Rules of the House of Representatives,
Rule I.11, 103d Cong. (1993) 9a

Rules of the House of Representatives,
Rule II.8, 112th Cong. (2011) 10a

Rules of the House of Representatives,
Rule II.8, 113th Cong. (2013) 11a

Rules of the House of Representatives,
Rule IX, 113th Cong. (2013) 12a

Appendix A

Relevant Constitutional Provisions

U.S. Const. art. I, § 5, cl. 2

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

U.S. Const. art. I, § 7, cl. 2

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

U.S. Const. art. II, § 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

U.S. Const. art. III, § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Appendix B

House Resolution 5,
113th Cong. § 4(a) (2013)

SEC. 4. COMMITTEES, COMMISSIONS, AND HOUSE OFFICES.

(a) LITIGATION MATTERS.—

(1) CONTINUING AUTHORITY FOR THE BIPARTISAN LEGAL ADVISORY GROUP.—

(A) The House authorizes the Bipartisan Legal Advisory Group of the One Hundred Thirteenth Congress—

(i) to act as successor in interest to the Bipartisan Legal Advisory Group of the One Hundred Twelfth Congress with respect to civil actions in which it intervened in the One Hundred Twelfth Congress to defend the constitutionality of section 3 of the Defense of Marriage Act (1 U.S.C. 7) or related provisions of titles 10, 31, and 38, United States Code, including in the case of Windsor v. United States, 833 F. Supp.2d 394 (S.D.N.Y. June 6, 2012), aff'd, 699 F.3d 169 (2d Cir. Oct. 18, 2012), cert. granted, No. 12–307 (Dec. 7, 2012), cert. pending No. 12–63 (July 16, 2012) and 12–785 (Dec. 28, 2012);

(ii) to take such steps as may be appropriate to ensure continuation of such civil actions; and

(iii) to intervene in other cases that involve a challenge to the constitutionality of section 3 of the Defense of Marriage Act or related provisions of titles 10, 31, and 38, United States Code.

(B) Pursuant to clause 8 of rule II, the Bipartisan Legal Advisory Group continues to speak for, and articulate the institutional position of, the House in all litigation matters in which it appears, including in Windsor v. United States.

(2) CONTINUING AUTHORITIES FOR THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM AND THE OFFICE OF GENERAL COUNSEL.—

(A) The House authorizes—

(i) the Committee on Oversight and Government Reform of the One Hundred Thirteenth Congress to act as the successor in interest to the Committee on Oversight and Government Reform of the One Hundred Twelfth Congress with respect to the civil action Committee on Oversight and Government Reform, United States House of Representatives v. Eric H. Holder, Jr., in his official capacity as Attorney General of the United States, filed by the Committee on Oversight and Government Reform in the One Hundred Twelfth Congress pursuant to House Resolution 706; and

(ii) the chair of the Committee on Oversight and Government Reform (when elected), on behalf of the Committee on Oversight and Government Reform, and the Office of General Counsel to take such steps as may be appropriate to ensure continuation of such civil action, including amending the complaint as circumstances may warrant.

(B) The House authorizes the chair of the Committee on Oversight and Government Reform (when elected), on behalf of the Committee on Oversight and Government Reform and until such committee has adopted rules pursuant to clause 2(a) of rule XI, to issue subpoenas related to the investigation into the United States Department of Justice operation known as "Fast and Furious" and related matters.

(C) The House authorizes the chair of the Committee on Oversight and Government Reform (when elected), on behalf of the Committee on Oversight and Government Reform, and the Office of General Counsel to petition to join as a party to the civil action referenced in paragraph (1) any individual subpoenaed by the Committee on Oversight and Government Reform of the One Hundred Twelfth Congress as part of its investigation into the United States Department of Justice operation known as "Fast and Furious" and related matters who failed to comply with such subpoena, or any successor to such individual.

(D) The House authorizes the chair of the Committee on Oversight and Government Reform (when elected), on behalf of the Committee on Oversight and Government Reform, and the Office of General Counsel, at the authorization of the Speaker after consultation with the Bipartisan Legal Advisory Group, to initiate judicial proceedings concerning the enforcement of subpoenas issued to such individuals.

Appendix C

Rules of the House of Representatives, Rule I.11, 103d Cong. (1993)

11. There is established in the House of Representatives an office to be known as the Office of General Counsel for the purpose of providing legal assistance and representation to the House. Legal assistance and representation shall be provided without regard to political affiliation. The Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships. The Speaker shall appoint and set the annual rate of pay for employees of the Office of General Counsel.

Rules of the House of Representatives, Rule II.8, 112th Cong. (2011)

Office of General Counsel

8. There is established an Office of General Counsel for the purpose of providing legal assistance and representation to the House. Legal assistance and representation shall be provided without regard to political affiliation. The Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships. The Speaker shall appoint and set the annual rate of pay for employees of the Office of General Counsel.

Rules of the House of Representatives, Rule II.8, 113th Cong. (2013)

Office of General Counsel

8. There is established an Office of General Counsel for the purpose of providing legal assistance and representation to the House. Legal assistance and representation shall be provided without regard to political affiliation. The Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships. The Speaker shall appoint and set the annual rate of pay for employees of the Office of General Counsel.

Rules of the House of Representatives, Rule IX, 113th Cong. (2013)

1. Questions of privilege shall be, first, those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings; and second, those affecting the rights, reputation, and conduct of Members, Delegates, or the Resident Commissioner, individually, in their representative capacity only.

2. (a)(1) A resolution reported as a question of the privileges of the House, or offered from the floor by the Majority Leader or the Minority Leader as a question of the privileges of the House, or offered as privileged under clause 1, section 7, article I of the Constitution, shall have precedence of all other questions except motions to adjourn. A resolution offered from the floor by a Member, Delegate, or Resident Com missioner other than the Majority Leader or the Minority Leader as a question of the privileges of the House shall have precedence of all other questions except motions to adjourn only at a time or place, designated by the Speaker, in the legislative schedule within two legislative days after the day on which the proponent announces to the House an intention to offer the resolution and the form of the resolution. Oral announcement of the form of the resolution may be dispensed with by unanimous consent.

(2) The time allotted for debate on a resolution offered from the floor as a question of the privileges of the House shall be equally divided between (A) the proponent of the resolution, and

(B) the Majority Leader, the Minority Leader, or a designee, as determined by the Speaker.

(b) A question of personal privilege shall have precedence of all other questions except motions to adjourn.

RESPONDENT'S BRIEF

No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the estate of THEA CLARA SPYER, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their state.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. Factual Background 1

B. The Defense of Marriage Act 5

C. Procedural Background 11

SUMMARY OF ARGUMENT 14

ARGUMENT 17

I. BECAUSE DOMA DISCRIMINATES ON THE BASIS OF SEXUAL ORIENTATION, IT TRIGGERS — AND FAILS — HEIGHTENED SCRUTINY 17

II. DOMA FAILS RATIONAL BASIS REVIEW ... 32

A. DOMA HAS CHARACTERISTICS THAT THIS COURT HAS IDENTIFIED IN PRIOR CASES AS EVIDENCE OF IRRATIONALITY 32

B. DOMA IS NOT RATIONALLY RELATED TO THE ACHIEVEMENT OF ANY LEGITIMATE FEDERAL INTEREST....................39

1. DOMA Is Not Rationally Related To Any Legitimate Federal Interest In Procreation....................39

2. DOMA Is Not Rationally Related To Any Legitimate Federal Interest In Uniformity Or Conserving Federal Resources....................48

3. DOMA Fails To Further Any Legitimate Federal Interest In Dual Sovereignty, Tradition, Or Caution....................55

C. THE FACTS OF THIS CASE REINFORCE THE CONCLUSION THAT DOMA IS UNCONSTITUTIONAL....................59

CONCLUSION....................63

TABLE OF AUTHORITIES

Page(s)

CASES

In re Adoption of Doe,
2008 WL 5006172
(Fla. Cir. Ct. Nov. 25, 2008), *aff'd sub nom. In re Adoption of X.X.G. & N.R.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010) 47

Armour v. City of Indianapolis,
132 S. Ct. 2073 (2012) 32, 48

Astrue v. Caputo,
132 S. Ct. 2021 (2012) 52

Baehr v. Lewin,
852 P.2d 44 (Haw. 1993) 8

Bd. of Trustees of Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 35, 57, 61

Bolling v. Sharpe,
347 U.S. 497 (1954) 17

Boutilier v. INS,
387 U.S. 118 (1967) 20

Bowen v. Gilliard,
483 U.S. 587 (1987) 25

Bowers v. Hardwick,
478 U.S. 186 (1986) 7, 20

Bray v. Alexandria Women's Health Clinic,
506 U.S. 263 (1993) 28

Christian Legal Soc'y v. Martinez,
130 S. Ct. 2971 (2010) 28, 57

City of Boerne v. Flores,
521 U.S. 507 (1997) 34

City of New Orleans v. Dukes,
427 U.S. 297 (1976) 17

Clark v. Jeter,
486 U.S. 456 (1988) 17

Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) .... *passim*

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,
483 U.S. 327 (1987) 26

Dragovich v. U.S. Dep't of Treasury,
872 F. Supp. 2d 944 (N.D. Cal. 2012) 40, 54

Eisenstadt v. Baird,
405 U.S. 438 (1972) 41, 44, 45

FCC v. Beach Commc'ns,
508 U.S. 307 (1993) 38

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,
130 S. Ct. 3138 (2010) 35

Frontiero v. Richardson,
411 U.S. 677 (1973) .... *passim*

Gill v. Office of Pers. Mgmt.,
699 F. Supp. 2d 374 (D. Mass. 2010) *aff'd sub nom Massachusetts v. U.S. Dep't of Health & Human Servs.*,
682 F.3d 1 (1st Cir. 2012)................................37, 54

Estate of Goldwater v. Comm'r,
539 F.2d 878 (2d Cir. 1976)...............................4, 51

Golinski v. Office of Pers. Mgmt.,
824 F. Supp. 2d 968 (N.D. Cal. 2012).............27, 54

Graham v. Richardson,
403 U.S. 365 (1971)...............................17, 18, 53

Heller v. Doe,
509 U.S. 312 (1993)..54

Hillsborough Twp. v. Cromwell,
326 U.S. 620 (1946)..32

Hooper v. Bernalillo Cnty. Assessor,
472 U.S. 612 (1985)..42

Howard v. Child Welfare Agency Review Bd.,
No. CV 1999-9881, 2004 WL 3154530 (Ark. Cir. Ct. Dec. 29, 2004); *aff'd sub nom. Dep't of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006)...47

Jimenez v. Weinberger,
417 U.S. 628 (1974)...19, 45

Johnson v. Robison,
415 U.S. 361 (1974)..43

Lawrence v. Texas,
539 U.S. 558 (2003) .... *passim*

Lee v. Comm'r,
550 F.2d 1201 (9th Cir. 1977) 51

In re Levenson,
587 F.3d 925 (9th Cir. 2009) 54

Lyng v. Int'l Union,
485 U.S. 360 (1988) 53

Massachusetts v. U.S. Dep't of Health & Human Servs.,
682 F.3d 1 (1st Cir. 2012)................................ *passim*

Mass. Bd. of Ret. v. Murgia,
427 U.S. 307 (1976) 23

Mathews v. Diaz,
426 U.S. 67 (1976) 38

Mathews v. Lucas,
427 U.S. 495 (1976) 22, 24, 27, 33

Metro. Life Ins. Co. v. Ward,
470 U.S. 869 (1985) 34

Mills v. Habluetzel,
456 U.S. 91 (1982) 21

Nyquist v. Mauclet,
432 U.S. 1 (1977) 26

Palmore v. Sidoti,
466 U.S. 429 (1984) 34

Pedersen v. Office of Pers. Mgmt.,
881 F. Supp. 2d 294 (D. Conn. 2012) 27, 40

Perry v. Brown,
671 F.3d 1052 (9th Cir. 2012) *cert. granted sub nom. Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) (Mem.) 29

Perry v. Schwarzenegger,
704 F. Supp. 2d 921 (N.D. Cal. 2010) *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir.), *cert. granted sub nom. Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) (Mem.) 47

Pers. Adm'r of Mass. v. Feeney,
442 U.S. 256 (1979) 33

Plyler v. Doe,
457 U.S. 202 (1982) 17, 53

Reed v. Reed,
404 U.S. 71 (1971) 19, 52

Romer v. Evans,
517 U.S. 620 (1996) .... *passim*

Rowland v. Mad River Local Sch. Dist.,
470 U.S. 1009 (1985) 20

Schweiker v. Wilson,
450 U.S. 221 (1981) 38

Estate of Spalding,
537 F.2d 666 (2d Cir. 1976) 51

Stanley v. Illinois,
405 U.S. 645 (1972) 53

Vill. of Belle Terre v. Boraas,
416 U.S. 1 (1974) 38

United States v. Carolene Prods. Co.,
304 U.S. 144 (1938) 18, 54

United States v. Lopez,
514 U.S. 549 (1995) 35

United States v. Morrison,
529 U.S. 598 (2000) 35

United States v. Virginia,
518 U.S. 515 (1996) .... *passim*

U.S. Dep't of Agric. v. Moreno,
413 U.S. 528 (1973) 33, 34, 49

Watkins v. U.S. Army,
875 F.2d 699 (9th Cir. 1989) 27

Watson v. City of Memphis,
373 U.S. 526 (1963) 57

Weber v. Aetna Cas. & Sur. Co.,
406 U.S. 164 (1972) 43, 46

Williamson v. Lee Optical Co.,
348 U.S. 483 (1955) 51

CONSTITUTION AND STATUTES

U.S. Const. amend. V.. *passim*

Defense of Marriage Act § 3, 1 U.S.C. § 7 .... 1, 5

5 U.S.C. App. 4 § 102 7

5 U.S.C. App. 4 § 103 7

5 U.S.C. App. 4 § 109 7

5 U.S.C. § 6382(a)(1)(C) 6

8 U.S.C. § 1186a(b)(1) 5

17 U.S.C. § 101 6

17 U.S.C. § 203 6

17 U.S.C. § 304 6

18 U.S.C. § 115(a), (c)(2) 7

26 U.S.C. § 2(b)(2) 5

26 U.S.C. § 2056(a) 4

26 U.S.C. § 6013 6

28 U.S.C. § 1738C 56

29 U.S.C. § 2612(a)(1)(C) 6

42 U.S.C. § 416(h)(1)(A)(i) 50

REGULATIONS

29 C.F.R. § 825.122 50

38 C.F.R. § 3.1(j) 50

SSR 63-20 1963 WL 3518 (1963)....................................50

EXECUTIVE AND LEGISLATIVE MATERIALS

142 Cong. Rec. 16,799 (1996) 10

142 Cong. Rec. 16,802 (1996) 10

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STATEMENT OF THE CASE

This case raises the question whether Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, which excludes legally married couples who are gay from the federal rights, benefits, and burdens that govern all other married couples, is constitutional. Both the district court and the court of appeals held that the equal protection component of the Fifth Amendment's due process clause was violated when the federal government imposed $363,053 in estate taxes on the estate of Thea Spyer simply because she was married to a woman (respondent Edith S. Windsor), instead of to a man.

A. Factual Background

1. In the early 1960s, at a time when lesbians and gay men risked losing their families, friends, and livelihoods if their sexual orientation became known, respondent Edith Windsor and her late spouse Thea Spyer fell in love and embarked upon a relationship that would last until Dr. Spyer's death forty-four years later.

The depth, commitment, and longevity of their relationship and eventual marriage are all the more remarkable given the times they lived through. Dr. Spyer was expelled from college when a campus security guard observed her kissing another woman. J.A.153. Ms. Windsor entered into a brief, and unsuccessful, marriage to a man in the early 1950s because she did not believe that it was possible for her to live openly as a lesbian. J.A.494-96.

Shortly after her first marriage ended, Ms. Windsor moved to New York City, where she received a graduate degree in mathematics. She eventually became a highly successful computer programmer at IBM, achieving the highest technical rank at the company, notable for a woman at the time. J.A.231. Sadly, discriminatory federal laws threatened her ability to pursue her career. Ms. Windsor supported herself during graduate school by working as a programmer on the UNIVAC computer for the Atomic Energy Commission. But an Executive Order prohibited companies that had contracts with the Government from employing gay men or lesbians. *See* Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953). Thus, when the FBI requested an interview in connection with her security clearance, Ms. Windsor rightly feared that she would lose her job if she were asked about her sexual orientation. J.A.497-98. (Fortunately for Ms. Windsor, the FBI never raised the subject. *Id.*) Similarly, by hiring Ms. Windsor (who never disclosed her sexual orientation), IBM later unknowingly ran afoul of that same Executive Order.

Threats of disclosure and harassment also forced gay people like Ms. Windsor and Dr. Spyer to lead important parts of their lives in secrecy. Ms. Windsor and Dr. Spyer met at one of the few restaurants in New York City where lesbians were welcomed in 1963. Four years later, they moved in together and became engaged, although there was then no prospect of their being able to marry legally. To avoid unwelcome questions about the identity of Ms. Windsor's "fiancé" from co-workers, Dr. Spyer proposed with a diamond brooch, instead of a diamond ring. J.A.231-33.

Ms. Windsor and Dr. Spyer's life together was full of all the joys and sorrows that any couple faces. They worked, paid their taxes, traveled, entertained friends, and participated in their community. J.A.233. Ms. Windsor spent her career at IBM. Dr. Spyer, who earned a doctorate in clinical psychology, maintained an active private practice.

In 1977, Dr. Spyer was diagnosed with progressive multiple sclerosis, a disease of the central nervous system that causes irreversible neurological damage and often, as in Dr. Spyer's case, paralysis. Ms. Windsor supported Dr. Spyer as her disability worsened, requiring first a cane, then crutches, then a manual wheelchair, then a motorized wheelchair that Dr. Spyer could operate with her one usable finger. J.A.234. Their life together became the subject of an award-winning documentary film, *Edie and Thea: A Very Long Engagement* (2009).

Eventually, Dr. Spyer's health had so deteriorated that it became clear she would not live long enough to hold their wedding ceremony in New York, as the couple had long hoped. Therefore, joined by a physician and several close friends, Dr. Spyer, then seventy-five, and Ms. Windsor, then seventy-seven, flew to Toronto, Canada, where they were wed on May 22, 2007. J.A.236.

They spent their last two years together as a married couple. Dr. Spyer died of a heart condition on February 5, 2009. Grief-stricken, Ms. Windsor suffered a severe heart attack and received a diagnosis of stress cardiomyopathy, or "broken heart syndrome." J.A.236-37.

2. Dr. Spyer left her entire estate to Ms. Windsor, who was appointed executor. J.A.237. Federal law imposes a tax on estates the value of which exceeds a specified threshold. Under 26 U.S.C. § 2056(a), however, there is an unlimited deduction for property that passes from the decedent to the surviving spouse. Congress enacted this deduction to eliminate the "widow's tax" on surviving spouses who were "subject to estate taxes even though the property remains within the marital unit." H.R. Rep. No. 97-201, at 159 (1981); *see also* S. Rep. No. 97-144, at 127 (1981).

But for DOMA, the applicability of the estate tax's marital deduction depends solely on whether the couple was validly married under the law of their state of domicile at the time of death. *See, e.g.*, *Estate of Goldwater v. Comm'r*, 539 F.2d 878 (2d Cir. 1976). All parties to this litigation agree that if Dr. Spyer had been married to a man, the marital deduction would have applied and her estate's federal tax bill would have been $0. J.A.464-65 (admission of the Bipartisan Legal Advisory Group of House of

Representatives); J.A.486 (acknowledgment of United States).

Although New York, where the couple lived together for more than four decades and where Dr. Spyer died, recognized the validity of the couple's marriage, J.A.467, the Internal Revenue Service ("IRS"), citing DOMA, did not. J.A.251-52. Consequently, Dr. Spyer's estate owed $363,053 in federal estate tax, which Ms. Windsor paid as executor. J.A.238-39.

B. The Defense of Marriage Act

1. Until 1996, federal law contained no comprehensive definition of the words "marriage" or "spouse." While some statutes or regulations contained program-specific provisions qualifying the scope of these words, *see, e.g.*, 26 U.S.C. § 2(b)(2) (imposing additional tax-related requirements in order to be considered "married" without defining term); 8 U.S.C. § 1186a(b)(1) (imposing additional requirement that qualifying marriage not be fraudulently entered), federal law generally treated an individual as married or not based on the laws of the relevant state (usually the state of domicile).

DOMA altered this status quo by imposing a new rule applicable to all federal laws. 1 U.S.C. § 7. That definition restricts "marriages" to "only a legal union between one man and one woman as husband and wife." *Id.* And it limits the word "spouse" to only "a person of the opposite sex." *Id.* Thus, under

DOMA, the federal government regards gay couples as not married even if they are married under state law.

DOMA excludes married couples who are gay from all of the rights, privileges, and obligations that the federal government otherwise affords married couples. Ms. Windsor's situation is representative. In addition to being denied the ability to claim the estate tax deduction on behalf of her deceased spouse's estate, she has also been denied the Social Security death benefit to which surviving spouses are normally entitled. *See* Windsor Jurisdiction Br. at 1a-9a; J.A.470.

Because DOMA affects more than 1,100 provisions of federal law, it denies married gay couples and surviving spouses access to protections in many other contexts as well. DOMA, for example, prevents married couples who are gay from filing joint federal income tax returns. *See* 26 U.S.C. § 6013. It denies federal employees the ability to share their health insurance and other medical benefits with their spouses. *See* U.S. Office of Pers. Mgmt., Federal Employees Health Benefits Program Handbook, *available at* http://tinyurl.com/FedBenefitsHandbook. It impairs the rights of same-sex spouses to obtain benefits relating to intellectual property. *See* 17 U.S.C. §§ 101, 203, 304. It denies gay couples the protections of the Family and Medical Leave Act ("FMLA"). *See* 5 U.S.C. § 6382(a)(1)(C); 29 U.S.C. § 2612(a)(1)(C). It deprives the surviving member of a military couple formal notification of his or her spouse's death in the line of duty, and blocks surviving spouses from accessing veterans benefits. *See* Br. of *Amici Curiae* Lawrence J. Korb et al.

At the same time, DOMA exempts married gay couples from federal restrictions and duties, such as the financial disclosure requirements that apply to the spouses of federal officials. *See* 5 U.S.C. App. 4 §§ 102, 103, 109; *see also* Br. of *Amici Curiae* Former Federal Election Commission Officials. DOMA also prevents the federal government from enforcing laws against third parties where those laws depend on marital status. For example, it is a federal crime to retaliate against a federal law enforcement official by threatening or injuring his or her spouse. *See* 18 U.S.C. § 115(a), (c)(2). Under DOMA, however, the federal government cannot use this law to prosecute the murderer of a gay FBI agent's spouse. *See* Br. of *Amicus Curiae* Citizens for Responsibility & Ethics in Washington.

2. In 1996, when DOMA was passed, twenty states criminalized consensual sodomy, and only 44% of Americans thought that gay and lesbian relations between consenting adults should be legal. Gay and Lesbian Rights, Gallup 2008, *available at* http://tinyurl.com/GLRightsGallup. This Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld the constitutionality of those laws, provided "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). Congress accepted that invitation by

passing DOMA. As the House Report noted, "[i]f (as in *Bowers*) moral objections to homosexuality can justify laws criminalizing homosexual behavior, then surely such moral sentiments provide a rational basis for choosing not to grant homosexuals . . . protect[ions] . . . under antidiscrimination laws." H.R. Rep. No. 104-664, at 31 (1996) ("House Report").

DOMA was enacted after a decision by the Hawaii Supreme Court that raised the possibility that Hawaii might permit gay couples to marry. *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); House Report at 2. The House Report acknowledged that "[t]he determination of who may marry in the United States is uniquely a function of state law." House Report at 3. Nonetheless, and without any congressional testimony "concern[ing] DOMA's effects on the numerous federal programs at issue," *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 13 (1st Cir. 2012), the bill raced from introduction to enactment in under four months on a fast track. *See* House Report at 36 (dissenting views).[1] As one Representative noted, "[t]here is no likelihood that Hawaii will complete this process until well into next year at the earliest, giving us plenty of time to legislate with more thought and analysis." *Id.* During the markup session in the House, one Representative commented with regard to Section 3 that Congress was "saying all sorts of things about this whole area of federal pensions and benefits without . . . really understanding what we're doing." Markup Session on H.R. 3396, The Defense of Marriage Act, Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. 30-31 (1996).

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[1] Although Congress did not invite testimony concerning the programmatic or other implications of DOMA, it did schedule witnesses who predicted that the failure to pass DOMA would lead to marriages "between parents and their grown children" and claimed that supporting DOMA was "no more 'homophobic' than it is 'siblingphobic' to oppose incest, or 'animalphobic' to want humans to make love only to their own species." *See* Defense of Marriage Act: Hearing on H.R. 3396 before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. 102, 132 (1996).

The fiscal effects of DOMA were unknown at the time. The House rejected a proposal that would have required the General Accounting Office to analyze DOMA's budgetary effects on the federal government. 142 Cong. Rec. 17,092-93 (1996). Similarly, Senator Robert Byrd, one of the bill's sponsors and an expert on federal appropriations, asked: "How much is it going to cost . . . if the definition of 'spouse' is changed? . . . I know I do not have any reliable estimate of what such a change would mean, but then, I do not know of anyone who does." 142 Cong. Rec. 22,448 (1996).

DOMA sped through Congress in large part because of the strong views many members of Congress expressed at the time about the morality of being gay. The House Report explained that refusing federal recognition to marriages of gay couples reflects "moral disapproval of homosexuality." House Report at 16. During one day's debate, a Representative declared that homosexuality "is based on perversion, that it is based on lust." 142 Cong. Rec. 16,972 (1996). Another Representative charged that homosexuality was "inherently destructive." Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. 237 (1996). At one point, the tenor of the debate led one Representative to observe: "Words have been thrown around . . . . Today, I wrote down . . . 'promiscuity, perversion, hedonism, narcissism, . . . depravity and sin.'" 142 Cong. Rec. 17,079 (1996).

The congressional debate was also filled with predictions of dire consequences if same-sex relationships received legal recognition. One Representative cautioned that marriages between gay couples would "destroy thousands of years of tradition which has upheld our society." 142 Cong. Rec. 17,084 (1996). Another Representative exclaimed that "[w]e as legislators . . . are in the midst of [ ] chaos." 142 Cong. Rec. 17,074 (1996). Yet another Representative stated that marriages of gay couples legitimized "unnatural" behavior. 142 Cong. Rec. 17,082 (1996). Two Representatives predicted that failure to pass DOMA would lead to "discussing pedophilia," 142 Cong. Rec. 17,077 (1996), and allowing marriage between "two men and one woman, or three men, four men, or an adult and a child," 142 Cong. Rec. 16,799 (1996). And another Representative warned that "no culture that has ever embraced homosexuality has ever survived." 142 Cong. Rec. 16,802 (1996).

C. Procedural Background

1. In 2010, as executor of Dr. Spyer's estate, Ms. Windsor filed this lawsuit against the United States in the United States District Court for the Southern District of New York. She sought a refund of the $363,053 paid by the estate and a declaratory judgment that DOMA violates the equal protection guarantee of the Fifth Amendment. J.A.172-73.

After the Attorney General notified Congress and the district court that the United States would not defend the constitutionality of DOMA, the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") was permitted to intervene to defend DOMA.

Following full discovery, the district court granted Ms. Windsor's motion for summary judgment. Applying rational basis review, Judge Barbara S. Jones concluded that "DOMA's section 3 does not pass constitutional muster." Pet. App. 14a.

In particular, the district court could not "discern a logical relationship between DOMA" and the goal of promoting responsible procreation or child-rearing by straight couples. *Id.* at 30a. DOMA "has no direct impact on heterosexual couples at all," *id.*; nor, because marriage remains largely a creature of state law, does DOMA affect "the types of family structures in which children in this country are raised," *id.* at 19a. Citing the Court's decision in *Romer v. Evans*, 517 U.S. 620, 635 (1996), the district court found that "here, Congress's goal is 'so far removed' from the classification, it is impossible to credit its justification." Pet. App. 19a.

As for BLAG's claim that DOMA serves a federal interest in uniformity, the district court found any "link between the means and the end" to be constitutionally "problematic" because DOMA "intrude[d] upon the states' business of regulating domestic relations." *Id.* at 20a. Historically, "states have enjoyed the latitude to 'experiment[ ] and exercis[e] their own judgment in an area to which [they] lay claim by right of history and expertise.'" *Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (alteration in original)). The district court concluded that DOMA is not a legitimate means for serving any "newfound interest in promoting or maintaining consistency in the marital benefits that the federal government provides," *id.*, because by "reexamin[ing] the states' decisions concerning same-sex marriage" and "sanction[ing] some of those decisions and reject[ing] others," DOMA "does not square with our federalist system of government." *Id.*

Accordingly, the district court declared DOMA "unconstitutional as applied to Plaintiff" and "awarded judgment in the amount of $363,053.00 plus interest and costs allowed by law." *Id.* at 23a.

2. The Second Circuit affirmed. The opinion, written by Chief Judge Dennis Jacobs, held that "review of Section 3 of DOMA requires heightened

scrutiny." U.S. Supp. Br. at 15a. Considering the factors this Court has used to decide whether to treat a particular classification as suspect or quasi-suspect, the Second Circuit found that "all four factors justify heightened scrutiny" of discrimination on the basis of sexual orientation: "A) homosexuals as a group have historically endured persecution and discrimination; B) homosexuality has no relation to aptitude or ability to contribute to society; C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and D) the class remains a politically weakened minority." *Id.* at 15a-16a.

Applying heightened scrutiny, the court of appeals found that DOMA is not "substantially related to an important government interest." *Id.* at 18a. The court observed that, "[a]t argument, BLAG's counsel all but conceded" that its proffered justifications for Congress's having "enact[ed] DOMA may not withstand intermediate scrutiny." *Id.* at 24a. With respect to an ostensible federal interest in uniformity, the court of appeals observed that any "emphasis on uniformity is suspicious," because federal law has "historically deferred to state domestic relations laws, irrespective of their variations," *id.*; because DOMA arguably created "more discord and anomaly," *id.* at 25a; and because DOMA also created "inefficiencies" in determining eligibility for federal benefits, *id.* at 26a.

Moreover, the court of appeals found that given that "DOMA is so broad, touching more than a thousand federal laws," the statute was "not substantially related to fiscal matters," and therefore could not be justified as preserving the federal fisc. *Id.* at 27a-28a.

Responding to BLAG's argument that DOMA serves a federal interest in responsible parenting by heterosexual couples, the court of appeals echoed the district court's analysis and concluded that "[i]ncentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before." *Id.* at 30a. Given that other courts had been "unable to find even a *rational* connection between DOMA and encouragement of responsible procreation and child-rearing," the court of appeals held that DOMA is not "substantially related" to that goal. *Id.*

Finally, the court of appeals recognized that some people object to marriage between same-sex couples or to homosexuality in general, often based on their religious beliefs. But secular "law (federal *or* state) is not concerned with holy matrimony." *Id.* at 31a. As the court of appeals explained, while a "state may enforce and dissolve a couple's marriage, . . . it cannot sanctify or bless it. For that, the pair must go next door." *Id.*

SUMMARY OF ARGUMENT

DOMA's discriminatory treatment of married gay couples violates Ms. Windsor's right to the equal protection of the laws as guaranteed by the Fifth Amendment.

This Court should apply heightened scrutiny to DOMA because it discriminates on the basis of sexual orientation. Classifications based on sexual orientation implicate all of the factors to which the Court has pointed in concluding that classifications based on race, sex, illegitimacy, alienage, and national origin or ancestry demand special scrutiny. First, lesbians and gay men have been subjected to a long history of discrimination. Second, a person's sexual orientation does not affect his or her ability to contribute to society. Third, sexual orientation is an immutable and distinguishing characteristic that is a core attribute of personhood. Fourth, lesbians and gay men lack the political power to protect themselves from invidious discrimination. BLAG hardly contests the first and second of these criteria, which are the most significant to the analysis.

Under heightened scrutiny, the federal government must at the very least show that the classification is "substantially related to the achievement of [important government objectives]." *United States v. Virginia*, 518 U.S. 515, 533 (1996). It cannot do so here.

Even under rationality review, DOMA is unconstitutional because it is not rationally related to any legitimate government interest. Although rational basis review necessarily depends on the facts of each case, the Court is particularly likely to find a law irrational where it targets an unpopular or disfavored group for disparate treatment, imposes sweeping disabilities divorced from any specific factual context, or is so novel that it lies outside our "constitutional tradition." *Romer*, 517 U.S. at 633-34. DOMA suffers from all of these infirmities.

None of the interests that have been proffered, either at the time of enactment or as post hoc rationalizations by BLAG, are plausibly advanced by DOMA. DOMA's exclusion of married gay couples from federal marital benefits does not rationally induce straight couples to marry or have children within marriage. DOMA does not encourage uniformity in the administration of federal benefits. To the contrary, it creates disuniformity by treating legally married couples differently even within the same state of domicile. DOMA does not save the federal government money and, even if it did, that would not be a permissible rationale absent some non-arbitrary or nondiscriminatory reason for choosing to exclude married gay couples.

Finally, BLAG offers a variety of circular arguments based on dual sovereignty, tradition, and caution, each of which simply asserts an interest in treating gay couples who have married differently because, according to BLAG, gay couples have always been treated differently. Thus, even subjected only to rationality review, DOMA cannot stand.

ARGUMENT

"The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted). This Court has long held that the Fifth Amendment imposes the same obligation on the federal government. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). All couples who are validly married under state law are similarly situated, regardless of whether those couples are straight or gay. The federal government's decision to treat them differently, based solely on their sexual orientation, triggers, and fails, heightened scrutiny. But even under rationality review, DOMA is unconstitutional.

I. BECAUSE DOMA DISCRIMINATES ON THE BASIS OF SEXUAL ORIENTATION, IT TRIGGERS — AND FAILS — HEIGHTENED SCRUTINY

The Court has held that some classifications are so much "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," *Plyler*, 457 U.S. at 216 n.14, that their use triggers especially searching judicial review. Over the years, the Court has applied heightened judicial scrutiny to classifications based on race, sex, illegitimacy, alienage, and national origin or ancestry. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

In reaching the conclusion that these classifications are presumptively unconstitutional, the Court has relied on a constellation of factors: (1) whether the group has suffered a history of discrimination; (2) whether the group's members differ from other individuals in a way that bears on their ability to perform or to contribute to society; (3) whether individuals cannot, or should not be expected to, change the characteristic that defines membership in the class; and (4) whether the group lacks political power because "prejudice" against the group "curtail[s] the operation of those political processes ordinarily to be relied upon." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); *Frontiero v. Richardson*, 411 U.S. 677, 686-88 (1973). No one of these factors is dispositive, but the Court's decisions demonstrate that the first two are at the core of the concept. Thus, for example, classifications based on alienage receive heightened scrutiny, despite the fact that noncitizens can be naturalized, and classifications based on sex receive heightened scrutiny even though women constitute a majority of the electorate. *See Graham*, 403 U.S. at 371-72; *Frontiero*, 411 U.S. at 686-88.

In this case, the court of appeals correctly held that discrimination on the basis of sexual orientation — which DOMA surely constitutes[2] — requires heightened scrutiny. U.S. Supp. Br. at 15a-16a. This Court should hold the same. As this Court has already recognized, laws burdening lesbians and gay men that were "once thought necessary and proper" may in fact "serve only to oppress," *Lawrence*, 539 U.S. at 579, and overly broad laws discriminating on the basis of sexual orientation are impermissible, *Romer*, 517 U.S. 620. Experience has shown that government discrimination against lesbians and gay men is not entitled to a presumption of constitutionality, just as this Court concluded over time that classifications based on gender and illegitimacy, which were initially subject to rational basis review, require heightened scrutiny because they are prone to abuse. *See Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Reed v. Reed*, 404 U.S. 71 (1971).

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[2] BLAG floats the curious suggestion that DOMA "does not classify based on a married couple's sexual orientation," because it is theoretically possible that a man and a woman, each of whom is gay, would marry each other and be treated as

Applying heightened scrutiny, which requires that the classification be "substantially related to the achievement of [important governmental] objectives," *Virginia*, 518 U.S. at 533, DOMA cannot be sustained.

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married, while two straight men who married each other would be treated as unmarried. BLAG Br. 25 n.7. If the Court were to accept that reading of DOMA — based, though it is, on a highly implausible, unrealistic view of who marries whom — then DOMA would constitute sex discrimination, which since the time of *Frontiero*, 411 U.S. 677, has triggered heightened scrutiny. *See* Br. of *Amicus Curiae* National Women's Law Center et al.

1. Gay men and lesbians have experienced a pervasive history of discrimination. As this Court recognized in *Lawrence*, "for centuries there have been powerful voices to condemn homosexual conduct as immoral." 539 U.S. at 571. As a result, lesbians and gay men have confronted discrimination at the hands of both governmental and private actors.

Government discrimination has taken many forms. Until this Court's decision only a decade ago in *Lawrence*, states used their criminal laws to discriminate against gay men and lesbians, often making their private, consensual sexual intimacy a felony punishable by imprisonment. *See Bowers*, 478 U.S. 186. For many years, the federal government refused to employ gay people and engaged in surveillance to purge supposed "homosexuals" from the federal civil service. J.A.358-62. (For Ms. Windsor, the threat of these official government policies was quite real. *See supra* pp.2-3.) Congress defined gay people as having a "psychopathic personality" that disqualified them from admission into the country. *Boutilier v. INS*, 387 U.S. 118, 120 (1967). Schoolteachers were fired from their jobs simply for revealing their sexual orientation. *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009 (1985).

BLAG points out that "homosexuals as a class have never been politically disenfranchised." BLAG Br. 57. True enough, but irrelevant. Formal disenfranchisement has never been used as a litmus test for applying heightened scrutiny. Classifications based on illegitimacy, for example, are suspect, *Mills v. Hablnetzel*, 456 U.S. 91, 99 (1982), but citizens born to unmarried parents have never been disenfranchised. For nearly a century, women have had the right to vote, and yet this Court applies heightened scrutiny to statutes adopted long after their enfranchisement.

Private discrimination against gay people also has been and remains pervasive. Campaigns have spread false stereotypes of lesbians and gay men as child molesters and unfit parents, stereotypes that linger to this day. J.A.370-76. Lesbians and gay men continue to face the ever-present threat of anti-gay violence. J.A.385-86; BLAG Objections and Resp. to Pls.' First Req. for Admiss. at 4-5, *Windsor v. United States*, No. 10 Civ. 8435 (BSJ) (JCF) (S.D.N.Y. Aug. 1, 2011), ECF No. 51 (admitting that lesbians and gay men have been and continue to be subjected to violence).[3]

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[3] The continued antipathy to gay people is reflected in the tone and content of many of the *amicus* briefs submitted in this case in support of BLAG. *Amici* refer to gay men and lesbians as "immoral," Br. of *Amici Curiae* Chaplain Alliance for Religious Liberty et al. 18; Br. of *Amicus Curiae* Westboro Baptist Church 26, "sinful," Br. of *Amici Curiae* Catholic Answers et al. 13, "radically disrupt[ive] to society," Br. of *Amicus Curiae* Manhattan Declaration 14, "abhorred and opposed," Br. of *Amicus Curiae* Foundation for Moral Law 3, and a "vector of injury and disease," Br. of *Amicus Curiae* David Boyle 3. One set of *amici* argues that overturning DOMA will "make it more socially acceptable for fathers to leave their families." Br. of *Amici Curiae* Robert P. George et al. 22. Another compares the

BLAG suggests that discrimination against lesbians and gay men is a relatively short-lived phenomenon that began in the twentieth century. BLAG Br. 57. Not so. Disapproval, stigma, and sanctions against homosexual conduct have existed in America since its founding, and discrimination against gay people has existed since people started to identify as gay in the late 1800s. J.A.345-48. Besides, "ninety years of discrimination" is enough; "whether such discrimination existed in Babylon is neither here nor there." U.S. Supp. Br. at 17a.

2. In deciding that heightened scrutiny should apply to a particular classification, a second factor on which this Court has relied is whether the classification is based on a characteristic that "frequently bears no relation to ability to perform or contribute to society." *Frontiero*, 411 U.S. at 686; *accord Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-42 (1985); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976). This makes sense: if a characteristic does not predict ability to participate in civil society, the courts should be skeptical of governmental reliance on it as a basis to categorize people.

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recognition of Ms. Windsor's marriage by New York to the "Fugitive Slave Act . . . that forced residents of New York . . . to . . . assist their slave-state neighbors to return slaves who had escaped back to slavery." Br. of *Amicus Curiae* Dovid Z. Schwartz 20. Still another analogizes "same-sex marriage advocates" to the "pro-slavery advocates of the 1850's." Br. of *Amicus Curiae* Eagle Forum 13.

Sexual orientation has nothing to do with "impairment in judgment, stability, reliability, or general social or vocational capabilities." J.A.267-68 (quoting Am. Psychiatric Ass'n, *Position Statement on Homosexuality and Civil Rights*, 131 Am. J. Psychiatry No. 4, 497 (1974)). Despite pervasive discrimination, lesbians and gay men have served with great distinction in virtually every facet of American society, as artists, athletes, academics, soldiers, scientists, lawyers, judges, psychologists like Dr. Spyer, and computer programmers like Ms. Windsor.

A person's sexual orientation is unlike "such nonsuspect statuses as intelligence or physical disability," *Frontiero*, 411 U.S. at 686, which the Court has noted may affect a person's capabilities, or a person's age, which is generally associated with a "decline[ ]" in "physical ability," *Mass. Bd. of. Ret. v. Murgia*, 427 U.S. 307, 315 (1976). In other words, sexual orientation has no bearing on a person's ability to "cope with and function in the everyday world." *Cleburne*, 473 U.S. at 442.

BLAG does not contest the equal ability of gay people to function in society. Rather, BLAG improperly fastens instead on the fact that gay couples "engage in relationships that do not produce unplanned and unintended offspring." BLAG Br. 54.

But this "distinguishing characteristic," *id.*, has no bearing on a gay person's "ability to perform or contribute to society." As this Court explained in

Cleburne, in deciding whether heightened scrutiny should apply, courts "should look to the likelihood that governmental action premised on a particular classification is valid *as a general matter*, not merely to the specifics of the case before us." 473 U.S. at 446 (emphasis added). BLAG fails to explain how gay people's immunity from unintended pregnancies bears on their ability, for example, to "cope with" the death of a loved one, "function in" a surgical residency program, "perform" in the armed forces, "participate" on a board of directors, or "contribute to" the financial success of a company. *Cleburne*, 473 U.S at 442; *Frontiero*, 411 U.S. at 686; *Lucas*, 427 U.S. at 505. Differences in forms of sexual intimacy, whatever their procreative implications, are simply not "characteristic[s] that the government may legitimately take into account *in a wide range of decisions*." *Cleburne*, 473 U.S. at 446 (emphasis added). At most, BLAG's argument amounts to an (unsuccessful) attempt at a defense of DOMA on the merits; it is irrelevant to whether sexual orientation classifications get heightened scrutiny.

Indeed, under BLAG's misformulation, discrimination against women would never have received heightened scrutiny either. This Court has repeatedly recognized that certain "[p]hysical differences between men and women" remain "enduring," and in some respects "'[t]he two sexes are not fungible.'" *Virginia*, 518 U.S. at 533 (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)). Those differences may arguably justify some differences in treatment. But the irrelevance of those differences to a wide range of government decisions explains why sex classifications trigger heightened scrutiny.

To the extent that BLAG or its *amici* are arguing that gay people are distinctively impaired in their ability to contribute to society generally because they are not always biologically related to their children, that is wrong. Thousands of straight couples are not parents at all; still other thousands of straight couples are not the biological parents of their children because they adopted their children, because they are stepparents, or because they used assisted reproductive technologies that rely on donor eggs or sperm. Yet BLAG does not dare suggest that those individuals are less able to contribute to society.[4]

3. Another factor this Court sometimes considers when determining whether a classification merits heightened review is whether there are "obvious, immutable, or distinguishing characteristics that define" the group at issue, *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987), and that members of the group should not be required to change.[5]

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[4] If gay people's general immunity from unintended pregnancies could ever be relevant to government decision-making, it could, at most, only be with respect to a statute intended to address unintended pregnancies.

[5] The Court's cases establish that a defining characteristic need not be absolutely unchangeable to form the basis of a suspect

Sexual orientation is such a trait. BLAG's argument that sexual orientation is not a defining characteristic because it is somehow "fluid" fails as a matter of fact and law.[8] Mainstream scientific opinion establishes that most gay people cannot change their orientation at will. *See* Am. Psychological Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, at v (2009), *available at* http://tinyurl.com/APAReportTherapy. "Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation."

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classification. *See, e.g.*, *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (aliens may apply for citizenship); *Lucas*, 427 U.S. at 506 n.12 (illegitimate children may be legitimated); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (suggesting that discrimination against a particular religion may be subjected to heightened scrutiny under the Equal Protection Clause as well as the First Amendment even though people can change religion).

[8] In its opposition to Ms. Windsor's motion for summary judgment below, BLAG cited the work of Professor Lisa Diamond, a leading expert on women's sexuality. BLAG Opp'n to Windsor Mot. for Summ. J. at 10, 11, *Windsor v. United States*, No. 10 Civ. 8435 (BSJ) (JCF) (S.D.N.Y. Aug. 1, 2011), ECF No. 50. In a subsequent affidavit, Professor Diamond responded definitively to BLAG's contentions as to the "fluidity" of sexual orientation: "If the question is whether gays, lesbians and bisexuals are a group of people with a distinct, immutable characteristic, my scientific answer to that question is yes." J.A.520.

Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring). But even if sexual orientation were "fluid" for some people, it is fixed for most. It is for Ms. Windsor. Contrary to suggesting the "fluidity" of her sexual orientation, her brief, unsuccessful marriage to Saul Windsor demonstrates that being gay was not a matter of "choice," but is a fundamental aspect of her identity. J.A.494-96.

Moreover, as lower courts to consider the issue since *Lawrence* have recognized, "[w]here there is overwhelming evidence that a characteristic is central and fundamental to an individual's identity . . . an individual should not be required to abandon it. To hold otherwise would penalize individuals for being unable or unwilling to change a fundamental aspect of their identity." *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 329 (D. Conn. 2012); *see also Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 987 (N.D. Cal. 2012).

BLAG's argument ignores a central reason why this factor matters. As the Second Circuit observed, the Court examines this factor in part to determine whether the characteristic may serve as "an obvious badge" that makes a group particularly vulnerable to discrimination. *See Lucas*, 427 U.S. at 506; *see also Frontiero*, 411 U.S. at 686 (heightened scrutiny appropriate because of "the high visibility of the sex characteristic"). Sexual orientation "is necessarily disclosed when two persons of the same sex apply for a marriage license . . . or when a surviving spouse of a same-sex marriage seeks the benefit of the spousal deduction (as Windsor does here)." U.S. Supp. Br. at 20a.

BLAG argues that discrimination against gay people should not receive heightened review because homosexuality is, in BLAG's view, defined solely by "a propensity to engage in certain conduct." BLAG Br. 55. That argument is demeaning to people like Ms. Windsor, for whom a lesbian or gay sexual orientation is a fundamental aspect of their identity, and in any event has already been rejected by this Court. In *Lawrence* and again in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), the Court rejected the false distinction between proscribing conduct and targeting gay people for disparate treatment. Just as a "tax on wearing yarmulkes is a tax on Jews," *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993), so too, an estate tax levied on married gay couples, but not on married straight couples, is a tax on gay people.

4. Although gay people have made significant strides in pursuing equal treatment under the law, it remains true that lesbians and gay men are clearly a numerical minority and frequently lack the political power to defend themselves against the majority. J.A.397-435. The fact that gay couples are the *only* legally married couples in the entire nation who cannot benefit from the wide range of federal benefits provided to all other legally married couples is itself powerful evidence of gay people's ongoing political vulnerability.

The political power of gay men and lesbians today stands in sharp contrast to the political efficacy of women in 1973, when the Court concluded in *Frontiero v. Richardson* that sex-based classifications required heightened scrutiny. 411 U.S. at 688. Congress had already passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. *See Frontiero*, 411 U.S. at 687-88. There is still no federal ban on sexual orientation discrimination in employment, housing, or public accommodations, and 29 states have no such protections either. J.A.405, 408-09. As political power has been defined by the Court for purposes of heightened scrutiny analysis, lesbians and gay men do not have it.

Indeed, the democratic process has been used to thwart protections for lesbians and gay men more frequently and with more success than against any other group in recent history. Gay people "have seen their civil rights put to a popular vote more often than any other group." Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257 (1997). Political scientist Gary Segura provided expert testimony below that "[e]vidence from the past two decades . . . has demonstrated that gay men and lesbians are especially vulnerable in the context of direct democracy." J.A.409; *see also* J.A.410-12 (expert testimony detailing initiatives); *Romer*, 517 U.S. at 623-24; *Perry v. Brown*, 671 F.3d 1052, 1063-64 (9th Cir. 2012) (describing Proposition 8); *cert. granted sub nom. Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) (Mem.); Br. of *Amici Curiae* Political Science Professors. This repeated use of majoritarian "direct democracy" to disadvantage a single minority group is extraordinary in our nation's history.

Not only do gay people continue to face repeated attempts to deprive them of civil rights, but their efforts to obtain "protections taken for granted by most people," *Romer*, 517 U.S. at 631, have been largely unsuccessful. As noted above, there is no federal civil rights protection for sexual orientation. Starting in 1977, legislation banning sexual orientation discrimination in employment and housing was introduced in every Congress over two decades but never made any progress toward enactment. More recently, advocates have attempted to achieve more modest protections by introducing an employment-only version in nine of the last ten Congresses. Yet, despite the fact that nearly 90% of Americans express support for such protections for lesbians and gay men, even that legislation has passed only once in the House and never in the Senate. *See Gay and Lesbian Rights*, Gallup 2008, *available at* http://tinyurl.com/GLRightsGallup; Br. of *Amici Curiae* Members of the U.S. House of Representatives and U.S. Senators.

That there surely have been political gains for lesbians and gay men in recent years does not alter this analysis. J.A.399-400, 407-08. "The question is not whether homosexuals have achieved political successes over the years . . . . The question is whether they have the strength to politically protect themselves from wrongful discrimination." U.S.

Supp. Br. at 21a. BLAG's contention that "gays and lesbians are one of the most influential, best-connected, best-funded" groups, BLAG Br. 53, contains unfortunate echoes of stereotypes about other minority groups.[7]

5. If this Court applies heightened scrutiny, DOMA must fail. As the Second Circuit concluded, DOMA is not substantially related to an important government purpose.

At oral argument before the court of appeals, "BLAG's counsel all but conceded" that its proffered justifications for DOMA could "not withstand intermediate scrutiny." U.S. Supp. Br. at 24a. Before this Court, BLAG relegates its entire argument on whether DOMA can survive heightened scrutiny to a single eight-line footnote. BLAG Br. 57-58 n.10. But when heightened scrutiny applies, the government must proffer "a tenable justification" describing "*actual* state purposes, not rationalizations for actions in fact differently grounded." *Virginia*, 518 U.S. at 535-36 (emphasis added). As Ms. Windsor explains in Part II of this brief, none of the ostensible federal interests Congress articulated in 1996 that BLAG identifies here satisfies even rationality review. *A fortiori*, they cannot withstand heightened scrutiny. As for the post hoc rationalizations for DOMA BLAG asserts in this case, they not only fail rationality review, but cannot properly be taken into account in the heightened scrutiny analysis at all. *Virginia*, 518 U.S. at 535-36.

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[7] Under BLAG's articulation of this factor, it is not clear whether even laws classifying on the basis of race or gender would still be entitled to receive heightened scrutiny today.

II. DOMA FAILS RATIONAL BASIS REVIEW

DOMA is also unconstitutional under rational basis review as the Court has applied that test. Particularly when viewed in the context of who is disadvantaged by the law, its tremendous breadth, and its impact on the relationship between federal and state law, DOMA serves no legitimate federal interest.

A. DOMA HAS CHARACTERISTICS THAT THIS COURT HAS IDENTIFIED IN PRIOR CASES AS EVIDENCE OF IRRATIONALITY

Equal protection principles demand that a statutory classification "bear a rational relationship to an independent and legitimate legislative end." *Romer*, 517 U.S. at 633. This requirement protects "the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough Twp. v. Cromwell*, 326 U.S. 620, 623 (1946); *see also Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2084-85 (2012) (Roberts, C.J., dissenting). Thus "even in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. Because this challenge is brought to a federal statute, the government interest must be a federal one.

1. Although rational basis review is generally deferential and necessarily depends on the facts and circumstances of each case, it is not "toothless." *Lucas*, 427 U.S. at 510. This Court's decisions show that laws fail rationality review in a variety of contexts relevant here. *See, e.g.*, Br. of *Amici Curiae* Gay & Lesbian Advocates & Defenders et al.; Br. of *Amicus Curiae* The Institute for Justice.

First, laws fail rationality review where the actual purpose of the law is illegitimate. A statute cannot be drawn simply "for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633; *see also Cleburne*, 473 U.S. at 450; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). When a classification has been chosen "'because of,' [and] not merely 'in spite of,' its adverse effects upon an identifiable group," a reviewing court must ask whether the statute serves some purpose beyond a mere desire to harm the targeted group. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Otherwise, as this Court has warned, "any discrimination subject to the rational relation level of scrutiny could be justified simply on the ground that it favored one group at the expense of another." *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 n.10 (1985). While sometimes using the term "animus," *see, e.g.*, *Romer*, 517 U.S. at 632, the Court's disapproval extends to laws based on irrational prejudice, unease, "negative attitudes," "fear," "bias," or the "bare . . . desire to harm a politically unpopular group," as well as laws reflecting stereotypical thinking about people who appear to be different or who have been historically disfavored. *See Cleburne*, 473 U.S. at 448, 450; *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *Moreno*, 413 U.S. at 534.

Second, a law can fail rationality review when it "targets a narrowly defined group and then imposes upon it disabilities that are so broad and undifferentiated as to bear no discernible relationship to any legitimate governmental interest." Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 Wm. & Mary Bill Rts. J. 89, 94 (1997); *Cf. City of Boerne v. Flores*, 521 U.S. 507, 533 (1997) (while Congress must have "wide latitude," there "must [still] be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end"). In such situations, the law's breadth may "outrun and belie any legitimate justifications that may be claimed for it." *Romer*, 517 U.S. at 635.

Third, laws that do not fit "within our constitutional tradition" require "careful consideration to determine whether they are obnoxious to the constitution[ ]." *Romer*, 517 U.S at 633. For example, statutes provoke suspicion when they upset the relationship between the federal government and the states in novel or unusual ways. *See, e.g., United States v. Morrison*, 529 U.S. 598, 615-16 (2000) (expressing concern for a federal law's intrusion into "family law" including "marriage, divorce, and childrearing"); *United States* v. *Lopez*, 514 U.S. 549, 564 (1995). Sometimes "the most telling indication of [a] severe constitutional problem" will be "the lack of historical precedent" for Congress's intervention. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010) (internal citation omitted).

2. DOMA raises all three of these red flags. First, DOMA was enacted out of "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). The Act was rushed through Congress at a time when there was no realistic prospect of gay couples getting married in the near future anywhere, even in Hawaii. The legislative history is replete with language of panic and fear, as well as stereotypical thinking about the purported dangers of gay people or their relationships. Congress gave no consideration to the ways DOMA would impact the thousands of federal programs implicated. It made no attempt to assess DOMA's impact on the federal budget. It expended no effort to address the obvious irrational consequences of DOMA's sweeping applicability, such as DOMA's exclusion of married gay couples from federal financial disclosure requirements or conflict of interest rules. The very language of its title indicates that DOMA was

enacted to *defend* or "guard against" people who appear to be different.

Second, DOMA's scope is uniquely broad. By amending the Dictionary Act, rather than any specific federal program, DOMA categorically disqualifies gay people who are married from all federal rights, privileges, and obligations of marriage, creating a sweeping exclusion that is disconnected from any specific rational justification. DOMA is arguably broader in scope even than Colorado's Amendment 2 in *Romer*, since, in contrast to an antidiscrimination statute, it affects more than a thousand federal laws and countless regulations and administrative decisions governing nearly every aspect of individuals' interactions with the federal government. U.S. Supp. Br. at 27a-28a.

Third, DOMA represents an abrupt departure from the traditional relationship between the federal government and the states. Prior to DOMA, "Congress ha[d] never purported to lay down a general code defining marriage or purporting to bind the states to such a regime." *Massachusetts*, 682 F.3d at 1, 12. "DOMA was therefore an unprecedented intrusion 'into an area of traditional state regulation.'" U.S. Supp. Br. at 25a (quoting *Massachusetts*, 682 F.3d at 13). State marriage laws have long varied on issues such as recognition of common law marriage, the age of consent to marry, the degree of consanguinity permitted, and divorce. J.A.291-304. Despite these differences, the federal government "fully embraced these variations and inconsistencies in state marriage laws," even though many involved "similarly politically-charged, protracted, and fluid debates at the state level." *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 391-92 (D. Mass. 2010), *aff'd sub nom Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012).

BLAG's assertion that Congress has "a long history . . . [of] supplying its own definitions of marriage for various federal purposes" is misleading. BLAG Br. 4. To be sure, Congress has adopted some narrow statutes distinguishing among marriages, but none purported to disregard an entire category of state-sanctioned marriages. Rather, as the First Circuit has explained, those statutes were all tailored "to the particular [federal] program or personnel involved." *Massachusetts*, 682 F.3d at 12; *see also* Br. of *Amici Curiae* Family Law Professors. DOMA's categorical exclusion of the marriages of gay couples is thus entirely different.

3. The characterization of DOMA as a typical "line-drawing" statute is equally misguided. BLAG Br. 29 (quoting *FCC v. Beach Commc'ns*, 508 U.S. 307, 316 (1993)). At the time Congress acted, there was already a line in place: the federal government generally recognized all marriages that were valid under state law. More specifically, when it came to the federal estate tax — the program at issue in this case — the preexisting line was whether the decedent was validly married under the law of the state of domicile at the time of death. DOMA therefore filled

no gap in the existing legal regime. Moreover, none of the line-drawing cases that BLAG cites involve anything like DOMA's distinction on the basis of sexual orientation between two classes of couples who are legally married under state law. Indeed, even in the "line-drawing" cases relied upon by BLAG, the Court insisted on a constitutionally permissible rationale for the line drawn.[8]

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[8] *See, e.g.*, *Beach Commc'ns*, 508 U.S. at 317-20 (statutory distinction between cable television facilities that served separately owned and managed buildings and those that served buildings under common ownership was justified by regulatory efficiency, avoiding monopoly, and differences in cable subscriber influence); *Schweiker v. Wilson*, 450 U.S. 221, 238 (1981) (federal disability benefits scheme that paid stipends to Medicaid recipients in public mental health facilities, but not to residents who did not receive Medicaid, was based on a permissible belief that Medicaid recipients were needier); *Mathews v. Diaz*, 426 U.S. 67, 83 (1976) (provision that permitted elderly resident citizens and some legal aliens to enroll in Medicare, but denied eligibility to aliens who had not resided in the United States for five years, was rationally based on differences in individuals' connection to the United States); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (zoning ordinance limiting occupancy of one-family residences could reasonably distinguish between families and groups of college students because of the different likelihood of occupants' increasing the amount of traffic and noise).

B. DOMA IS NOT RATIONALLY RELATED TO THE ACHIEVEMENT OF ANY LEGITIMATE FEDERAL INTEREST

The interests that BLAG offers or that can be gleaned from the legislative history fall into three general categories: (1) procreation-related interests, (2) uniformity/conservation of resources interests, and (3) interests in dual sovereignty, tradition, and caution. None provides a rational basis for DOMA.

1. DOMA Is Not Rationally Related To Any Legitimate Federal Interest In Procreation

BLAG's most developed (and its only particularized) justification for DOMA's exclusion of married gay couples is that DOMA somehow channels straight couples who may have unplanned pregnancies into marriage, encourages biological parents to raise children together, and provides children with a male and female role model. Denying federal marital obligations and protections to married gay couples is rational, BLAG asserts, because gay couples and straight couples, "whatever their other similarities, are not similarly situated with regard to their propensity to result in unplanned pregnancies." BLAG Br. 47.

That BLAG advances only this distinction between gay and straight married couples speaks volumes about the lack of any rational basis for

DOMA's comprehensive discrimination against married gay couples. This one difference cannot explain the federal government's decision to impose a sweeping disability on married gay couples that excludes them from countless federal programs and protections, and that only harms their children. Because this distinction is based on the one feature that distinguishes married gay couples from married straight couples, what BLAG is really arguing is that it is acceptable to discriminate against married gay couples simply because they are gay.[9]

1. DOMA cannot be justified simply by pointing out that Congress has a legitimate interest in the well-being of children. Rather, excluding married gay couples from all federal benefits and responsibilities must bear some logical connection to the well-being of children. It does not.

First, as nearly every court to have considered the question has noted — and as even BLAG concedes, BLAG Br. 32, 43 — DOMA does not prevent gay couples from marrying under state law or change state adoption or parenting laws. *See, e.g.*, *Massachusetts*, 682 F.3d at 14-15; *Pedersen*, 881 F. Supp. 2d at 340-41; *Dragovich v. U.S. Dep't of*

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[9] In addition, BLAG cannot justify a classification by pointing to biological differences between gay and straight couples — which ultimately come down to biological differences between men and women — unless those differences are sufficiently material that they satisfy heightened scrutiny. *See, e.g.*, *Virginia*, 518 U.S. at 532-34.

Treasury, 872 F. Supp. 2d 944, 959 (N.D. Cal. 2012). There is no reason to think that DOMA has the effect of preventing gay couples from deciding to raise children, and any such purpose would be illegitimate because all individuals possess a fundamental right to decide "whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

Even less does DOMA influence the procreative behavior of *heterosexuals*. Denying federal protections to married gay couples will not affect whether straight couples marry or have children who are biologically related to both parents. Whatever benefits or protections straight couples receive from the federal government do not come from DOMA. Those benefits or protections come from various independent programmatic statutes (like the Internal Revenue Code, the Social Security Act, or the FMLA). All DOMA does is bar married gay couples from also gaining access to those programs. As the First Circuit recognized, "[t]his is not merely a matter of poor fit of remedy to perceived problem, but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage." *Massachusetts*, 682 F.3d at 15 (citations omitted); *see also* U.S. Supp. Br. at 29a ("All [of BLAG's procreation-related] rationales have the same defect: they are cast as incentives for heterosexual couples, incentives that DOMA does not affect in any way."). A total lack of connection violates equal protection at any level of review. *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 621-22 (1985).

BLAG acknowledges this essential disconnect, but claims nevertheless that federal recognition "can still [a]ffect such institutions at the margin." BLAG Br. 43. Significantly, BLAG does not, and cannot, suggest that fewer straight couples would get married without DOMA. The best that BLAG and its *amici* can come up with is an argument that recognizing the marriages of couples who cannot "inherently" procreate might suggest to straight couples that marriage is about things like love and commitment between two adults and not simply and solely about having children. BLAG Br. 10, 45. Under this argument, federal recognition of gay couples' marriages would somehow make straight couples less likely to marry before having children. *See, e.g.*, Br. of *Amicus Curiae* Helen M. Alvaré 34; Br. of *Amici Curiae* Robert P. George et al. 15-20.

This far-fetched theory has nothing to do with DOMA. It is irrational, fantastical thinking to believe that the federal government's decision to treat married gay couples as unmarried under federal law will encourage straight couples to marry before having children. *Cleburne*, 473 U.S. at 446 (government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"). Put more concretely, no straight couple would decide to marry or have children simply because Ms. Windsor had to pay $363,053 in federal estate taxes.

Conversely, no straight couple would call off their wedding if Ms. Windsor receives a tax refund.[10] *Cf. Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173 (1972) (pointing out the illogic of thinking that "persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation").

2. Further, DOMA cannot logically be explained by the fact that gay couples do not have unplanned pregnancies. It is not enough for BLAG simply to identify some difference between gay and

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[10] Relying on *Johnson v. Robison*, 415 U.S. 361 (1974), BLAG argues that DOMA is rational "because the institution of marriage arose in large measure in response to a unique social difficulty that opposite-sex couples, but not same-sex couples, posed." BLAG Br. 49. *Johnson* involved a statute that created a benefit for veterans who had served in the military, but denied the benefit to those who were conscientious objectors. *Johnson*, 415 U.S. at 362-63. This Court upheld the statute because granting benefits only to those who served in the military could help compensate for the special hardships and risks of active military service. In so holding, the Court explained that, if "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory." *Id.* at 383. But DOMA does not "include" married straight couples or grant a single benefit to them; rather, it excludes married gay couples from all federal programs. *See* U.S. Supp. Br. at 27a (DOMA "functionally *eliminated* longstanding federal recognition of all marriages that are properly ratified under state law — and the federal benefits (and detriments) that come with that recognition." (emphasis added)).

straight couples; it must articulate how that difference "rationally explains the different treatment." *Eisenstadt*, 405 U.S. at 447; *see also Romer*, 517 U.S. at 631-33. Any procreative rationale for DOMA is both too narrow and too broad. It is too narrow in the sense that federal law grants recognition to many marriages that cannot result in children. Older married couples, infertile married couples, and married couples who choose not to have children are all given federal recognition. *Cf. Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) ("[T]he sterile and the elderly are allowed to marry.").

And any procreative rationale for DOMA is too broad in that DOMA touches upon a vast array of programs that have nothing to do with children. While Congress can and does rationally choose to give some benefits and protections to people who have children rather than those who do not (e.g., the child tax credit, adoption tax credit), a huge number of the benefits and responsibilities affected by DOMA — for example, federal employee pensions, criminalization of retaliation against a federal official's spouse, and conflict of interest statutes — have no relationship to whether a married person or couple have children. Congress cannot justify treating married gay couples as unmarried for all federal purposes on the ground that their unions cannot result in inadvertent pregnancies. *Cleburne*, 473 U.S. at 446.

Similarly, it is impossible to credit BLAG's suggestion that the purpose of DOMA was to "offer[ ] special encouragement and support for relationships that can result in mothers and fathers jointly raising their biological children." BLAG Br. 48. Federal policy does not favor biological over non-biological (including adopted) children. *See, e.g.*, 2 Am. Jur. 2d *Adoption* § 172 (2013) ("[N]o legal distinction is drawn between adopted children and natural born children . . . the rights and status of an adopted child are the same as those of a natural child."); *see also* Br. of *Amici Curiae* Professors of Family and Child Welfare Law. The overwhelming majority of families in which one or both parents are not biologically related to the child involve heterosexual couples. This is true because of adoption (stepparent and otherwise), as well as the increasing use of assisted reproductive technologies that rely on donor sperm or eggs. If federal policies designed to support children do not distinguish between biological and non-biological children, a desire to encourage biological parenthood cannot explain DOMA even as to the federal laws related to children, let alone the vast majority of DOMA-affected laws that are unrelated to children. *Cf. Eisenstadt*, 405 U.S. at 447-50 (holding that a justification cannot be a rational basis where it "has at best a marginal relation to the proffered objective"). Moreover, a federal statute intended to favor biological over non-biological children would itself raise significant equal protection issues. *See, e.g.*, *Jimenez*, 417 U.S. at 631-32.[11]

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[11] This Court has held that "[p]enalizing" children "is an ineffectual — as well as unjust — way of deterring the parent."

3. Because there is no logical connection between what DOMA does and whether any couples, straight or gay, married or unmarried, have children, there is no need for this Court to engage with the discredited assertions of BLAG and its *amici* that the children of married gay parents do not fare as well as the children of married straight parents. A few points are nevertheless worthy of mention.

DOMA deprives children with married gay parents of tangible protections and stigmatizes their families by branding them unequal. *See* Br. of *Amici Curiae* Scholars of the Constitutional Rights of Children. Thus, DOMA itself harms children.

Moreover, when it passed DOMA, Congress had before it no evidence on the suitability of gay or straight couples as parents, and it made no factual findings that gay couples are inferior parents. To the contrary, the overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows that children raised by gay parents are just as well adjusted as those raised by straight parents. J.A.327-34. It is also well established that men and women both have the capacity to be good parents, and that having one parent of each gender does not improve a child's development. J.A.324-26; *see also* Br. of *Amici Curiae* the American Psychological

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Weber, 406 U.S. at 175. Denying protections to married gay parents with children in order to encourage either straight couples to marry before having children, or gay couples not to have children, is "illogical" and "unjust." *Id.*

Association et al.[12] BLAG does not dispute this scientific consensus, although its *amici* argue that one recent study has now created a scientific debate about the outcomes for children raised by gay and lesbian couples. That study, however, does nothing to disturb the longstanding consensus that children raised by committed gay couples are as well adjusted as children raised by committed straight couples.[13]

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[12] In multiple cases where evidence about parenting by same-sex couples was put to trial, the lower courts have agreed. *See, e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1000 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir.), *cert. granted sub nom. Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) (Mem.); *In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008), *aff'd sub nom. In re Adoption of X.X.G. & N.R.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010); *Howard v. Child Welfare Agency Review Bd.*, No. CV 1999-9881, 2004 WL 3154530, at *5-6, 8 (Ark. Cir. Ct. Dec. 29, 2004), *aff'd sub nom. Dep't of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006).

[13] That study, Mark Regnerus, *How Different are the Adult Children of Parents Who Have Same Sex Relationships?*, 41 Social Sci. Res. 752-70 (2012), did not compare children raised in stable gay households with children raised in stable straight households. Br. of *Amicus Curiae* the American Sociological Association. The author himself recognized that "[c]hild outcomes in stable, 'planned' [gay] families and those that are the product of previous heterosexual unions [like most of those in his study] are quite likely distinctive, as previous studies' conclusions would suggest." *Id.* at 765. BLAG cites one other report for the proposition that biological parents are better for their children than other parents. *See* Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?*, Child

2. DOMA Is Not Rationally Related To Any Legitimate Federal Interest In Uniformity Or Conserving Federal Resources

Another set of purported justifications for DOMA focuses on the administration of federal programs that turn on marital status. BLAG argues that DOMA serves a federal interest in the uniform treatment of federal benefits and avoids the "fiscal impact of expanding the class of federal beneficiaries." BLAG Br. 21; *see also id.* at 33. On closer inspection, neither of these justifications can sustain DOMA. First, DOMA does not actually accomplish them. Second, as justifications, "uniformity" and "cost savings" are similar in that, while beneficial in the abstract, they both fail to explain the classification chosen — that is, why Congress was justified in promoting either "cost savings" or "uniformity" by sacrificing the interests of married gay couples. *See Armour*, 132 S. Ct. at 2084-85 (Roberts, C.J., dissenting).

1. DOMA was not, of course, necessary to achieve uniformity. Absent DOMA, all *married* couples (whether gay or straight) would uniformly

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Trends Research Brief 1-2 (2002), http://tinyurl.com/ChildTrendsFamily. The authors of that report have stated "no conclusions can be drawn from this research about the well-being of children raised by same-sex parents or adoptive parents." *Id.* at 1.

have been eligible for the benefits and responsible for the obligations imposed by federal law. Ms. Windsor would have been treated the same as any other widow in New York.

What DOMA does is to impose a disuniformity between married straight couples and married gay couples, while imposing a uniformity between married gay couples and unmarried gay couples. To argue, as BLAG does, that this ensures "that similarly-situated couples will have the same federal benefits regardless of the state in which they happen to reside," BLAG Br. 33, is really to say that married gay couples aren't genuinely married at all but instead are "similarly situated" to unmarried people. That ignores reality. There are over 130,000 legally married same-sex couples in the United States, each subject to all of the legal obligations that come with marriage within each state. *See Census Releases Data on Same-Sex Couples*, The Williams Institute (Sept. 27, 2011), *available at* http://tinyurl.com/WilliamsCensus. DOMA's choice can therefore only be explained by an illegitimate desire to treat married gay couples differently simply because they are gay. *Moreno*, 413 U.S. at 534.

BLAG's subsidiary arguments fare no better. BLAG suggests that the differential treatment of married gay couples for all federal programs and statutes is justified because Congress has "a distinct interest in making a federal employee indifferent between working [or perhaps more accurately, living] in Maryland or Virginia." BLAG Br. 43. But state law, not DOMA, will be the driving force in that situation. A federal employee who is asked to move from a state that recognizes his or her marriage to one that does not faces a significant disincentive in any event. Piling a federal disability on top of a state-law inequality advances no independent or legitimate federal interest. In any case, it is implausible to think that DOMA — which sweeps across all federal statutes and programs, not just those related to federal employees — was enacted for that purpose or serves that goal.

Furthermore, the problem that BLAG posits Congress was trying to fix — married couples losing or gaining federal benefits simply by moving to a different state — existed before gay couples began to marry and continues to exist today for married straight couples whose status is recognized in one state, but not in another. This problem confronts, among others, couples in common law marriages and couples who are first cousins. *See* Social Security Ruling ("SSR") 63-20, 1963 WL 3518 (1963) (first cousins); *see also* 42 U.S.C. § 416(h)(1)(A)(i) (marriage for Social Security benefits based on law of state where couple resides at time of application); 29 C.F.R. § 825.122 (2009) (same for FMLA); 38 C.F.R. § 3.1(j) (marriage for veterans benefits based on place of residence at time of marriage or when benefits accrued). *See* Br. of *Amici Curiae* Former Cabinet Secretaries et al.

The most striking example of disuniformity in modern times involves divorces. After some states adopted no-fault divorce regimes, the federal government repeatedly confronted the question of whether a remarriage following an out-of-state divorce was valid. *See, e.g.*, *Estate of Goldwater*, 539 F.2d 878 (2d Cir. 1976) (marital estate tax); *Estate of Spalding*, 537 F.2d 666 (2d Cir. 1976) (same). When confronted with differing state and foreign rules for divorce, Congress declined to adopt a uniform federal definition of divorce because, as the Ninth Circuit observed, "[t]o provide a federal tax law of marriage would create greater confusion," given that marriage "is peculiarly a creature of state law." *Lee v. Comm'r*, 550 F.2d 1201 (9th Cir. 1977). Instead, the Government adopted choice-of-law rules that advanced the goals of particular federal programs; those rules typically deferred to the law of the state of domicile. And it did so despite profound disagreement among the states over whether and when couples should be allowed to terminate their marriages, litigation as to the validity of those divorces, and social disapproval of some of the more lenient standards for divorce. *See, e.g.*, *Estate of Spalding*, 537 F.2d at 667 (describing Nevada in 1968 as a "then-regarded renegade state whose procedural practices, re divorce, caused lifted eyebrows in more Victorian jurisdictions"). Even if Congress can regulate "one step at a time," *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955), any claim that Congress was really pursuing uniformity, rather than discriminating against married gay couples, is undermined by its acceptance of far greater variation in marriage recognition, particularly with respect to divorce. *Cleburne*, 473 U.S. at 448; *Reed*, 404 U.S. at 76-77.

BLAG's suggestion that a uniform federal rule for treatment of married gay couples was needed to "eas[e] administrative burdens," BLAG Br. 34, is also impossible to reconcile with the straightforward state law about who is married and who is not. The federal government can determine whether gay couples are married the same way it determines whether straight couples are married: by relying on state law. This is a far simpler question than many others dealt with by federal agencies every day.[14] While BLAG asserts that Ms. Windsor's claim for an estate tax refund "illustrates" the "complicated" issue that DOMA was intended to solve, BLAG Br. 34, only BLAG appears to harbor any confusion about whether Ms. Windsor and Dr. Spyer were married.[15] As the courts below observed, DOMA creates complexity; it does not combat it. *See, e.g.*, U.S. Supp. Br. at 26a ("The uniformity rationale is further undermined by inefficiencies that [DOMA] creates."); Pet. App. at 19a-20a. And in any event, this Court has repeatedly declared that "the Constitution recognizes higher values than speed and efficiency." *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972); *see also Frontiero*, 411 U.S. at 690.

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[14] In addition to variations in marriage eligibility from state to state, the federal government routinely incorporates state-law definitions of other family law terms such as "child" into federal law, *cf. Astrue v. Caputo*, 132 S. Ct. 2021, 2031 (2012), and deals with far greater complexities in administering benefits programs that use a functional definition of family or "household" (many of which actually recognize same-sex couples for purposes of determining income eligibility). *See* Br. of *Amici Curiae* Former Cabinet Secretaries et al.

[15] As discussed in footnote 1 of the jurisdiction brief filed on behalf of Ms. Windsor, New York unquestionably recognized Ms. Windsor's marriage. Windsor Jurisdiction Br. at 2 n.1.

2. Nor can DOMA be justified by a congressional desire to avoid the "fiscal impact of expanding the class of federal beneficiaries." BLAG Br. 21. An interest in conserving resources, standing alone, "can hardly justify the classification used in allocating those resources." *Plyler*, 457 U.S. at 227. Congress cannot "pursue the objective of saving money by discriminating against individuals or groups." *Lyng* v. *Int'l Union*, 485 U.S. 360, 373 (1988).

To the contrary, like uniformity, saving money provides a legitimate, independent justification for a classification only where there is some reason to believe that the group being excluded is different in some relevant way from the group receiving the benefit. *See Graham*, 403 U.S. at 375 ("The saving of welfare costs cannot justify an otherwise invidious classification." (citation omitted)). If BLAG's view were correct, the government could also decide to save money by denying benefits to couples who married on odd days of the month because doing so would save money. But that law would clearly be struck down as irrational. Here too, it is irrational to save money by denying benefits to married gay couples that the government confers on married straight couples. It is thus not surprising that numerous lower courts have rejected this justification as failing to explain why Congress sought to save money by discriminating against gay people. *See, e.g.*, *In re Levenson*, 587 F.3d 925, 933 (9th Cir. 2009); *Dragovich*, 872 F. Supp. 2d at 957; *Golinski*, 824 F. Supp. 2d at 994-95; *Gill*, 699 F. Supp. 2d at 390.

In any event, experience has disproved BLAG's suggestion that DOMA conserves federal resources. BLAG Br. 37-41. When Congress enacted DOMA, it lacked any information about the fiscal consequences of this sweeping change in federal law. *See supra* p. 9. Nor, as the co-sponsor of the bill in the Senate admitted at the time, did Congress even attempt to arrive at a "reliable estimate." *See id.* Thus, any attempt to justify DOMA as a cost-saving measure cannot survive constitutional scrutiny. *See Heller v. Doe*, 509 U.S. 312, 321 (1993); *Carolene Prods. Co.*, 304 U.S. at 153 (a showing that presumed facts do not exist is relevant to the constitutionality of a statute).

More recently, the Congressional Budget Office has concluded that federal recognition of married gay couples would actually result in a net benefit to the federal treasury. *See* Cong. Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* 1 (June 21, 2004), *available* at http://tinyurl.com/CBO2004. BLAG's response is to say that unlike straight couples, gay couples might decide whether or not to marry solely on the basis of financial considerations. BLAG Br. 40 n.8. But gay couples like Ms. Windsor and Dr. Spyer marry for the same reasons straight couples do — to express their love and commitment to each other. To suggest otherwise, without a shred of empirical support, insults gay people and rests on impermissible stereotypes that render a classification unconstitutional. *See Cleburne*, 473 U.S. at 453 n.6.

3. DOMA Fails To Further Any Legitimate Federal Interest In Dual Sovereignty, Tradition, Or Caution

The remaining interests put forward by BLAG today and by Congress in 1996 focus on values related to federalism, tradition, and caution. None of these interests is furthered in a rational way by DOMA.

1. BLAG asserts that federal discrimination against married gay couples is warranted because DOMA preserves dual sovereignty. BLAG Br. 20. According to BLAG, DOMA allows "each sovereign in our federal system" to decide the "important issue" of civil marriage for gay people "for itself." BLAG Br. 32. Similarly, the House Report identifies one of DOMA's aims as protecting "democratic self-governance." *See* House Report at 16.

Section 3 of DOMA, however, is not rationally related to achieving this goal. As the district court found in this case, the purported interest in protecting "democratic self-governance," *id.*, applies only to Section 2.[16] Pet. App. at 3a n.1; *see also Massachusetts*, 682 F.3d at 14. In fact, by discriminating between gay and straight married couples, DOMA actually undermines the sovereignty of states, like Ms. Windsor's home state of New York, that allow gay couples to marry. *See* Br. of *Amici Curiae* States of New York, Massachusetts et al.

As for the alleged interest in "preserv[ing] each sovereign's ability to define marriage for itself," BLAG Br. 31, DOMA is not a statute that gives each sovereign the ability to define marriage. Rather, it is a statute through which the federal government adopted a particular definition of marriage that nullifies the marriages of gay couples for all purposes under federal law. The relevant constitutional question is whether *that choice* — to treat for federal purposes the marriages of straight people one way and the marriages of gay people another way — is consistent with the equal protection principles of our Constitution. In other words, no one disputes that Congress has sovereign power to decide eligibility with respect to federal programs and benefits. The question here is whether it exercised that power constitutionally. For the reasons already described, it did not.

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[16] Section 2 of DOMA provides that "No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State." 28 U.S.C. § 1738C.

2. Nor can DOMA be justified by a desire for "caution," BLAG Br. 41-42 — or perhaps more accurately, and in the words of the House Report, a desire to "nurtur[e] the institution of traditional, heterosexual marriage," or to "promot[e] heterosexuality." House Report at 12-15. In context, this appeal not to change or to "go slow" simply "reflect[s] some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring). Unless that difference is both real and rationally related to the decision to exclude the group at issue, it cannot justify the government's decision. *Romer*, 517 U.S. at 633. And it is hard to conceive of how Congress could "promote" heterosexuality in a way that does not denigrate gay people based on their status as gay. *See Lawrence*, 539 U.S. at 575; *Christian Legal Soc'y*, 130 S. Ct. at 2990. It is also worth remembering that the very same "go slow" argument was made against extending rights to African-Americans, among others. *See, e.g., Watson v. City of Memphis*, 373 U.S. 526, 535-36 (1963).

As discussed above, DOMA was anything but a cautious legislative step. Instead, in a rush to respond to a perceived problem of gay couples marrying in Hawaii, DOMA abandoned the uniform historic federal practice of deferring to the states in terms of marital status. J.A.311-12. Indeed, DOMA today operates not to defend marriage for straight people, but only to undermine the institution of marriage as it now exists where gay couples are allowed to marry: Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, and the District of Columbia. Pet. App. 16a-17a.

3. BLAG similarly argues that because gay couples were not allowed to marry before 1996, it was rational for Congress "to preserve . . . past legislative judgments." BLAG Br. 38.

The "past legislative judgments," however, had always been to respect the determination of each state and to treat people as married if they were married under state law. By adopting a different rule, DOMA dramatically departed from the consistent legislative judgment of previous Congresses solely to single out gay people as different from straight people. As BLAG has acknowledged, when gay couples could not legally marry under state law, the federal government had no reason to grant federal marital protections to such couples. *See* BLAG Br. 30. BLAG argues that it is this status quo that Congress sought to maintain when it enacted DOMA. However, a bare desire to "preserve" legislative judgments made when there were no married gay couples cannot explain why, when such couples *can* legally marry, they should be treated as unmarried by the federal government for all federal purposes. This interest, like BLAG's "sovereignty" and "caution" arguments, simply restates what

DOMA does. It provides no independent justification for treating married gay couples as legal strangers.

C. THE FACTS OF THIS CASE REINFORCE THE CONCLUSION THAT DOMA IS UNCONSTITUTIONAL

1. In her complaint, Ms. Windsor challenged the way DOMA operated to deny her spouse's estate the marital deduction generally available to married couples. J.A.173. If Congress had passed a discrete statute simply excluding married couples who are gay from the benefits of the estate tax's spousal exemption, it would be impossible to discern a rational connection between that exclusion and any of the interests that have been advanced on behalf of DOMA.

For example, even if the federal government has a legitimate interest in encouraging responsible procreation by straight couples, it would be irrational to think that denying gay couples the benefits of the estate tax deduction would do anything to further that interest. Hardly any straight couples — especially straight couples of an age where their relationship still runs a risk of "produc[ing] unplanned and unintended offspring," BLAG Br. 11 — would make decisions about "responsible procreation" based on their eligibility for a deduction from an estate tax likely to be levied only decades later and only on a small fraction of the population.[17] And none are likely to be influenced in their immediate procreative or childbearing choices by how that tax is or is not levied on gay people.

2. Nor could the exclusion of gay couples from the marital estate-tax deduction be justified as rationally related to any other legitimate government interest. To be sure, excluding married gay couples from the marital deduction would raise revenue. But so would excluding couples where one of the spouses was born on February 29. Both would be unacceptably arbitrary. Any rationale for excluding the estates of married gay decedents from the deduction requires explaining not just that uniformity is a legitimate federal interest, but why treating the estates of married gay decedents *differently* than the estates of married straight decedents rationally promotes an interest in *uniformity*. Even under rationality review, such a distinction would fail.

3. The fact that DOMA is *not* a discrete or tailored statute, but instead sweeps across over 1,100 federal statutes that confer benefits or impose responsibilities on married people, strengthens the

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[17] Male decedents with estates sufficiently large to trigger the estate tax live to an average age of 77.2 years, while female decedents live to 82.0 years. See Brian G. Raub, *Federal Estate Tax Returns Filed for 2004 Decedents*, Stat. of Income Bull., Spring 2008, at 115, 117, *available* at http://tinyurl.com/estatestats.

conclusion that it fails rationality review. The indiscriminate nature of DOMA's definition reinforces the inference that DOMA reflects impermissible animus, or "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring).

This same lack of explanation for DOMA's discrimination between married gay and straight couples pervades every context that DOMA touches. DOMA is not a collection of discrete laws; it is "a status-based enactment divorced from any factual context from which [one] could discern a relationship to legitimate state interests." *Romer*, 517 U.S. at 635. This sweeping classification of married gay couples thus "confounds th[e] normal process of judicial review," *id.* at 633, and makes it clear that DOMA was not intended "to further a proper legislative end" but rather to make married gay couples "unequal to everyone else," *id.* at 635.

Finally, while BLAG repeatedly argues that the Court should not "constitutionalize" the issue because "the democratic process is at work," BLAG Br. 22; *see also id.* at 20, 54, 58, the question presented here is a narrow one: is there a sufficient federal interest in treating married gay couples differently from all other married couples for all purposes under federal law? There is not. By suggesting that the Court cannot or should not answer this question, BLAG fails to recognize that the protections of the Fifth Amendment are abiding. DOMA is impossible to reconcile with the promise of impartial governance that the Constitution's guarantee of equal protection extends to all of our Nation's citizens.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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February 26, 2013

RESPONDENT'S
BRIEF

No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the estate of THEA CLARA SPYER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF ON THE JURISDICTIONAL QUESTIONS FOR RESPONDENT EDITH SCHLAIN WINDSOR

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QUESTIONS PRESENTED

1. Whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case.

2. Whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

- A. Factual And Legal Background 1
- B. Proceedings Below 6

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. Ms. Windsor Properly Invoked The Jurisdiction Of The Federal Courts 12

II. The Executive Branch's Agreement With The Court Below That DOMA Is Unconstitutional Does Not Deprive This Court Of Jurisdiction To Decide This Case. 15

- A. There Remains A Live Article III Case Or Controversy Between Ms. Windsor And The United States 15
- B. Section 1254(1) And Ordinary Rules Of Appellate Practice Confirm That This Court Has Jurisdiction. 25
- C. Prudential And Practical Concerns Strongly Favor This Court Exercising Its Jurisdiction Here. 31

III. Because Ms. Windsor Has A Cause Of Action Only Against The United States, Whether BLAG Has Independent Article III Standing Does Not Affect This Court's Jurisdiction. 36

CONCLUSION 39

APPENDICES

Appendix A: Social Security Administration Notice Of Reconsideration 1a

Appendix B: Written Request For Expedited Appeal 10a

Appendix C: Social Security Administration Statement Of Claimant Or Other Person 12a

TABLE OF AUTHORITIES

Cases

Already, LLC v. Nike, Inc.,
133 S. Ct. 721 (2013) 12

Am. Elec. Power Co. v. Connecticut,
131 S. Ct. 2527 (2011) 32

Baker v. Carr,
369 U.S. 186 (1962) 20

Barnes v. Kline,
759 F.2d 21 (D.C. Cir. 1984), *vacated sub nom.*
Burke v. Barnes, 479 U.S. 361 (1987) 36

Bender v. Williamsport Area Sch. Dist.,
475 U.S. 534 (1986) 32

Blodgett v. Holden,
275 U.S. 142 (1927) 31

Camreta v. Greene,
131 S. Ct. 2020 (2011) 25, 32, 36, 37

Cardinal Chem. Co. v. Morton Int'l, Inc.,
508 U.S. 83 (1993) 21

Chadha v. INS,
634 F.2d 408 (9th Cir. 1980), *aff'd*,
462 U.S. 919 (1983) 17, 18, 19, 20

Chevron U.S.A. Inc. v. NRDC,
467 U.S. 837 (1984) 28

Deposit Guar. Nat'l Bank v. Roper,
445 U.S. 326 (1980) 27, 29

Diamond v. Charles,
476 U.S. 54 (1986) 37, 38

Dillard v. Chilton Cnty. Comm'n,
495 F.3d 1324 (11th Cir. 2007) 38

Farrar v. Hobby,
506 U.S. 103 (1992) 30

FCC v. Action for Children's Television,
503 U.S. 914 (1992) 31

GTE Sylvania, Inc. v. Consumers Union, Inc.
445 U.S. 375 (1980) 24

Heckler v. Mathews,
465 U.S. 728 (1984) 14

Hein v. Freedom From Religion Found., Inc.,
551 U.S. 587 (2007) 13

Holder v. Humanitarian Law Project,
130 S. Ct. 2705 (2010) 31

Horne v. Flores,
557 U.S. 433 (2009) 15, 19, 29

In re Estate of Ranftle,
917 N.Y.S.2d 195 (App. Div. 1st Dep't 2011) 2

In re Metro. Ry. Receivership,
208 U.S. 90 (1908) 19

INS v. Chadha,
462 U.S. 919 (1983) .... passim

Jones v. Prince George's Cnty., Md.,
348 F.3d 1014 (D.C. Cir. 2003) 38

Lefemine v. Wideman,
133 S. Ct. 9 (2012) 30

Lewis v. Cont'l Bank Corp.,
494 U.S. 472 (1990) 29

Lewis v. N.Y. State Dep't of Civil Serv.,
872 N.Y.S.2d 578 (App. Div. 3d Dep't), *aff'd sub nom. Godfrey v. Spano*, 13 N.Y.3d 358 (2009) 2

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 29

Martinez v. Cnty. of Monroe,
850 N.Y.S.2d 740 (App. Div. 4th Dep't 2008) 2

Millbrook v. United States,
No. 11-10362 24

Miss. Univ. for Women v. Hogan,
458 U.S. 718 (1982) 14

Moore v. Charlotte-Mecklenburg Bd. of Ed.,
402 U.S. 47 (1971) 22, 23

Mukasey v. ACLU,
555 U.S. 1137 (2009) 31

N.C. State Bd. of Ed. v. Swann,
402 U.S. 43 (1971) 23

Nw. Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009) 31

OPM v. Richmond,
496 U.S. 414 (1990) 34

Princeton Univ. v. Schmid,
455 U.S. 100 (1982) 22

Purnell v. City of Akron,
925 F.2d 941 (6th Cir. 1991) 38

Ruiz v. Estelle,
161 F.3d 814 (5th Cir. 1998) 38

San Juan Cnty., Utah v. United States,
503 F.3d 1163 (10th Cir. 2007) 38

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs,
101 F.3d 503 (7th Cir. 1996) 38

Sprint Commc'ns Co. v. APCC Servs., Inc.,
554 U.S. 269 (2008) 15

U.S. Postal Serv. v. Brennan,
579 F.2d 188 (2d Cir. 1978) 38

United States v. Alvarez,
132 S. Ct. 2537 (2012) 31

United States v. Lovett,
328 U.S. 303 (1946) 16, 17, 18

United States v. Mendoza,
464 U.S. 154 (1984) 32

United States v. Stevens,
130 S. Ct. 1577 (2010) 31

Warth v. Seldin,
422 U.S. 490 (1975) 29

Constitutional Provisions

U.S. Const. art. I, § 9, cl. 7 34

U.S. Const. amend. V .... passim

Statutes

1 U.S.C. § 7 .... passim

26 U.S.C. § 2001(a) 3

26 U.S.C. § 2056 3

26 U.S.C. § 6511(a) 13

26 U.S.C. § 7422 .... 6, 13, 14, 36

28 U.S.C. § 1252 .... 26, 27

28 U.S.C. § 1254(1) 11, 25, 26, 27

28 U.S.C. § 1291 30

28 U.S.C. § 1331 6

28 U.S.C. § 1346(a)(1) 6, 13

28 U.S.C. § 2414 34

31 U.S.C. § 1304 34
31 U.S.C. § 1341 34
31 U.S.C. § 1350 34
42 U.S.C. § 402 5

Legislative Materials

100 H.R. Rep. No. 100-660 (1988) 27

Regulations

11 C.F.R. § 113.2(a)(1) 35
26 C.F.R. § 301.6402-2(e) 13

Other Authorities

14 U.S.L.W. 3379 (1946) 18

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BRIEF ON THE JURISDICTIONAL QUESTIONS FOR RESPONDENT EDITH SCHLAIN WINDSOR

This Court has directed the parties to address two jurisdictional questions. The answer to the first question is that this Court has jurisdiction to decide this case without regard to the Executive Branch's view on the constitutionality of Section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, because the United States continues to enforce DOMA against respondent Edith Windsor. And because the United States is a proper and indispensable party to this lawsuit, the answer to the second question does not affect this Court's ability to reach the merits.

STATEMENT OF THE CASE

A. Factual And Legal Background

1. Respondent Edith Schlain Windsor and her late spouse, Thea Clara Spyer, first met in 1963. J.A. 231. They soon became a couple, and in 1967, Dr. Spyer proposed to Ms. Windsor with a circular diamond pin. *Id.* 232-33. Following the same path as many newly engaged couples, they purchased a home together – a house near the beach on Long Island where they would spend the next forty summers until Dr. Spyer's death in 2009. *Id.* 233. During those four decades, in sickness and in health, the couple also shared an apartment in Manhattan, supported one another's careers, and built their lives together.

In 1977, Dr. Spyer was diagnosed with progressive multiple sclerosis, a chronic disease that causes debilitating and irreversible neurological damage and paralysis. J.A. 234. As Dr. Spyer's condition deteriorated – and she moved from a cane, to crutches, to a wheelchair – Ms. Windsor cared for her. *Id.* In 1993, they expressed their continued commitment to one another by becoming the eightieth pair to register as domestic partners when New York City first offered legal recognition for gay couples. *Id.* 235. Over the next fourteen years, Dr. Spyer's disease wrought many changes in their daily lives, but one constant remained: Ms. Windsor and Dr. Spyer were determined to marry one another. *Id.*

In 2007, the couple married in Toronto. J.A. 236. At the ages of seventy-seven and seventy-five, they were featured on the wedding pages of the *New York Times*. *Id.* 175-77; *Thea Spyer, Edith Windsor*, N.Y. Times, May 27, 2007, at ST14. They spent the last two years of Dr. Spyer's life together as a married couple.[1]

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[1] New York, "through its executive agencies and appellate courts, uniformly recognized Windsor's same-sex marriage in the year that she paid the federal estate taxes." Pet. App. 8a; *see also* U.S. Supp. Br. App. 7a. In fact, years before Ms. Windsor's marriage to Dr. Spyer, the State Attorney General had already concluded that "New York law presumptively require[d]" that married gay couples "must be treated as spouses for purposes of New York law." N.Y. Att'y Gen. Informal Op. 2004-1, at 16 (Mar. 3, 2004), *available at* http://tinyurl.com/NYAG04OP. Similarly, the State Comptroller General had ordered that the state's retirement system "recognize a same-sex Canadian marriage in the same manner as an opposite-sex New York marriage, based on the principle of comity." Letter from George S. King, Counsel to the Retirement System, to Mark E. Daigneault, at 5 (Oct. 4, 2004), *available at* http://tinyurl.com/NYCG04OP. And during Dr. Spyer's lifetime,

2. As most married couples do, Ms. Windsor and Dr. Spyer provided for one another in their wills. Dr. Spyer's will made Ms. Windsor executor and sole primary beneficiary of her estate. J.A. 164.

Under the Internal Revenue Code, an estate like Dr. Spyer's would usually qualify for an unlimited marital deduction and would therefore pass to the surviving spouse without imposition of the federal estate tax. *See* 26 U.S.C. § 2056. But DOMA denies this deduction when both spouses are of the same sex. Instead, when read together with DOMA, the Internal Revenue Code treats gay spouses as if they were total strangers to one another, forcing estates like Dr. Spyer's to pay the federal estate tax. *See id.* § 2001(a).

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the Governor issued a directive requiring all state agencies to afford "same-sex marriages that are legally performed in other jurisdictions" the "same recognition as any other legally performed union." Memorandum from David Nocenti to All Agency Counsel, at 1-2 (May 14, 2008), *available at* http://tinyurl.com/NYGOV08.

While New York's highest court has not directly addressed the question, three of the state's four intermediate appellate courts have, and they have each upheld the validity of out-of-state marriages involving gay couples. *See In re Estate of Ranftle*, 917 N.Y.S.2d 195 (App. Div. 1st Dep't 2011) (upholding the validity of a gay couple's 2008 Canadian marriage); *Lewis v. N.Y. State Dep't of Civil Serv.*, 872 N.Y.S.2d 578, 583-84 (App. Div. 3d Dep't) (upholding the Civil Service's decision to recognize marriages of gay couples performed in other jurisdictions), *aff'd on other grounds sub nom. Godfrey v. Spano*, 13 N.Y.3d 358 (2009); *Martinez v. Cnty. of Monroe*, 850 N.Y.S.2d 740 (App. Div. 4th Dep't 2008) (recognizing the validity of a gay couple's 2004 Canadian marriage).

Ms. Windsor, acting as executor of Dr. Spyer's will, made an advance payment to the Internal Revenue Service (IRS) and applied for an automatic extension of time within which to file the estate tax return. J.A. 169. The return she subsequently filed showed that the estate owed $363,053. *Id.* On the accompanying Schedule M form, she explained that the estate "was not claiming the marital deduction authorized by 26 U.S.C. § 2056(a) because of the operation of DOMA." *Id.* In March 2010, the U.S. Treasury accordingly issued the estate a refund for the difference between the advance payment and the amount owed. *Id.*

The following month, Ms. Windsor filed a Claim for Refund and Request for Abatement with the IRS seeking a refund of the remaining $363,053. J.A. 242. In the accompanying Disclosure Statement, she explained that she and Dr. Spyer had been validly married under New York law at the time of Dr. Spyer's death. *Id.* She further asserted that DOMA "discriminates against surviving spouses in married same-sex couples, such as Ms. Windsor," in violation of the equal protection component of the Fifth Amendment. *Id.* 244.

The IRS rejected Ms. Windsor's claim for a refund. J.A. 245. It insisted on "consider[ing] the facts of [the] claim without regard to the merits of [the] constitutional challenge" because "a determination regarding the constitutionality of a federal law is within the province of the courts." *Id.* 251-52. Instead, the IRS simply declared that since "both spouses were women," the marital deduction was "inapplicable because the surviving spouse is not a spouse as defined by DOMA." *Id.* 252.[2]

3. The Social Security Act provides a surviving spouse with widow's insurance benefits and a lump-sum death payment (together, "survivors benefits"). *See* 42 U.S.C. § 402(e), (i). As Dr. Spyer's widow, Ms. Windsor sought the survivors benefits. J.A. 166-67. In November 2010, when Ms. Windsor's attorney hand delivered her application to the local Social Security Administration (SSA) office, a field supervisor rejected it on the spot, citing DOMA. Ms. Windsor immediately filed a request for reconsideration, but in April 2011 she received a Notice of Disapproved Claim, which purported to dismiss her request on the grounds that there had been no initial determination. In response, she filed a second request for reconsideration. In April 2012, that request was also denied. In its "Reconsideration Determination," the SSA acknowledged that Ms. Windsor's marriage was "considered valid" in New York "at the time of [Dr. Spyer's] death." Juris. App. 8a.[3] But like the IRS, the SSA disclaimed any ability

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[2] At the time, New York State, for purposes of imposing its own estate tax, calculated the value of a decedent's estate by reference to the estate's federal tax liability. Thus, the IRS's decision meant that Dr. Spyer's estate, instead of owing New York nothing, owed the State $275,528. The estate timely paid that sum to the New York Department of Taxation and Finance. Ms. Windsor has filed a protective claim for a refund of New York estate tax.

[3] The relevant Social Security materials are contained in the Appendix to this brief and are cited as "Juris. App."

to entertain Ms. Windsor's equal protection claim: "We are not permitted to make judgment regarding the constitutionality of the law at this level of your request, and we must follow the law as written." *Id.*

The SSA also informed Ms. Windsor that, for constitutional claims, an "expedited appeal" process was available. Under that process, a claimant can bypass the usual requirement of full administrative exhaustion and "go directly to court." Juris. App. 2a. Before an expedited appeal can proceed, both the claimant and the SSA must sign off. Ms. Windsor filed the necessary request for an expedited appeal in June 2012 and a revised request in August. *Id.* 10a-15a. The SSA has yet to respond.

B. Proceedings Below

1. Ms. Windsor filed suit in the United States District Court for the Southern District of New York, naming the United States as the defendant. Her amended complaint invoked the district court's jurisdiction under 26 U.S.C. § 7422 and 28 U.S.C. §§ 1331 and 1346(a)(1). J.A. 151. She sought three forms of relief: a refund of the $363,053 Ms. Windsor had paid on behalf of Dr. Spyer's estate; a declaratory judgment that DOMA violates the equal protection component of the Fifth Amendment as applied to her in her capacity as executor; and an injunction requiring the United States to treat Dr. Spyer's estate as if her spouse had been of the opposite sex. *Id.* 173. Her amended complaint stated that she was seeking the Social Security survivors benefit and notified the court that she would amend her complaint to add a claim for that relief if her application were ultimately to be denied. *Id.* 166-67.

2. Shortly before the United States' answer was due, Attorney General Eric Holder announced that, while DOMA "will continue to be enforced by the Executive Branch . . . unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality," the Department of Justice would "forgo the defense of this statute." J.A. 191-92.

The Attorney General explained that he was instructing the Department's lawyers to "immediately inform" the district court in this case "of the Executive Branch's view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law." J.A. 193.

3. The Attorney General's announcement prompted the district court to invite Congress to intervene. *See* J.A. 528.

The Senate did not respond to the district court's invitation. But the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) voted 3-2 along party lines to participate. BLAG then filed a motion to intervene for the limited purpose of defending DOMA's constitutionality. J.A. 195. Neither Ms. Windsor nor the United States opposed BLAG's motion.

The magistrate judge granted BLAG's motion. J.A. 218. Under Second Circuit precedent, BLAG was not required "to establish independent Article III standing" given that there was "an ongoing case or controversy between the existing parties to the litigation." *Id.* 226. Since then, BLAG has participated actively at every stage of this litigation.

4. Ultimately, Ms. Windsor moved for summary judgment, J.A. 90, and BLAG and the United States moved to dismiss her complaint, *id.* 98.

The district court granted Ms. Windsor's motion for summary judgment, and consequently denied the United States' and BLAG's motions to dismiss. J.A. 114. The district court held that DOMA failed to satisfy rationality review. Pet. App. 13a-14a. Accordingly, the court declared DOMA "unconstitutional as applied to Plaintiff" and awarded "judgment in the amount of $363,053.00, plus interest and costs allowed by law." *Id.* 23a.

5. BLAG and the United States each filed a notice of appeal. J.A. 522, 524.

Before the Second Circuit, BLAG moved to dismiss the United States' appeal and to "realign the appellate parties to reflect that the United States prevailed in the result it advocated in the district court." U.S. Supp. Br. App. 4a. The Second Circuit denied that motion, agreeing unanimously that it had jurisdiction over the United States' appeal. *See id.* 4a, 31a. On the merits, a divided panel then held that because DOMA discriminated against individuals on the basis of sexual orientation, heightened scrutiny was appropriate. *Id.* 15a-16a. Applying that standard, the majority held that "DOMA's classification of same-sex spouses was not substantially related to an important government interest." *Id.* 30a. It therefore affirmed the judgment of the district court. *Id.* 31a.

6. While the case had been pending before the Second Circuit, both Ms. Windsor and the United States filed petitions for a writ of certiorari before judgment raising the question of DOMA's constitutionality under the Fifth Amendment.

BLAG filed its brief in opposition to the United States' petition after the Second Circuit's decision. Although the Second Circuit had held that "Windsor's marriage would have been recognized under New York law at the time of Spyer's death," U.S. Supp. Br. App. 7a, BLAG questioned whether Ms. Windsor met "Article III prerequisites" to bring her action, BIO 20. Accordingly, BLAG argued that her case was an inappropriate vehicle for resolving a concededly important constitutional question. In addition, BLAG contended that because the United States had "prevailed" in the court of appeals, it was "not clear" that the United States had appellate standing. *Id.* 21.

Once the Second Circuit had ruled, the United States filed a supplemental brief requesting that this Court consider its earlier-filed petition "as one for certiorari after judgment." U.S. Supp. Br. 7. BLAG also filed a supplemental brief, reiterating its claims that Ms. Windsor's case was a problematic vehicle for resolving DOMA's constitutionality.

7. This Court granted the United States' petition. It directed the parties to brief and argue two jurisdictional questions in addition to the question presented by the United States. *See* 133 S. Ct. 786 (2012).

Three weeks later, BLAG filed its own petition for certiorari in Ms. Windsor's case, ostensibly "so that this Court has a vehicle to reach the question of DOMA's constitutionality even if it concludes that the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction over DOJ's petition." Pet. Cert. 10, *Bipartisan Legal Advisory Group of the United States House of Representatives v. Windsor* (No. 12-785). That petition is pending. Subsequently, the House of Representatives passed a resolution purporting to authorize BLAG's participation in this lawsuit. J.A. 578-79.

SUMMARY OF ARGUMENT

Respondent Edith Windsor was compelled to pay hundreds of thousands of dollars in federal estate tax because the Defense of Marriage Act precluded her from claiming the marital deduction on behalf of her spouse's estate. She sued the United States and obtained a judgment declaring DOMA unconstitutional as applied to her and ordering a refund of the tax she had paid. The United States has appealed that judgment against it and continues to withhold the taxes it collected. These facts, which *Amica* does not dispute, provide this Court with jurisdiction to decide this case.

1. As in *INS v. Chadha*, 462 U.S. 919 (1983), this Court has jurisdiction to reach the constitutional question even though the Executive Branch, the private party who has challenged the statute, and the courts below have agreed at every stage of this litigation that the statute is unconstitutional. Here, too, this Court can review the constitutional question at the behest of the Solicitor General.

a. This case presents a concrete controversy within the meaning of Article III. The United States has enforced DOMA against Ms. Windsor throughout this litigation. It will continue do so in the future if DOMA is upheld by this Court. Thus, this Court's decision "will have real meaning" for both parties. *Chadha*, 462 U.S. at 939. Furthermore, the participation of a congressional intervenor in support of the statute allays any concern about whether the issues will be sharply presented.

b. This Court has statutory jurisdiction over this case. The plain language of 28 U.S.C. § 1254(1) grants this Court jurisdiction to hear a petition from "any party," and the United States undeniably meets that criterion. For purposes of appeal, moreover, the United States is an "aggrieved party" within the traditional understanding of that term. Judgment was entered against the United States. That judgment requires the United States both to pay hundreds of thousands of dollars to Ms. Windsor and to alter its administration of more than one thousand statutory provisions that affect married gay couples. These are legally cognizable consequences that, by any objective standard, make the United States an aggrieved party. Nothing bars a government defendant from appealing this sort of adverse judgment.

c. Assuming that this Court has jurisdiction, prudential and practical concerns militate strongly in favor of deciding the constitutionality of DOMA now. Leaving that question to the lower courts will perpetuate the harmful uncertainty faced by Ms. Windsor and hundreds of thousands of others. It may also result in significant disuniformity across jurisdictions in the application of a federal statute. *See* Br. of *Amici Curiae* New York et al. Requiring every individual or couple affected by DOMA to bring a separate lawsuit until the relevant courts of appeals have ruled would create a legal morass for no good reason.

Furthermore, this is not a situation where, if this Court declines to review the constitutional question, unilateral Executive Branch action can provide a stable solution. With respect to federal benefits programs, the Appropriations Clause and the Anti-Deficiency Act may mean that federal agencies cannot simply write individuals a check. And because DOMA applies outside the Executive Branch, and binds Congress, the Judiciary, and independent agencies, executive "non-enforcement" would not resolve the application of DOMA in many contexts.

2. Whether BLAG has independent Article III standing does not affect this Court's jurisdiction. The United States' continued – indeed, necessary – presence dictates that BLAG can properly assert "piggyback" standing and participate fully in this litigation.

ARGUMENT

I. Ms. Windsor Properly Invoked The Jurisdiction Of The Federal Courts.

This case raises profound questions of constitutional law regarding the Defense of Marriage Act, but those questions are "embedded" in an "actual controversy" about Ms. Windsor's "particular legal rights." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013) (internal quotation marks and citation omitted). Ms. Windsor filed suit seeking "the recovery of" $363,053 in federal estate taxes "alleged to have been . . . illegally assessed." 28 U.S.C. § 1346(a)(1). The United States refused, and continues to refuse, to refund this money.

1. As the executor of Dr. Spyer's estate and the filer of the claim for refund, Ms. Windsor is the proper plaintiff in this lawsuit. *See* 26 U.S.C. §§ 6511(a), 7422(a); 26 C.F.R. § 301.6402-2(e). In that capacity, she has suffered injury in fact: "[A] claim that the plaintiff's tax liability is higher than it would be, but for the allegedly unlawful government action" is a "concrete and particularized injury." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 619 (2007) (Scalia, J., concurring in the judgment).[4] Here, to add insult to this "wallet injury," *id.*, the tax was imposed on Dr. Spyer's estate

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[4] DOMA clearly caused this tax liability. While BLAG may continue to cast aspersions on Ms. Windsor and Dr. Spyer's marriage, *see, e.g.*, BLAG Br. 14, 24 n.6, both courts below agreed that at the time of Dr. Spyer's death, Ms. Windsor and Dr. Spyer were legally married, *see* U.S. Supp. Br. App. 7a; Pet. App. 8a; *see also supra* p. 2 n.1. Absent DOMA, Dr. Spyer's estate would have qualified for the marital deduction. Even BLAG concedes that Ms. Windsor has produced documents that, "if accurate, establish the eligibility of Spyer's estate for the estate tax marital deduction and that the estate would not have been liable for federal estate tax, if Spyer had been married to a surviving male U.S. citizen at the time of her death." J.A. 465.

Redressability is not in doubt: the federal courts are entirely capable of curing the injury Ms. Windsor suffered by issuing a judgment in her favor. But in any event, questions about the validity of a claimant's marriage go to the merits, and not to jurisdiction.

because DOMA treats married gay couples differently from all other married couples. As this Court has "repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious noneconomic injuries to those persons" who are "denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (internal citation omitted) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

2. The United States is the proper – indeed, the indispensable – defendant in this lawsuit. The Internal Revenue Code requires that the "United States," and only the United States, be named as the defendant in a lawsuit seeking a tax refund. *See* 26 U.S.C. § 7422(f)(1). When a plaintiff names any other official defendant – for example, the IRS or the Commissioner of Internal Revenue – the "court shall order . . . that the pleadings be amended to substitute the United States as a party." *Id.* § 7422(f)(2). Moreover, because this is a tax refund case, the United States is the only party that can provide the relief Ms. Windsor seeks.

3. In light of these facts, *Amica* states the obvious: "The district court plainly had jurisdiction over Windsor's lawsuit." *Amica* Br. 23. For the reasons that follow, as long as the United States continues to withhold the taxes DOMA forced Ms. Windsor to pay on behalf of Dr. Spyer's estate, the appellate courts continue to have jurisdiction over her lawsuit.

II. The Executive Branch's Agreement With The Court Below That DOMA Is Unconstitutional Does Not Deprive This Court Of Jurisdiction To Decide This Case.

Ms. Windsor obtained a declaratory judgment against the United States holding DOMA unconstitutional as applied to her and ordering the United States to refund $363,053 in federal estate taxes unconstitutionally levied. Under these circumstances, the United States had standing to appeal to the Second Circuit and to seek review in this Court. *See, e.g.*, *Horne v. Flores*, 557 U.S. 433, 445 (2009). The straightforward conclusion that the United States can seek this Court's review of the judgment entered against it is in no way undercut by the Executive Branch's motives for doing so. Its views on the constitutionality of DOMA do not alter the fact that this Court's "decision will have real meaning" for the parties in this case, and for Ms. Windsor in particular. *Chadha*, 462 U.S. at 939. Accordingly, this Court should reach the merits.

A. There Remains A Live Article III Case Or Controversy Between Ms. Windsor And The United States.

1. This case involves a concrete dispute between Ms. Windsor and the United States. Article III, Section 2, of the Constitution confers on the federal courts "'judicial Power' [for] the resolution of 'Cases' and 'Controversies.'" *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008). For purposes of determining whether such a case or controversy exists here, the two most instructive cases, as *Amica* acknowledges, are *INS v. Chadha*, 462 U.S. 919

(1983), and *United States v. Lovett*, 328 U.S. 303 (1946). *See Amica* Br. 25. In each case, this Court exercised jurisdiction to reach the merits of the constitutional challenge despite the fact that the Solicitor General agreed with the lower court's decision striking down the federal statute in question.

Chadha offers a particularly detailed analysis that shows why the lawsuit between Ms. Windsor and the United States remains a live case or controversy before this Court. *See Chadha*, 462 U.S. at 939-40. Chadha challenged a decision by the Immigration and Naturalization Service (INS) to reinstate deportation proceedings against him following a one-house "veto" of the Attorney General's earlier decision to suspend those proceedings. *See id.* at 927-28.

The Attorney General agreed with Chadha, both before the court of appeals and in this Court, that the statute providing for a one-house veto was unconstitutional. *See Chadha*, 462 U.S. at 928, 939. Before this Court, the House and Senate argued that, because Chadha and the INS took "the same position on the constitutionality of the one-House veto," there was no "genuine controversy." *Id.* at 939. This Court rejected that argument, explaining that "the INS's agreement with Chadha's position does not alter the fact that the INS would have deported Chadha absent the Court of Appeals' judgment." *Id.* Thus, this Court "agree[d] with the Court of Appeals that 'Chadha has asserted a concrete controversy, and our decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold § 244(c)(2), the INS will execute its order and deport him.'" *Id.* at 939-40 (quoting *Chadha v. INS*, 634 F.2d 408, 419 (9th Cir. 1980) (Kennedy, J.)). On this basis, the Court concluded that an Article III case or controversy was "present[]" in the case before it. *Id.* at 939.

For purposes of Article III adverseness, Chadha's case and Ms. Windsor's are indistinguishable. As in *Chadha*, a decision on the merits by this Court would have "real meaning." If this Court rules for Ms. Windsor, she will receive a $363,053 refund; if the Court upholds DOMA, the United States will keep the money.[5]

This Court's opinion in *Chadha* expressly relied on *Lovett* in reaching its conclusion that there was a live case or controversy before it. *Chadha*, 462 U.S. at 940. In *Lovett*, the Executive Branch declined to defend a provision of a congressional appropriations act that forbade salary payments to Lovett and two other government employees suspected of being subversives. 328 U.S. at 304-08. In a suit by the employees for back pay, the Court of Claims entered judgment against the United States – the sole defendant before it. The United States then sought review in this Court. Its petition for certiorari, which this Court granted, expressly reaffirmed the Attorney General's view that the statute was "unconstitutional," but asked the Court to grant review nonetheless because an "[a]uthoritative decision by this Court" was "of the highest importance to the Government of the United States." Pet. Cert. 9, *Lovett v. United States*, 328 U.S. 303 (1946).

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[5] A ruling in Ms. Windsor's favor would also provide her with binding precedent requiring the SSA to grant her application for survivors benefits. *See infra* p. 32.

Lovett was not a case in which jurisdictional questions went entirely "unaddressed." *Amica* Br. 25 (internal quotation marks omitted). To the contrary, this Court was acutely aware that the case before it raised some questions of Article III justiciability, and it addressed those questions directly. *See Lovett*, 328 U.S. at 313-14. But no Justice so much as hinted that the Court lacked jurisdiction over the constitutional issue because the Executive Branch had agreed with the judgment of the court below.[6] Given the uncommon alignment of the parties, it is just not plausible that this Court would have overlooked a serious question about its jurisdiction. The best reading of *Lovett* is therefore that this Court "found the requisite case or controversy was not absent." *Chadha v. INS*, 634 F.2d at 420 n.9 (Kennedy, J.).

2. The Executive Branch's motivation for continuing to enforce DOMA against Ms. Windsor by withholding her refund has no bearing on the continued existence of this live case or controversy.

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[6] That silence is all the more telling given that Justice Frankfurter at oral argument vowed to "avoid the constitutional question" if he could do so "with intellectual integrity." 14 U.S.L.W. 3379, 3382 (1946). His solution was to urge that the case be decided on statutory grounds. *See Lovett*, 328 U.S. at 320 (Frankfurter, J., concurring). He never suggested that the Court lacked jurisdiction altogether.

This Court has long understood that the presence of a case or controversy turns on whether the plaintiff has obtained the relief she is seeking, and not on the defendant's view of the ultimate merits of the plaintiff's claim. As this Court explained in *In re Metropolitan Railway Receivership*, 208 U.S. 90, 107-08 (1908), "where there is a justiciable claim of some right," it is "not necessary that the defendant should controvert or dispute the claim. It is sufficient that he does not satisfy it." This Court took the same approach in *Chadha*, observing that "it would be a curious result if, in the administration of justice, a person could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments asserted by the individual." 462 U.S. at 939. As then-Judge Kennedy stated in reaching the same conclusion, "it would be a perversion of the judicial process" to "dismiss[] [Chadha's] appeal for lack of adversity" because doing so "would implicitly approve the untenable result that all agencies could insulate unconstitutional orders and procedures from appellate review simply by agreeing that what they did was unconstitutional." *Chadha v. INS*, 634 F.2d at 420.

The same analysis applies here. *Chadha* is merely one illustration of the general point that government defendants may be "happy to be sued and happier still to lose," *Horne*, 557 U.S. at 449 (internal quotation marks and citation omitted). That point goes to the scope of courts' remedial powers, *see id.* at 449-50, and not to the scope of their jurisdiction. This Court has never suggested that courts lack jurisdiction to enter judgments against government defendants that agree with an injured plaintiff's claim on the merits. Whatever its reasons for doing so, the United States continues to withhold hundreds of thousands of dollars that Ms. Windsor contends are rightfully hers. That fact alone establishes an Article III case or controversy before this Court.

BLAG's participation in this case reinforces the presence of a live case or controversy here. As in *Chadha*, where Congress's participation before this Court assured that "concrete adverseness" was "beyond doubt," 462 U.S. at 939; *see also id.* at 931 n.6, so too here. BLAG's full participation in briefing and oral argument continues to "sharpen[] the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

3. *Amica*'s attempts to distinguish *Chadha* are unavailing.

First, *Amica* claims that this Court's finding of an Article III case or controversy between Chadha and the United States only "sustained the justiciability of the case in the Ninth Circuit," *Amica* Br. 27, and does not answer the question whether there was jurisdiction in this Court. *Amica*'s reading, however, cannot be reconciled with this Court's actual language. Three times, this Court used the word "we" in its discussion of why a "concrete controversy" existed: "*We* agree with the Court of Appeals" that "'if *we* rule for Chadha, he will not be deported; if *we* uphold § 244(c)(2), the INS will execute its order and deport him.'" *Chadha*, 462 U.S. at 939-40 (emphases added) (quoting *Chadha v. INS*, 634 F.2d at 419). Had this Court meant to restrict its analysis to the Ninth Circuit, it would not have repeatedly used the first-person plural. Moreover, *Amica* does not explain why this Court would have addressed the Ninth Circuit's jurisdiction, while ignoring questions about its own, if in fact it had them. The only plausible reading of the Court's discussion, therefore, is that it was directed at the question whether this Court – and not just the Ninth Circuit – had jurisdiction to decide the case.

Amica is also incorrect in asserting that *Chadha* "did *not* decide . . . whether, without the intervenors, a sufficient case or controversy would have been present on appeal to this Court." *Amica* Br. 28 (emphasis in original). Again, a straightforward reading of *Chadha* undermines her argument. This Court squarely stated, "*prior to Congress' intervention*, there was adequate Art. III adverseness even though the only parties were the INS and Chadha." *Chadha*, 462 U.S. at 939 (emphasis added). That adverseness did not evaporate when the status of the House and Senate changed from that of *amici* to that of intervenors as the case advanced to this Court. Indeed, as this Court later explained, in *Chadha* there was "Art. III adverseness even though the two parties agreed on the unconstitutionality of the one-House veto." *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 88 n.9 (1993).

To be sure, "prudential, as opposed to Art. III, concerns" may exist when a case comes to this Court "in the absence of any participant supporting the validity of" a challenged statute. *Chadha*, 462 U.S. at 940. But just as those prudential concerns were "properly dispelled" in *Chadha* by the briefs filed by Congress, *id.*, those concerns are dispelled here by BLAG's participation. Whether or not the Executive

Branch's agreement with a lower court judgment implicates prudential concerns – and Ms. Windsor believes it does not, *see infra* pp. 31-35 – Article III poses no barrier to hearing this case.

4. *Amica*'s reliance on this Court's per curiam decisions in *Princeton University v. Schmid*, 455 U.S. 100 (1982), and *Moore v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971), is also misplaced.

Amica herself acknowledges that *Schmid*, a case involving mootness, "is not on all fours" with this one. *Amica* Br. 30 n.18. At most, *Schmid* casts doubt on jurisdiction only when a party's refusal "to take a position on the merits" forces the Court to either "decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties." 455 U.S. at 102.

None of these difficulties exists here. Ms. Windsor, the United States, and BLAG have all taken positions on the merits. Like the INS and Chadha, the United States and Ms. Windsor are "adverse parties." *See supra* pp. 15-20. There is nothing "hypothetical" about Ms. Windsor's $363,053 refund claim or her application for the Social Security survivors benefits.

Nor does *Moore* support *Amica*'s argument. To be sure, this Court did observe there that when "both litigants desire precisely the same result" there is "no case or controversy within the meaning of Art. III of the Constitution." *Moore*, 402 U.S. at 48; *see also Amica* Br. 31. But it did so in a singular context far removed from this case. As this Court has explained, *Moore* was an "ancillary proceeding" to the well-known *Swann v. Charlotte-Mecklenburg* desegregation lawsuit. *N.C. State Bd. of Ed. v. Swann*, 402 U.S. 43, 44 (1971); *see Moore*, 402 U.S. at 47. Moore sued the Board in a separate action to prevent it from complying with the desegregation remedy that Swann had been seeking in his ongoing lawsuit against the Board. Without consolidating the two cases, a three-judge district court entered an order enjoining both Moore and the Board from enforcing or seeking to enforce North Carolina's anti-busing statute. *N.C. State Bd. of Ed.*, 402 U.S. at 44 n.2. Thus, as it arrived at this Court, *Moore* was essentially a case with two defendants against whom relief had been granted, but no plaintiff. This problem, although it resulted in Moore's appeal being dismissed for lack of adverseness, did not preclude the Court from reaching and adjudicating the underlying constitutional issue, which it did in a companion case (in which the Board participated). *See id.* at 44.

Finally, it bears mentioning that although the House of Representatives relied on *Moore* at every stage of its briefing in *Chadha*, *see* House Supp. Br. 71, 1982 U.S. S. Ct. Briefs LEXIS 1631; House Reply Br. 12-13, 1982 WL 607218; House Br. 47, 1981 WL 388493; House Mot. to Dismiss 24-25, 1981 U.S. S. Ct. Briefs LEXIS 1429, not a single Justice was persuaded that *Moore* undermined this Court's jurisdiction. This Court should once again reject that argument here. *See also* 20 Charles Alan Wright & Mary Kay Kane, *Federal Practice and Procedure Deskbook* § 13 nn.25-27 (2012) (distinguishing *Schmid* and *Moore* from *Chadha* for purposes of the Article III case or controversy requirement).

5. *Amica* recognizes that this Court has repeatedly granted review in cases where the Government has confessed error and therefore is seeking "precisely the same result" as the opposing party. *Amica* Br. 31 & n.19 (internal quotation marks omitted) (quoting *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, 445 U.S. 375, 383 (1980)). *See generally* Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting* Amici Curiae *to Defend Abandoned Lower Court Decisions?*, 63 Stan. L. Rev. 907 (2011).

Amica contends, however, that "Government 'confession of error' is quite distinct" from the situation here. *Amica* Br. 31 n.19. She is mistaken. *Amica* conflates the question of adverseness under Article III with the question of appellate standing. With respect to adverseness, the only difference between confession of error cases and this case is the timing of the Government's change of position. There is no reason why that timing affects the nature of the relationship between the litigants. Whether the Executive Branch declined to defend DOMA before the district court, or it waited until the court of appeals, the certiorari stage, or even merits briefing, *see Millbrook v. United States*, No. 11-10362, is immaterial. The factor that preserves the ongoing case or controversy here is the United States' continuing enforcement of DOMA against Ms. Windsor.

Amica's observation that in confession of error cases "the parties seek to *undo* a judgment," while "here, the government *agrees* with the judgment below," *Amica* Br. 31 n.19 (emphases in original), goes not to the relationship between the litigants, but to the distinct question of the United States' relationship to the judgment below. That is a matter of appellate standing, which as the next section of this brief explains, the United States satisfies.

B. Section 1254(1) And Ordinary Rules Of Appellate Practice Confirm That This Court Has Jurisdiction.

1. This Court reviews cases coming from the courts of appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree." 28 U.S.C. § 1254(1). In *Camreta v. Greene*, 131 S. Ct. 2020 (2011), this Court held that the statute means what it says: Section 1254 "confers unqualified power on this Court to grant certiorari 'upon the petition of *any* party.'" *Id.* at 2028 (emphasis in original) (quoting 28 U.S.C. § 1254(1)). The United States was undeniably a party to Ms. Windsor's lawsuit in both the district court and the court of appeals. That fact disposes of the question whether, as a matter of statutory construction, the United States can seek review in this Court. It can.

2. "[O]rdinary rules of appellate jurisdiction," *Amica* Br. 24, do not alter that conclusion. Once again, *Chadha* controls. There, this Court rejected the argument that the United States could not seek review in this Court because it was not an "aggrieved party." *Chadha*, 462 U.S. at 930. This Court offered two bases for its holding. First, the INS was "sufficiently aggrieved" because "the Court of Appeals decision prohibit[ed] it from taking action it would otherwise take" – namely, deporting Chadha. *Id.* Second, the INS was "an aggrieved party for purposes

of taking an appeal" because an "Act of Congress it administers" was "held unconstitutional." *Id.* at 931. Importantly, the "agency's status as an aggrieved party" was "not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional." *Id.*

The same analysis governs this case. As in *Chadha*, although the Executive Branch may agree with the holding that the challenged statute is unconstitutional, the decision of the court of appeals prohibits the United States from taking action it would otherwise continue to take – here, enforcing DOMA by withholding the taxes collected from Dr. Spyer's estate and denying Ms. Windsor Social Security survivors benefits. And it goes without saying that DOMA, an Act of Congress that the United States administers through many different agencies (including, in Ms. Windsor's case, the IRS and the SSA), was held unconstitutional. The United States is therefore "sufficiently aggrieved" by the lower court's judgment.

3. *Amica* attempts to downplay this aspect of *Chadha* by claiming that the case "spoke only in statutory terms" applicable to the since-repealed 28 U.S.C. § 1252, which concerned this Court's mandatory jurisdiction. *Amica* Br. 26. That argument is unpersuasive. For purposes of deciding which parties are entitled to seek this Court's review, nothing distinguishes former Section 1252 from Section 1254(1). Both expressly confer that right on "any party."

The salient difference between Sections 1252 and 1254(1) does not concern who can seek review, but rather whether this Court's exercise of review is mandatory or permissive. *Amica* claims that the "permissive" nature of Section 1254 "weighs in favor of hewing to prudential limits on the exercise of jurisdiction." *Amica* Br. 37. Even if that were true, it would be irrelevant in a case like this, where the need to resolve the constitutional question is manifest. The logic of the House Report that accompanied the legislation repealing Section 1252 is incompatible with *Amica*'s argument. That Report declared it "unlikely" that the contraction of this Court's mandatory jurisdiction would lead it to "deny review to important constitutional questions that merit its immediate attention." 100 H.R. Rep. No. 100-660, at 10 (1988). The class of litigants that could previously bring an appeal under Section 1252 would still, after repeal, be able to seek review of courts of appeals' decisions by petition for certiorari. The Report further explained that "the removal of direct appeal authority should not create an obstacle to the expeditious review of cases of great importance." *Id.* at 11. No one disputes the great importance of this case.

4. *Amica*'s reliance on *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), is similarly unavailing. *Amica* argues that the United States is not aggrieved because "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Amica* Br. 38 (quoting *Deposit Guar.*, 445 U.S. at 333). But in *Chadha*, this Court rejected an identical invocation of *Deposit Guaranty*. 462 U.S. at 930. There, Congress contended that because the INS had "already

received what it sought from the Court of Appeals" – namely, a holding that a statute permitting the one-house veto was unconstitutional – the agency was "not an aggrieved party." *Id.* In response, this Court flatly declared: "We cannot agree." *Id.*

It did so for good reason. *Deposit Guaranty* addressed the question whether *plaintiffs* who have been awarded the relief they sought nonetheless qualify as aggrieved parties for purposes of appeal. The answer to that question says nothing about whether – as in *Chadha* and here – a *defendant* against whom judgment has been entered may appeal.[7] Counsel are aware of no case in which a government defendant against whom judgment was entered has been denied the right to appeal on the grounds that it believed the adverse judgment was the correct legal result.

In any event, "this Court reviews judgments, not opinions." *Chevron U.S.A. Inc. v. NRDC,* 467 U.S. 837, 842 (1984). And in this case, there is no question that "judgment was entered against the United States." *Amica* Br. 39. First, it was ordered to pay hundreds of thousands of dollars to Ms. Windsor. How this one-way transfer from the U.S. Treasury to Ms. Windsor could mean that *both* parties "prevailed" in any legal sense is a mystery. Furthermore, an Act of Congress that the United

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[7] *Camreta*, by contrast, involved the very different question of whether a defendant, *in whose favor* judgment has been entered, may nonetheless appeal because he retains an interest in seeking review of a legal issue.

States administers with respect to hundreds of different federal programs was "held unconstitutional" – essentially the situation that led this Court in *Chadha* to hold that the Government was "an aggrieved party." 462 U.S. at 931. When a named defendant has a declaratory judgment entered against it, that defendant "has alleged a sufficiently 'personal stake in the outcome of the controversy' to support standing" to seek review of the lower court's judgment. *Horne*, 557 U.S. at 445 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). By any objective standard, then, the United States is an aggrieved party, entitled to seek review of the judgment against it.[8]

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[8] *Amica* claims that *Chadha* does not answer the question whether the United States has "Article III standing to appeal" in this case. *Amica* Br. 28. She then suggests that such standing is lacking because, with respect to the judgment below, "no 'injury' to the United States was 'caused' by that judgment, nor could this Court's overturning of that judgment provide 'redress.'" *Id.* 31.

Amica is wrong. Her discussion confuses the requirements a *plaintiff* must show to invoke the judicial power of the United States in the first place, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), with the quite different standard applicable to a *defendant* against whom the judicial power has been exercised and judgment has been entered. Although the words "injury," "caused," and "redress" appear in quotation marks, the brief provides no supporting authority for the proposition that Article III imposes injury, causation, and redressability requirements on defendants seeking to appeal. The question with respect to standing to appeal is not whether a defendant against whom judgment has been entered can show an "injury" from the lower court's judgment (as a plaintiff must show an "injury traceable to the defendant," *Lewis v. Cont'l*

Amica would have this Court fashion "more common-sense standards for determining who is a prevailing party." *Amica* Br. 40. But common sense confirms the wisdom of the existing bright-line rule: a party prevails when a court "materially alters the legal relationship between the parties" in a manner that "directly benefits" the party in question. *Lefemine v. Wideman*, 133 S. Ct. 9, 11 (2012) (internal quotation marks omitted) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992)). In this case, that definition makes Ms. Windsor, not the United States, the prevailing party. Accordingly, the Executive Branch's agreement with the court below that DOMA is unconstitutional in no way forecloses the United States from obtaining review in this Court.[9]

Bank Corp., 494 U.S. 472, 477 (1990)), but rather, as *Chadha* makes clear, whether the defendant can show that it is "aggrieved" by the judgment, 462 U.S. at 930. As the preceding discussion shows, the United States is an aggrieved party, and in any event that requirement "does not have its source in the jurisdictional limitations of Art. III," *Deposit Guar.*, 445 U.S. at 333-34.

[9] For the reasons outlined above, *see supra* pp. 15-29, *Amica*'s suggestion that "any government appeal from the District Court is barred," *Amica* Br. 33 n.22, is also misplaced. The Article III case or controversy analysis is identical at both stages. Moreover, the relevant jurisdictional statute was satisfied here because that statute gives the courts of appeals "jurisdiction of appeals from *all* final decisions of the district courts." 28 U.S.C. § 1291 (emphasis added). Finally, the United States was aggrieved by the district court's judgment against it for the same reasons it was aggrieved by the Second Circuit's affirmance of that judgment.

C. Prudential And Practical Concerns Strongly Favor This Court Exercising Its Jurisdiction Here.

It is axiomatic that "judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called on to perform.'" *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)). Thus, this Court rarely delays reviewing cases where congressional statutes have been declared unconstitutional. *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537 (2012); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010); *United States v. Stevens*, 130 S. Ct. 1577 (2010). Doing so is necessary to avoid the confusion that inevitably arises from differing lower court decisions.[10]

1. There are particularly strong reasons for this Court to reject *Amica*'s suggestion that it leave the question of DOMA's constitutionality undecided to

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[10] *Amica* points to no instance in which this Court has denied the Solicitor General's request to review a lower court decision striking down a federal statute as unconstitutional. Counsel for Ms. Windsor are aware of just two. *FCC v. Action for Children's Television*, 503 U.S. 914 (1992), was both interlocutory in posture and presented a real likelihood of an equally divided court, given that then-Judge Thomas was on the panel below. *Mukasey v. ACLU*, 555 U.S. 1137 (2009), was a case where this Court had already affirmed the grant of a preliminary injunction barring enforcement of the challenged statute on First Amendment grounds. Those two cases are a far cry from this one.

allow for more "time and reflection in the lower courts." *Amica* Br. 38.

First, "federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court." *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2540 (2011); *see Camreta*, 131 S. Ct. at 2033 n.7. So even a raft of decisions striking down DOMA as applied to particular plaintiffs would leave thousands of similarly situated people unprotected until the relevant courts of appeals have ruled. *See* Br. of *Amici Curiae* Former Senior Justice Department Officials et al. And until then, individuals and couples may be forced to litigate each discrete claim for equal treatment separately.

Ms. Windsor's predicament illustrates this very point. If this case were unwound back to the district court's judgment, it is unclear whether that judgment would bind the Government with respect to Ms. Windsor's ongoing Social Security claim. Collateral estoppel is available against the United States in only limited circumstances. *See United States v. Mendoza*, 464 U.S. 154, 162-64 (1984). Ms. Windsor obtained the existing judgment in her capacity as executor of Dr. Spyer's will, J.A. 173, but in seeking her Social Security survivors benefits, she would be proceeding in her individual capacity. She might therefore be forced to relitigate DOMA's constitutionality because "[a]cts performed by the same person in two different capacities are generally treated as the transactions of two different legal personages." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 n.6 (1986) (internal quotation marks and citation omitted).

Second, leaving DOMA's constitutionality to the courts of appeals poses its own set of problems for married gay couples. It may well take years for "a uniform rule" to emerge. *Amica* Br. 38. And absent this Court's intervention, uniformity may never come. In the meantime, married gay couples will continue to be denied equality under the law and essential government benefits that all other married couples can depend on. *See* Br. of *Amici Curiae* Empire State Pride Agenda et al. (highlighting some of the burdens DOMA imposes on married gay couples). *Amica* provides no persuasive argument why the speculative benefits of further percolation outweigh the quite tangible harms that DOMA inflicts every day.

2. The Executive Branch's decision to enforce but not defend DOMA was expressly designed to ensure that this Court would remain "the final arbiter of the constitutional claims raised" in Ms. Windsor's case. J.A. 192. Any suggestion that the Executive Branch should stop enforcing DOMA now that two courts of appeals and several district courts have held the statute unconstitutional ignores the difficulties that course of action would pose for tens of thousands of people. Indeed, it is a misnomer even to speak of "enforcing" or "declining to enforce" DOMA. Because DOMA cuts across a wide swath of federal law, "non-enforcement" in many instances would actually require government officials to take affirmative steps.

Even within the Executive Branch itself, "non-enforcement" raises a host of difficult issues. For example, the Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S.

Const. art. I, § 9, cl. 7. Similarly, the Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1350, dictates that "[i]f an executive officer on his own initiative had decided that, in fairness, [a claimant] should receive benefits despite [a] statutory bar, the official would risk prosecution." *OPM v. Richmond*, 496 U.S. 414, 430 (1990). It is therefore unclear whether the Executive Branch could decide unilaterally to provide married gay couples with the federal benefits from which DOMA undeniably excludes them or whether "non-enforcement" would nevertheless require those couples to continue litigating to secure their right to equal treatment.[11]

Even if the Executive Branch could unilaterally start cutting checks from the U.S. Treasury, "non-enforcement" would do absolutely nothing to resolve the daily quandaries confronting married gay couples and the government actors outside the Executive Branch with whom they deal. DOMA affects every branch of the federal government, including Congress, the Judiciary, and independent agencies. Consider just a few examples:

- House Rules require a Member to prohibit "lobbying contact" between the Member's "spouse" and the Member's staff. House Rule XXV, cl. 7 (rev. Jan. 3, 2013), *available at* http://tinyurl.com/House-Rules113thCong. If

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[11] Once a federal court has issued an order requiring that benefits be provided, the Government may, through the Judgment Fund, *see* 28 U.S.C. § 2414; 31 U.S.C. § 1304(a), issue payments that the Appropriations Clause or the Anti-Deficiency Act might otherwise have prohibited.

DOMA controls, could a married Representative direct his staff to meet with his male spouse to discuss pending legislation if his spouse is a lobbyist?

- The rules for admission to the Supreme Court Bar provide that an applicant-attorney must have two sponsors who are "not related to [the applicant] by blood or marriage." Supreme Court of the United States, *Instructions for Admission to the Bar*, *available at* http://tinyurl.com/afb24er (last visited Feb. 18, 2013). Could an attorney sponsor her female spouse for admission to this Court's Bar?
- The Federal Election Commission, an independent agency, has promulgated a regulation permitting the use of campaign funds to pay for the "costs of travel by the recipient Federal officeholder and an accompanying spouse." 11 C.F.R. § 113.2(a)(1). Could a married Senator be prohibited from using campaign funds to bring her female spouse with her on a trip?

In the absence of a definitive determination from this Court, married gay couples, government officials, and other actors whose behavior is affected by DOMA cannot rely on the Attorney General's views about the statute to resolve any of these questions. *See* Br. of *Amici Curiae* New York et al. In short, prudential considerations cut decisively in favor of this Court resolving the constitutionality of DOMA, and resolving it now.

III. Because Ms. Windsor Has A Cause Of Action Only Against The United States, Whether BLAG Has Independent Article III Standing Does Not Affect This Court's Jurisdiction.

1. Given the nature of Ms. Windsor's cause of action, the United States is an indispensable party defendant in this case. With respect to Ms. Windsor's cause of action for a tax refund, federal law requires the claimant to file suit against the United States – and permits her to sue no one else, including BLAG. *See* 26 U.S.C. § 7422(f)(1). And in general, "the proper defendant in a suit for prospective relief is the party prepared to enforce the relevant legal rule against the plaintiff." *Camreta v. Greene*, 131 S. Ct. 2020, 2043 (2011) (Kennedy, J., dissenting). Thus, with respect to her claim for the $363,053 refund, Ms. Windsor was required to sue the United States, not BLAG.

Moreover, Ms. Windsor has never had any legally cognizable cause of action against BLAG for prospective or injunctive relief. Here, too, because her injuries are caused by the action of Executive Branch officials (in the IRS or SSA), Ms. Windsor is required to sue the United States or the relevant officials, and not the five members of the House leadership who constitute BLAG. In short, because BLAG did not cause Ms. Windsor's injury and could not provide her with redress, Ms. Windsor could not have sued it, even assuming that BLAG is a legal entity subject to suit. *Cf. Barnes v. Kline*, 759 F.2d 21, 67 (D.C. Cir. 1984) (Bork, J., dissenting) (explaining that in *Chadha*, Congress functioned more like an *amicus curiae* than a party, as "[n]o judgment could be entered against Congress"), *vacated on other grounds sub nom. Burke v. Barnes*, 479 U.S. 361 (1987).

2. Nor, of course, could BLAG have sued Ms. Windsor. Counsel are aware of no lawsuit in which a group of elected officials has been permitted to pursue a declaratory judgment action against a private individual in order to obtain a ruling on the constitutionality of a statute it supports. *See* Brief For *Amici Curiae* Former Senior Justice Department Officials et al.; *cf. Camreta*, 131 S. Ct. at 2043 (Kennedy, J., dissenting) (suggesting that the party there was "in effect fil[ing] a new declaratory judgment action in this Court").

In light of this reality, BLAG can at most be an intervenor in an ongoing lawsuit between Ms. Windsor and some other party – in this case, the United States. As such, BLAG's independent Article III standing is irrelevant to this Court's ability to adjudicate this case.

3. The United States' continuing presence as a party means that BLAG can assert "piggyback" standing without regard to Article III. *Diamond v. Charles*, 476 U.S. 54, 64 (1986). In *Diamond*, the State of Illinois did not appeal a decision striking down its abortion law, but a doctor who had intervened in the lower court proceedings did. *Id.* at 61. This Court rejected the doctor's claim that he had independent Article III standing. *Id.* at 56. But it nonetheless confirmed that, had Illinois sought review, "this Court's Rule 10.4 makes clear that Diamond, as an intervening defendant below," also would have been "entitled to seek review, enabling him to file a brief on the merits, and to seek leave to

argue orally." *Id.* at 64. The Court further explained that "this ability to ride 'piggyback' on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for Diamond to join." *Id.* The same principles apply here. Because the United States sought certiorari, BLAG can participate fully in the proceedings before this Court, regardless of whether it has independent Article III standing.

4. Whether BLAG would have had independent Article III standing if the United States had not petitioned for certiorari is a counterfactual question that this Court need not answer. Indeed, because of controlling Second Circuit precedent, neither court below found it necessary to resolve the nature of BLAG's standing.[12] This Court should reserve the question for another day, when answering it would actually affect this Court's ability to reach the merits.

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[12] Along with the Fifth, Sixth, Tenth, and Eleventh Circuits, the Second Circuit has held that intervening parties need not establish independent standing so long as there is an Article III case or controversy between the original plaintiff and the original defendant. *See U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978); *Ruiz v. Estelle*, 161 F.3d 814, 832 (5th Cir. 1998); *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991); *San Juan Cnty., Utah v. United States*, 503 F.3d 1163, 1172 (10th Cir. 2007); *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1337 (11th Cir. 2007). This position conflicts with the view of the District of Columbia and Seventh Circuits. *See Jones v. Prince George's Cnty., Md.*, 348 F.3d 1014, 1017 (D.C. Cir. 2003); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996).

CONCLUSION

For the foregoing reasons, this Court should hold that it has jurisdiction to decide whether DOMA violates the Fifth Amendment.

Respectfully submitted,

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February 22, 2013

APPENDIX A

SOCIAL SECURITY ADMINISTRATION NOTICE OF RECONSIDERATION

[Caption Omitted in Printing]

EDITH SCHLAIN WINDSOR

[address redacted]

You asked us to take another look at your claim for Social Security widow's benefits. Someone who did not make the first decision reviewed your case, including any new facts you gave us. After this review, we found that our first decision was correct.

You are not entitled to benefits because you do not meet the marriage requirements to be entitled to widow's benefits.

On the enclosed form, we discuss the reasons for our decision in more detail.

Do You Disagree With The Decision?

If you disagree with the decision, you have the right to request a hearing. At the hearing, a person who has not seen your case before will look at it. That person is an Administrative Law Judge. The judge will review your case again and consider any new facts you have.

- You have 60 days to ask for a hearing.
- The 60 days start the day you receive this letter. We assume you got this letter 5 days after the date on it, unless you show us that you did not get it within the 5-day period.

- You must have a good reason if you wait more than 60 days to ask for a hearing.
- You have to ask for a hearing in writing. We will ask you to fill out a Form HA-501, called "Request for Hearing." If you want to make a request, please contact one of our offices. We can help you fill out the form.

Please read the enclosed pamphlet, "Your Right to an Administrative Law Judge Hearing and Appeals Council Review of Your Social Security Case." It contains more information about the hearing.

There is a different way to appeal if you think the Social Security law is not constitutional. It is called expedited appeal. If you choose expedited appeal, after an agreement is signed by you and by our representative, you can go directly to court for a decision about whether the law is constitutional. The Social Security Administration cannot make that decision. Only the court can decide if the law is constitutional. Social Security will not make any other appeal decision about your claim for benefits if you choose an expedited appeal.

If you want to use this appeal or have any questions, you should contact any Social Security office within 60 days to file a written request.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as appealing this decision. If you disagree with this decision and you file a new application instead of appealing:

- you might lose some benefits, or not qualify for any benefits, and
- we could deny the new application using this decision, if the facts and issues are the same.

So, if you disagree with this decision, you should file an appeal within 60 days.

If You Have Any Questions

We invite you to visit our website at www.socialsecurity.gov on the Internet to find general information about Social Security. If you have any specific questions, you may call us toll-free at 1-800-772-1213, or call your local Social Security office at 1-866-335-1089. We can answer most questions over the phone. If you are deaf or hard of hearing, you may call our TTY number, 1-800-325-0778. You can also write or visit any Social Security office. The office that serves your area is located at:

SOCIAL SECURITY
ROOM 120 31ST FLOOR
26 FEDERAL PLAZA
NEW YORK, NY 10278

If you do call or visit an office, please have this letter with you. It will help us answer your questions. Also, if you plan to visit an office, you may call ahead to make an appointment. This will help us serve you more quickly when you arrive at the office.

Social Security Administration

RECONSIDERATION DETERMINATION

(Form SSA-662)

PROGRAM SERVICE CENTER Processing Center Operations Northeastern Program Service Center	DISTRICT OFFICE OR BRANCH OFFICE Downtown NY, NY
NAME OF WAGE EARNER OR SELF-EMPLOYED PERSON Thea C Spyer	SOCIAL SECURITY CLAIM NO. [redacted]
NAME OF CLAIMANT Edith Schlain Windsor	TYPE OF CLAIM Widow's Insurance Benefits

DETERMINATION:

On November 15, 2011 [sic], you applied for widow's insurance benefits and the lump sum death payment, on the record of Thea C Spyer, who died February 5, 2009. On or about April 22, 2011 you were told that your claim had been disallowed because you do not meet the marriage requirements for widow's benefits, or the lump sum death payment. On June 15, 2011, you asked for reconsideration stating that the Defense of Marriage Act and Social Security law violate the United States Constitution.

The issue to be decided is whether or not you are entitled to widow's insurance benefits, and the lump sum death payment on the record of Thea C Spyer. This depends on whether you meet the requirements for entitlement under the Social Security Act and the regulations of the Social Security Administration.

Section 202(e)(1) of the Act permits entitlement of a widow (as defined in Section 216(c) whose spouse died fully insured if she:

(1) is unmarried, and

(2) has attained

  (a) age 60, or

  (b) age 50 and is disabled, and

(3) (a) filed a widow's benefit application, or

  (b) meets one of the exceptions to filing, and

(4) is not entitled to a benefit amount on her own record which equals or exceeds the insured's primary insurance amount.

Section 216(c) indicates that a woman qualifies as a widow only if the marriage lasted at least nine months before the insured died.

Section 202(i) of the Social Security Act, as amended in 1981, provides that upon the death of a fully or currently insured individual who dies on or after September 1, 1981, $255.00 shall be paid in a lump-sum to the person, if any, determined by the Secretary to be the widow or widower of the deceased and to have been living in the same household as the deceased at the time of death.

If there is no such person, or if such person dies before receiving payment, then such amount is to be paid in the following order of priority:

(1) To the widow or widower, other than a divorced spouse, who is entitled to benefits (or would have been so entitled had a timely application been filed) as a widow, widower, mother or father, based on the earnings record of the deceased individual for the month of death.

(2) In equal shares, to each child who is entitled to benefits (or would have been so entitled had a timely application been filed) based on the earnings record of the deceased individual for the month of death.

The Social Security Act provides that an individual is the insured's widow or widower if she or he:

- is considered validly married to the insured under State law, or
- is not validly married but has the same status as a spouse to share in the insured's intestate personal property, or
- meets the requirements of the Federal deemed marriage provision.

Individuals who are free to marry each other may enter into a valid marriage under the law of all States.

Public Law 104-199, Section 2, amends Chapter 115 of title 28, United States Code by adding Sec. 1738C after Sec. 1738B:

No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.' .

Public Law 104-199, Section 3, amended Chapter 1 of title 1, United States Code by adding the following definition of 'marriage' and 'spouse':

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word marriage' means only a legal union between one man and one woman as husband and wife, and the word spouse' refers only to a person of the opposite sex who is a husband or a wife.' .

Section 216(a)(1) of the Act states: The term "spouse" means a wife as defined in subsection (b) or a husband as defined in subsection (f).

Section 216(a)(2) of the Act states: The term "surviving spouse" means a widow as defined in subsection (c) or a widower as defined in subsection (g).

Section 202(e) of the Social Security Act provides for the payment of monthly benefits to an otherwise qualified woman who meets the legal status requirement as widow under Section 216(h)(1) of the Act.

Section 216(h)(1)(A) of the Social Security Act provides that a claimant is the spouse of a worker for purposes of Social Security benefits if, under the law of the state of the worker's domicile at the time of death, the claimant would be considered the worker's spouse or would have the same status as spouse for purposes of inheriting personal property in the event the worker left no will.

When you applied for widow's benefits, and the lump sum death payment, on the record of Thea C Spyer, you presented your marriage certificate issued October 28, 2010, which indicated you married Thea C Spyer on May 22, 2007 in Toronto Canada. You also submitted a death certificate for Thea C Spyer, which verified her date of death as February 05, 2009 and listed you as the surviving spouse of the deceased.

You do not qualify for benefits as the surviving spouse of Thea C Spyer, or the lump sum death payment, because you do not meet the definition of a widow as defined in the Social Security Act. A widow by definition is the surviving spouse of a deceased wage earner; a spouse by definition is someone of the opposite sex who is a husband or a wife. Although your marriage to Thea C Spyer is considered valid in Canada and in the state of her domicile at the time of death, Federal Regulations define the term marriage as: a legal union between one man and one woman as husband and wife. In your request, you state that you should be awarded benefits because the Defense of Marriage Act, and Social Security law violates the United States Constitution. We are not permitted to make judgment regarding the constitutionality of the law at this level of your request, and we must follow the law as written.

Accordingly, upon reconsideration, the initial determination is affirmed. The initial determination is correct and proper and in accordance with the pertinent provisions of the law and regulations.

Authority: Section (s) 202(e), 202(i), and 216 of the Social Security Act. Public Law 104-199 Section (s) 2 and 3.

Social Security Administration

April 28, 2012

Enclosure(s):

Form SSA-662

SSA Pub No 70-10281

APPENDIX B

WRITTEN REQUEST FOR EXPEDITED APPEAL

Claimant: Edith S. Windsor
Claimant's SSN: [redacted]
Wage Earner: Thea C. Spyer
Wage Earner's SSN: [redacted]

Pursuant to 20 C.F.R. §§ 405.701–405.725 (attached as Tab 4), Edith S. Windsor hereby requests expedited appeal of her claim for survivors benefits (including widow's insurance benefits and the lump-sum death benefit). On April 28, 2012, the Social Security Administration (the "SSA") rejected Ms. Windsor's request for reconsideration. A copy of this rejection letter is attached as Tab 3.

Ms. Windsor does not dispute the findings of fact or the interpretation of the controlling law by the SSA. However, Ms. Windsor believes, consistent with her prior correspondence with the SSA (attached as Tab 2), that Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"), and (insofar as it precludes a surviving spouse of a same-sex married couple from qualifying as a surviving spouse or widow) Social Security law violate the United States Constitution. Indeed, since Ms. Windsor filed her request for survivors benefits, every federal circuit, district, or bankruptcy court to have considered this issue in the non-immigration context has agreed that DOMA is unconstitutional for the very reasons asserted by Ms. Windsor. *See Massachusetts* v. *Dep't of Health and*

Human Servs., *Gill* v. *Office of Pers. Mgmt.*, Nos. 10-2204, 10-2207, 10-2214 (1st Cir. May 31, 2012); *Dragovich* v. *Dep't of Treasury*, No. C 10-1564 (CW), 2012 WL 1909603 (N.D. Cal. May 24, 2012); *Golinski* v. *Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012); *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011). Because DOMA is the only reason that Ms. Windsor was denied these SSA benefits to which she is otherwise entitled, she respectfully submits that her request for an expedited appeal should be granted.

Please copy Colin S. Kelly, Ms. Windsor's attorney, on all correspondence with Ms. Windsor. A copy of Form SSA-1696-U4 (Appointment of Representative) is attached in Tab 2.

* * *

I declare under penalty of perjury that I have examined all the information in this written request, and on any accompanying statements or forms, and it is true and correct to the best of my knowledge.

Date: June 05, 2012 *Edith S. Windsor*
Edith S. Windsor (Claimant)
[redacted]

Colin S. Kelly
Colin S. Kelly (Attorney)
Paul, Weiss, Rifkind, Wharton & Garrison, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Tel. No.: (212) 373-3961
Fax No.: (212) 492-0961

APPENDIX C

Form Approved
OMB No. 0960-0045

SOCIAL SECURITY ADMINISTRATION STATEMENT OF CLAIMANT OR OTHER PERSON

Name of Wage Earner, Self-Employed Person, or SSI Claimant Thea Spyer	Social Security Number [redacted]
Name of Person Mating Statement (if other than above wage earner, self-employed person, or SSI claimant) Edith Windsor	Relationship to Wage Earner, Self-Employed Person, or SSI Claimant SurSpo

Understanding that this statement is for the use of the Social Security Administration, I hereby certify that –
1. EAP Requirements
For the EAP to apply, all of the following requirements must be met:
A formal decision at the reconsideration level or higher has been made.
The EAP request is in writing.
The written request was filed timely, that is:
Within 60 days from date of receipt of the notice of determination or decision, unless good cause for late filing is found (GN 03101.020), or

After filing a timely request for a hearing or Appeals Council (AC) review but prior to a decision having been issued.
The claimant is willing to enter into a written agreement with SSA in which he/she concedes that:
SSA's determination or decision was correct based on the law and the facts in the case; and
The law, or a specific section of the law applicable in his/her case, is unconstitutional, and
The adverse determination or decision is due solely to the unconstitutionality of the law which SSA followed, or
The constitutional issue is the sole issue precluding the individual from receiving benefits or receiving a favorable determination in a nonclaim earnings discrepancy case.

1. Claimant's Written Statement

If, after explaining the requirements, the claimant decides to proceed with EAP, then the FO will:
Obtain a signed statement indicating that he/she:
Received an explanation of EAP.
Agrees that the requirements in GN 03107.100D.1. are met; and
Wishes to enter into an EAP agreement.

* * *

Paperwork Reduction Act Statement – This information collection meets the requirements of 44 U.S.C §3507, as amended by Section 2 of the Paperwork Reduction Act of 1995. You do not need to answer these questions unless we display a valid Office of Management and Budget control number. We estimate that it will take about 15 minutes to read the instructions, gather the facts, and answer the questions. **SEND THE COMPLETED FORM TO YOUR LOCAL SOCIAL SECURITY OFFICE. The office is listed under U. S. Government agencies in your telephone directory or you may call Social Security at 1-800-772-1213.** *You may send comments on our time estimate above to: SSA, 1338 Annex Building, Baltimore, MD 21235-0001.* ***Send only comments relating to our time estimate to this address, not***

I declare under penalty of perjury that I have examined all the information on this form, and on any accompanying statements or forms, and it is true and correct to the best of my knowledge. I understand that anyone who knowingly gives a false or misleading statement about a material fact in this information, or causes someone else to do so, commits a crime and may be sent to prison, or may face other penalties, or both.

SIGNATURE OF PERSON MAKING STATEMENT

Signature *(First name, middle initial, last name) (Write in ink)* Sign Here> *Edith S. Windsor*	Date *(Month, day, year)* August 9, 2012 Telephone Number *(include Area Code)* [redacted]
Mailing Address *(Number and street, Apt. No., P.O. Box, Rural Route)* [redacted]	
City and State New York, NY	ZIP Code [redacted]

Witnesses are required ONLY if this statement has been signed by mark (X) above. If signed by mark (X), two witnesses to the signing who know the individual must sign below, giving their full addresses.

1. **Signature of Witness**	2. **Signature of Witness**
Address ***(Number and street, City, State and ZIP Code)***	**Address** ***(Number and street, City, State and ZIP Code)***

NEW YORK, N.Y.
Jul 18 2012
21100
SSA FIELD OFFICE

REPLY
BRIEF

No. 12-307

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES ON THE JURISDICTIONAL QUESTIONS

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TABLE OF CONTENTS

Page

A. The United States' petition gives this Court jurisdiction to decide this case 2

  1. Plaintiff's suit presents a case or controversy between plaintiff and the United States 2
  2. The case or controversy between plaintiff and the United States continues to exist 3

B. BLAG lacks standing to appeal 7

  1. BLAG does not represent the House 8
  2. The House would have no standing in this case 9

TABLE OF AUTHORITIES

Cases:

Alfred L. Snapp & Son, Inc. v. *Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) 11

Arizonans for Official English v. *Arizona*, 520 U.S. 43 (1997) 13

Bowsher v. *Synar*, 478 U.S. 714 (1986) 10, 11

Buckley v. *Valeo*, 424 U.S. 1 (1976) 12, 15

Camreta v. *Greene*, 131 S. Ct. 2020 (2011) 5, 10

Chafin v. *Chafin*, 133 S. Ct. 1017 (2013) 7

Coleman v. *Miller*, 307 U.S. 433 (1939) 14

Deposit Guaranty Nat'l Bank v. *Roper*, 445 U.S. 326 (1980) 7

INS v. *Chadha*, 462 U.S. 919 (1983) 2, 3, 5, 6, 11

Karcher v. *May*, 484 U.S. 72 (1987) 13

Lord v. *Veazie*, 49 U.S. (8 How.) 251 (1850) 6

Medellin v. *Texas*, 552 U.S. 491 (2008) 12

Raines v. *Byrd*, 521 U.S. 811 (1997) 10, 14

Reed v. *County Comm'rs*, 277 U.S. 376 (1928) 9

Reisenberg, In re, 208 U.S. 90 (1908) 6

United States v. *Ballin*, 144 U.S. 1 (1892) 8

Cases—Continued: Page

United States v. *Johnson*, 319 U.S. 302 (1943) 6

United States v. *Lovett*, 328 U.S. 303 (1946) 3, 5

United States v. *Smith*, 286 U.S. 6 (1932) 9

Constitution and statute:

U.S. Const. Art. II, § 3 12

26 U.S.C. 7422(f)(1) 2

28 U.S.C. 2414 7

Miscellaneous:

18 James W. Moore et al., *Moore's Federal Practice* (3d ed. 2011) 10

In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES ON THE JURISDICTIONAL QUESTIONS

Neither the amica nor BLAG disputes that the district court's judgment runs against the United States, invalidates the application of a federal statute that the United States would otherwise enforce, and requires the United States to refund tax revenue from the Treasury. The amica and BLAG nevertheless assert that the United States is powerless to seek further review of that judgment. In the amica's view, the judgment is completely unreviewable. In BLAG's view, the party bound by the judgment—the United States—cannot itself seek further review, but a congressional subgroup mentioned nowhere in the Constitution or the United States Code, acting at the direction of three Members of the House of Representatives, can. Adopting either of those jurisdictional theories would run counter to this Court's precedents and make little jurisprudential or practical sense.

A. The United States' Petition Gives This Court Jurisdiction To Decide This Case

As the United States' opening jurisdictional brief explains (Br. 10-27), the Executive Branch's agreement with plaintiff that Section 3 of DOMA is unconstitutional does not preclude either the district court, the court of appeals, or this Court from reaching the merits in this case. BLAG's arguments to the contrary are unavailing.

1. Plaintiff's suit presents a case or controversy between plaintiff and the United States

BLAG, like the amica, does not seriously dispute the existence of an Article III case or controversy in the district court. That case or controversy, which concerned plaintiff's tax liability, was between plaintiff and the United States, not plaintiff and BLAG (or the United States and BLAG). See U.S. Jur. Br. 10-12. Because the President had instructed federal agencies to continue enforcing Section 3, see J.A. 192, litigation was the only way for plaintiff to obtain a tax refund. She could obtain a refund only from the United States, see 26 U.S.C. 7422(f)(1), not from BLAG. Contrary to BLAG's suggestion (Br. 12 n.3), the Executive Branch's view that Section 3 is unconstitutional did not bar plaintiff from affirmatively seeking such relief. See *INS* v. *Chadha*, 462 U.S. 919, 939 (1983) (rejecting proposition that "a person could be denied access to the courts because the Attorney General of the United States agreed with [his] legal arguments").

BLAG suggests (Br. 37) that its presence as a full party in the district court was necessary to avoid "all manner of jurisdictional conundrums" that would otherwise arise from the United States' agreement with plaintiff that Section 3 is unconstitutional. But this Court has made clear that such agreement raises, at most, "prudential, as opposed to Art[icle] III, concerns" and that any such concerns are "dispelled" by amicus participation supporting the law's constitutionality, with no need for party participation. See *Chadha*, 462 U.S. at 940 (1983); see also *United States* v. *Lovett*, 328 U.S. 303 (1946); see U.S. Jur. Br. 36-37. In any event, even if BLAG were correct that effective presentation of its views in this case required procedures beyond those ordinarily available to an amicus, the underlying controversy in this case—a tax-refund dispute between plaintiff and the United States that does not involve BLAG—would remain unchanged.

2. *The case or controversy between plaintiff and the United States continues to exist*

BLAG's challenge to the United States' ability to seek further review in this case relies on two arguments also advanced by the amica: (1) that the United States lacks "prudential standing," on the theory that it is not aggrieved by an order declaring a federal statute unconstitutional and requiring the payment of more than $360,000 from the federal Treasury (BLAG Jur. Br. 35-37); and (2) that the adverseness between plaintiff and the United States, which existed in the district court, disappeared once the district court entered judgment (*id.* at 32-35). Those arguments—for which BLAG largely relies on the same inapposite authorities as the amica—lack merit. See U.S. Jur. Br. 12-27.

a. On prudential standing, BLAG's basic contention is that "the executive cannot ground its appellate standing on the desire for an opinion with the identical effect on this case and controversy, but a broader precedential scope for other cases." Br. 36-37 (emphasis omitted). That contention rests on two fundamental misconceptions. First, BLAG incorrectly views the Department of Justice as representing only "the executive." As the United States' opening jurisdictional brief explains (Br. 13-14), the Constitution and the relevant statutes make clear that the Department of Justice represents the United States as a whole. The jurisdictional inquiry therefore turns on the full interests of the sovereign, not some limited conception of what the Executive Branch's interests might be were it not the sovereign's representative. Indeed, BLAG describes this case as one in which "the executive branch was the named defendant," Br. 15, when the named defendant in fact is the United States.

Second, BLAG incorrectly views the United States' requests for further review merely as attempts to obtain a broader precedential scope for the lower courts' judgments. But the lower courts do not have the last word about what the Constitution requires in *this* case. The United States has been aggrieved and injured by the lower courts' decisions, see U.S. Jur. Br. 14-20; the United States would continue to enforce Section 3 against plaintiff unless barred by a final judicial decision from doing so, see *id.* at 21-22; and the United States has sought further review to determine whether the injuries that the lower courts' decisions inflict on its law-enforcement and financial interests in this case are, in fact, constitutionally compelled, see J.A. 192 (explaining that the President has instructed the Executive Branch to enforce Section 3 as written "unless and until * * * the judicial branch renders *a definitive verdict* against the law's constitutionality") (emphasis added).

An appellate decision in this case, like any appellate decision, will have precedential force in future cases. But that does not mean that the United States lacks a case-specific interest in seeking further review of the lower courts' adverse judgments. Nor does that interest disappear simply because the government's appellate briefs in this case, like its briefs in *Chadha* and *Lovett*, have taken the position that the correct constitutional result would be to affirm. See INS Br. at 77, *Chadha*, *supra* (Nos. 80-1832, 80-2170, 80-2171) (requesting affirmance); Pet. Br. at 72, *Lovett*, *supra* (No. 45-809) (same). The United States recognizes that a reviewing court may disagree with that position; it has made clear that it will enforce Section 3 if the Judicial Branch's final decision in this case is to uphold it, see J.A. 192; and it has a right to seek further review before being required permanently to comply with a judicial decision that injures the United States' sovereign interests, see *Chadha*, 462 U.S. at 931 ("The agency's status as an aggrieved party under § 1252 is not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional.").

b. On adverseness, BLAG—like the amica—appears erroneously to believe that Article III requires the parties to disagree on the legal issue before the court. As the United States' opening jurisdictional brief explains (Br. 20-27), however, adverseness turns not on disagreement about a point of law, but instead on whether the parties each have "an ongoing interest in the dispute." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028 (2011). That requirement is satisfied here, because appellate resolution of the case will determine whether the United States can enforce Section 3 against plaintiff or whether plaintiff will get a refund of her tax. See *Chadha*, 462

U.S. at 939-940 ("We agree with the Court of Appeals that 'Chadha has asserted a concrete controversy, and our decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold § 244(c)(2), the INS will execute its order and deport him.'") (citation omitted); cf. *In re Reisenberg*, 208 U.S. 90, 107 (1908) (finding "controversy" under diversity-jurisdiction statute where "defendant admitted [its] indebtedness" but "demand of payment * * * had been made and refused").

Unlike cases relied upon by BLAG, moreover, this is not a circumstance in which the parties have manufactured a collusive suit. See *Lord* v. *Veazie*, 49 U.S. (8 How.) 251, 255 (1850) (finding no controversy where parties entered into contract and manufactured suit to defeat rights of absent third parties); *United States* v. *Johnson*, 319 U.S. 302, 304 (1943) (per curiam) (finding no controversy where one party "dominated the conduct of the suit by payment of the fees of both"). It is, instead, a circumstance in which the United States has enforced—and continues to enforce—a federal statute. The President's belief that the courts should find the statute unconstitutional, and his expression of that belief in litigation, does not deprive the Judiciary of authority to reach the merits of the parties' ongoing dispute over the statute's continued enforcement. See *Chadha*, 462 U.S. at 939 ("[T]he INS's agreement with Chadha's position does not alter the fact that the INS would have deported Chadha absent the Court of Appeals' judgment."). This case therefore is distinct from a situation in which the parties to a dispute agree to settle it. See BLAG Jur. Br. 12; see also U.S. Jur. Br. 21.

BLAG, like the amica, has no explanation for why the adverseness that was concededly present in the district court somehow vanished on appeal. A "decision that is 'final' for purposes of appeal does not absolutely resolve a case or controversy until the time for appeal has run." *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980); see 28 U.S.C. 2414 (money judgment against United States not final if further review is sought). Thus, contrary to BLAG's assertion (Br. 34), appellate review of the district court's decision would in no way constitute an "advisory opinion." Because an appellate decision would conclusively determine whether the United States can—and will continue to—enforce Section 3 against plaintiff, and whether plaintiff should get a tax refund, such a decision would neither "decide questions that cannot affect the rights of litigants in the case" nor "advis[e] what the law would be upon a hypothetical state of facts," *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1023 (2013) (citation omitted). The parties "continue to have a personal stake," *ibid.* (quotation marks and citation omitted), in the outcome of the appellate proceedings, and this Court has jurisdiction to decide the merits of the case.

B. BLAG Lacks Standing To Appeal

Because the Court can resolve this case based on the United States' already-granted petition, it need not address BLAG's argument (Br. 11-32) that it independently had standing to appeal the district court's decision and to seek certiorari in this Court. In any event, BLAG fails to establish that it had such standing. BLAG does not (and could not, see U.S. Jur. Br. 27-29) contend that it represents the interests of the United States, the only party against which plaintiff could obtain relief and the only party injured by the lower courts' judgments. BLAG also does not (and could not, see *id.* at 29-31) contend that it has standing as an independent legislative body or as an organization with individual legislators as members. Instead, BLAG contends that (1) it should be deemed to have been representing the entire House of Representatives (but not Congress as a whole), and (2) the House has standing to seek further review of the judgments below. Neither contention is correct.

1. BLAG does not represent the House

As the government's opening jurisdictional brief explains (Br. 29), the full House did not authorize BLAG to represent it in this case until *after* BLAG had filed its notice of appeal and petition for a writ of certiorari. BLAG fails to show otherwise.

BLAG's assertion that it has, for the past 30 years, been litigating "on behalf of the House without any authorizing votes by the full House" (Br. 25) is question-begging. It presumes that that BLAG can, in fact, represent the full House without an "authorizing vote." That premise is incorrect. See *United States* v. *Ballin*, 144 U.S. 1, 7-8 (1892) (concluding that action by the House requires a quorum and a majority vote). BLAG's observation (Br. 26-27) that the House has not *forbidden* BLAG from representing the House in this case is therefore irrelevant.

BLAG suggests that an after-the-fact resolution stating that BLAG "'continues'" to represent the House in litigation matters, including this case, "confirms" that BLAG has always had authority to represent the House in this litigation. Br. 26 (citation omitted). But a resolution by the House as constituted in the 113th Congress cannot retroactively authorize BLAG to represent the previous House (of the 112th Congress) for purposes of an appeal BLAG filed six months before the relevant resolution was passed. See J.A. 522; U.S. Jur. Br. 29.

And BLAG offers no textual explanation for how its sole authority under the previous House's rules—to "consult" with the Speaker about directing the General Counsel, Rule II.8, Rules of the House of Representatives, 112th Cong. (2011)—could plausibly be understood as implicitly including the power to intervene in litigation, in its own name, on behalf of the full House.

BLAG nevertheless asserts (Br. 28-29) that this Court has no choice but to read the most recent House's resolution as a binding interpretation of the prior House's resolution, no matter how implausible such an interpretation might be. But this Court has not automatically deferred to the Legislature's interpretation of rules about an entity's litigating authority. See *Reed* v. *County Comm'rs*, 277 U.S. 376, 388-389 (1928) (concluding that Senate rules did not authorize Senate committee to file suit). And it has recognized that a legislative interpretation "arrived at subsequent to the events in controversy" warrants less deference. *United States* v. *Smith*, 286 U.S. 6, 33 (1932).

A holding that BLAG can represent the House, even in the absence of a formal vote by the House itself, would permit the House to escape political accountability. It would allow BLAG to place the weight of the full 112th House behind its notice of appeal and petition for a writ of certiorari, even though the 98.9% of that House's Members who do not belong to BLAG would have cast no vote about that intervention. If the House had litigating interests to assert in this case, it could have directly voted on the matter ahead of time, and it could have intervened in its own name, not BLAG's.

2. The House would have no standing in this case

In any event, as the United States' opening jurisdictional brief explains (Br. 31-37), even the House itself would not have standing to seek further review of the judgments below.

a. As a threshold matter, even on BLAG's own theory, BLAG lacked standing to appeal from the district court. Neither of the interests BLAG purports to assert on behalf of the House—(1) "ensuring that * * * passage of DOMA is not completely nullified by a binding judicial determination" (Br. 9), and (2) avoiding the imposition of "a heightened standard of review" for hypothetical future "legislation that classifies on the basis of sexual orientation" (Br. 13)—was affected by the district court's decision. "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta*, 131 S. Ct. at 2033 n.7 (quoting 18 James W. Moore et al., *Moore's Federal Practice* § 134.02[1][d], at 134-26 (3d ed. 2011)). The district court's non-precedential, case-specific decision here thus could neither have "completely nullified" Section 3 nor have imposed a heightened standard of review applicable to future laws. All it could have done (and all it did) was to preclude the "execution of the Act" in the particular circumstances of plaintiff's tax-refund request, which affects an "executive function," not a legislative one. *Bowsher* v. *Synar*, 478 U.S. 714, 733-734 (1986). Even if the court of appeals' (geographically limited) decision could be seen as having the sort of effect BLAG asserts, BLAG's jurisdictional theory fails to explain how it could have appealed the case to the court of appeals in the first place.

b. In any event, the interests proffered by BLAG are not interests that the Constitution permits the House to assert in litigation. See, *e.g.*, *Raines* v. *Byrd*, 521 U.S. 811, 826 (1997) (rejecting claim of standing based on "abstract dilution of institutional legislative power"). The "power to create and enforce a legal code" is an interest of the "sovereign." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 601 (1982). The sovereign in the federal system is the United States, not the House. Although the House plays a necessary role in passing legislation, it cannot enact laws without the involvement of the Senate and the President, see *Chadha*, 462 U.S. at 946-951 (discussing bicameralism and presentment requirements), and its relationship to the bill ends once the bill has passed Congress and been signed by the President. The House has no role at all in enforcing laws. See *Bowsher*, 478 U.S. at 733 ("[O]nce Congress makes its choice in enacting legislation, its participation ends."). Nor does the House have a judicially cognizable stake in the law's validity and enforcement any greater than the citizens its Members represent, who have only a generalized interest in the law. See U.S. Jur. Br. 30-31.

BLAG's theory of independent legislative litigating authority would impermissibly aggrandize the Legislative Branch, at the expense of the Executive Branch, in two distinct ways. First, the interests BLAG asserts are, at bottom, enforcement interests that properly belong to the Executive. BLAG acknowledges (Br. 15 n.4) that court decisions "do not *formally* constrain the House and Senate from proposing new legislation," but asserts that the "practical effect" (Br. 15) of such decisions nevertheless injures the legislature. But the only "practical effect" of the district court's decision here is to preclude *enforcement* of Section 3 to deny plaintiff a tax refund, and the only "practical effect" of the court of appeals' decision, even as a precedential matter, is to preclude *enforcement* of Section 3 against same-sex couples within the Second Circuit. Those enforcement-related interests are not the House's to claim. See, *e.g.*, *Medellin* v. *Texas*, 552 U.S. 491, 526 (2008) (reciting the "fundamental constitutional principle that 'the power to *make* the necessary laws is in Congress; the power to *execute* in the President'") (emphasis added; citation omitted). This case does not involve a challenge to the role of the House (or Senate) in *enacting* legislation; it instead challenges the *enforcement* of an enacted law.

Second, allowing independent litigation by the Legislative Branch in this case would encroach upon the Executive Branch's role of representing the United States as sovereign in court. "[I]t is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed,'" including the "discretionary power to seek judicial relief." *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam) (quoting U.S. Const. Art. II, § 3). Even assuming that the lower courts' decisions could be seen to interfere with legislative interests, those interests are so inextricably intertwined with enforcement that they cannot reasonably be separated out. See, *e.g.*, BLAG Jur. Br. 12 (characterizing House's interest as assuring that "DOMA would remain on the books and *could be enforced*") (emphasis added). BLAG asks this Court to endorse a novel theory under which the House or Senate could in many cases override strategic litigating decisions (such as the decision not to appeal a particular decision) that the President deems best for the United States as a whole, pursuant to his responsibilities under the Take Care Clause. But it can identify no constitutional provision that vests Congress, or any component thereof, with any responsibility or authority with respect to government litigation.

c. BLAG's expansive view of legislative authority contains no meaningful limiting principle. Although BLAG repeatedly impugns the President's determination to inform the courts that Section 3 is unconstitutional, BLAG's jurisdictional theory in no way depends on the Executive Branch's litigating position. BLAG makes clear that in its view, the House or Senate can independently litigate (possibly in competition with one another) *any* case concerning a federal statute's constitutionality, *regardless* whether the Executive is also in the case, subject only to possible "prudential" limitations that BLAG declines either to fully endorse or to explain. See Br. 23. Indeed, the implications of BLAG's jurisdictional theory would sweep even further. Its asserted legislative interest in court decisions defining constitutional standards (Br. 13) would allow the House or Senate to intervene in federal cases challenging the constitutionality of *state* statutes and then to seek further review of adverse decisions if the State itself declined to do so, based merely on the speculation that Congress might at some point try to pass a similar law.

BLAG identifies no decision of this Court that recognizes anything approaching such a far-reaching role for the federal Legislature. For reasons explained in the United States' opening jurisdictional brief (Br. 34-37), BLAG's reliance on *Chadha* is misplaced. Likewise misplaced is BLAG's reliance on cases concluding that a State may authorize its legislature or legislators to represent the State itself in litigation. See *Karcher* v. *May*, 484 U.S. 72, 82 (1987) (legislature had authority "under state law" to represent State's interests in litigation); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 65 (1997) (legislators can have standing to challenge ruling that state law is unconstitutional "if state law authorizes legislators to represent the State's interests"). Because the States are not constrained by the separation-of-powers principles embodied in the United States Constitution as among the three Branches of the United States government, those decisions suggest neither that Congress or one of its Houses may represent the United States as a sovereign in court nor that Congress or one of its Houses has a judicially cognizable interest independent of the sovereign interests of the United States represented by the Executive in court.

Nor can BLAG draw support from *Coleman* v. *Miller*, 307 U.S. 433 (1939), another case involving state legislators. The individual plaintiffs in *Coleman* were challenging a state procedural mechanism that, they alleged, had invalidated their votes and caused the legislature to ratify, rather than reject, a proposed federal constitutional amendment. *Id.* at 436-438. The state legislators had sued state officials in state court, and their interest in maintaining the effectiveness of their votes had been "treated by the state court as a basis for entertaining and deciding the federal questions." *Id.* at 438, 446. *Coleman* does not suggest that the United States House of Representatives has standing to appeal a decision of a federal district court precluding the United States from enforcing a federal statute against a particular plaintiff. See *Byrd*, 521 U.S. at 821-826 & n.8 (1997) (discussing the limited holding of *Coleman*).

d. BLAG asserts that denying independent litigating authority to the House would "significantly skew the separation of powers in favor of the executive and away from Congress and the courts." Br. 31 (emphasis omitted). But the assignment of sovereign litigating authority to the Executive Branch, rather than the Legislative or Judicial Branches, is a deliberate feature of the constitutional design. See *Buckley*, 424 U.S. at 138-140. In any event, the course charted by the President in this case is inclusive, not exclusive, of the other Branches. It allows the Legislative Branch to present its views about Section 3 to the courts, and it allows the Judicial Branch to have the final word on the statute's constitutionality. Practical reasons, as well as precedential ones, accordingly support a decision on the merits of the United States' petition.

* * * * *

For the foregoing reasons and those stated in the United States' opening brief on the jurisdictional questions, this Court should reach the merits of this case based on the petition for a writ of certiorari filed by the United States.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MARCH 2013

REPLY
BRIEF

No. 12-307

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR
AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

**On Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit**

REPLY BRIEF ON JURISDICTION FOR RESPONDENT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES

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PARTIES TO THE PROCEEDING

The Bipartisan Legal Advisory Group of the United States House of Representatives intervened as a defendant in the district court and was an appellant and appellee in the court of appeals.*

Edith Schlain Windsor was the plaintiff in the district court and an appellee in the court of appeals.

The United States of America was a defendant in the district court and an appellee and appellant in the court of appeals.

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* The Bipartisan Legal Advisory Group articulates the institutional position of the House in all litigation matters in which it appears. The Group currently is comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. While the Democratic Leader and the Democratic Whip have declined to support the position taken by the Group on the merits of DOMA Section 3's constitutionality in this and other cases, they support the Group's Article III standing.

TABLE OF CONTENTS

PARTIES TO THE PROCEEDING i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

ARGUMENT 2

I. The Bipartisan Legal Advisory Group Speaks For The House 2

  A. The Group Is Authorized by Longstanding Precedent and Tradition to Defend the House's Interests in Litigation 2

  B. House Resolution 5 Confirms the Group's Authority 3

II. The House Has Standing And Is A Necessary Party To This Case 4

  A. *Chadha* Definitively Establishes the House's Standing 4

  B. Well-Established Constitutional Rules Confirm the House's Article III Standing 5

  C. The Constitution Fully Supports the House's Participation as a Party 9

III. The Executive Does Not Have Independent Appellate Standing 12

CONCLUSION 16

APPENDIX

Letter from Eric H. Holder, Jr., Att'y Gen., to Kerry Kircher, House Gen. Counsel (Mar. 7, 2012) 1a

Letter from Eric H. Holder, Jr., Att'y Gen., to Kerry Kircher, House Gen. Counsel (June 22, 2011) 5a

Letter from Eric H. Holder, Jr., Att'y Gen., to Irving Nathan, House Gen. Counsel (Apr. 24, 2009) 10a

TABLE OF AUTHORITIES

Page(s)

Cases

Buckley v. Valeo,
424 U.S. 1 (1976) 11

Camreta v. Greene,
131 S. Ct. 2020 (2011) 12, 14, 15

City of Boerne v. Flores,
521 U.S. 507 (1997) 5

Comm. on the Judiciary, U.S. House of Representatives v. Miers,
558 F. Supp. 2d 53 (D.D.C. 2008) 10

Deposit Guaranty Nat'l Bank v. Roper,
445 U.S. 326 (1980) 4, 13

Hayburn's Case,
2 U.S. 409 (1792) 12

In re United States,
463 F.3d 1328 (Fed. Cir. 2006)........................... 11

INS v. Chadha,
462 U.S. 919 (1983) ....*passim*

Lord v. Veazie,
49 U.S. 251 (1850) 15

Maine v. Taylor,
477 U.S. 131 (1986) 7

Moore v. Charlotte-Mecklenburg Bd. of Educ.,
402 U.S. 47 (1971) 13

Muskrat v. United States,
219 U.S. 346 (1911) 12, 13

N.C. State Bd. of Educ. v. Swann,
402 U.S. 43 (1971) 13

Raines v. Byrd,
521 U.S. 811 (1997) 3

Senate Select Comm. on Presidential Campaign Activities v. Nixon,
498 F.2d 725 (D.C. Cir. 1974) 10

Swidler & Berlin v. United States,
524 U.S. 399 (1998) 11

U.S. House of Representatives v. U.S. Dep't of Commerce,
11 F. Supp. 2d 76 (D.D.C. 1998) 10

United States v. AT&T,
551 F.2d 384 (D.C. Cir. 1976) 10

United States v. Ballin,
144 U.S. 1 (1892) 2

United States v. Johnson,
319 U.S. 302 (1943) 13, 15

United States v. Providence Journal Co.,
485 U.S. 693 (1988) 11

United States v. U.S. House of Representatives,
556 F. Supp. 150 (D.D.C. 1983) 10

Vt. Agency of Natural Res. v. U.S. ex rel. Stevens,
529 U.S. 765 (2000) 11

Constitutional Provision

U.S. Const. art. II, § 3 9

Other Authorities

[DOJ] Mot. to Dismiss for Lack of Appellate
Jurisdiction, *Lui v. Holder*, No. 11-57072
(9th Cir. Jan. 26, 2012) (ECF 17)........................ 13

159 Cong. Rec. 13 (2013) 4

Wright & Miller, et al.,
13 *Federal Practice & Procedure* § 3530
(3d ed. 2012).. 15

Consolidated Br. in Supp. of [House]'s Cross-
Mot. for Summ. J, and in Opp. to Pls.'
Mot. for Summ. J., *Bishop v. United
States*, No. 04-cv-848
(N.D. Okla. Oct. 19, 2011) (ECF 215) 7

Resp. of [DOJ] to Pls.' Notice to Ct.,
Bishop v. United States, No. 04-cv-848
(N.D. Okla. Aug. 18, 2010) (ECF 169) 7

This Court made clear 30 years ago that the House "is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiff[] that the statute is inapplicable or unconstitutional." *INS v. Chadha*, 462 U.S. 919, 940 (1983). The House has a concrete interest in preserving its constitutional role and protecting DOMA Section 3—legislation the House passed—from effective repeal based on arguments made by the executive and approved by the judiciary. Such judicial nullification imposes a distinct injury on the House that is directly traceable to the executive's abdication and the decisions below, and redressable by this Court.

The House's standing not only is sufficient; it is necessary to this Court's appellate jurisdiction. Indeed, without the House's participation, there would be no ongoing case or controversy at all. Even the Department of Justice ("DOJ") and Ms. Windsor recognize that the House's participation is the answer to *amica*'s concerns about their lack of adversity. Although they would relegate the House to *amicus* status, *Chadha* was correct to recognize the House as a "proper party." The House's party status is even more important in the lower courts, where only a party can take discovery, file motions to dismiss, and notice appeals. Those steps cannot be reserved to the executive when it has abandoned the defense of the statute. Determinations about how best to proceed in defending a statute should be made by the party actually defending the statute. In sum, only the House's intervention and party status provide the adverseness that Article III demands.

ARGUMENT

I. The Bipartisan Legal Advisory Group Speaks For The House.

The Bipartisan Legal Advisory Group has articulated the House's institutional interests in litigation for the three decades since *Chadha*, and represents the House's interests here. House Resolution 5 confirms the Group's role as defender of the House's interests in this case, and neither the courts nor the executive may second-guess that definitive statement.

A. The Group Is Authorized by Longstanding Precedent and Tradition to Defend the House's Interests in Litigation.

The Group plainly speaks for the House in this case. *See* House Juris. Br. 24-30. Following *Chadha*, the House created the Group to assert the House's interests in litigation, without requiring a full House vote in each case. *See* House Juris. Br. 24-25. That is how the Group has functioned ever since. Indeed, although the House's Minority Leader and Minority Whip disagree with the House's merits position in this case, they agree that the Group can and does articulate the institutional position of the House here. *See supra* n.*. DOJ therefore is incorrect that the Group's "sole authority" is to "'consult' about the House's general counsel." DOJ Juris. Br. 29. Moreover, neither the executive nor this Court may substitute their interpretation of the House Rules for the House's own interpretation. *United States v. Ballin*, 144 U.S. 1, 5 (1892) (rules adopted pursuant to Rulemaking Clause are "absolute and beyond the challenge of any other body or tribunal."); House Juris. Br. 28-30.

DOJ's reliance on *Raines v. Byrd*, 521 U.S. 811 (1997), is misplaced. *See* DOJ Juris. Br. 29-31. *Raines* did not address the institutional standing of a house of Congress, and the House does not assert that the Group has standing separate and apart from the House. And DOJ itself acknowledges, DOJ Juris. Br. 36, that this Court expressly "attach[ed] some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress ..., and indeed both Houses actively oppose[d] their suit." *Raines*, 521 U.S. at 829. Here, by contrast, the Group *is* authorized by the House to articulate the House's institutional interests.

B. House Resolution 5 Confirms the Group's Authority.

The rules package for the 113th Congress adopted by the full House confirms the Group's longstanding authority to speak for and articulate the institutional position of the House in litigation. H. Res. 5, 113th Cong. § 4(a)(1)(B) (2013), JA 579 ("[T]he ... Group *continues* to speak for, and articulate the institutional position of, the House in all litigation matters in which it appears, including in Windsor v. United States." (emphasis added)); *see also* House Juris. Br. 26. House Resolution 5 is not an "'after-the-fact' authorization" of the Group to litigate on behalf of the House. *See* DOJ Juris. Br. 31. It is a confirmation of the Group's longstanding authority. Indeed, House Resolution 5 was expressly designed to "clarify the role of the Bipartisan Legal

Advisory Group generally, and in the Windsor litigation particularly," 159 Cong. Rec. 13 (2013), in response to this Court's order directing briefing on the standing issue. Thus, the resolution expresses the House's definitive confirmation of the Group's authority, which is binding on this Court under *Ballin*.

II. The House Has Standing And Is A Necessary Party To This Case.

A. *Chadha* Definitively Establishes the House's Standing.

Chadha definitively establishes that the House has standing to defend DOMA's constitutionality here. In no uncertain terms, *Chadha* held that each house of "Congress is both a proper party to defend the constitutionality of" a statute when the executive declines to do so "and a proper petitioner under [28 U.S.C.] § 1254(1)." *Chadha*, 462 U.S. at 939. That statement was followed closely by a second: "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiff[] that the statute is inapplicable or unconstitutional." *Id.* at 940.[1]

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[1] DOJ attempts to disarm this second statement by (i) relegating it to a discussion of prudential rather than Article III standing, and (ii) arguing that it only supports Congress' role as an *amicus*. The context of the statement and its proximity to the statement regarding Congress' role as a proper petitioner directly support the House's party status here. The House and Senate could not have been proper petitioners without adequate Article III standing. *See Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 334 (1980).

Thus, *Chadha* definitively established that each house of Congress is a proper party in an action where the executive has refused to defend the constitutionality of a statute. In *Chadha*, the House and Senate participated separately as independent parties; they had separate counsel and filed separate briefs; and this Court acknowledged that the "two Houses of Congress" were separate "parties." 462 U.S. at 931 n.6. Accordingly, *Chadha's* reasoning is equally applicable when only one house participates. Indeed, the Constitution requires as much. *See* House Juris. Br. 21-22.

B. Well-Established Constitutional Rules Confirm the House's Article III Standing.

Chadha's holding is wholly consistent with well-established Article III standing principles. The House has a concrete, particularized interest in protecting its role in the legislative process when the executive seeks to invalidate a law through the judicial process. By its participation as a party-defendant below and as the proper petitioner here, the House seeks to prevent a permanent nullification of the House-passed DOMA Section 3. *See* House Juris. Br. 11-20.

The potential injury to the House when the executive turns from defender of duly-enacted statutes to attacker is obvious. Not only does judicial invalidation of a statute on constitutional grounds permanently nullify House-passed legislation; it also leaves Congress—and each house thereof—without a remedy. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). And despite DOJ's contrary suggestion, DOJ

Juris. Br. 32, "a judicial decree precluding enforcement of a federal statute on constitutional grounds" is vastly "different from a Presidential determination not to enforce the statute." The latter carries no precedential effect and leaves DOMA on the books to be enforced by later administrations, while the former, by contrast, is the functional equivalent of repeal, in which the House is a constitutionally necessary party. The executive should not be permitted to evade the Constitution's "finely wrought" process for legislative repeal by orchestrating a judicial repeal without the possibility of full participation of one or both houses of Congress as parties. *Chadha*, 462 U.S. at 951.

The House adequately can protect its interests only through participation as a full party. Indeed, even DOJ and Ms. Windsor acknowledge that the House's participation is the answer to *amica*'s concerns about a lack of ongoing controversy. *See, e.g.*, DOJ Juris. Br. 34 (House's participation ensures "that both sides of the constitutional question will be before the court"); Windsor Juris. Br. 20 ("BLAG's participation in this case reinforces the presence of a live case or controversy here."). But their suggestion that the House be relegated to *amicus* status is inconsistent with *Chadha*, common sense, and Article III. As this Court recognized explicitly in *Chadha* (and as DOJ and Ms. Windsor acknowledge implicitly), when an Act of Congress is challenged as unconstitutional and the executive joins the attack, the House (and/or the Senate)—not a court-appointed *amicus*—is the proper party to defend the statute. That is because the House, unlike an *amicus* or member of the general public, suffers a concrete institutional injury and thus has a real and direct stake in the outcome of the case. *Cf. Maine v. Taylor*, 477 U.S. 131, 136-37 (1986) (holding that state-intervenor could appeal decision rejecting federal Lacey Act prosecution on ground that underlying state statute was unconstitutional, even when DOJ abandoned its own appeal, because state-intervenor "clearly has a legitimate interest in the continued enforceability of its own statutes").

The House requires full-party status throughout the litigation. At the district court level, only a party can participate completely in the litigation by, for example, conducting discovery and filing jurisdictional and procedural motions. The discovery process is the sole avenue for developing a factual record, which in some cases may be critical to developing or countering constitutional arguments. Similarly, jurisdictional and procedural motions may be important processes for establishing a legitimate claim before a district court and for weeding out defective constitutional challenges.

The executive's actions in other DOMA cases demonstrate why full-party status for the House is essential. For example, in *Bishop v. United States*, No. 04-cv-848 (N.D. Okla.), over the House's protest, DOJ refused to seek dismissal of plaintiffs' claims on standing grounds, instead "conced[ing]" that plaintiffs had standing. *See* Resp. of [DOJ] to Pls.' Notice to Ct. 1 (Aug. 18, 2010) (ECF 169); Consolidated Br. in Supp. of [House]'s Cross-Mot. for Summ. J, and in Opp. to Pls.' Mot. for Summ. J. 16-25 (Oct. 19, 2011) (ECF 215). The plaintiffs and the executive, whose interests in overturning DOMA

Section 3 were aligned, had no incentive to insist on the Article III prerequisites, let alone engage in traditional, full-scale litigation; only the House did.

Furthermore, only a party can determine when and where to seek appellate review. DOJ suggests that it respects the constitutional separation of powers by taking "steps to secure further review" of DOMA. DOJ Juris. Br. 8, 21-23. But there is no reason to think that a party actively attacking the constitutionality of a statute will select appellate vehicles with an eye to maximizing the statute's chances of surviving. Indeed, in the DOMA cases, DOJ has worked assiduously to expedite appeals in circuits that had not previously adopted rational basis as the governing standard, while slowing or torpedoing appeals in other circuits. While that strategy minimized DOJ's difficulties in explaining why it was attacking DOMA when it was on record as affirming that DOMA survives rational-basis review, it hardly maximized the chances that DOMA would survive appellate review.[2]

Moreover, it certainly is not the case that DOJ always appeals a decision holding an Act of Congress unconstitutional.[3] Accordingly, both Article III and common sense suggest that the party with an actual interest in defending a legal position—and not a party on the other side—should make the critical determinations about when and whether to appeal. And when DOJ abandons a statute, as it has here, there is every reason that one or both houses of Congress should make those strategic judgments, but doing so requires full party status.

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[2] DOJ says that absent its standing to appeal there would be no "reliable avenue for a definitive resolution of [DOMA's] constitutionality." DOJ Juris. Br. 22. Ignoring the obvious—namely, the avenue provided by the House's standing—the executive asks all of us to trust that it will control the appeals process fairly in its own attempt to invalidate DOMA. In DOJ's own words, that "approach has little to recommend it, and nothing to compel it." *Id.*

C. The Constitution Fully Supports the House's Participation as a Party.

DOJ is wrong that the executive's duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, bars the House's full participation. *See* DOJ Juris. Br. 27-29, 32-34. The House intervened to defend against DOMA's nullification, as *Chadha* envisioned. Doing so is not an exercise of, or infringement on, executive powers.

Moreover, the logic of DOJ's argument would require it to represent parties on both sides of a case even when the House seeks to enforce its rights *against* the executive. The executive, of course, has never made this wholly impractical suggestion in non-DOMA cases where the House and Senate have routinely and appropriately litigated for themselves. *See, e.g.*, *United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974); *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 96 (D.D.C. 1998); *United States v. U.S. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983). This case is no different: When the executive and legislative branches have opposing interests, as they do here, the executive cannot attack and defend at the same time.

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[3] *See, e.g.*, Letter from Eric H. Holder, Jr., Att'y Gen., to Kerry Kircher, House Gen. Counsel (Mar. 7, 2012) (declining to appeal decision holding application of 18 U.S.C. § 2261A(2)(A) violated First Amendment), App. 1a; Letter from Eric Holder, to Kerry Kircher (June 22, 2011) (declining to appeal decision holding 10 U.S.C. § 920 violated Due Process Clause), App. 5a; Letter from Eric Holder to Irving Nathan, House Gen. Counsel (Apr. 24, 2009) (declining to petition for certiorari in *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008), holding substantive due process challenge to 10 U.S.C. § 654 subject to heightened scrutiny), App. 10a.

As these cases demonstrate, DOJ's belief that only it can represent the "sovereign interests of the United States" is fundamentally inconsistent with our tripartite system of government. DOJ Juris. Br. 13. The framers' genius was to divide the "sovereign interests of the United States" among the three branches. In the ordinary case, the executive respects this separation of powers by making professionally responsible arguments in defense of statutes or judicial prerogatives, even when it disagrees with the policy reflected in such statutes or prerogatives. But when the executive abandons that role—or when a statute or cause of action implicates divergent interests of the executive and legislative branches—there is no reason the legislative branch, a coordinate and co-equal branch, cannot defend its own sovereign interests in litigation.[4]

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[4] DOJ's insistence that only it may defend against challenges to federal actions also threatens the independence of the *judiciary*. Typically, DOJ defends cases that implicate the interests of the

The executive's reliance on *Buckley v. Valeo*, 424 U.S. 1 (1976), is misplaced. Unlike in *Buckley*, the House does not seek to defend "public rights" or control the civil enforcement process against private parties. *See* 424 U.S. at 140. Nor does the House seek to step into the shoes of the United States. *See* DOJ Juris. Br. 27-29.[5] Rather, as explained above and in the House's Brief on Jurisdiction (at 11-16), the House's modest hope is to defend its own institutional interests against executive attack.[6]

Not only is the House a proper party to this litigation; it is a necessary party. For the same reasons it has standing here, the House is the only party truly adverse to Ms. Windsor. Indeed, without the House's participation, this Court would be left issuing an advisory opinion at the executive's urging,

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judiciary. *See, e.g.*, *In re United States*, 463 F.3d 1328 (Fed. Cir. 2006) (DOJ successfully defended challenge to Third Circuit's decision not to reappoint bankruptcy judge). But under DOJ's view, if it declines to defend the judiciary, the judiciary would have no right to appoint its own counsel to defend its distinct interests.

[5] For similar reasons, DOJ's reliance on *United States v. Providence Journal Co.*, 485 U.S. 693 (1988), is also misplaced. *See id.* at 705 n.9 (decision does not "preclude[] Members of Congress or the Judiciary from adding their views in litigation before this Court as intervenors or *amici curiae*").

[6] DOJ's insistence that only it can represent the sovereign interests of the United States also is inconsistent with both the long tradition of *qui tam* statutes, *see, e.g.*, *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000), and the representation of the United States by Independent Counsels, *see, e.g.*, *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

something it has no constitutional authority to do. *See, e.g.*, *Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 U.S. 409, 410 n.† (1792). Faced with similar circumstances in *Chadha*, this Court's assessment of Article III jurisdiction was explicitly contingent on "the presence of the two Houses of Congress as adverse *parties*." *Chadha*, 462 U.S. at 931 n.6 (emphasis added). Here, too, the House's adverse presence is essential.

III. The Executive Does Not Have Independent Appellate Standing.

The executive lacks both Article III and prudential standing to appeal. The executive received precisely the result it requested in the Second Circuit. All it can possibly achieve here is to broaden the geographic scope of its success via the decision's precedential effect on *other* same-sex couples. But Article III and this Court's cases focus on the actual parties to the case or controversy. To establish Article III standing on appeal, a petitioner that prevailed below "must show that [it] has suffered an injury in fact that is caused by the [ruling] complained of and that will be redressed by a favorable decision." *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) (quotation marks omitted). Both the executive and Ms. Windsor can obtain no more relief from this Court than they already received from the Second Circuit.[7]

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[7] Indeed, DOJ argued precisely this—but with respect to the House—in another DOMA case. *See* [DOJ] Mot. to Dismiss for Lack of Appellate Jurisdiction 11-12 & n.3, *Lui v. Holder*, No. 11-57072 (9th Cir. Jan. 26, 2012) (ECF 17) (DOJ insisting House lacked appellate standing—where district court had granted House motion to dismiss but only "without prejudice"—

Thus, by definition, they suffered no "injury in fact" from the decision below.

Without the House's full participation, this case is the sort of manufactured controversy this Court always has declined to hear. *See, e.g.*, *United States v. Johnson*, 319 U.S. 302, 303-05 (1943) (finding no case or controversy when parties arranged to bring case to court to further defendant's interest); *Muskrat*, 219 U.S. at 362-63. The Court's decision in *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47 (1971) (per curiam) is instructive, despite DOJ's efforts to distinguish it. In *Moore*, because "both litigants desire[d] precisely the same result," the Court declined to decide the question. *Id.* at 48. The fact that the Court reached the same issue in a companion case, with truly adverse parties, *see N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971), does not distinguish *Moore*. It proves the House's point: Without the House, this case is like *Moore*; with the House, there is jurisdiction as in *Swann*.

The executive also cannot satisfy the prudential standing requirement. "Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom." *Roper*, 445 U.S. at 333. For the same reasons that the executive has suffered no Article III injury, it is not "aggrieved" for the purposes of prudential standing. One need look no further than the hearing list for this case to spot the anomaly: DOJ is listed as "petitioner in support of affirmance."

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because House "successfully achieved all of its reasons for its limited intervention in this case").

Res ipsa loquitur—the appellate standing problem with that label speaks for itself.[8]

Neither *Chadha* nor *Camreta* assist the executive on this point. In *Chadha*, because the executive relied on 28 U.S.C. § 1252, a statute no longer in effect, this Court never reached the issue of prudential standing under 28 U.S.C. § 1254. *See* House Juris. Br. 36. Moreover, the executive is mistaken that *Chadha* supports its *appellate* standing based on this Court's statement that "prior to Congress' intervention, there was adequate Art. III adverseness even though the only parties were the INS and Chadha." 462 U.S. at 939. That is because the particular procedural path of *Chadha* made the initial petition for review before the Ninth Circuit equivalent to the district court proceeding here. *See Chadha*, 462 U.S. at 928, 937. There was no district court proceeding in *Chadha* and no "appeal" to the Ninth Circuit. Thus, this Court's holding regarding Article III adversity before intervention by the two houses of Congress turned on the agency's order to deport Chadha. *See id.* at 939.

In *Camreta*, the petitioners sought review of an "adverse constitutional ruling." 131 S. Ct. at 2029. Although they were prevailing parties below (on less-favorable qualified immunity grounds), the petitioners had appellate standing because the decision on the constitutional question was adverse to the position they advocated (and would deprive them of qualified immunity prospectively). *See id.* at 2029-33. There is no analog here. The executive received *everything* it requested below, and it does not seek to prevail here on a different, more-favorable ground.

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[8] To be sure, the executive claims it is injured because it was ordered to issue Ms. Windsor a refund. Tellingly, it does not ask this Court to redress that injury; instead, it seeks *affirmance* of that order.

The executive cannot grant itself appellate standing by insisting that it will not issue a refund without this Court's direction. The bare refusal to act might be enough for a justiciable controversy in the district court; otherwise "a person could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments asserted by the individual." *Chadha*, 462 U.S. at 939. Absent participation by a genuinely adverse party, however, the district court should at most enter a consent decree—or, if the executive agrees to issue a refund, dismiss the case as moot. *Cf. Johnson*, 319 U.S. at 305. That is how the courts would treat private parties in the same position, regardless of any desire to obtain binding precedent or stated unwillingness to comply with an order they hope to see affirmed. *See, e.g., Lord v. Veazie*, 49 U.S. 251 (1850); Wright & Miller, et al., 13 *Federal Practice & Procedure* § 3530 (3d ed. 2012).

There is no reason to bend this Court's prudential standing principles or to allow a party opposed to DOMA to appeal a decision striking it down. There is a party with constitutional standing to appeal (and the ordinary incentives of an adverse party) actively defending DOMA. That party is the House. This Court can, by granting the House's petition, resolve DOMA Section 3's constitutionality without disfiguring bedrock Article III principles, which require adverseness and disfavor feigned controversies.

CONCLUSION

For the foregoing reasons and those articulated in the House's Brief on Jurisdiction, this Court should dismiss the petition in No. 12-307, grant the House's petition in No. 12-785, and resolve the constitutionality of DOMA Section 3 in No. 12-785 without re-briefing or re-argument.

Respectfully submitted,

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March 19, 2013

Appendix

TABLE OF CONTENTS

Letter from Eric H. Holder, Jr., Att'y Gen., to Kerry Kircher, House Gen. Counsel (Mar. 7, 2012) 1a

Letter from Eric H. Holder, Jr., Att'y Gen., to Kerry Kircher, House Gen. Counsel (June 22, 2011) 5a

Letter from Eric H. Holder, Jr., Att'y Gen., to Irving Nathan, House Gen. Counsel (Apr. 24, 2009) 10a

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C. 20530

March 7, 2012

Mr. Kerry Kircher
General Counsel
U.S. House of Representatives
Washington, DC 20515

Re: *United States* v. *William L. Cassidy*, No. 8:11-91 (D. Md. Dec. 15, 2011)

Dear Mr. Kircher:

Consistent with 28 U.S.C. 530D, I write to advise you that on February 28, 2012, the Department of Justice determined not to appeal the decision of the district court in the above-referenced case. A copy of the decision is enclosed.

In 2007, defendant William Cassidy became involved with a Tibetan Buddhist sect called Kunzang Palyul Choling, but only after Cassidy had misrepresented his religious background. The sect's leader, A.Z., eventually confronted Cassidy about his actual background, and Cassidy left the group. Then, over the course of several months in 2010, Cassidy posted hundreds of vulgar and derogatory comments about A.Z. on Twitter and a personal blog. The government indicted Cassidy on one count of interstate stalking, in violation of 18 U.S.C. 2261A(2)(A). As relevant here, that provision makes it a crime to use "any interactive computer service" "to engage in a course of conduct that causes substantial emotional distress" to a person in another

State, with the intent to "cause substantial emotional distress to that person."

The district court dismissed the indictment, holding that Section 2261A(2)(A) violates the First Amendment as applied in this case. The court reasoned that Cassidy's Internet postings did not fall within any category of speech unprotected by the First Amendment; that Section 2261A(2)(A) regulated Cassidy's speech based on its content and was therefore subject to strict scrutiny; and that the government lacked a compelling interest in criminalizing Cassidy's speech because, although the speech was emotionally distressing, A.Z. could have avoided it by blocking Cassidy's tweets or not reading his blog. The court further reasoned that even if the statute were analyzed as a content-neutral regulation of conduct, Section 2261A(2)(A) placed more than an incidental restriction on Cassidy's speech regarding matters of public concern. The district court emphasized that it was invalidating Section 2261A(2)(A) only as applied to the facts of this case, without addressing Cassidy's facial challenges.

The Department defended the constitutionality of Section 2261A(2)(A) in this case, and it will continue to do so in future cases to the extent consistent with recent Supreme Court precedent. In *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1219 (2011), the Court held that speech in a public place on matters of public concern may not be subject to civil liability on the ground that such speech inflicts emotional distress on its listeners. *Snyder* involved a public protest of a funeral, and the Court recognized that

Internet postings might pose distinct issues. See *id.* at 1214 n.1; *id.* at 1221 (Breyer, J., concurring). The Court also recognized that it had permitted restrictions on speech in other contexts in order to protect unwilling but captive listeners; however, the Court held that doctrine inapplicable in *Snyder* because the funeral attendees were largely able to avoid the speech at issue. See *id.* at 1220.

Accordingly, the Department may be able to defend the constitutionality of Section 2261A(2)(A) as applied in future cases, consistent with the Court's decision in *Snyder*. Here, however, the district court found that Cassidy's speech did not target A.Z. in a way that made the speech difficult to ignore, because A.Z. could have avoided the speech by blocking Cassidy's tweets or not reading his blog. Because the district court declined to address Cassidy's facial challenge and held that the statute was unconstitutional only as applied to these specific facts, the decision in this case does not prejudice the Department's ability to defend Section 2261A(2)(A) in appropriate future cases. Finally, to the extent that Cassidy's Internet postings threatened physical harm, the government retains the ability to prosecute those threats under Section 2261A(2)(B).

A notice of appeal was due on January 17, 2012, and the Department filed a protective notice of appeal on that date. The Department's opening brief is currently due on April 13, 2012, but the Department intends to dismiss the appeal in advance of that date. Please let me know if we can be of further assistance in this matter.

Sincerely,

Eric H. Holder, Jr.
Attorney General

Enclosure

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C. 20530

June 22, 2011

Mr. Kerry Kircher
General Counsel
U.S. House of Representatives
Washington, DC 20515

Re: *United States* v. *Prather*, 69 M.J. 338 (C.A.A.F. 2011)

Dear Mr. Kircher:

In accordance with 28 U.S.C. 530D, I write to advise you of the Department of Justice's decision not to petition the Supreme Court to review the decision of the U.S. Court of Appeals for the Armed Forces (CAAF) in this case. The CAAF held that a provision of the Uniform Code of Military Justice (UCMJ) violates the Due Process Clause because it unconstitutionally shifts to the defendant the burden to disprove an element of the offense. Because the decision is not an unreasonable application of existing law, because the Department of Defense has recommended to Congress that it amend the relevant UCMJ provision to eliminate the problem, and because jury instructions have cured the problem in other pending cases, the issue does not warrant petitioning for a writ of certiorari in this case.

Article 120 of the UCMJ, 10 U.S.C. 920, defines the military offenses of rape, sexual assault, and other sexual misconduct crimes. In particular, Article 120(c)(2) defines aggravated sexual assault as, among other things, engaging in a sexual act with another person "if that person is substantially incapacitated or substantially incapable" of appraising the nature of the sexual act, declining participation in it, or communicating unwillingness to engage in the sexual act. Article 120(r) provides that "consent" is not "an issue," but may be raised as an affirmative defense by the accused. Article 120(t)(14) defines "consent" but provides that a person cannot consent if that person is "substantially incapable" of appraising the nature of the sexual act due to mental impairment or unconsciousness resulting from, among other things, consumption of alcohol or drugs. Article 120(t)(16) provides that the accused "has the burden of proving the affirmative defense by a preponderance of the evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist."

Defendant Stephen Prather, an airman in the United States Air Force, was tried by a general court-martial on charges including aggravated sexual assault, in violation of Article 120(c)(2). The charge alleged that Prather had sexual intercourse with a woman who was substantially incapacitated due to her intoxication. His defense was consent. The court-martial found Prather guilty. He was sentenced to a dishonorable discharge, confinement for two years and six months, forfeiture of all pay and allowances, and reduction in rank.

The CAAF reversed the aggravated sexual assault conviction. It concluded that the "interplay" of the element of substantial incapacity in Article 120(c)(2), the definition of consent in Article

120(t)(14), and the affirmative defense in Article 120(t)(16) "results in an unconstitutional burden shift to the accused." 69 M.J. at 343. The CAAF explained that "[i]f an accused proves that the victim consented, he has necessarily proven that the victim had the capacity to consent, which logically results in the accused having disproven an element of the offense of aggravated sexual assault—that the victim was substantially incapacitated." *Ibid.* The CAAF rejected the government's argument that the military judge's instructions cured "any constitutional infirmity in the statutory scheme." *Ibid.*; *see id.* at 343–345. It also concluded that, because the initial burden shift in Article 120(t)(16) was unconstitutional under the circumstances of the case, any question concerning the second burden shift (*i.e.*, providing that once a defendant has met his burden to prove an affirmative defense, the government has the burden to disprove it beyond a reasonable doubt) was "moot." *Id.* at 345. Even if the issue were not moot, however, the CAAF held that the second burden shift is a "legal impossibility." *Ibid.* Separately, the CAAF upheld Prather's conviction for adultery and ordered resentencing. *Ibid.*

Judge Baker, joined by Judge Stucky, dissented in part and concurred in the result. They believed that the first burden shift in Article 120(t)(16) is not unconstitutional on its face and can be applied constitutionally with proper instructions. But they also believed that the second burden shift is unconstitutional on its face. 69 M.J. at 348.

The CAAF applied well-settled due process principles in reaching its conclusion, and its decision breaks no new ground. The Department of Defense has recently transmitted to Congress recommended amendments to Article 120. One aspect of those amendments, if adopted by Congress, would eliminate the constitutional defect identified in this case—in particular, by striking the affirmative-defense provisions, Article 120(r) and (t)(16). And the CAAF's application of due process principles in this context does not have independent jurisprudential significance for military prosecutions. Accordingly, the ability to respond legislatively to the CAAF's decision counsels against seeking Supreme Court review.

Furthermore, in nearly every other case pending in the military courts, military judges have given an instruction specifying that the government bears the burden of proving the absence of consent beyond a reasonable doubt. *See* 69 M.J. at 340 & n.2. Since deciding this case, the CAAF has affirmed a conviction obtained after such an instruction. *See United States v. Medina*, 69 M.J. 462, 465–466 (C.A.A.F. 2011). The minimal effect on cases beyond Prather's own case, while Congress considers whether to amend the statute, is a further reason why Supreme Court review is not warranted at this time.

In this case, the Department of Defense, which is responsible for litigating before the CAAF, did not advise the Department of Justice of its recommendation with respect to whether to seek certiorari until June 13, 2011, and the Criminal Division of the Department of Justice did not provide the Solicitor General with its recommendation until

June 14, 2011. The Solicitor General promptly sought an extension from the Supreme Court to and including July 15, 2011, and the Chief Justice granted an extension to June 29, 2011. Accordingly, a petition for a writ of certiorari would be due on June 29, 2011.

Please let me know if we can be of further assistance in this matter.

Sincerely,

Eric H. Holder, Jr.
Attorney General

Enclosure

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C. 20530

April 24, 2009

Mr. Irving Nathan
General Counsel
U.S. House of Representatives
Washington, D.C. 20515

Re: *Witt* v. *Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008)

Dear Mr. Nathan:

I am sending this letter consistent with my obligation under 28 U.S.C. 530D to report to Congress on the enforcement of laws. Because this is the first such letter I have sent to Congress, I take this opportunity to note the process that I will generally follow. As the chief law enforcement officer of the United States, I intend in the usual case to send notifications consistent with Section 530D in my own name.

Consistent with the purposes of 28 U.S.C. 530D, I am writing to advise you that the Department of Justice has decided not to seek Supreme Court review of the interlocutory decision of the United States Court of Appeals for the Ninth Circuit in the above-referenced case, but instead to continue defending the constitutionality of the statute at issue, 10 U.S.C. 654, on remand in the district court. This decision was made after extensive consultation with the Department of Defense and is based on the longstanding presumption against Supreme Court review of interlocutory decisions as well as practical litigation considerations. The government retains all rights to petition the Supreme Court to review a final decision in the case, including every aspect of the Ninth Circuit's ruling, after the proceedings on remand are completed.

The court of appeals held in *Witt* that a discharged service member's challenge to 10 U.S.C. 654, which establishes the policy concerning homosexuality in the armed forces, is subject to intermediate scrutiny under the substantive component of the Due Process Clause. 527 F.3d at 817–19. Under that standard, the court of appeals concluded that the government had advanced a sufficiently important interest, but remanded to the district court to determine whether applying the statute to the service member at issue, plaintiff Margaret Witt, would significantly further that interest and whether that interest could be achieved substantially through a less intrusive means. *Id.* at 821. The Ninth Circuit subsequently denied the government's petition for rehearing en banc, over the dissent of six judges. *Witt* v. *Department of the Air Force*, 548 F.3d 1264 (2008). Copies of the opinions are enclosed.

The court of appeals' decision neither declared 10 U.S.C. 654 unconstitutional on its face nor held the statute unconstitutional as applied to Margaret Witt. The court of appeals instead instructed the district court to determine the statute's constitutionality as applied to Witt. The question at this juncture concerns the most appropriate way to continue defending the constitutionality of the statute against Witt's claims in this procedural context.

The Supreme Court ordinarily does not review nonfinal, interlocutory decisions. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "to review the adverse rulings made by the Court of Appeals ... because the Court of Appeals remanded the case [and thus it] is not yet ripe for review by this Court"); *American Construction Co.* v. *Jacksonville, Tampa and Key West Railway Co.*, 148 U.S. 372, 384 (stating the general rule that "this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order"); *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); see generally Robert L. Stern, et al., *Supreme Court Practice* § 4.18, at 280 (9th ed. 2007) ("'[E]xcept in extraordinary cases, the writ is not issued until final decree.'") (quoting *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)). The government's usual practice is to respect this principle of certiorari jurisdiction in its decisions about whether and when to petition the Supreme Court for review. Indeed, the government often invokes the Supreme Court's presumption against reviewing interlocutory decisions as a reason to deny certiorari, because it avoids decision of unnecessary questions.

In this case, if the remand and any subsequent appeal results in the upholding of the statute as applied, Margaret Witt's claims against the government will terminate. If, instead, the remand and a subsequent appeal results in the invalidation of the statute as applied, the government can raise any and all of its arguments in defense of the statute in a petition for a writ of certiorari seeking review of the final judgment. In the event that defense of the statute in the Supreme Court should prove necessary, the development of the factual record on remand will provide the government with an opportunity to strengthen its case; at a minimum, it will afford the Court a more complete basis on which to assess the parties' various contentions concerning the statute. And the Department of Justice's assessment is that the burdens associated with any discovery requests by the plaintiff in the remand proceedings likely can be appropriately cabined.

The Department of Defense has provided views to the Solicitor General about this case consistent with the above analysis. Noting the interlocutory nature of the court of appeals' decision and the ability of the government to petition for certiorari in the case at a later time, the General Counsel of the Department of Defense advised that "a remand will allow DoD to develop a factual record in the case which will, we believe, demonstrate that the discharge was fully appropriate and consistent with law." Letter from J. Johnson to E. Kagan (Apr. 20, 2009). A copy of the recommendation from the Department of Defense is enclosed.

The appropriate course, in light of the Department of Defense's views, all relevant litigation considerations, and the government's usual practice of waiting for a final judgment to petition the Supreme Court for certiorari, is now to defend the constitutionality of 10 U.S.C. 654 on remand in the district court.

At the same time, the Department of Justice will oppose a petition for certiorari in *Pietrangelo* v. *Gates*, No. 08-824 (filed Dec. 23, 2008). In that case, the United States Court of Appeals for the First Circuit dismissed a service member's constitutionally-based challenge to his discharge under 10 U.S.C. 654. See *Cook* v. *Gates*, 528 F.3d 42 (1st Cir. 2008). The government will file its opposition to certiorari, defending the constitutionality of the statute, by May 6.

Thank you for your attention to this matter.

Sincerely,

Eric H. Holder, Jr.
Attorney General

Enclosures

REPLY
BRIEF

No. 12-307

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR

AND

BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF ON THE MERITS FOR RESPONDENT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES

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PARTIES TO THE PROCEEDING

The Bipartisan Legal Advisory Group of the United States House of Representatives intervened as a defendant in the district court and was an appellant and appellee in the court of appeals.*

Edith Schlain Windsor was the plaintiff in the district court and an appellee in the court of appeals.

The United States of America was a defendant in the district court and an appellee and appellant in the court of appeals.

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* The United States House of Representatives has articulated its institutional position in litigation matters through a five-member bipartisan leadership group since at least the early 1980's (although the formulation of the group's name has changed somewhat over time). Since 1993, the House rules have formally acknowledged and referred to the Bipartisan Legal Advisory Group, as such, in connection with its function of providing direction to the Office of the General Counsel. *See, e.g.*, Rule I.11, Rules of the House of Representatives, 103rd Cong. (1993); Rule II.8, Rules of the House of Representatives, 112th Cong. (2011). While the group seeks consensus whenever possible, it, like the institution it represents, functions on a majoritarian basis when consensus cannot be achieved. The Bipartisan Legal Advisory Group currently is comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. The Democratic Leader and the Democratic Whip have declined to support the position taken by the Group on the merits of DOMA Section 3's constitutionality in this and other cases.

TABLE OF CONTENTS

PARTIES TO THE PROCEEDING i

TABLE OF AUTHORITIES iv

I. DOMA Is Rationally Related To Numerous Legitimate Governmental Interests 3

  A. Sovereignty and Caution 3

  B. Uniformity 6

  C. Preserving Past Congressional Judgments, Providing Definitional Clarity, and Fiscal Prudence 9

  D. The Rational Bases That Support States' Decisions to Adopt and Retain the Traditional Definition 12

  E. Alleged "Animus" Cannot Invalidate a Statute, Such as DOMA, Supported by Rational Bases 16

II. This Court Should Not Make Sexual Orientation The First New Suspect Class In Four Decades 17

  A. Gays and Lesbians Are Hardly Politically Powerless 17

  B. Sexual Orientation Is Relevant to Legitimate Governmental Interests 20

  C. No Other Protected Class Is Defined With Reference to Conduct 20

  D. The Unique History of Discrimination 21

  E. In All Events, DOMA Satisfies Heightened Scrutiny 22

III. This Court Should Leave The Definition Of Marriage To The Democratic Process............... 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Armour v. City of Indianapolis,
132 S. Ct. 2073 (2012) 15

Bowen v. Owens,
476 U.S. 340 (1986) 12

Bowers v. Hardwick,
478 U.S. 186 (1986) 22

City of Cleburne, Tex.
v. Cleburne Living Ctr.,
473 U.S. 432 (1985) 18, 19

Druker v. Comm'r,
697 F.2d 46 (2d Cir. 1982) 12

Frontiero v. Richardson,
411 U.S. 677 (1973) 19

Godfrey v. Spano,
920 N.E.2d 328 (2009) 7

Johnson v. Robison,
415 U.S. 361 (1974) 14

Lawrence v. Texas,
539 U.S. 558 (2003) 4, 21, 22, 23

Loving v. Virginia,
388 U.S. 1 (1967) 4

Mass. Bd. of Ret. v. Murgia,
427 U.S. 307 (1976) 19

Romer v. Evans,
517 U.S. 620 (1996) 2

United States v. Carolene Prods. Co.,
304 U.S. 144 (1938) 18

United States v. O'Brien,
391 U.S. 383 (1968) 16

Vill. of Belle Terre v. Boraas,
416 U.S. 1 (1974) 15, 16

Williamson v. Lee Optical of Okla., Inc.,
348 U.S. 483 (1955) 9

Other Authorities

George Chauncey, *Why Marriage?: The History Shaping Today's Debate Over Gay Equality* (2004).. 21

John Cohen, *Gay Marriage Support Hits New High in Post-ABC Poll*, Washington Post, The Fix (Mar. 18, 2013), http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/18/gay-marriage-support-hits-new-high-in-post-abc-poll/?wpisrc=al_comboNP_p 22

The many *amicus* briefs filed on both sides of this case amply demonstrate that the issue of same-sex marriage inspires strong feelings and passionate disagreement. But the parties' briefs underscore that the legal issue in this case actually is quite narrow. Even DOJ concedes that Section 3 of DOMA survives traditional rational basis review. And Ms. Windsor contends that DOMA fails rational basis review only by distorting the deferential nature of a form of review so forgiving that it has led to the invalidation of only a single federal statute by this Court. Applying conventional rational basis review, multiple rational bases support Congress' decision to clarify that the traditional definitions of "marriage" and "spouse" continue to apply for purposes of federal law only. DOMA respects the judgments of different states. It recognizes that some states can rationally choose to give full recognition to same-sex marriages, others can rationally embrace civil unions, and still others can rationally choose to retain the traditional definition. And as long as states retain the ability to choose among these various options, the federal sovereign surely has the ability to adopt the traditional and majority rule for federal law purposes.

Nor is there any basis for this Court to make sexual orientation the first new suspect class in forty years. Treating a group as a suspect class for equal protection purposes is, at bottom, a determination that by dint of a long history of official disenfranchisement or other obstacle, a group cannot protect its interests through the ordinary political processes. But gays and lesbians have made more progress through the ordinary political processes more quickly than any other group in recent memory, both on the issue of marriage and more generally. The impressive array of *amici* supporting affirmance provides powerful testimony to the political clout of a group that has been remarkably and increasingly successful in accomplishing its goals through the political process.

None of this is to suggest that such political gains have been easy or uniform, but that is the nature of the political process. And when it comes to an issue as fast-moving and divisive as same-sex marriage, the political process has manifold advantages over constitutionalizing the issue. The political process requires advocates to persuade opponents, not label them bigots or dismiss their arguments as explicable only by animus. The political process allows the losing side to moderate its views and seek future compromises, instead of having its views harden. The political process permits compromises, like civil unions, and transition rules, instead of one-size-fits-all solutions with retroactive consequences. The political process is in the midst of dealing with this issue, with new developments seemingly every week. For example, just last week, in Colorado, the state that passed the amendment invalidated in *Romer v. Evans*, 517 U.S. 620 (1996), the legislature enacted a law authorizing civil unions. As Judge Straub correctly observed, this Court "can intervene in this robust debate only to cut it short." Supp. Pet. App. 83a. This Court should decline the invitation to cut this vital debate short, uphold DOMA as constitutional, and permit the citizens of this country to continue participating in working through this important issue.

I. DOMA Is Rationally Related To Numerous Legitimate Governmental Interests.

A. Sovereignty and Caution

In enacting DOMA, Congress ensured that the federal government and every state would have the right to define marriage for itself, and that no jurisdiction would be forced to recognize same-sex marriage just because another jurisdiction (or courts interpreting a distinct state constitution) did so. And in retaining the traditional definition of marriage for purposes of federal law only, Congress exercised the same sovereign prerogative that it preserved for every state. It rationally decided to clarify that the traditional definition would continue to apply as the uniform federal definition and thereby proceeded cautiously at the federal level while allowing each state to chart its own course within its own borders without dictating the outcome for other sovereigns. In short, DOMA allowed each state to operate as a laboratory of democracy, while preserving each sovereign's ability to make this sensitive determination for purposes of that sovereign's own law.

Ms. Windsor agrees (Windsor Br. 56)[1] that states, as sovereigns, should be allowed to define marriage, as her "home state of New York" has done to "allow gay couples to marry." And she concedes that "Congress has sovereign power to decide eligibility [for] federal programs and benefits." *Id.* Tellingly, she does not explain how it was irrational for Congress to respect state sovereignty (by allowing New York and every other state to define marriage for itself) and to exercise its own sovereign power (by employing the traditional definition to determine eligibility for federal programs and benefits).[2]

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[1] All citations herein to party briefs are to merits briefing.

DOJ likewise concedes (at 45) that "[i]t is, of course, true that the federal government has an interest in defining marriage for purposes of federal law." But DOJ suggests that such definitions, like all exercises of federal power, must comply with equal protection principles, and so the federal government obviously could not define marriage in a manner that violated *Loving v. Virginia*, 388 U.S. 1 (1967). But that is because no government—state, local, or federal—can define marriage inconsistently with *Loving*. There is no special disability on the federal government's exercise of its "interest in defining marriage for purposes of federal law." Thus, if states can continue to have the constitutional option to employ the traditional definition, there is no reason—and DOJ offers none—why the federal government does not have the same option for purposes of federal law.

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[2] DOJ "does not challenge" DOMA's constitutionality under rational-basis review and "has previously defended Section 3" under that test. DOJ Br. 51-52. Its discussion of various interests supporting DOMA (*id.* at 38-51) is premised on the applicability of heightened scrutiny, and thus has little value if rational basis applies. DOJ also raises, without actually endorsing, the possibility that the Court could apply a heightened form of rational-basis inquiry. DOJ itself seems to recognize that three levels of scrutiny are enough, and its principal authority, Justice O'Connor's concurrence in *Lawrence v. Texas*, 539 U.S. 558 (2003), went out of its way to acknowledge the "legitimate state interest" in "preserving the traditional institution of marriage." *Id.* at 585.

Both DOJ and Ms. Windsor suggest that Congress' stated interest in promoting "democratic self-governance" only explains Section 2 of DOMA. Not so. Sections 2 and 3 work together to ensure that no one sovereign's decision—whether through the legislature or the courts—will automatically dictate the decision of another sovereign through either full faith and credit principles or federal borrowing of state definitions. Section 2 primarily preserves the independent decision-making of states (and tribes and possessions), while Section 3 primarily preserves the ability of the federal government to employ its own definition. But both provisions promote "democratic self-governance" by preventing the automatic borrowing of redefinitions of marriage that Congress correctly anticipated would come first from unelected state judiciaries.

As to caution, Ms. Windsor does not argue that it was irrational for Congress to allow the states to experiment with same-sex marriage while preserving the traditional definition of marriage at the federal level. Instead, she argues that Congress was not cautious because "DOMA abandoned the uniform historic federal practice of deferring to the states in terms of marital status." Br. 57.

But that ignores the unique dynamic facing Congress when it enacted DOMA. Up until that point, the traditional definition had governed in every state and for all federal law purposes. Congress thus had no occasion to choose between adopting a uniform federal definition and deferring to state definitions. But when Hawaii was poised to become the first jurisdiction in the United States to deviate from the traditional definition, there was nothing incautious about retaining the traditional definition as the federal definition while states began a process of experimentation. That approach was a rational exercise in caution and a rational approach to the issue given our system of dual sovereignty.

In all events, it is not true that Congress has always deferred to the states on marriage, *see* House Br. 4-9, and neither Ms. Windsor nor DOJ seriously argues that Congress must do so. To the contrary, both recognize that Congress has a legitimate interest in defining terms in federal statutes. What is true is that Congress has never—before 1996 or after—allowed federal law to depart from the traditional definition of marriage. Thus, DOMA maintained the relevant status quo ante, and was indeed an appropriately cautious response to the onset of state experimentation with redefining marriage.

B. Uniformity

In DOMA, Congress rationally chose to have a uniform federal rule that treated all same-sex couples the same, without regard to whether their state of residence recognizes same-sex marriage, civil unions or domestic partnerships, or employs the traditional definition. DOJ and Ms. Windsor suggest that Congress should have selected a different kind of uniformity—namely, a uniform rule of deference to the states' varying definitions of marriage. DOJ Br. 48-49; Windsor Br. 48-49. But if uniformity is a legitimate government interest (as DOMA's opponents do not dispute), then what *kind* of uniformity to pursue is a choice constitutionally vested in Congress, not the judiciary.

As noted, Congress faced a unique dynamic in enacting DOMA. Previously, there was no tension between deferring to states and achieving nationwide uniformity in the basic definition of marriage. But when Congress could no longer obtain substantive uniformity by applying a uniform procedural rule of deference, there was nothing irrational about deciding substantive uniformity was more important. Ms. Windsor asserts (at 49) that she should be treated the same as any other widow in New York, and as far as the State of New York is concerned that is certainly true. But the federal sovereign has a unique interest in treating a survivor of a same-sex relationship in New York the same as a survivor of a same-sex relationship in Oklahoma. And DOMA rationally furthers that uniquely federal interest in nationwide uniformity.

Congress also has a rational interest in avoiding the difficult residency and choice-of-law determinations that federal agencies would have needed to make absent DOMA. Ms. Windsor dismisses such administrability concerns by suggesting (at 52) that it is obvious to everyone but the House that New York would have recognized a Canadian same-sex marriage in the years before it issued same-sex marriage licenses of its own. But the New York Court of Appeals viewed the question as difficult enough to reserve it as recently as November 2009 in *Godfrey v. Spano*, 920 N.E.2d 328 (2009), and whatever the answer to that recognition-of-foreign-judgments question in New York, the answers to comparable questions remain opaque in other jurisdictions. Surely it is rational for Congress to employ an easily administrable rule that avoids the need for federal agencies to make state-law determinations difficult enough for state high courts to reserve.

None of this is to suggest that it would have been irrational for Congress to choose Ms. Windsor's preferred uniform rule of deference. But rational basis review means having choices, and Congress surely had discretion to choose between these two forms of uniformity.

Ms. Windsor does not seem to take issue with the notion that this substantive uniformity interest could rationally support a decision of a future Congress to adopt a uniform federal definition that includes all same-sex couples if a majority of states ultimately moves away from the traditional definition. But there is no reason that this interest in uniformity operates only in one direction. It bears emphasis that the traditional definition was the only definition at the time of DOMA's enactment and remains the rule in more than 80% of the jurisdictions. If and when that changes, Congress could rationally choose to adopt a different uniform federal rule, but that only underscores the validity of uniformity as a federal objective and the rationality of the choice Congress made in DOMA.

Finally, DOMA's opponents claim it is irrational for Congress to seek national uniformity in federal recognition of same-sex marriages, because it has not sought national uniformity in federal recognition of first-cousin marriages, common-law marriages, or teenage marriages. DOJ Br. 48-49; Windsor Br. 50-51. But rational-basis review, as it must, leaves the legislature ample room to "select one phase of one field and apply a remedy there," particularly if it is "the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

This is particularly true when it comes to the federal interest in uniformity. Taken to its logical conclusion, Ms. Windsor's view would suggest that whenever Congress legislates it must fully displace conflicting state laws. But such a rule would be antithetical to both rational-basis review and notions of cooperative federalism. Congress may pursue a rational interest in uniformity by, for example, providing a uniform federal statute of limitation for a federal cause of action. Doing so for one statute does not somehow prevent Congress from borrowing the state statutes of limitations for a different statute. Certainly, there were rational reasons for Congress to place greater weight on uniformity when it came to same-sex marriage than first-cousin marriages, as evidenced by the much more robust political debate regarding the former.

C. Preserving Past Congressional Judgments, Providing Definitional Clarity, and Fiscal Prudence

Every federal statute on the books in 1996 reflected a congressional intent—either implicit or express—to use terms like marriage and spouse to refer only to opposite-sex couples. Congress knew to a certainty that the various legislative judgments and compromises reflected in that array of statutory provisions were based on the traditional definition. It was thus eminently rational to preserve those past judgments.

Ms. Windsor suggests that an interest in preserving those past legislative judgments does not necessarily mean that those judgments were themselves rational. That is true, but it conflates two distinct questions. If no government can constitutionally employ the traditional definition for any purpose (or ever could), then there is obviously no exception for DOMA. But if the argument is instead that DOMA uniquely lacks a rational basis even though states and the federal government in pre-DOMA legislation were free to employ the traditional definition, then the fact that DOMA preserved the legislative intent and legislative compromises of prior Congresses—by adopting not just *a* uniform federal definition, but *the precise definition* that underlay every prior congressional reference to marriage—is a sufficient answer.

Ms. Windsor also complains that DOMA addresses over 1,000 statutes at once. But that simply reflects Congress' intent to adopt a definitional provision. By adopting a single definition that reaffirmed that there is a uniform federal definition of the terms "marriage" and "spouse" wherever they appear in federal law, Congress clarified the meaning of federal law and preempted countless questions that would have arisen in DOMA's absence. For example, without DOMA, there would be questions whether federal statutes that expressly incorporated the traditional definition wholly apart from DOMA, *see* House Br. 5, would apply to same-sex married couples. Questions also would arise about the treatment of couples in state-sanctioned civil unions. DOMA avoided all those questions and clarified the meaning of marriage and spouse under federal law. Thus, DOMA is supported by the same rational basis that justifies any definitional provision in the U.S. Code: It rationally clarifies the meaning of the defined term. To demand more, or to complain that it applies comprehensively to all federal statutes and agencies, is to ignore Congress' manifest intent to adopt Section 3 as a definitional provision.

Congress likewise was rationally concerned with avoiding the uncertain and likely negative fiscal impact of redefining marriage. Indeed, whatever the ultimate net impact of DOMA on the overall federal budget, Congress could rationally choose to avoid the disparate impact on various federal programs, some of which benefit married couples (and therefore would face a budget shortfall if the definition were broadened) and some which involve the opposite dynamic.

Ms. Windsor and her *amici* assert that DOMA does not save money overall, and that saving money is not a legitimate government purpose without some further justification for how the savings are achieved. Windsor Br. 53-55. But as the House has explained and the First and Second Circuits have both recognized, these objections contradict established principles of rational-basis review. *See* House Br. 39-41 & n.8. In particular, while Ms. Windsor points out (at 53) that this Court has required some further justification for the method of savings when government *withdraws* a benefit that it previously offered, the Court has found cost savings and caution sufficient justifications for not extending benefits to a group that never had previously been eligible. *Bowen v. Owens*, 476 U.S. 340, 347-48 (1986). DOMA plainly does the latter.[3]

D. The Rational Bases That Support States' Decisions to Adopt and Retain the Traditional Definition

The federal government has uniquely federal interests that provide a rational basis for DOMA. But by incorporating the definition long used by every state and still employed by the vast majority of states, DOMA is likewise supported by the rational bases that caused the states to adopt and retain the traditional definition. In other words, as long as the vast majority of states have not adopted a wholly irrational and unconstitutional definition, Congress acted rationally in clarifying that federal law reflects the same definition.

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[3] Ms. Windsor objects (at 54-55) to the House's observation that marriage penalties make people less likely to marry, but this has long been a concern with respect to opposite-sex couples. *E.g., Druker v. Comm'r*, 697 F.2d 46, 50 (2d Cir. 1982) (Friendly, J.). In other words, the House agrees with Ms. Windsor's observation (at 55) that "gay couples ... marry for the same reasons straight couples do," and since Congress has long expressed concerns that "marriage penalties" imposed by federal tax and benefit programs might impact at least some couples' willingness to marry, it was rational to think that same-sex couples would not be wholly immune from such considerations.

There is no dispute that, unlike opposite-sex relationships, same-sex relationships do not have a propensity to produce children without advance planning, Windsor Br. 43-44, or that marriage creates a beneficial social structure for responsible procreation and childrearing. Those concessions are enough to give Congress a rational basis to treat same-sex and opposite-sex couples differently. DOMA's opponents resist that conclusion only by offering arguments that fundamentally misunderstand the deferential nature of rational-basis review.

First, DOMA's opponents challenge as irrational the long-held cultural judgment that a child's biological parents are, other things being equal, the child's natural and most suitable guardians. Ms. Windsor even claims (at 45) that current law does not recognize this principle. That is mistaken: Every state recognizes that a child ordinarily should be raised by his or her biological mother and father, if they are able and willing.

To be sure, children can be raised by their unmarried biological parents and married couples often raise children without a biological link. But none of that denies that marriage as an institution is linked to the unique tendency of opposite-sex couples to produce unintended offspring and the societal interest in providing a stable structure for raising such children. And to the extent that marriage is an answer to the procreative potential of opposite-sex relationships, it is not irrational to decline to extend it to same-sex couples who by definition do not have the same propensity for their intimate acts to produce unplanned offspring.

Second, Ms. Windsor argues (at 41-42) that DOMA (i) operates solely to deny marital eligibility to same-sex couples, and therefore (ii) has no effect on procreation or childrearing by opposite-sex couples. The first part of this argument is simply incorrect: DOMA defines terms for purposes of federal law; it does not deny marital eligibility—which remains a matter of state law—to anyone. Moreover, the second part of Ms. Windsor's argument simply misses the point under equal-protection rational-basis review. What must have a rational basis is not the denial of benefits in the abstract, but the *difference* in treatment between same-sex and opposite-sex couples. A denial of veterans' benefits to civilian employees of the Defense Department who served during wartime is of no particular direct benefit to military veterans, but the distinction drawn is nonetheless rational. Under this Court's established precedents, the fact that opposite-sex couples implicate the state interests in procreation and childrearing in a unique way and to a unique degree is a rational basis for treating them differently. *E.g., Johnson v. Robison*, 415 U.S. 361, 383 (1974).

Third, and finally, Ms. Windsor argues (at 36, 44) that the array of federal marital benefits and burdens is too broad for them all to relate to childrearing, or any rationale justifying the traditional definition of marriage. But that simply asks too much of a federal definitional provision. All parties agree that, as DOJ puts it (at 45), "the federal government has an interest in defining marriage for purposes of federal law." In some circumstances, a federal program refers to marriage in the context of benefits that have a close nexus to childrearing, while in others the term is used to allocate different benefits or address different problems. But it is certainly rational for Congress to apply a single definition to the terms "marriage" and "spouse" wherever they appear in federal law.

* * *

At most, then, all that DOMA's opponents have demonstrated is that definitions of marriage eligibility (as with most definitions) involve a line-drawing process in which "every line drawn by a legislature leaves some out that might well have been included." *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974). For example, Ms. Windsor and her *amici* point out that certain disclosure laws may not reach same-sex spouses. But for purposes of such laws, it is equally anomalous that there is no coverage for a long-time live-in girlfriend of a Congressman, someone in a state-sanctioned civil union, and someone in a committed long-term same-sex relationship in a state with the traditional definition. Indeed, it might make more sense for a decade-long girlfriend to be covered than a newlywed, but so it goes with line-drawing. "[T]he Constitution does not require [government] to draw the perfect line nor even to draw a line superior to some other line it might have drawn." *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2083 (2012). "That exercise of discretion ... is a legislative, not a judicial, function," not to be struck down unless arbitrary.

Belle Terre, 416 U.S. at 8; *see id.* n.10. DOMA plainly passes that test.

E. Alleged "Animus" Cannot Invalidate a Statute, Such as DOMA, Supported by Rational Bases.

Ms. Windsor—but not DOJ—quite remarkably appears to contend that DOMA fails rational-basis review even if it has a rational basis, because it was allegedly born of "animus." Br. 33, 35-36. But this Court's precedents hold otherwise.

"It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 383 (1968). Thus, while the Court has long recognized that discrimination purely for its own sake is not rational, under the established approach, constitutional review does not require a separate judicial inquiry into whether a law was motivated by "animus." Instead, only *after* the search for other rational bases for a law has been exhausted will the Court conclude that impermissible animus is the sole remaining explanation. Animus is thus a conclusion drawn from the unsuccessful search for rational bases, not a separate inquiry. Since the House has identified numerous rational bases for DOMA, the inquiry ends there.

In any event, as Ms. Windsor and her *amici* point out, many applications of DOMA actually benefit same-sex couples by exempting them from federal marriage penalties or other duties. DOMA's opponents treat this as evidence of its irrationality;

in fact, these applications establish only that DOMA would be an irrational means of implementing animus against gay people—which only underscores that something else, and something rational, was afoot.

II. This Court Should Not Make Sexual Orientation The First New Suspect Class In Four Decades.

All parties to this case agree that Section 3 should be analyzed as a sexual-orientation classification, and DOJ and Ms. Windsor argue that such classifications should be subjected to heightened scrutiny. (They make no other argument for heightened scrutiny.)

It is the longstanding law of this Court that race, alienage, and national origin are the suspect classes while sex and illegitimacy are quasi-suspect. For forty years, this Court has not added to this list. It has never put sexual orientation in either category despite multiple opportunities to do so. Eleven courts of appeals have applied rational basis review to sexual orientation, with a majority adopting or reaffirming that conclusion post-*Lawrence*; the court below is the *only one* to rule otherwise.

The four factors discussed by DOJ and Ms. Windsor only confirm that the suspect-class list should not be expanded in this case.

A. Gays and Lesbians Are Hardly Politically Powerless.

This Court's equal-protection jurisprudence has long recognized that the "political processes ordinarily [are] to be relied upon to protect minorities," and that the incursion into democratic self-governance that comes with "more searching judicial inquiry" is appropriate only when those processes are "seriously" curtailed. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Thus, the most salient factor justifying heightened equal-protection review is whether the members of the proposed suspect class "are politically powerless in the sense that they have no ability to attract the attention of the lawmakers." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985). While "[a]ny minority can be said to be powerless to assert direct control over the legislature," that alone does not a suspect class make. *Id.*

Gay and lesbian interest groups clearly can attract the attention of lawmakers—to a remarkable degree. The briefing before this Court is testament to that ability. The President, Vice President, and Attorney General all support same-sex marriage and have urged this Court to find it required both at the federal level and in the states. *Amici* briefs opposing DOMA have been filed by 40% of all Senators and Representatives, including the Senate Majority Leader and House Minority Leader (*see Amici* Br. of 172 Members of U.S. House of Representatives and 40 U.S. Senators); by numerous former senior executive-branch officials of both political parties (*see* Br. of Donna Shalala, *et al.*); and by 15 states and the District of Columbia (*see* Br. for New York, *et al.*). Moreover, one of the two major political parties supports same-sex marriage in its platform; other *amici* opposing DOMA include a large group of the country's leading businesses (*see* Br. of 278

Employers, *et al.*), as well as the nation's largest labor organization (*see* Br. of AFL-CIO).

Ms. Windsor counters that gays and lesbians have uniquely had their rights put to public votes. But the critical point is not that such votes have occurred (which is merely evidence of the democratic process at work), but that gays and lesbians are increasingly prevailing at the ballot box, even in states like Maine, where they previously lost.

Unable to deny such substantial successes, DOMA's opponents suggest that the relevant benchmark is the political power of women at the time that sex was subjected to heightened scrutiny. But the political power of women is clearly an outlier in suspect-class analysis, as is perhaps most dramatically illustrated by the reality that women, unlike every other protected class, are a political majority. That benchmark would make nonsense of this Court's subsequent decisions that heightened scrutiny is unnecessary for the disabled or the elderly. *Cleburne*, 473 U.S. at 445; *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976). The Court's application of heightened scrutiny, despite the majority status and substantial achievements of women, was explained instead by over a century of official disenfranchisement that left the statute books littered with laws based on outdated stereotypes. *See Frontiero v. Richardson*, 411 U.S. 677 (1973). As all concede, gays and lesbians (in common with other groups who have tried but failed to obtain the benefit of heightened scrutiny since *Frontiero*) have not been subject to such official disenfranchisement.

B. Sexual Orientation Is Relevant to Legitimate Governmental Interests.

Even DOMA's opponents concede that same-sex couples do not have the same propensity to produce unplanned and unintended offspring relative to opposite-sex couples. That basic distinction—and the biological reality that underlies it—provides a basis for governments to draw the kind of distinctions at issue in DOMA. *See* House Br. 44-48. The question is not whether gays and lesbians have an "ability to perform or contribute to society." DOJ Br. 27. Of course they do. But so do individuals with disabilities, the aged, the poor, and other groups that do not qualify as suspect classes. What is relevant is whether opposite-sex couples and same-sex couples are differently situated when it comes to things like their propensity to produce unplanned offspring. They are. And that provides a basis for the government to legislate in response to that difference in ways that do not implicate concerns triggering heightened scrutiny.

C. No Other Protected Class Is Defined With Reference to Conduct.

Unlike the recognized suspect classes, sexual orientation is defined by a tendency to engage in a particular kind of conduct. Ms. Windsor takes umbrage at this observation (at 28), but her own *amici* medical organizations agree that "it is only by acting with another person—or desiring to act—that individuals express their heterosexuality, homosexuality, or bisexuality." Br. of Am. Psych. Ass'n, *et al.* 11. Sexual orientation is thus unlike any of the recognized suspect classes.

Sexual orientation is also unlike other suspect classes (but like other groups not so recognized) in that it is not discernible at birth. Nor is it immutable in the same ways. In implicit recognition of this difference, DOJ goes so far as to question the continuing relevance of immutability and emphasizes instead that sexual orientation is "distinguishing." But that proves far too much. *Every* law that draws lines distinguishes between the groups on both sides of the line.

D. The Unique History of Discrimination

In describing the history of discrimination against gays and lesbians, DOJ and Ms. Windsor describe a world that is nearly unrecognizable today. DOJ Br. 23-26; Windsor Br. 20-21. For present purposes, the most remarkable fact about this history is how dramatically, and how quickly, things have changed. As Ms. Windsor's own expert historian states, "antigay discrimination ... is a unique and relatively short-lived product of the twentieth century." George Chauncey, *Why Marriage?: The History Shaping Today's Debate Over Gay Equality* 14 (2004). In 2003, this Court could say that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter"—and nor could there be since "according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century." *Lawrence*, 539 U.S. at 568.

And things have changed dramatically since *Lawrence* precisely because of *Lawrence*. *Lawrence* recognized that allowing "homosexual conduct [to be] made criminal by the law of the State" presented an obstacle to eliminating discrimination on the basis of sexual orientation. 539 U.S. at 575 (discussing *Bowers v. Hardwick*, 478 U.S. 186 (1986)). This Court eliminated that obstacle in *Lawrence*, which has allowed gays and lesbians to make remarkable strides in the political process in the decade since. *See* John Cohen, *Gay Marriage Support Hits New High in Post-ABC Poll*, Washington Post, The Fix (Mar. 18, 2013), http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/18/gay-marriage-support-hits-new-high-in-post-abc-poll/?wpisrc=al_comboNP_p (noting that public support for same-sex marriage has reached all-time high, reversing the percentages from a decade ago). There is no reason to remove those issues from the political process at the precise moment that the successes enabled by *Lawrence* are mounting.

E. In All Events, DOMA Satisfies Heightened Scrutiny.

Even if the Court were to add sexual orientation to the list of quasi-suspect classifications, DOMA should be upheld. As already noted, Congress responded to a unique dynamic in enacting DOMA. At the time of passage, every state retained the traditional definition, but Congress correctly perceived that things could change based on judicial decisions interpreting state constitutions. Preserving our unique system of dual sovereignty clearly constitutes an important government interest. In acting to preserve the ability of each sovereign in that system to define marriage for itself, Congress furthered that unique interest in a matter perfectly tailored to our federal system. Each state could decide the issue, without any one state dominating the discussion through principles of full faith and credit. And the federal government preserved its ability to adopt the majority rule as its own, without simply borrowing the rule any state or state court chose to adopt. None of that reflects animus or irrationality. Instead, DOMA reflects an appropriate accommodation of a unique dynamic in our federal system.

III. This Court Should Leave The Definition Of Marriage To The Democratic Process.

This case poses basic questions regarding a foundational social institution and the rights of the American people. For many people on both sides of this debate, "these are not trivial concerns," but implicate instead "profound and deep convictions." *Lawrence*, 539 U.S. at 571. This case also presents a fundamental choice regarding whether such questions will be resolved through the democratic process—which is actively engaged on these issues—or instead through the courts. With an issue as fast-moving and divisive as same-sex marriage, the advantages of the political process are substantial. The democratic process requires opposing sides to attempt to persuade each other, to understand each other's positions, and perhaps, at least temporarily, to reach compromises that both sides can accept. A constitutional right to same-sex marriage, on the other hand, could be achieved only by marginalizing, as bigoted at worst or irrational at best, the "profound and deep convictions" of those who disagree.

It is no small matter to declare that the federal adoption of the traditional definition—the only definition our Country had ever known for over 220 years—is not just antiquated or imperfect, but wholly irrational. And declaring the firmly held views of many individuals and jurisdictions across the country (and across the world, *see* International Jurists *Amici* Br.) irrational and constitutionally verboten is likewise no small matter. Doing so based on an Equal Protection Clause that has co-existed with the traditional definition of marriage for nearly 150 years would be more difficult still.

The alternative is to allow a robust political debate in which proponents of same-sex marriage have made remarkable strides to continue. While that political debate will not result in uniform and retroactive results nationwide—at least not in the near term—that is inherent in the political process, especially in our federalist system. One state may fully recognize same-sex marriages, another may permit civil unions, and others may apply the traditional definition. The federal government, for its part, is free to adopt its own definition, but can also provide broader benefits to families (a term not defined in DOMA). If one group were permanently frozen out of this political process, through official disenfranchisement or some other obstacle, judicial intervention would be imperative. But that clearly is not the case here.

As this Court recognized in *Lawrence*, the Court's own decision in *Bowers* skewed the political process. But having removed that obstacle in *Lawrence* and returned the issues to an unskewed political process, there is no cause to warp the robust political debate that has ensued by intervening to end it. This Court should recognize that DOMA satisfies rational basis review and allow the robust democratic debate over this issue to continue.

CONCLUSION

For the foregoing reasons, as well as those stated in the House's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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March 19, 2013

REPLY
BRIEF

No. 12-307

In The
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *ET AL.*,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR COURT-APPOINTED *AMICA CURIAE* ON JURISDICTION

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

- I. BLAG LACKS STANDING. 2
- II. THE EXECUTIVE BRANCH'S AGREEMENT WITH THE COURTS BELOW DEPRIVES THIS COURT OF JURISDICTION. 6
  - A. The United States Lacks Appellate Standing; It Is Adverse Neither To Windsor Nor The Judgment Below 7
  - B. *Lovett* and *Chadha* Are Distinguishable 8
  - C. Non-Justiciability Here Comports With Other Precedent 11
  - D. Article III's Consequences Considered 13

CONCLUSION 16

TABLE OF AUTHORITIES

CASES:

Already, LLC v. Nike, Inc.,
133 S. Ct. 721 (2013) 1

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 6

ASARCO, Inc. v. Kadish,
490 U.S. 605 (1989) 6

Ashwander v. TVA,
297 U.S. 288 (1936) 9

Bartnicki v. Vopper,
532 U.S. 514 (2001) 14

Bob Jones Univ. v. United States,
461 U.S. 574 (1983) 12

Bowsher v. Synar,
478 U.S. 714 (1986) 4, 12

Buckley v. Valeo,
424 U.S. 1 (1976) 3, 12

Califano v. Yamasaki,
442 U.S. 682 (1979) 15

Cardinal Chem. Co. v. Morton Int'l, Inc.,
508 U.S. 83 (1993) 11

Central Va. Cmty. Coll. v. Katz,
546 U.S. 356 (2006) 14

Cheng Fan Kwok v. INS,
392 U.S. 206 (1968).. 11

City of Erie v. Pap's A.M.,
529 U.S. 277 (2000).. 12

Clapper v. Amnesty Int'l USA,
133 S. Ct. 1138 (2013)..................................... 15

Clinton v. New York,
524 U.S. 417 (1998).. 14

Coleman v. Miller,
307 U.S. 433 (1939).. 4

DaimlerChrysler Corp v. Cuno,
547 U.S. 332 (2006).. 1

Diamond v. Charles,
476 U.S. 54 (1986).. 1, 6

Dickerson v. United States,
530 U.S. 428 (2000).. 12

Director, OWCP v. Perini N. River Associates,
459 U.S. 297 (1983).. 10

Heckler v. Edwards,
465 U.S. 870 (1984).. 15

Horne v. Flores,
557 U.S. 433 (2009).. 12

In re Metro. Ry. Receivership,
208 U.S. 90 (1908).. 13

INS v. Chadha,
462 U.S. 919 (1983) .... *passim*

Kentucky v. Indiana,
281 U.S. 163 (1930) 13

Lewis v. Casey,
518 U.S. 343 (1996) 9

Metro Broad., Inc. v. FCC,
497 U.S. 547 (1990) 12

Morrison v. Olson,
487 U.S. 654 (1988) 8, 12

Muskrat v. United States,
219 U.S. 346 (1911) 5

Myers v. United States,
272 U.S. 52 (1926) 5, 11

Pope v. United States,
323 U.S. 1 (1944) 13

Princeton University v. Schmid,
455 U.S. 100 (1982) 7

Raines v. Byrd,
521 U.S. 811 (1997) 2, 4, 13, 15

Sixty-Seventh Minnesota State Senate v. Beens,
406 U.S. 187 (1972) 4

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 2

Stern v. Marshall,
131 S. Ct. 2594 (2011) 14

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 2

United States v. Lovett,
328 U.S. 303 (1946) 8, 9

United States v. Nixon,
418 U.S. 684 (1974) 8

United States v. Richardson,
418 U.S. 166 (1974) 5

Vermont Agency of Natural Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000) 7

Warth v. Seldin,
422 U.S. 490 (1975) 7

STATUTES:

28 U.S.C.
§ 515 8
§ 2403 14

29 U.S.C.
§ 1055 14
§ 1132 14
§ 2617(a)(2) 14

31 U.S.C.
§ 1324 (2010) 9

The Respect for Marriage Act, S. 598, 112th Cong., 1st Sess. (2011) 15

OTHER AUTHORITIES:

Hall, Matthew, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539 (2012) 3

Kmiec, Douglas, *OLC's Opinion Writing Function: The Legal Adhesive For A Unitary Executive*, 15 CARDOZO L. REV. 337 (1993) 5

Lochhead, Carolyn, *Feinstein's Bill to Repeal DOMA Clears Committee*, SFGATE, Nov. 11, 2011 15

Meltzer, Daniel, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183 (2012) 5, 6

Paulsen, Michael Stokes, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO L.J. 217 (1994) 5

INTRODUCTION

"If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). Article III's case-or-controversy requirements apply at "'all stages'" of litigation, *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (citation omitted), and thus issues decided in the lower courts sometimes cannot be reviewed by this Court, *see, e.g., Diamond v. Charles*, 476 U.S. 54, 63-64 (1986). Here, none of the parties seeking review suffers cognizable "injury" "caused" by the lower court judgments and "redressable" by the relief requested from this Court.

The United States claims injury because the judgments below hold DOMA unconstitutional and require payment to Windsor. Yet the United States does not want—indeed, advocates forcefully against—the only meaningful relief this Court could provide, which is reversal of the judgments below. Like Windsor, it seeks only affirmance. But Article III requires that the party invoking this Court's jurisdiction seek judicial *redress* of the injury it asserts, not validation of the (injury-inflicting) decisions below.

BLAG *has* sought reversal. But neither BLAG nor the institution it claims to represent has suffered a legally cognizable injury. The Constitution assigns the execution of the laws to the Executive. Separation-of-powers principles do not allow subunits of Congress to "pinch hit" whenever they object to the Executive's exercise of his "Take Care" duties.

Article III jurisprudence requires that this Court's decision on DOMA's constitutionality wait until a justiciable case comes before it. Undoubtedly delay may have real consequences. But "[h]owever desirable prompt resolution of the merits *** may be, it is not as important as observing the constitutional limits set upon courts in our system of separated powers," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 110-11 (1998), limits intended to endure over time and hard cases.

ARGUMENT

I. BLAG LACKS STANDING.

Like private litigants, Congress, its subparts, and its members may invoke Article III jurisdiction only when injury to their legally cognizable interests is alleged. *Cf. Raines v. Byrd*, 521 U.S. 811, 819 (1997). BLAG asserts no such injury.

1. At least before the House's adoption of revised rules on January 3, 2013, BLAG was not properly authorized to act for the House of Representatives and thus could not assert injury on the House's behalf. Because Article III jurisdiction must exist at all stages of litigation, retroactive "*nunc pro tunc*" authorization cannot suffice. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 495, n.* (2009) (respondents "could not remedy [a standing] defect retroactively"). And authorization from one House is not authorization to represent the entire Congress.

2. More importantly, neither all nor part of Congress suffers cognizable "injury" from the Executive's failure to defend the constitutionality of DOMA. Congress' *interest* in how a law is executed does not constitute Article III "*injury*." Once

Congress enacts legislation, its legal role is ordinarily at a constitutional end.

Litigation decisions about federal laws are quintessentially Executive judgments. "A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take care that the laws be faithfully executed.'" *Buckley v. Valeo*, 424 U.S. 1, 138 (1976). Permitting a congressional body to step in when it disagrees with the Executive would undermine that allocation of power.[1] If BLAG suffers Article III "injury" by Executive failure to defend a statute, then presumably congressional bodies could also intervene when they disagree with the Executive's constitutional theory defending a statute, or even its interpretation of a statute. That cannot be right: Whether the Executive performs its duties well or badly, Congress cannot "second chair" its litigation. Separation of powers would mean little if disagreement with one Branch's exercise or non-exercise of its assigned powers entitled other Branches to intrude into that sphere.

This Court's decisions do not support BLAG's standing. In *INS v. Chadha*, 462 U.S. 919, 931 n.6, 939-40 (1983), the challenged statute provided each House of Congress with a concrete, distinctly legislative veto power. Notwithstanding the Court's broad language, *see id.* at 939, it was the threatened elimination of that statutory power that gave the intervenors standing, not the invalidation of the statute qua statute.[2] Similarly, in *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972), the State Senate was not defending a statute's constitutionality; it was objecting to a reapportionment order that reduced the Senate's size from 67 to 35 seats, thereby "directly affect[ing]" the Senate itself. *Id.* at 194.

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[1] *Cf.* Matthew Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1568-69 (2012) (allowing intervenors "to assert defenses that the Executive has chosen not to *** necessarily shifts *** power from the Executive to the courts and Congress").

In *Raines*, 521 U.S. at 823, this Court suggested that injury might exist if legislators' votes were "completely nullified" –*e.g.*, not counted properly in determining whether a statute has been enacted, or an amendment ratified (as in *Coleman v. Miller*, 307 U.S. 433 (1939)). But nothing like that happened here. Legislative votes in DOMA's favor were plainly counted; DOMA went "into effect," see *Raines* at 823, and has been enforced for nearly two decades. BLAG's complaint is not about recognizing votes but about the defense and enforcement of enacted law, which is committed to the Executive.

3. Treating BLAG's claimed interest in the standard of review that might be adopted (BLAG Br. 13-15) as "injury" would drive a large hole through Article III. It would allow speculation about the effect of case outcomes on future legislation to open the door to standing in countless cases involving state, local and federal lawmakers. Moreover, *Raines*, 521 U.S. at 825-26, rejected standing for

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[2] In *Bowsher v. Synar*, 478 U.S. 714 (1986), the Court did not address any appellant's standing, and the challenged statute's empowerment of the Comptroller-General, *see id.* at 717-719, gave him standing to appeal a judgment stripping him of those new powers.

legislators who challenged the possible diminution of their authority by operation of the Line Item Veto Act. BLAG's claim of injury here is far more remote.

4. Finally, BLAG's participation is not necessary to bring DOMA's constitutionality before this Court. *See* Part II.D, *infra*. But even if it were, the desire for a ruling cannot alter the requirements of Article III. *See, e.g., United States v. Richardson*, 418 U.S. 166, 179 (1974); *Muskrat v. United States*, 219 U.S. 346 (1911).

Congress has many constitutional mechanisms to express disagreement with the President. Congress famously disagreed with President Andrew Johnson's refusal to comply with a Tenure of Office Act.[3] When another President ignored a similar Act and the removed official sued, a member of Congress filed as *amicus* to defend the constitutionality of the law. *Myers v. United States*, 272 U.S. 52 (1926). When the Reagan Administration refused to enforce a government contracting law as unconstitutional, Congress responded politically by threatening appropriations and forcing concessions from the Administration, and then later modifying the law itself.[4] When the Clinton Administration decided to enforce but not defend a requirement that the military discharge HIV-positive personnel, Congress changed the law.[5] Recognizing congressional "injury" from Executive decisions not to defend, when the statute implicates no special legislative prerogative, is inconsistent with this tradition and with the separation of powers.

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[3] *See* Daniel Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1192-93 (2012).

[4] *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO L.J. 217, 328-29 (1994); Douglas Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive For A Unitary Executive*, 15 CARDOZO L. REV. 337, 349 (1993).

II. THE EXECUTIVE BRANCH'S AGREEMENT WITH THE COURTS BELOW DEPRIVES THIS COURT OF JURISDICTION.

This case concerns appellate justiciability. The case before the district court was clearly justiciable: it would be unacceptable if "a person could be denied access to the courts because the Attorney General of the United States agreed with [the person's] legal arguments," but did not provide relief. *Chadha*, 462 U.S. at 939. But in those rare situations in which the Executive agrees that a challenged statute is unconstitutional, an Article III court's judgment in favor of the challenge will ordinarily end the case or controversy.

The United States and Windsor have obtained the judgment for which they argued; they seek no change in that judgment from this Court. Moreover, the injuries the Executive claims from that judgment are not redressable by the appellate relief it seeks: that the "judgment of the court of appeals should be affirmed" (U.S. Merits Br. 54).[6]

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[5] *See* Meltzer, *supra* note 3, at 1203-04.

[6] Windsor (Br. 29 n.8) mistakenly suggests that standing requirements do not apply where the appellate jurisdiction of Article III courts is invoked. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997); *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 618-19 (1989); *Diamond*, 476 U.S. at 62-64, 68-69.

A. The United States Lacks Appellate Standing; It Is Adverse Neither To Windsor Nor The Judgment Below.

Although the United States has sought *review*, it has sought no *relief* from this Court to remediate its asserted injury from the lower court judgment. The redressability component of standing requires a direct correspondence between the injury alleged and the judicial remedy sought by the party invoking Article III jurisdiction; it presupposes that the party is actually seeking redress. *See, e.g., Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (redressability is "a 'substantial likelihood' that the requested relief will remedy the alleged injury"); *Warth v. Seldin*, 422 U.S. 490, 504 (1975) (as part of standing, petitioners must show "that, if the court affords the relief requested, the asserted inability of petitioners will be removed"). But here, the "requested relief"—affirmance—will not redress or remove the injury alleged.

Princeton University v. Schmid, 455 U.S. 100 (1982), underscores this point. The Court there found New Jersey's appeal nonjusticiable because "simply ask[ing] for review [of a state court judgment] and declin[ing] to take a position on the merits" does not create any "case or controversy." *Id.* at 102. Had New Jersey urged "reversal," the Court elaborated, its appeal would have been justiciable. *Id.* In this case, the United States has advocated *both* for the judgment below and for its affirmance here, which compounds this justiciability problem. [7]

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[7] The United States' suggestion (Br. 24) that the Court treated New Jersey as not having appealed at all is mistaken. *See*

Moreover, the notion that the United States suffers "injury" from the invalidation of a statute the Executive has concluded is unconstitutional is difficult to reconcile with the Justice Department's statutory role as the United States' sole representative in this litigation. In *Morrison v. Olson*, 487 U.S. 654 (1988), and *United States v. Nixon*, 418 U.S. 683 (1974), an independent counsel and special prosecutor, respectively, were appointed, under different statutory authorities, to litigate on behalf of the United States and took positions at odds with the President's view.[8] But here it is the Justice Department that speaks for the United States. And given its constitutional view, the United States suffers no injury from a district court judgment it sought and of which it seeks affirmance.

B. *Lovett* and *Chadha* Are Distinguishable

Contrary to the opposing arguments, neither *United States v. Lovett*, 328 U.S. 303 (1946), nor *Chadha* resolve the question here.

1. In *Lovett*, 328 U.S. 303, no party, amicus or Justice raised any question relating to the United States' agreement with the judgment from which it appealed; the issue was neither discussed nor decided. Instead, Congress argued that the constitutionality of a limit on appropriated funds was

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Schmid, 455 U.S. at 102 ("The State of New Jersey did not file a separate jurisdictional statement but joined in that of the University."). Windsor suggests (Br. 22) that *Schmid* concerned only hypothetical or advisory opinions; yet court review of a judgment at the behest of a party who agrees with it surely has "advisory" elements.

[8] The Attorney General continues to have statutory authority to appoint special counsel. 28 U.S.C. § 515.

a political question, Congress Br. 26, *Lovett, supra* (No. 45-809). This Court disagreed and held the statute unconstitutional. 328 U.S. at 313, 315. Justice Frankfurter concurred, *id.* at 318-330, invoking *Ashwander v. TVA*, 297 U.S. 288, 341, 338, 348 (1936) (Brandeis, J., concurring), to explain why he rested only on statutory grounds. Thus, contrary to Windsor's suggestion, *Lovett* did not decide the justiciability question presented here. And "the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996).[9]

2. In *Chadha*, this Court deliberately did not decide whether the case before it would have been justiciable without the congressional intervenors. Although *Chadha* found the United States to be a "party" for purposes of *statutory* appellate jurisdiction, 462 U.S. at 930-31, the Court distinguished that statutory issue from the Article III question. *Id.* at 931 n.6 ("In addition to meeting the statutory requisites of Section 1252 *** an appeal must present a justiciable case or controversy under Art. III."). The Court then *refrained* from

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[9] Moreover, in *Lovett*, there was a real risk that the Court of Claims judgment would not be enforced unless reviewed by this Court. There was no established judgment fund to pay money judgments against the United States then, and the Solicitor General specifically noted the expressed "reluctan[ce]" of the relevant House Appropriations subcommittee to recommend appropriations to pay the judgment below, "in the absence of a clear ruling on the question of constitutionality." U.S. Pet. for Writ of Cert. at 15, *Lovett, supra* (No. 45-809). Here, by contrast, there is no similar risk that Windsor's judgment would not be paid because there is today a permanent, indefinite appropriation to assure payment of tax refunds. *See* 31 U.S.C. § 1324 (2010).

holding that Article III would have been satisfied had the United States been the only appellant.[10] Instead, the Court expressly held that a "justiciable case or controversy *** clearly exists in No. 80-1832, as in the other two cases, because of the presence of the two Houses of Congress as adverse parties." *Id.* at 931 n.6.[11]

The Court then referenced "*infra* at 939," *id.*, where it discussed Article III in more detail, covering two different periods in the litigation—in the Ninth Circuit before Congress had intervened, and in this Court after congressional intervention. As to the latter, the Court repeated that the presence of the congressional intervenors, whose own one-house veto right was at stake, provided justiciability: "[F]rom the time of Congress' formal intervention, *** the concrete adverseness is beyond doubt." *Id.* at 939.

The Court then separately analyzed justiciability before the Ninth Circuit, explaining that, "prior to Congress' intervention, there was adequate Art. III adverseness" because, notwithstanding "the INS's agreement with Chadha's position[,] *** the INS would have deported Chadha absent the Court of Appeals' judgment." 462 U.S. at 939. Thus, *Chadha* held that an Article III court—the Ninth Circuit there, like the District Court here—can grant relief at the behest of a person claiming injury from an unconstitutional law the Executive was enforcing, notwithstanding the Executive's agreement that the challenged law is unconstitutional.[12] But the Court did *not* hold that an Article III court would have jurisdiction over *an appeal* by the Executive once an Article III court gave the government, and the challenger, the judgment they sought.

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[10] Although the United States suggests (Br. 18) that there would be no point to a statutory rule less rigorous than Article III, at the time of *Chadha*, a party whose standing was unclear could invoke statutory appellate jurisdiction if another party who had not filed its own petition had standing. *See Director, OWCP v. Perini N. River Associates*, 459 U.S. 297, 302-05 (1983).

[11] *Perini N. River Associates*, cited by *Chadha*, 462 U.S. at 931 n.6, similarly avoided deciding whether the OWCP's Director had standing to appeal because the presence of another party satisfied justiciability requirements.

C. Non-Justiciability Here Comports With Other Precedent

Aside from *Chadha* and *Lovett*, in several other cases before this Court the United States has argued that a statute was unconstitutional, *e.g*, *Myers*, or has agreed with an opposing party on a legal issue, *e.g.*, *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968). But in all such cases of which counsel is aware, some party invoking this Court's jurisdiction sought *reversal* or *modification* of the judgment below. In no such case has this Court affirmatively held justiciable an appeal or petition where no party properly before the Court was adverse to another and no party sought modification of the decision below.

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[12] The statement in *Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83, 88-89 n.9 (1993), noted by Windsor Br. 21, noting that *Chadha* found adverseness even though "the two parties agreed" on the law's unconstitutionality, is correct insofar as it refers to Chadha's analysis of the Ninth Circuit, where there were only two parties. Once the Ninth Circuit ruled in Chadha's favor, and it was the INS seeking to invoke Article III jurisdiction, the Court is best understood to have rested justiciability on the presence of the intervenors.

Sometimes, the United States has agreed that a lower court judgment in its favor is wrong; but confession of error does not itself undo the judgment. In such appellate cases, the parties may both be adverse to the judgment below (and the Court not uncommonly asks an amicus to defend it). *See, e.g., Dickerson v. United States*, 530 U.S. 428, 441 n.7 (2000); *Bob Jones Univ. v. United States*, 461 U.S. 574, 599 n.24 (1983). But neither the United States nor Windsor disagrees with the judgment below.

Other times, the United States has agreed with another litigant that a lower court judgment was correct (as here), but a third party, such as an independent agency or officer authorized to litigate on its own, seeks modification of the decision below. *See, e.g., Morrison*, 487 U.S. 654 (review sought by independent counsel); *Bowsher*, 478 U.S. 714 (review sought by Comptroller-General).[13] Here, however, BLAG lacks standing, and so no proper party is adverse to the judgment below.[14]

The parties cite other cases to show that litigants' agreement on a legal claim does not necessarily deprive a court of jurisdiction. U.S. Br. 26; Windsor Br. 19. For example, in *Kentucky v. Indiana*, 281 U.S. 163 (1930), an original jurisdiction case, Indiana agreed that it was bound by a contract but refused to perform. Kentucky thus sought redress for its injury from a court of first instance (as Windsor did in this case). Likewise, courts may exercise jurisdiction over receivership proceedings, where a debtor may agree it is liable, but be unable to pay, *see In re Metro. Ry. Receivership*, 208 U.S. 90 (1908), or over entry of consent judgments, *see Pope v. United States*, 323 U.S. 1, 11-12 (1944), where entry of the judgment redresses the injury alleged. But none of those cases suggest that a party may ask an appellate court to "review" a judgment in order to affirm it.

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[13] *Cf. Buckley v. Valeo*, 424 U.S. 1 (1976) (appeal by plaintiffs challenging statute; United States files two separate briefs, one challenging some aspects of decision below); *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (review sought by would-be licensees challenging agency rules; United States as amicus and FCC as party filed briefs taking different positions).

[14] The United States (Br. 18-19) notes that lower court decisions invalidating statutes or requiring governments to pay money or take other action can create "injury" sufficient for standing on appeal. *See, e.g., Horne v. Flores*, 557 U.S. 433 (2009); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). But in these cases, the appealing party asked for reversal or modification of the judgment. Here, the United States does not.

D. Article III's Consequences Considered

The parties' desire to secure a ruling from this Court is understandable. But the burdens of adhering to Article III's justiciability limits should not be overstated. While this particular case is not justiciable in this Court, Article III does not preclude resolution of this important constitutional question in other cases.

When the Executive decides to enforce but not defend a statute, and its "nondefense" position prevails in the lower courts, Article III (in the absence of another party suffering cognizable injury from the judgment) forecloses appellate review at the United States' behest. But DOMA's constitutionality may well come before this Court in justiciable form in another case. *Compare Raines*, 521 U.S. at 813-14 (justiciability barrier prevents review of Line Item

Veto Act), *with Clinton v. New York*, 524 U.S. 417, 421 (1998) (review undertaken).

For example, the issue could arise in litigation in which the United States is not the principal defendant, such as suits against employers for failing to provide ERISA-mandated annuities to a same-sex spouse or FMLA leave to care for an ill, same-sex spouse.[15] Indeed, many important constitutional challenges involving federal statutes have arisen in suits by one nonfederal party against another. *See, e.g., Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *cf. Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006).[16] And if a lower court were to *uphold* DOMA in litigation against the federal government, the issue could be brought before this Court by the challenger, perhaps even seeking certiorari before judgment by the court of appeals.[17]

Other developments, moreover, could moot the need for resolution by this Court. The Executive has said it will continue to enforce DOMA until either Congress repeals it or "the judicial branch renders a definitive verdict against the law's constitutionality."

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[15] *See* 29 U.S.C. §§ 1055, 1132, 2617(a)(2); Empire State Pride Br. 28-29 (private employer's denial of annuity to same-sex surviving spouse), 32-33 (employer's denial of FMLA leave to same-sex spouse).

[16] In *Bartnicki*, the United States intervened under 28 U.S.C. § 2403; in *Stern*, the United States filed an amicus brief; in *Katz*, the United States did not participate in briefing or argument.

[17] One district court recently upheld DOMA in litigation against the Attorney General, notwithstanding the United States' position on DOMA's unconstitutionality. *See Lui v. Holder*, No. 2:11-CV-01267-SVW-JCG (C.D. Cal. Sept. 28, 2011).

JA 192. If additional courts rule against DOMA, the Executive might conclude that the judicial branch had spoken with sufficient definitiveness and halt its enforcement. [18] Congressional repeal is also possible. [19]

Beyond that, having to litigate one's claim is not ordinarily an "injury" for standing purposes; otherwise, Article III's limitation on standing would collapse on itself. *Cf. Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) (incurring expenses to avoid eavesdropping does not constitute injury); *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979) (noting "the usual rule that litigation is conducted by and on behalf of the individual named parties only"). While a system permitting abstract review or advisory opinions could avoid delays in judicial resolution of important questions, and would not be "irrational," "it is obviously not the regime that has obtained under our Constitution to date," which "contemplates a more restricted role for Article III courts." *Raines*, 521 U.S. at 828.

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[18] The Executive Branch previously has modified its administration of a federal-benefits statute after conceding the unconstitutionality of a provision. *See Heckler v. Edwards*, 465 U.S. 870, 873 nn. 2 & 3 (1984) (Executive determination that gender-discriminatory presumption in Social Security Act is unconstitutional published as Social Security Ruling 81-17c (C. E. 1981)).

[19] In the 112th Congress, Senator Feinstein's bill to repeal DOMA, The Respect for Marriage Act, S. 598, 112th Cong., 1st Sess. (2011), was favorably reported out of the Senate Judiciary Committee. *See* Carolyn Lochhead, *Feinstein's Bill to Repeal DOMA Clears Committee*, SFGATE, Nov. 11, 2011.

CONCLUSION

For the foregoing reasons and those set forth in the opening brief, the United States' petition is not justiciable and BLAG lacks standing.

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March 20, 2013

REPLY
BRIEF

No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the estate of THEA CLARA SPYER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF ON THE JURISDICTIONAL QUESTIONS FOR RESPONDENT EDITH SCHLAIN WINDSOR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF ON THE JURISDICTIONAL QUESTIONS FOR RESPONDENT EDITH SCHLAIN WINDSOR 1

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

ASARCO Inc. v. Kadish,
490 U.S. 605 (1989) 4

Bond v. United States,
131 S. Ct. 2355 (2011) 1

Brady v. Maryland,
373 U.S. 83 (1963) 6

Camreta v. Greene,
131 S. Ct. 2020 (2011) 4, 5, 6

INS v. Chadha,
462 U.S. 919 (1983) 1, 4

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 4

Statutes

1 U.S.C. § 7 .... passim

26 U.S.C. § 7422(f)(1) 2

Other Authorities

U.S. General Accounting Office, GAO/OGC-97-16, *Defense of Marriage Act* (1997) 8

U.S. Government Accountability Office, GAO-04-353R, *Defense of Marriage Act: Update to Prior Report* (2004) 8

REPLY BRIEF ON THE JURISDICTIONAL QUESTIONS FOR RESPONDENT EDITH SCHLAIN WINDSOR

Ms. Windsor's opening brief on the jurisdictional questions shows why this Court can decide the constitutionality of Section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, on the United States' petition. First, there remains a live controversy within the meaning of Article III: the United States continues to enforce DOMA by refusing to refund $363,053 in federal taxes that Ms. Windsor was forced to pay on behalf of her late spouse's estate. *See* Windsor Juris. Br. 15-25. Second, because the district court entered judgment against the United States, and the court of appeals affirmed that judgment, the United States has standing to seek review in this Court. *See id.* 25-30; *see also* U.S. Juris. Br. 12-18.

The Bipartisan Legal Advisory Group of the U.S. House of Representatives (BLAG) offers a different interpretation of this lawsuit. In its view, this case is essentially a conflict between the House leadership and the Executive Branch over how to litigate the question of DOMA's constitutionality. But this Court does not sit to hear that kind of interbranch dispute. To the contrary, "the claims of individuals – not of Government departments – have been the principal source of judicial decisions concerning separation of powers." *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011); *see also INS v. Chadha*, 462 U.S. 919, 935-36 (1983). It is Ms. Windsor's equal protection claim against the United States that provides the source for this Court's jurisdiction.

1. For the district court to have had jurisdiction over this case, there had to have been a party before it asserting a concrete and particularized injury. Only one party could claim an injury from the Government's enforcement of DOMA. That party was Ms. Windsor. Contrary to suggestions in its brief, BLAG cannot plausibly claim any injury from the decision to continue enforcing DOMA.[1]

2. As federal law required, *see* 26 U.S.C. § 7422(f)(1), Ms. Windsor named the United States as the defendant in her lawsuit. BLAG never comes to terms with this basic fact. Instead, it claims that "the *executive branch* was the named defendant," BLAG Juris. Br. 15 (emphasis added), and

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[1] Though it stresses that DOMA was "duly enacted" by Congress, BLAG Juris. Br. 16, BLAG claims it somehow would have been less "affront[ed]" if the Executive Branch had ceased all enforcement of the statute, *id.* 12.

Had the Government taken BLAG's suggested approach, DOMA would have been insulated from judicial review. *See* BLAG Juris. Br. 12-13; *see also* Br. of Constitutional Law Scholars as *Amici Curiae* in Support of Petitioner (Jurisdictional Questions) ("Scholars Br.") 17-18. But allowing DOMA to "remain on the books" so that it could "be enforced by subsequent administrations," BLAG Juris. Br. 12, would do nothing but leave hundreds of thousands of married gay couples in a state of legal limbo, *see, e.g.*, Scholars Br. 16-17; Br. of Empire State Pride Agenda et al. as *Amici Curiae* on the Jurisdictional Questions in Support of Respondent Edith Schlain Windsor 37-39; Br. of *Amicus Curiae* American Bar Association in Support of Respondent Edith Schlain Windsor on the Merits Question 9-11; *cf.* Br. on the Merits for the States of New York et al. as *Amici Curiae* in Support of Respondent Edith Schlain Windsor 20-23.

compounds this misrepresentation by referring to "the executive" as the "nominal defendant," *id.* 37. Indeed, throughout its brief, BLAG treats "the executive" as the "party." *Id.* 36; *see also id.* 7, 9-11, 15-16, 31-33, 35-38.

BLAG knows better. Before the district court, BLAG recognized that "[h]ere, of course, the United States is a party." J.A. 204. Before the court of appeals, BLAG equivocated, referring to "the appeal filed by the Department of Justice ('DOJ') on behalf of defendant United States" before adding a parenthetical equating the United States with the "Executive Branch." *Id.* 526. But in this Court, the only time BLAG acknowledges in its jurisdictional brief that the United States is the actual party is in the front matter. *See* BLAG Juris. Br. ii.

This is not a problem of mere semantics; it infects the substance of BLAG's jurisdictional analysis. BLAG argues in its merits brief that DOMA serves several interests of the United States. *See* BLAG Merits Br. 28-49. It would be totally inconsistent with that position for BLAG to claim in its jurisdictional brief that the United States has not been aggrieved by a judgment declaring DOMA unconstitutional and ordering it to pay hundreds of thousands of dollars to Ms. Windsor. Attempting to avoid that obvious problem, BLAG never discusses the interests of the *United States* in its jurisdictional brief. Instead it focuses exclusively on what it claims are the interests of "the Department" of Justice, BLAG Juris. Br. 35, 37 n.19 and "the executive," *id.* 32-33, 35-38. This Court should reject BLAG's attempt to deflect attention from the bright-line rule that the United States is "an aggrieved party" when an "Act of Congress it administers" in hundreds of federal programs is "held unconstitutional." *Chadha*, 462 U.S. at 931; *see* Windsor Juris. Br. 25-26.

3. BLAG tries to recast Ms. Windsor's tax refund lawsuit against the United States as a separation of powers dispute between the legislative and executive branches. *See* BLAG Juris. Br. 37-38. This Court should not permit BLAG to reframe the injury at the core of this case as one to the House's "institutional interests." BLAG Juris. Br. 16.

It does not matter how "aggrieved" – in the colloquial sense of the word – BLAG considers itself to be by the fact that the district court and court of appeals entered judgment for Ms. Windsor and against the United States. BLAG is not aggrieved in any legal sense. Whatever "comfort and joy" BLAG might obtain "from the fact that the United States Treasury is not cheated . . . or that the Nation's laws are faithfully enforced" is nothing more than "psychic satisfaction." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

Moreover, the judgment Ms. Windsor obtained has no binding legal effect on BLAG. BLAG has not been ordered to pay her a dime, and nothing in the judgment below imposes any "defined and specific legal obligation" on BLAG, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989). And BLAG cannot rely on *Camreta v. Greene*, 131 S. Ct. 2020 (2011), for the proposition that it should be permitted to appeal because the judgment below "permanently diminish[es] the House's legislative power," BLAG Juris. Br. 13 (citing *Camreta*). In *Camreta*, the court of appeals' constitutional ruling required an executive branch official to "either change the way he performs his duties or risk a meritorious damages action." 131 S. Ct. at 2029. Here, by contrast, Congress's duties (and its Members' immunity from suit) remain unchanged. In light of that fact, if this Court were to accept BLAG's argument, it would be permitting BLAG "in effect [to] file[] a new declaratory judgment action in this Court against the Court of Appeals" seeking to have DOMA upheld, *Camreta*, 131 S. Ct. at 2043 (Kennedy, J., dissenting). This BLAG cannot do.

4. BLAG argues that the United States "cannot ground its appellate standing on a desire for an opinion with . . . a broader precedential scope for other cases." BLAG Juris. Br. 36-37 (emphasis omitted). True enough: a desire for broad precedent, without more, might not be sufficient to confer appellate standing. But the United States' appellate standing here rests firmly on the concrete way in which it is aggrieved by the judgments below ordering it to issue a $363,053 refund and declaring DOMA unconstitutional. *See* Windsor Juris. Br. 26, 28-29; U.S. Juris. Br. 16-18.[2]

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[2] Both the United States and Ms. Windsor agree that the United States has appellate standing but reach this conclusion in slightly different ways. The United States argues that the "statutory aggrieved-party rule and the Article III 'injury' requirement examine the same thing: how the lower court's judgment affects the appealing party." U.S. Juris. Br. 18. The United States then explains that invalidation of a statute and an order to pay money each "constitute Article III injuries," *id.*, "directly traceable" to the lower court's decision and "redressed" by a reversal of that decision, *id.* 19. Ms. Windsor, by contrast,

And once jurisdiction is established, it is entirely appropriate for the United States in seeking certiorari to consider interests beyond "this case and controversy," BLAG Juris. Br. 37 (emphasis omitted). As Solicitor General Sobeloff long ago explained, the Department of Justice is the "advocate for a client whose business is not merely to prevail in the instant case. . . . but to establish justice." *Brady v. Maryland*, 373 U.S. 83, 87 n.2 (1963). Justice for the hundreds of thousands of married gay couples whose lives are daily and irreparably affected by DOMA's sweep turns on "the geographic reach" and precedential effect of the decision that DOMA is unconstitutional, BLAG Juris. Br. 37.

The briefs filed in this case illustrate the hardships DOMA inflicts.

- When Staff Sergeant Donna Johnson was killed by a suicide bomber in Afghanistan, DOMA prevented the Army from notifying her wife Tracy. DOMA also precluded the Army from returning Sergeant Johnson's wedding ring to Tracy and from giving her the American flag that draped Sergeant

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believes that while the Article III requirements might be necessary in a case where a prevailing party seeks review, *see Camreta*, 131 S. Ct. at 2028-29, they are redundant when a party against whom judgment has been entered files an appeal, *see* Windsor Juris. Br. 28-29 nn.7-8. In any event, the United States was objectively "injured" by the district court's order to pay $363,053; that injury was "caused" by the adverse judgment below; and this Court would "redress" that injury if it were to uphold DOMA.

Johnson's coffin. Br. of *Amicus Curiae* OutServe-SLDN Inc. on the Merits in Support of Respondent Edith Windsor 10-11.

- Kathy Bush and Mary Ritchie have been together for nearly a quarter century and were legally married in 2004. Ms. Ritchie is a Massachusetts state police officer, while Ms. Bush is a stay-at-home mother. Because of DOMA, Ms. Ritchie cannot use her income to make tax-deductable contributions to Ms. Bush's IRA, as a straight spouse would be allowed to do. Br. of *Amici Curiae* Services and Advocacy for Gay, Lesbian, Bisexual, and Transgender Elders (SAGE) et al. in Support of Respondents (Merits Brief) 30.
- Martin Koski cannot add his husband, James Fitzgerald, to his federal employee health benefit plan. As a result, in one year the couple had to pay nearly $3000 more for healthcare than they would have paid had they both been covered by Mr. Koski's insurance. Br. of American Federation of Labor and Congress of Industrial Organizations et al. as *Amici Curiae* Supporting Respondent Edith Schlain Windsor and Suggesting Affirmance 16.

These examples are but the tip of the iceberg. Every day, married gay couples are denied the benefits that the United States grants to all other married couples in areas ranging from bankruptcy, to tax, to immigration, to healthcare, to retirement planning, to veterans benefits, and many more. Denial of these benefits affects not just the married couples themselves, but also the tens of thousands of children they are raising.[3]

Ms. Windsor's experience demonstrates both the harms wrought by DOMA and the importance of a precedential decision. Ms. Windsor was forced to pay hundreds of thousands of dollars in estate taxes because DOMA unconstitutionally denies Dr. Spyer's estate the marital deduction that the estate of a straight married decedent could claim. *See* J.A. 150-51. But although Ms. Windsor has obtained a judgment from the district court ordering a refund of those taxes, that judgment has done nothing to advance her claim for Social Security survivors benefits. Indeed, despite experienced counsel having spent more than two years on her Social Security claim, she has been unable even to obtain the "expedited" appeal from the Social Security Administration that would enable her to file suit seeking those benefits. Windsor Juris. Br. 5-6, 10a-15a. A precedential decision would presumably impel the SSA to provide those benefits since it acknowledges that she was in fact legally married. *Id.* 8a. What then of gay and lesbian seniors who lack access to legal representation and who live hand-to-mouth while seeking the benefits all other surviving spouses are entitled to receive?

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[3] For a catalogue of the federal statutory provisions that are affected by DOMA, see generally U.S. General Accounting Office, GAO/OGC-97-16, *Defense of Marriage Act* (1997) and U.S. Government Accountability Office, GAO-04-353R, *Defense of Marriage Act: Update to Prior Report* (2004).

BLAG recognizes that "legislation often has the effect of limiting the autonomy of its subjects." BLAG Juris. Br. 14. But nowhere does it acknowledge how DOMA denies the autonomy and dignity of the married gay couples it excludes from federal recognition. This Court should therefore exercise the jurisdiction it possesses over the live controversy between Ms. Windsor and the United States to reach, and rectify, this denial of equal protection.

CONCLUSION

For the foregoing reasons, this Court should hold that it has jurisdiction to decide whether DOMA violates the Fifth Amendment.

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March 20, 2013

SUPPLEMENTAL BRIEF

No. 12-307

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Cases: Page

Baker v. *Nelson*, 409 U.S. 810 (1972) 2, 7
Bishop v. *Wood*, 426 U.S. 341 (1976) 8
Elk Grove Unified Sch. Dist. v. *Newdow*, 542 U.S. 1 (2004) 8
General Elec. Co. v. *Gilbert*:
  429 U.S. 125 (1976) 9, 10
  423 U.S. 822 (1975) 10
Graham v. *Richardson*, 403 U.S. 365 (1971) 6
Heller v. *Doe*, 509 U.S. 312 (1993) 6
Huddleston v. *Dwyer*, 322 U.S. 232 (1944) 8
INS v. *Chadha*, 462 U.S. 919 (1983) 2, 8
MacGregor v. *State Mut. Life Assurance Co.*, 315 U.S. 280 (1942) 8
Propper v. *Clark*, 337 U.S. 472 (1949) 8
Township of Hillsborough v. *Cromwell*, 326 U.S. 620 (1946) 8
United States v. *Durham Lumber Co.*, 363 U.S. 522 (1960) 8

Constitution, statutes and rules:

U.S. Const. Amend. V 1
Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419:
  § 3, 110 Stat. 2419 (1 U.S.C. 7) .... *passim*
28 U.S.C. 1254(1) 9
Sup. Ct. R.:
  Rules 10-16 9
  Rule 15.8 1

Miscellaneous: Page

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 10

In the Supreme Court of the United States

No. 12-307

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

This supplemental brief, filed pursuant to Rule 15.8 of the Rules of this Court, brings to the Court's attention the opinion of the court of appeals in this case, which was issued after the filing of the government's petition for a writ of certiorari before judgment, and addresses its impact on the pending petition.

1. On June 6, 2012, the district court entered summary judgment for plaintiff based on its conclusion that Section 3 of the Defense of Marriage Act (DOMA) violates the equal protection guarantee of the Fifth Amendment. Pet. App. 1a-22a. On September 11, 2012, after both the Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) and the government had filed timely notices of appeal to the United States Court of Appeals for the Second Circuit

(Pet. App. 25a-29a), the government filed a petition for a writ of certiorari before judgment in this case.

2. On October 18, 2012, the court of appeals affirmed the district court's judgment. App., *infra*, 1a-83a.

a. At the outset, the court of appeals denied BLAG's motion to strike the government's notice of appeal, rejecting BLAG's argument that the government does not constitute an aggrieved party that can take an appeal. App., *infra*, 4a-5a. Relying on *INS* v. *Chadha*, 462 U.S. 919, 931 (1983), the court held that the government is an aggrieved party because "the United States continues to enforce Section 3" and Section 3's constitutionality "will have a considerable impact on many operations of the United States." App., *infra*, 4a-5a.

b. The court of appeals then rejected BLAG's threshold request that it should certify to the New York Court of Appeals the question, which BLAG characterized as implicating plaintiff's standing, whether New York in 2009 recognized same-sex marriages entered into in other jurisdictions. App., *infra*, 5a-7a.[1] Relying on the "useful and unanimous" rulings of New York's intermediate appellate courts on that question, *id.* at 6a, the court of appeals agreed with the district court and concluded that New York recognized such marriages at the relevant time, *id.* at 6a-7a.

c. The court of appeals also rejected BLAG's argument that this Court's summary dismissal of the appeal in *Baker* v. *Nelson*, 409 U.S. 810 (1972), which sought review of the Minnesota Supreme Court's decision upholding the constitutionality of a state statute interpreted to limit marriage to persons of the opposite sex, controls plaintiff's equal protection challenge. App., *infra*, 7a-11a. After noting the limited precedential value of summary dismissals, the court of appeals explained that the "question whether the federal government may constitutionally define marriage as it does in Section 3 of DOMA is sufficiently distinct from the question in *Baker*: whether same-sex marriage may be constitutionally restricted by the *states*." *Id.* at 8a. The court reasoned, moreover, that even if "*Baker* might have had resonance" when it was decided, "it does not today" because of the "manifold changes to the Supreme Court's equal protection jurisprudence" since *Baker*. *Id.* at 9a.

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[1] In denying plaintiff's refund claim, the Internal Revenue Service relied only on Section 3 of DOMA. It did not identify or address any question of the recognition or validity of plaintiff's marriage under New York law. See No. 12-307 Pet. 4; 1:10-cv-08435 Docket entry No. 31-12, at 7 (June 24, 2011).

d. Turning to the constitutionality of Section 3, the court of appeals noted that "the existence of a rational basis for Section 3 of DOMA is closely argued," App., *infra*, 12a, but concluded that it need not resolve that argument "if heightened scrutiny is available, as it is in this case," *id.* at 14a. In considering the applicable level of scrutiny, the court first looked to whether the class has been subjected to discrimination. *Id.* at 16a-17a. The court found "[i]t is easy to conclude that homosexuals have suffered a history of discrimination." *Id.* at 16a. "Perhaps the most telling proof of animus and discrimination," the court determined, "is that, for many years and in many states, homosexual conduct was criminal." *Ibid.* The court rejected BLAG's effort to distinguish the history of discrimination against gay and lesbian people from that against racial minorities and women. That "homosexuals as a class have never been politically disenfranchised," the court reasoned, is "not decisive," pointing to this Court's application of heightened scrutiny to classifications based on illegitimacy. *Ibid.* Noting that "BLAG concedes that homosexuals have endured discrimination in this country since at least the 1920s," the court concluded that "[n]inety years of discrimination is entirely sufficient." *Id.* at 17a.

The court of appeals then assessed whether sexual orientation, the distinguishing class characteristic, bears on a typical class member's ability to contribute to society. App., *infra*, 17a-18a. The court reasoned that, while "[t]here are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society," sexual orientation "is not one of them." *Id.* at 18a. In determining that sexual orientation "has nothing to do with aptitude or performance," the court rejected BLAG's argument that "the proper consideration is whether the classification turns on distinguishing characteristics relevant to interests the State has the authority to implement," rather than general ability to contribute to society. *Ibid.* (citation and internal quotation marks omitted). The court concluded that, among other problems, "BLAG cites no precedential application of that standard to support its interpretation, and it is inconsistent with actual cases." *Ibid.*

Next, the court of appeals examined the discernability of sexual orientation, App., *infra*, 19a-21a, determining that "what matters here is whether the characteristic invites discrimination when it is manifest," *id.* at 21a. The court rejected the characterization of this factor as one of "immutability," finding that "the test is broader." *Id.* at 19a-20a. Analogizing to classifications based on alienage, illegitimacy, and national origin, *id.* at 19a-21a, the court concluded that "sexual orientation is a sufficiently distinguishing characteristic to identify the discrete minority class of homosexuals," *id.* at 21a.

Finally, the court of appeals evaluated the political power of gay and lesbian people. App., *infra*, 21a-23a. The court acknowledged that "homosexuals have achieved political successes over the years," but determined that the "question is whether they have the strength to politically protect themselves from wrongful discrimination." *Id.* at 21a. Pointing to "the seemingly small number of acknowledged homosexuals" in positions of power, among other evidence, *id.* at 22a, the court concluded that gay and lesbian people cannot "adequately protect themselves from the discriminatory wishes of the majoritarian public," *id.* at 23a.

Based "on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect," the court concluded that "the class is quasi-suspect (rather than suspect)," and that laws drawing distinctions on the basis of sexual orientation are thus subject to intermediate scrutiny. App., *infra*, 23a.

e. The court of appeals then held that Section 3 of DOMA fails under intermediate scrutiny. App., *infra*, 23a-31a. The court concluded that the purposes that BLAG advanced in support of Section 3 do not bear a substantial relationship to an important governmental objective, *id.* at 24a-30a, noting that "BLAG's counsel all but conceded [at argument] that these reasons for enacting DOMA may not withstand intermediate scrutiny," *id.* at 24a.

The court first determined that an asserted interest in "maintaining a consistent federal definition of marriage" cannot withstand intermediate scrutiny. App., *infra*, 24a. The court explained that, among other problems, "DOMA's sweep arguably creates more discord and anomaly than uniformity"; "[b]ecause DOMA defined only a single aspect of domestic relations law, it left standing all other inconsistencies in the laws of the states, such as minimum age, consanguinity, divorce, and paternity." *Id.* at 25a. Nor could the court discern a substantial relationship between Section 3 and the interest in "sav[ing] government resources." *Id.* at 26a. "DOMA is so broad," the court concluded, *id.* at 27a, that it "transcends a legislative intent to conserve public resources," *id.* at 28a. And while "[f]iscal prudence is undoubtedly an important government interest," *id.* at 27a, the court noted, the "saving of welfare costs cannot justify an otherwise invidious classification," *ibid.* (quoting *Graham* v. *Richardson*, 403 U.S. 365, 375 (1971)).

Turning to the asserted interest in "preserving traditional marriage as an institution," App., *infra*, 28a, the court explained that the "ancient lineage of a legal concept does not give a law immunity from attack," *ibid.* (quoting *Heller* v. *Doe*, 509 U.S. 312, 326 (1993) (brackets omitted)). The court concluded, moreover, that "[e]ven if preserving tradition were in itself an important goal, DOMA is not a means to achieve it"; "because the decision of whether same-sex couples can marry is left to the states, DOMA does not, strictly speaking, preserve the institution of marriage as one between a man and a woman." *Id.* at 29a (citation and internal quotation marks omitted). Finally, the court determined that Section 3 does not advance an interest in the "encouragement of responsible procreation and child-rearing," *id.* at 30a, because "DOMA does not affect in any way" the incentives for opposite-sex couples to engage in such procreation and child-rearing, *id.* at 29a. "Incentives for opposite-sex couples to marry and procreate (or not)," the court concluded, "were the same after DOMA was enacted as they were before." *Id.* at 30a.

f. Judge Straub dissented in part. While he concurred with the parts of the court's opinion denying BLAG's motion to dismiss the government's appeal and declining to certify to the New York Court of Appeals the marriage-recognition issue, App., *infra*, 31a, he would have held that *Baker*, *supra*, forecloses petitioner's equal protection challenge, *id.* at 40a-48a. Even if *Baker* did not control, Judge Straub would have applied rational basis scrutiny and held that Section 3 is constitutional under that standard of review. *Id.* at 48a-83a.

3. Although the government initially recommended that its petition be held pending the consideration of petitions in other cases raising the same issue, the court of appeals' decision materially strengthens this case as a vehicle for resolving the constitutionality of Section 3 of DOMA. In its brief in opposition to the government's petition, BLAG raised three main vehicle objections: (1) that the grant of a petition for certiorari before judgment is "an extremely rare occurrence" (No. 12-307 Br. in Opp. 14 (citation omitted)); (2) that plaintiff's standing turns on an unresolved question of State law (*id.* at 18-20); and (3) that the government's "appellate standing" is unclear (*id.* at 21-25). The decision below eliminates or substantially mitigates all three objections.

First, and most obviously, as a result of the court of appeals' decision, this case is no longer one in which this Court is faced with the decision whether to grant certiorari before judgment. As explained below (pp. 9-10, *infra*), the Court, consistent with past practice, can now consider the present petition as one for certiorari after judgment and, if it were to grant the petition, review the judgment of the court of appeals.

Second, after finding New York law sufficiently clear to resolve the issue directly rather than requiring certification to the New York Court of Appeals, the court of appeals unanimously held—consistent with the "useful and unanimous" rulings of New York's intermediate appellate courts—that New York law recognized plaintiff's foreign marriage at the relevant time. App., *infra*, 5a-7a; *id.* at 31a (Straub, J., dissenting). The district court had reached the same conclusion. Pet. App. 6a-8a. As this Court has repeatedly explained, the Court generally "accept[s] the interpretation of state law in which the District Court and Court of Appeals have concurred," and indeed, does so "even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Bishop* v. *Wood*, 426 U.S. 341, 346 (1976).[2] Accordingly, the court of appeals' resolution of the state-law marriage-recognition issue in plaintiff's favor eliminates any potential vehicle concerns that a contrary conclusion might have raised.

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[2] See also, *e.g.*, *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 16 (2004) (noting this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located"); *United States* v. *Durham Lumber Co.*, 363 U.S. 522, 526-527 (1960) ("In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable.") (quoting *Propper* v. *Clark*, 337 U.S. 472, 486-487 (1949)); *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620, 629-630 (1946) ("On such questions [of local law] we pay great deference to the views of the judges of those courts 'who are familiar with the intricacies and trends of local law and practice.'") (quoting *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944) (per curiam)); *MacGregor* v. *State Mut. Life Assurance Co.*, 315 U.S. 280, 281 (1942) (per curiam) ("In the absence of [state court] guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan.").

Third, citing *Chadha*, *supra*, the court of appeals rejected BLAG's contention that the government lacked standing to appeal the district court's judgment holding that Section 3 violates equal protection. App., *infra*, 4a-5a. The decision below thus reinforces the government's reliance on *Chadha* to seek the Court's review in this case and in other cases in which Section 3 has been held unconstitutional. See No. 12-307 Pet. 11 n.6.

4. Although the government's petition in this case was filed as one for certiorari before judgment, the issuance of the court of appeals' intervening decision does not deprive the Court of the authority to grant it. If granted, the writ of certiorari would still be directed to the court of appeals, and this Court could still exercise jurisdiction pursuant to 28 U.S.C. 1254(1) ("Cases in the courts of appeals may be reviewed by the Supreme Court by * * * writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."). This Court's rules do not establish any additional requirements, other than inclusion of the court of appeals' opinion (attached as an Appendix to this brief), for a petition for a writ of certiorari after judgment. See Sup. Ct. R. 10-16.

The Court's authority to grant this petition is consistent with the course of proceedings in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), the most analogous example of which the government is aware. In *General Electric*, the parties jointly petitioned for a writ of certiorari before judgment. Before the Court considered that petition, however, the court of appeals rendered an opinion and judgment in the case. The parties then jointly filed a "Supplemental Brief of All Parties," to which they attached a copy of the court of appeals' opinion and judgment. See Supp. Br. of All Parties to

Joint Pet. for a Writ of Cert. to the U.S. Ct. of Appeals for the Fourth Circuit, App. F & G, Nos. 74-1589 and 74-1590, *General Elec.*, *supra*. That brief stated that "[t]he fact that the court of appeals has now issued a judgment * * * does not render the petition for certiorari herein either moot or less viable," and reaffirmed the request that certiorari be granted. *Id.* at 2-3. The Court granted certiorari, 423 U.S. 822 (1975), and reviewed the court of appeals' decision, ultimately reversing the judgment of the court of appeals, 429 U.S. at 128, 146. See Eugene Gressman et al., *Supreme Court Practice* § 2.4, at 86 n.28 (9th ed. 2007) (discussing certiorari procedure in *General Electric*). Here, the Court should likewise grant the petition for a writ of certiorari and review the court of appeals' decision.

* * * * *

For the foregoing reasons, the petition for a writ of certiorari in this case should be granted. Although *Department of Health and Human Services* v. *Massachusetts*, petitions for cert. pending, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012), and 12-97 (filed July 20, 2012), is also a case in which a court of appeals has rendered a decision, this case now provides the most appropriate vehicle for this Court's resolution of the constitutionality of Section 3 of DOMA. In particular, the court of appeals in *Massachusetts* was constrained by binding circuit precedent as to the applicable level of scrutiny, No. 12-15 Pet. App. 10a, whereas the court of appeals here was not so constrained, and its analysis may be beneficial to this Court's consideration of that issue.

In the event the Court grants review in this case, it should hold the petitions in *Massachusetts* pending final resolution on the merits. In the event the Court decides that neither case provides an appropriate vehicle, it should grant the government's petition for a writ of certiorari before judgment in either *Office of Personnel Management* v. *Golinski*, No. 12-16 (filed July 3, 2012), or *Office of Personnel Management* v. *Pedersen*, No. 12-302 (filed Sept. 11, 2012).

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

OCTOBER 2012

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2012

Docket No. 12-2335-cv(L); 12-2435(Con)

EDITH SCHLAIN WINDSOR, IN HER OFFICIAL CAPACITY
AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

AND

BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
INTERVENOR-DEFENDANT-APPELLANT

Argued: September 27, 2012
Decided: October 18, 2012

Before: JACOBS, *Chief Judge*, STRAUB and DRONEY, *Circuit Judges*.

Intervenor Bipartisan Legal Advisory Group of the United States House of Representatives appeals from an order of the United States District Court for the Southern District of New York granting summary judgment in favor of the surviving spouse of a same-sex couple who was denied the benefit of the spousal deduction under federal tax law. The United States, the defendant, is a nominal appellant. For the following reasons, we conclude that Section 3 of the Defense of Marriage Act violates equal protection and is therefore unconstitutional.

Judge STRAUB dissents in part and concurs in part in a separate opinion.

DENNIS JACOBS, *Chief Judge*:

Plaintiff Edith Windsor sued as surviving spouse of a same-sex couple that was married in Canada in 2007 and was resident in New York at the time of her spouse's death in 2009. Windsor was denied the benefit of the spousal deduction for federal estate taxes under 26 U.S.C. § 2056(A) solely because Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, defines the words "marriage" and "spouse" in federal law in a way that bars the Internal Revenue Service from recognizing Windsor as a spouse or the couple as married. The text of § 3 is as follows:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7. At issue is Windsor's claim for a refund in the amount of $363,053, which turns on the constitutionality of that section of federal law.

For the reasons that follow we hold that:

I. Windsor has standing in this action because we predict that New York, which did not permit same-sex marriage to be licensed until 2011, would nevertheless have recognized Windsor and Thea Clara Spyer as married at the time of Spyer's death in 2009, so that Windsor was a surviving spouse under New York law.

II. Windsor's suit is not foreclosed by *Baker v. Nelson*, 409 U.S. 810 (1971), which held that the use of the traditional definition of marriage for a state's own regulation of marriage status did not violate equal protection.

III. Section 3 of DOMA is subject to intermediate scrutiny under the factors enumerated in *City of Cleburn v. Cleburn Living Center*, 473 U.S. 431 (1985), and other cases.

IV. The statute does not withstand that review.

* * *

On June 6, 2012, the United States District Court for the Southern District of New York (Jones, *J.*) granted summary judgment in favor of Windsor in a thorough opinion. *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012). The court ruled that Section 3 of DOMA violated the equal protection because there was no rational basis to support it. *Id.* at 406. "We review a district court's grant of summary judgment *de novo*, construing the record in the light most favorable to the nonmoving party." *Church of American Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 203 (2d Cir. 2004).

A preliminary issue concerning alignment of the parties on appeal has been presented by motion. The United States, initially named as the sole defendant, conducted its defense of the statute in the district court up to a point. On February 23, 2011, three months after suit was filed, the Department of Justice declined to defend the Act thereafter, and members of Congress took steps to support it. The Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") retained counsel and since then has taken the laboring oar in defense of the statute. The United States remained active as a party, switching sides to advocate that the statute be ruled unconstitutional.

Following the district court's decision, BLAG filed a notice of appeal, as did the United States in its role as nominal defendant. BLAG moved this Court at the outset to strike the notice of appeal filed by the United States and to realign the appellate parties to reflect that the United States prevailed in the result it advocated in the district court. The motion is denied. Notwithstanding the withdrawal of its advocacy, the United States continues to enforce Section 3 of DOMA, which is indeed why Windsor does not have her money. The constitutionality of the statute will have a considerable impact on many operations of the United States. *See INS v. Chadha*, 462 U.S. 919, 931 (1983)

("When an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional, it is an aggrieved party for purposes of taking an appeal . . . . The agency's status as an aggrieved party . . . is not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional.").

DISCUSSION

I

For the purpose of federal estate taxes, the law of the state of domicile ordinarily determines whether two persons were married at the time of death. *Eccles v. Comm'r*, 19 T.C. 1049, 1051, 1053-54 (1953); Rev. Rul. 58-66, 1958-1 C.B. 60 ("The marital status of individuals as determined under state law is recognized in the administration of the Federal income tax laws."). At the time of Spyer's death in 2009, New York did not yet license same-sex marriage itself. A separate question—decisive for standing in this case—is whether in 2009 New York recognized same-sex marriages entered into in other jurisdictions. That question was presented to the New York Court of Appeals in *Godfrey v. Spano*, 13 N.Y.3d 358 (2009). However, the court was able to resolve that case on other grounds, finding "it unnecessary to reach defendants' argument that New York's common-law marriage recognition rule is a proper basis for the challenged recognition of out-of-state same-sex marriages." *Id.* at 377.

When we are faced with a question of New York law that is decisive but unsettled, we may "predict" what the state's law is, consulting any rulings of its intermediate appellate courts and trial courts, or we may certify the question to the New York Court of Appeals. *See State Farm Mut. Auto. Ins. Co. v. Madella*, 372 F.3d 500, 505 (2d Cir. 2004). BLAG urges that we certify this question, observing that this is an option that we have and that the district court did not. We decline to certify.

First, the Court of Appeals has signaled its disinclination to decide this very question. When it elected to decide *Godfrey* on an alternative sufficient ground, the Court of Appeals expressed a preference and expectation that the issue would be decided by the New York legislature: "[w]e . . . hope that the Legislature will address this controversy." *Godfrey*, 13 N.Y.3d at 377. We hesitate to serve up to the Court of Appeals a question that it is reluctant to answer for a prudential reason.

Second, rulings of New York's intermediate appellate courts are useful and unanimous on this issue. It is a "well-established principle that the ruling of an intermediate appellate state court is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Statharos v. New York City Taxi and Limousine Comm'n*, 198 F.3d 317, 321 (2d Cir. 1999) (internal quotation marks and ellipsis omitted). Three of New York's four appellate divisions have concluded that New York recognized foreign same-sex marriages before the state passed its marriage statute in 2011. *See In re Estate of Ranftle*, 81 A.D.3d 566 (1st Dep't 2011) (Windsor's home Department, recognizing a 2008 Canadian marriage); *Lewis v. N.Y. State Dep't of Civil Serv.*, 872 N.Y.S.2d 578 (3rd Dep't 2009), *aff'd on other grounds sub nom. Godfrey*, 13 N.Y.3d 358; *Martinez v. Cnty. of Monroe*, 850 N.Y.S.2d 740 (4th Dep't 2008). Two of these cases, *Lewis* and *Martinez*, were decided *before* Spyer died on February 5, 2009. Given the consistent view of these decisions, we see no need to seek guidance here. Because Windsor's marriage would have been recognized under New York law at the time of Spyer's death, she has standing.

II

In *Baker v. Nelson*, an appeal from a Minnesota Supreme Court decision finding no right to same-sex marriage, the Supreme Court issued a summary dismissal "for want of a substantial federal question." 409 U.S. 810 (1971). The Minnesota Supreme Court had held that "[t]he equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry." *Baker v. Nelson*, 291 Minn. 310, 313 (Minn. 1971). According to BLAG, *Baker* compels the inference that Congress may prohibit same-sex marriage in the same way under federal law without offending the Equal Protection Clause. We disagree.

"The Supreme Court has long recognized that the precedential value of a summary dismissal is limited to 'the precise issues presented and necessarily decided by' the dismissal." *Alexander v. Cahill*, 598 F.3d 79, 89 n.7 (2d Cir. 2010) (quoting *Mandell v. Bradley*, 432 U.S. 173, 176 (1977)). The question whether the federal government may constitutionally define marriage as it does in Section 3 of DOMA is sufficiently distinct from the question in *Baker*: whether same-sex marriage may be constitutionally restricted by the *states*. After all, Windsor and Spyer were actually married in this case, at least in the eye of New York, where they lived. Other courts have likewise concluded that *Baker* does not control equal protection review of DOMA for these reasons.[1]

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[1] *See Massachusetts v. U.S. Dep't of HHS*, 682 F.3d 1, 8 (1st Cir. 2012) (finding that *Baker* permitted equal protection review so long as arguments did not "rest on a constitutional right to same-sex marriage"); *Windsor*, 833 F. Supp. 2d at 399-400 ("The case before the Court does not present the same issue as that presented in *Baker*. . . . Accordingly, after comparing the issues in *Baker* and those in the instant case, the Court does not believe that *Baker* 'necessarily decided' the question of whether DOMA violates the Fifth Amendment's Equal Protection Clause."); *Pedersen v. Office of Pers. Mngmt.*, No. 3:10-cv-1750, 2012 WL 3113883, at *11 (D. Conn. July 31, 2012) ("DOMA impacts federal benefits and obligations, but does not prohibit a state from authorizing or forbidding same-sex marriage, as was the case in *Baker*."); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.5 (N.D. Cal. 2012) ("The failure of the federal government to recognize Ms. Golinski's marriage and to provide benefits does not alter the fact that she is married under state law."); *Dragovich v. U.S. Dept. of Treasury*,

Even if *Baker* might have had resonance for Windsor's case in 1971, it does not today. "'[I]nferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so *except when doctrinal developments indicate otherwise*.'" *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (quoting *Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth.*, 387 F.2d 259, 263 n.3 (2d Cir. 1967) (Friendly, *J.*)) (emphasis added). In the forty years after *Baker*, there have been manifold changes to the Supreme Court's equal protection jurisprudence.

When *Baker* was decided in 1971, "intermediate scrutiny" was not yet in the Court's vernacular. *See Craig v. Boren*, 429 U.S. 190, 218 (1976) (Rehnquist, *J.*, dissenting) (coining "intermediate level scrutiny"). Classifications based on illegitimacy and sex were not yet deemed quasi-suspect. *See Lalli v. Lalli*, 439 U.S. 259, 264-65, 275 (1982) (applying intermediate scrutiny to a classification based on illegitimacy, and describing how heightened scrutiny had been used for such classifications starting in 1976); *Frontiero v.*

No. 4:10-cv-01564-CW, 2012 WL 1909603, at *6-7 (N.D. Cal. May 24, 2012); *Smelt v. Cnty of Orange*, 374 F. Supp. 2d. 861, 872-74 (C.D. Cal. 2005), *vacated in part on other grounds*, 447 F.3d 673 (9th Cir. 2006); *In re Kandu*, 315 B.R. 123, 135-38 (Bankr. W.D. Wash. 2004); *see also Perry v. Brown*, 671 F.3d 1052, 1082 n.14 (9th Cir. 2012) (finding that *Baker* did not preempt consideration of Proposition 8 case, because "the question of the constitutionality of a *state's* ban on same-sex marriage" was not before the court) (emphasis added).

Richardson, 411 U.S. 677, 682 (1973) (plurality opinion) (identifying sex as a suspect class); *Boren*, 429 U.S. at 197-98 (applying intermediate scrutiny to a classification based on sex); *United States v. Virginia*, 518 U.S. 515, 575 (1996) (Scalia, *J.*, dissenting) (summarizing that sex-based classifications were analyzed with rational basis review before the 1970's).[2] The Court had not yet ruled that "a classification of [homosexuals] undertaken for its own sake" actually lacked a rational basis. *Romer v. Evans*, 517 U.S. 620, 635 (1996). And, in 1971, the government could lawfully "demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime." *Lawrence v. Texas*, 539 U.S. 558, 574, 578 (2003) (noting that there was a "tenable" equal protection argument against such laws, but choosing instead to overturn *Bowers v. Hardwick*, 478 U.S. 186 (1986)). These doctrinal changes constitute another reason why *Baker* does not foreclose our disposition of this case.

The First Circuit has suggested in dicta that recognition of a new suspect classification in this context would "imply[] an overruling of *Baker*." *See Massachusetts*, 682 F.3d at 9. We disagree for two reasons that the First Circuit did not discuss. First, when it comes to marriage, legitimate regulatory interests of a state differ from those of the federal government.

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[2] While other classifications have been deemed quasi-suspect or suspect over the years, the decisions to add sex and illegitimacy are especially helpful in analyzing whether the classification made in DOMA merits intermediate scrutiny.

Regulation of marriage is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). It has for very long been settled that "[t]he State . . . has [the] absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878), *overruled on other grounds by Shaffer v. Heitner*, 433 U.S. 186 (1977). Therefore, our heightened scrutiny analysis of DOMA's marital classification under federal law is distinct from the analysis necessary to determine whether the marital classification of a state would survive such scrutiny.

Second, the Supreme Court's decision to apply rational basis review in *Romer* does not imply to us a refusal to recognize homosexuals as a quasi-suspect class. *See Massachusetts*, 682 F.3d at 9. The litigants in *Romer* had abandoned their quasi-suspect argument after the trial court decision. *See Romer*, 517 U.S. at 640 n.1 (Scalia, *J.*, dissenting). We are satisfied, for these reasons, that *Baker* has no bearing on this case.

III

"In deciding an equal protection challenge to a statute that classifies persons for the purpose of receiving [federal] benefits, we are required, so long as the classifications are not suspect or quasi-suspect and do not infringe fundamental constitutional rights, to uphold the legislation if it bears a rational relationship to a legitimate governmental objective." *Thomas v. Sullivan*, 922 F.2d 132, 136 (2d Cir. 1990). Of course, "'a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* government interest.'" *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (quoting *Dep't. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). So while rational basis review is indulgent and respectful, it is not meant to be "toothless." *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)).

The district court ruled that DOMA violated the Equal Protection Clause for want of a rational basis. *Windsor*, 833 F. Supp. 2d at 406. But the existence of a rational basis for Section 3 of DOMA is closely argued. BLAG and its amici proffer several justifications that alone or in tandem are said to constitute sufficient reason for the enactment. Among these reasons are protection of the fisc, uniform administration of federal law notwithstanding recognition of same-sex marriage in some states but not others, the protection of traditional marriage generally, and the encouragement of "responsible" procreation.

Windsor and her amici vigorously argue that DOMA is not rationally related to any of these goals. Rational basis review places the burden of persuasion on the party challenging a law, who must disprove "'every conceivable basis which might support it.'" *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). So a party urging the absence of any rational basis takes up a heavy load. That would seem to be true in this case—the law was passed by overwhelming bipartisan majorities in both houses of Congress; it has varying impact on more than a thousand federal laws; and the definition of marriage it affirms has been long-supported and encouraged.

On the other hand, several courts have read the Supreme Court's recent cases in this area to suggest that rational basis review should be more demanding when there are "historic patterns of disadvantage suffered by the group adversely affected by the statute." *See Massachusetts*, 682 F.3d at 10-11; *Able v. U.S.*, 155 F.3d 628, 634 (2d Cir. 1998); *United States v. Then*, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, *J.*, concurring). Proceeding along those lines, the district court in this case and the First Circuit in *Massachusetts* both adopted more exacting rational basis review for DOMA. *See Massachusetts*, 682 F.3d at 11 (describing its "more careful assessment"); *Windsor*, 833 F. Supp. 2d at 402 (noting that "rational basis analysis can vary by context"). At argument, counsel for BLAG wittily characterized this form of analysis as "rational basis plus or intermediate scrutiny minus." Oral Arg. Tr. 16:10-12.

The Supreme Court has not expressly sanctioned such modulation in the level of rational basis review; discussion pro and con has largely been confined to concurring and dissenting opinions.[3] We think it is safe to say that there is some doctrinal instability in this area.

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[3] *Compare Lawrence*, 539 U.S. at 580 (O'Connor, *J.*, concurring) ("When a law exhibits such a desire to harm a politically unpopular

Fortunately, no permutation of rational basis review is needed if heightened scrutiny is available, as it is in this case. We therefore decline to join issue with the dissent, which explains why Section 3 of DOMA may withstand rational basis review.

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group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.") *and U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 188 (1980) (Brennan, *J.*, dissenting) ("In other cases, however, the courts must probe more deeply.") *with City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 459-60 (1985) (Marshall, *J.*, concurring in part and dissenting in part) ("The refusal to acknowledge that something more than minimum rationality review is at work here is, in my view, unfortunate . . . . [B]y failing to articulate the factors that justify today's 'second order' rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked. Lower courts are thus left in the dark on this important question, and this Court remains unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny.") *and Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 321 (1976) (Marshall, *J.*, dissenting) ("[T]he Court has rejected, albeit Sub silentio, its most deferential statements of the rationality standard in assessing the validity under the Equal Protection Clause of much noneconomic legislation."). *But see U.S. R.R. Ret. Bd.*, 449 U.S. at 176 n.10 ("The comments in the dissenting opinion about the proper cases for which to look for the correct statement of the equal protection rational-basis standard, and about which cases limit earlier cases, are just that: comments in a dissenting opinion.").

Instead, we conclude that review of Section 3 of DOMA requires heightened scrutiny. The Supreme Court uses certain factors to decide whether a new classification qualifies as a quasi-suspect class. They include: A) whether the class has been historically "subjected to discrimination," *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); B) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society," *Cleburne*, 473 U.S. at 440-41; C) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group;" *Bowen*, 483 U.S. at 602; and D) whether the class is "a minority or politically powerless." *Id.* Immutability and lack of political power are not strictly necessary factors to identify a suspect class. *See Cleburne*, 473 U.S. at 442 n.10 ("'[T]here's not much left of the immutability theory, is there?'") (quoting J. Ely, Democracy and Distrust 150 (1980)); *Cleburne*, 473 U.S. at 472 n.24 (Marshall, *J.*, concurring in part and dissenting in part) ("The 'political powerlessness' of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates."); *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (rejecting the argument that alienage did not deserve strict scrutiny because it was not immutable); *see also Pedersen*, 2012 WL 3113883, at *13; *Golinski*, 824 F. Supp. 2d at 983; *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 167-68 (2008). Nevertheless, immutability and political power are indicative, and we consider them here. In this case, all four factors justify heightened scrutiny: A) homosexuals as a group have historically endured persecution and discrimination; B) homosexuality has no relation to aptitude or ability to contribute to society; C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and D) the class remains a politically weakened minority.

A) History of Discrimination

It is easy to conclude that homosexuals have suffered a history of discrimination. Windsor and several amici labor to establish and document this history, but we think it is not much in debate. Perhaps the most telling proof of animus and discrimination against homosexuals in this country is that, for many years and in many states, homosexual conduct was criminal. These laws had the imprimatur of the Supreme Court. *See Bowers*, 478 U.S. at 196; *see also Lawrence*, 539 U.S. at 578 (noting that such laws "demean[ed homosexuals'] existence [and] control[led] their destiny").

BLAG argues that discrimination against homosexuals differs from that against racial minorities and women because "homosexuals as a class have never been politically disenfranchised." True, but the difference is not decisive. Citizens born out of wedlock have never been inhibited in voting; yet the Supreme Court has applied intermediate scrutiny in cases of illegitimacy. *See generally Lalli v. Lalli*, 439 U.S. 259 (1982). Second, BLAG argues that, unlike protected classes, homosexuals have not "suffered discrimination for longer than history has been recorded." But whether such discrimination existed in Babylon is neither here nor there. BLAG concedes that homosexuals have endured discrimination in this country since at least the 1920s. Ninety years of discrimination is entirely sufficient to document a "history of discrimination." *See Pedersen*, 2012 WL 3113883 at *21 (summarizing that "the majority of cases which have meaningfully considered the question [have] likewise held that homosexuals as a class have experienced a long history of discrimination").

B) Relation to Ability

Also easy to decide in this case is whether the class characteristic "frequently bears [a] relation to ability to perform or contribute to society." *Cleburne*, 473 U.S. at 440-41; *see Frontiero*, 411 U.S. at 686 ("[W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."). In *Cleburne*, the Supreme Court ruled that heightened scrutiny was inappropriate because "those who are mentally retarded have a reduced ability to cope with and function in the everyday world." 473 U.S. at 442. The Court employed similar reasoning with respect to age classifications, finding that heightened scrutiny was not appropriate for mandatory retirement laws because "physical ability generally declines with age" and such requirements reasonably "serve[d] to remove from . . . service those whose fitness for uniformed work presumptively has diminished with age." *Murgia*, 427 U.S. at 316.

There is no such impairment here. There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them. The aversion homosexuals experience has nothing to do with aptitude or performance.

We do not understand BLAG to argue otherwise. Rather, BLAG suggests that the proper consideration is whether "the classification turns on 'distinguishing characteristics relevant to interests the State has the authority to implement,'" quoting *Cleburne*, 473 U.S. at 441. Thus, BLAG urges that same-sex couples have a diminished ability to discharge family roles in procreation and the raising of children. BLAG cites no precedential application of that standard to support its interpretation, and it is inconsistent with actual cases. *See, e.g.*, *Frontiero*, 411 U.S. at 686 (distinguishing that sex, unlike intelligence, has no bearing on one's general ability to contribute to society). In any event, the abilities or inabilities cited by BLAG bear upon whether the law withstands scrutiny (the second step of analysis) rather than upon the level of scrutiny to apply. *Cf. Clark v. Jeter*, 486 U.S. 456, 461 (1988) (defining the test for intermediate scrutiny as whether a classification is "substantially related to an important government interest").

C) Distinguishing Characteristic

We conclude that homosexuality is a sufficiently discernible characteristic to define a discrete minority class. *See Rowland v. Mad River Local School Dist., Montgomery County, Ohio*, 470 U.S. 1009, 1014 (1985) (Brennan, *J.*, dissenting from denial of certiorari) ("[H]omosexuals constitute a significant and insular minority of this country's population.").

This consideration is often couched in terms of "immutability." BLAG and its amici argue that sexual orientation is not necessarily fixed, suggesting that it may change over time, range along a continuum, and overlap (for bisexuals). But the test is broader: whether there are "obvious, immutable, *or* distinguishing characteristics that define . . . a discrete group." *See Bowen*, 483 U.S. at 602 (emphasis added). No "obvious badge" is necessary. *See Mathews v. Lucas*, 427 U.S. 495, 506 (1976). Classifications based on alienage, illegitimacy, and national origin are all subject to heightened scrutiny, *Cleburne*, 473 U.S. at 440-41, even though these characteristics do not declare themselves, and often may be disclosed or suppressed as a matter of preference.[4] What seems to matter is whether the characteristic of the class calls down discrimination when it is manifest.

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[4] Alienage and illegitimacy are actually subject to change. *See Pedersen*, 2012 WL 3113883 at *23 ("The Supreme Court has held that resident aliens constitute a suspect class despite the ability to opt out of the class voluntarily. Additionally, one's status as illegitimate may be subject to change and is therefore not a strictly immutable characteristic.") (internal citation omitted); *see also Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, *J.*,

Thus a person of illegitimate birth may keep that status private, and ensure that no outward sign discloses the status in social settings or in the workplace, or on the subway. But when such a person applies for Social Security benefits on the death of a parent (for example), the illegitimate status becomes manifest. The characteristic is necessarily revealed in order to exercise a legal right. Similarly, sexual preference is necessarily disclosed when two persons of the same sex apply for a marriage license (as they are legally permitted to do in New York), or when a surviving spouse of a same-sex marriage seeks the benefit of the spousal deduction (as Windsor does here).

BLAG argues that a classification based on sexual orientation would be more "amorphous" than discrete. It may be that the category exceeds the number of persons whose sexual orientation is *outwardly* "obvious, immutable, or distinguishing," and who thereby

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concurring) ("It is clear that by 'immutability' the [Supreme] Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed. People can frequently hide their national origin by changing their customs, their names, or their associations. . . . At a minimum, then, the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.").

predictably undergo discrimination. But that is surely also true of illegitimacy and national origin. Again, what matters here is whether the characteristic invites discrimination when it is manifest.

The class affected by Section 3 of DOMA is composed entirely of persons of the same sex who have married each other. Such persons constitute a subset of the larger category of homosexuals; but as counsel for BLAG conceded at argument, there is nothing amorphous, capricious, or tentative about their sexual orientation. Oral Arg. Tr. 12:11-14. Married same-sex couples like Windsor and Spyer are the population most visible to the law, and they are foremost in mind when reviewing DOMA's constitutionality.

We therefore conclude that sexual orientation is a sufficiently distinguishing characteristic to identify the discrete minority class of homosexuals.

D) Political Power

Finally, we consider whether homosexuals are a politically powerless minority. *See Bowen*, 483 U.S. at 602. Without political power, minorities may be unable to protect themselves from discrimination at the hands of the majoritarian political process. We conclude that homosexuals are still significantly encumbered in this respect.

The question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination. When the Supreme Court ruled that sex-based classifications were subject to heightened scrutiny in 1973, the Court acknowledged that women had already achieved major political victories. *See Frontiero*, 411 U.S. at 685. The Nineteenth Amendment had been ratified in 1920, and Title VII had already outlawed sex-based employment. *See* 78 Stat. 253. The Court was persuaded nevertheless that women still lacked adequate political power, in part because they were "vastly underrepresented in this Nation's decisionmaking councils," including the presidency, the Supreme Court, and the legislature. *Frontiero*, 411 U.S. at 686 n.17.

There are parallels between the status of women at the time of *Frontiero* and homosexuals today: their position "has improved markedly in recent decades," but they still "face pervasive, although at times more subtle, discrimination . . . in the political arena." *Frontiero*, 411 U.S. at 685-86. It is difficult to say whether homosexuals are "under-represented" in positions of power and authority without knowing their number relative to the heterosexual population. But it is safe to say that the seemingly small number of acknowledged homosexuals so situated is attributable either to a hostility that excludes them or to a hostility that keeps their sexual preference private—which, for our purposes, amounts to much the same thing. Moreover, the same considerations can be expected to suppress some degree of political activity by inhibiting the kind of open association that advances political agendas. *See Rowland*, 470 U.S. at 1014 (Brennan, *J.*, dissenting from denial of certiorari) ("Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena.").

In sum, homosexuals are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public.

* * *

Analysis of these four factors supports our conclusion that homosexuals compose a class that is subject to heightened scrutiny. We further conclude that the class is quasi-suspect (rather than suspect) based on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect. While homosexuals have been the target of significant and long-standing discrimination in public and private spheres, this mistreatment "is not sufficient to require 'our most exacting scrutiny.'" *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (quoting *Mathews v. Lucas*, 427 U.S. 495, 506 (1976)).

The next step is to determine whether DOMA survives intermediate scrutiny review.

IV

To withstand intermediate scrutiny, a classification must be "substantially related to an important government interest." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). "Substantially related" means that the explanation must be "'exceedingly persuasive.'" *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting

Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.*

BLAG advances two primary arguments for why Congress enacted DOMA. First, it cites "unique federal interests," which include maintaining a consistent federal definition of marriage, protecting the fisc, and avoiding "the unknown consequences of a novel redefinition of a foundational social institution." Second, BLAG argues that Congress enacted the statute to encourage "responsible procreation." At argument, BLAG's counsel all but conceded that these reasons for enacting DOMA may not withstand intermediate scrutiny. Oral Arg. Tr. 16:24-17:6.

A) Maintaining a "Uniform Definition" of Marriage

Statements in the Congressional Record express an intent to enforce uniform eligibility for federal marital benefits by insuring that same-sex couples receive—or lose—the same federal benefits across all states.[5] However, the emphasis on uniformity is suspicious because Congress and the Supreme Court have historically deferred to state domestic relations laws, irrespective of their variations.

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[5] For example, certain legislators were concerned that it would be administratively difficult to deal with benefit changes as same-sex couples moved between states with different policies on same-sex marriage. *See, e.g.*, 150 Cong. Rec. 15318 (2004) (Sen. Inhofe).

To the extent that there has ever been "uniform" or "consistent" rule in federal law concerning marriage, it is that marriage is "a virtually exclusive province of the States." *Sosna*, 419 U.S. at 404. As the Supreme Court has emphasized, "the states, at the time of the adoption of the Constitution, possessed *full power* over the subject of marriage and divorce. . . . [T]he Constitution delegated *no authority* to the Government of the United States on the subject of marriage and divorce." *Haddock v. Haddock*, 201 U.S. 562, 575 (1906) (emphasis added), *overruled on other grounds by Williams v. State of North Carolina*, 317 U.S. 287 (1942). DOMA was therefore an unprecedented intrusion "into an area of traditional state regulation." *Massachusetts*, 682 F.3d at 13. This is a reason to look upon Section 3 of DOMA with a cold eye. "The absence of precedent . . . is itself instructive; '[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

Moreover, DOMA's sweep arguably creates more discord and anomaly than uniformity, as many amici observe. Because DOMA defined only a single aspect of domestic relations law, it left standing all other inconsistencies in the laws of the states, such as minimum age, consanguinity, divorce, and paternity. *See* Br. of Amici Curiae Family Law Professors Supporting Petitioner at 12-13 (noting that "the federal government has always accepted the states' different ways of defining parental status" and offering numerous examples of critical differences in state parental policies).

The uniformity rationale is further undermined by inefficiencies that it creates. As a district court in this Circuit found, it was simpler—and more consistent—for the federal government to ask whether a couple was married under the law of the state of domicile, rather than adding "an additional criterion, requiring the federal government to identify and exclude all same-sex marital unions from federal recognition." *Pedersen*, 2012 WL 3113883 at *48; *see Golinski*, 824 F. Supp. 2d at 1001-02 ("The passage of DOMA actually undermined administrative consistency by requiring that the federal government, for the first time, discern which state definitions of marriage are entitled to federal recognition and which are not.").

Because DOMA is an unprecedented breach of longstanding deference to federalism that singles out same-sex marriage as the only inconsistency (among many) in state law that requires a federal rule to achieve uniformity, the rationale premised on uniformity is not an exceedingly persuasive justification for DOMA.

B) Protecting the Fisc

Another professed goal of Congress is to save government resources by limiting the beneficiaries of government marital benefits. H.R. Rep. No. 104-664, at 18 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905,

2922. Fiscal prudence is undoubtedly an important government interest. Windsor and certain amici contest whether the measure will achieve a net benefit to the Treasury; but in matters of the federal budget, Congress has the prerogative to err (if error it is), and cannot be expected to prophesy the future accurately. But the Supreme Court has held that "[t]he saving of welfare costs cannot justify an otherwise invidious classification." *Graham v. Richardson*, 403 U.S. 365, 375 (1971) (quotation marks omitted). As the district court observed, "excluding any arbitrarily chosen group of individuals from a government program conserves government resources." *Windsor*, 833 F. Supp. 2d at 406 (quotation marks).

Citing *Bowen v. Owens*, 476 U.S. 340, 348 (1986), BLAG draws the distinction that DOMA did not *withdraw* benefits from same-sex spouses; since DOMA was enacted before same-sex marriage was permitted in any state, DOMA operated to prevent the *extension* of benefits to people who never enjoyed them. However, *Bowen* was decided on rational basis grounds and did not involve an invidious classification. *Id.* at 349-50. Moreover, DOMA is properly considered a benefit withdrawal in the sense that it functionally eliminated longstanding federal recognition of all marriages that are properly ratified under state law—and the federal benefits (and detriments) that come with that recognition.

Furthermore, DOMA is so broad, touching more than a thousand federal laws, that it is not substantially related to fiscal matters. As amicus Citizens for

Responsibility and Ethics in Washington demonstrates, DOMA impairs a number of federal laws (involving bankruptcy and conflict-of-interest) that have nothing to do with the public fisc. *See* Br. of Amicus Curiae Citizens for Responsibility and Ethics in Washington at 5-11, 18-23. DOMA transcends a legislative intent to conserve public resources.

For these reasons, DOMA is not substantially related to the important government interest of protecting the fisc.

C) Preserving a Traditional Understanding of Marriage

Congress undertook to justify DOMA as a measure for preserving traditional marriage as an institution. 150 Cong. Rec. 14951. But "[a]ncient lineage of a legal concept does not give [a law] immunity from attack for lacking a rational basis." *Heller*, 509 U.S. at 326. *A fortiori*, tradition is hard to justify as meeting the more demanding test of having a substantial relation to an important government interest. Similar appeals to tradition were made and rejected in litigation concerning anti-sodomy laws. *See Lawrence*, 539 U.S. at 577-78 ("'[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; ***neither history nor tradition*** could save a law prohibiting miscegenation from constitutional attack.'") (quoting *Bowers*, 478 U.S. at 216 (Stevens, *J.*, dissenting)) (emphasis added).

Even if preserving tradition were in itself an important goal, DOMA is not a means to achieve it. As the district court found: "because the decision of whether same-sex couples can marry is left to the states, DOMA does not, strictly speaking, 'preserve' the institution of marriage as one between a man and a woman." *Windsor*, 833 F. Supp. at 403.

Preservation of a traditional understanding of marriage therefore is not an exceedingly persuasive justification for DOMA.

D) Encouraging Responsible Procreation

Finally, BLAG presents three related reasons why DOMA advances the goals of "responsible child-rearing": DOMA subsidizes procreation because only opposite-sex couples can procreate "naturally"; DOMA subsidizes biological parenting (for more or less the same reason); and DOMA facilitates the optimal parenting arrangement of a mother and a father. We agree that promotion of procreation can be an important government objective. But we do not see how DOMA is substantially related to it.

All three proffered rationales have the same defect: they are cast as incentives for heterosexual couples, incentives that DOMA does not affect in any way. DOMA does not provide any incremental reason for opposite-sex couples to engage in "responsible procreation."[6] Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before.[7] Other courts have likewise been unable to find even a *rational* connection between DOMA and encouragement of responsible procreation and child-rearing. *See Massachusetts*, 682 F.3d at 14-15 (underscoring the "lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage") (citations omitted); *Windsor*, 833 F. Supp. at 404-05; *Pedersen*, 2012 WL 3113883, at *40-43.

DOMA is therefore not substantially related to the important government interest of encouraging procreation.

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DOMA's classification of same-sex spouses was not substantially related to an important government interest. Accordingly, we hold that Section 3 of DOMA violates equal protection and is therefore unconstitutional.

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[6] "[T]he argument that withdrawing the designation of 'marriage' from same-sex couples could on its own promote the strength or stability of opposite-sex marital relationships lacks any such footing in reality." *Perry v. Brown*, 671 F.3d 1052, 1089 (9th Cir. 2012).

[7] To the extent that BLAG is suggesting that Congress' laws might actually *influence* sexual orientation, there is no evidence to support that claim (and it strikes us as far-fetched).

V

Our straightforward legal analysis sidesteps the fair point that same-sex marriage is unknown to history and tradition. But law (federal *or* state) is not concerned with holy matrimony. Government deals with marriage as a civil status—however fundamental—and New York has elected to extend that status to same-sex couples. A state may enforce and dissolve a couple's marriage, but it cannot sanctify or bless it. For that, the pair must go next door.

CONCLUSION

For the foregoing reasons, we AFFIRM the grant of Windsor's motion for summary judgment.

STRAUB, *Circuit Judge*, dissenting in part and concurring in part:

INTRODUCTION

I respectfully dissent in part and concur in part.

I concur with those parts of the majority opinion that (1) deny BLAG's motion to dismiss the appeal taken by the United States, and (2) decline to certify to the New York Court of Appeals the question of whether the State of New York recognized Windsor's marriage at the time of her wife's death. For the reasons that follow, I dissent from the majority's holding that DOMA is unconstitutional under the Fifth Amendment's equal protection guarantee.

The majority holds DOMA unconstitutional, a federal law which formalizes the understanding of marriage in the federal context extant in the Congress, the Presidency, and the Judiciary at the time of DOMA's enactment and, I daresay, throughout our nation's history. If this understanding is to be changed, I believe it is for the American people to do so.

Forty years ago, the United States Supreme Court was presented with the essentially identical challenge we have here. The then DOMA-like Minnesota law was upheld in that state's highest court because it found that the right to marry without regard to sex was not a fundamental right and the law's thrust was not irrational or invidious discrimination. The Supreme Court of Minnesota held that the applicable Minnesota statute defining marriage as a union between a man and a woman did not violate the United States Constitution. Upon their appeal to the United States Supreme Court, the plaintiffs' jurisdictional statement squarely claimed that Minnesota's same-sex marriage prohibition violated their equal protection rights. The Supreme Court, in dismissing the appeal for "want of a substantial federal question," obviously found no constitutional infirmity in that DOMA-like Minnesota law. I am unable to conclude, as it is suggested we should, that the Supreme Court of the United States would have held as it did had it concluded that the Minnesota law was unconstitutional—at a time when it was required to accept the appellate challenge. The Supreme Court made a merits decision, and has never walked away from it or ever suggested that its disposition elided a merits determination on some procedural basis. It has further instructed us that such a disposition, albeit summary, rejects the challenge presented in the jurisdictional statement and is binding on the lower federal courts. And, as recently as 2003, Justice O'Connor reminded us that rational reasons exist to promote the traditional institution of marriage. *Baker* dictates my decision.

Furthermore, it is argued here that we are to disregard this binding precedent and the traditionally applicable rational basis standard of review and, instead, now create a new type of suspect classification requiring a heightened level of scrutiny in respect of the federal definition of marriage. The Supreme Court has never done so, while reminding us to be wary of creating any new such classification and itself not having created any in decades. I believe it would be imprudent to do so in this case. Eleven of our nation's federal Circuit Courts of Appeals have not utilized an elevated form of scrutiny as to sexual orientation discrimination. Most recently, the First Circuit went to the extreme of creating a new, increased level of rational basis analysis. This appears to be the first case in which this Court is asked to do the same or more, and the majority is the first to apply intermediate scrutiny to invalidate the federal definition of marriage as between a man and a woman. The discrimination in this case does not involve a recognized suspect or quasi-suspect classification. It is squarely about the preservation of the traditional institution of marriage and its procreation of children. DOMA centers on legitimate state interests that go beyond mere moral disapproval of an excluded group.

DOMA's classification is to be reviewed on the basis of whether it has a rational relation to any legitimate end. Utilizing that standard, I conclude that DOMA is constitutional. The rational basis standard is most deferential to the determinations of the Congress. Such may be conclusory and are not to be tried in the traditional fact-oriented process. The public policy choice set forth in DOMA is to be made by Congress, not the Judiciary. In DOMA, Congress has set the boundaries for marriage—all in keeping with American society's historical view of a marriage as being between a man and a woman. This is not the first time the Congress has signaled its intentions in various definitions of eligibility for federal purposes as to children, marriage, and domestic relations. These have at times conflicted with state laws but the federal law has always prevailed for federal purposes.

The Congress had the benefit of advice from the Department of Justice that DOMA is constitutional. The Congress decided to codify what had always been implicit in federal law. The history of federal legislation in respect of the meaning of marriage or spouse was never even suggested to mean anything other than the lawful union of one man and one woman for all federal purposes. The nation's traditional understanding was memorialized in DOMA. Congress explicitly sought to recognize for federal purposes the significance of our historical understanding of a mainstream value, joining the biological component of the marriage relationship to the legal responsibility of rearing the offspring of that union. The Congress referenced its intention to sanction, for federal purposes, society's desire to approve the man and woman long term union as the ideal by which to beget and rear children. Indeed, state high courts—as in New York—have credited their legislature's rational decisions to promote the welfare of children via opposite-sex marriage laws. Further, Congress has articulated, as another legitimate reason for DOMA, that the federal fisc as well as America's desired right to equitable distribution of benefits should not be based on the particularity or peculiarity of any state's definition of marriage, but rather the federal government is entitled to codify a single definition of marriage as historically understood.

The Congress was uniform and consistent. And, it chose not to rush ahead with a redefinition at a time when all the states utilized the traditional definition of marriage. It chose to let the issue evolve within American society. The Congress accomplished its task in a manner which continues to respect the principle of federalism. The states remain free to define marriage as they choose, pursuant to DOMA. And, forty-one of our states continue to define marriage as DOMA does. The totality of the foregoing is sufficient to hold DOMA constitutional under the rational basis standard. Even the majority opinion, while ultimately holding DOMA unconstitutional under a higher level of scrutiny, appears to imply that DOMA passes rational basis review. (Maj. Op. at 22:3-9.)

My final observation relates to the Attorney General's current position. His assertion that sexual orientation is a suspect classification and that DOMA fails to pass strict scrutiny is recently minted, and is contrary to an established body of cases to the contrary. The Attorney General's position is unprecedented in its departure from the Department of Justice's long-standing policy of defending federal statutes even if the President disagrees as a matter of policy.

At bottom, the issue here is marriage at the federal level for federal purposes, and not other legitimate interests. The Congress and the President formalized in DOMA, for federal purposes, the basic human condition of joining a man and a woman in a long-term relationship and the only one which is inherently capable of producing another generation of humanity. Whether that understanding is to continue is for the American people to decide via their choices in electing the Congress and the President. It is not for the Judiciary to search for new standards by which to negate a rational expression of the nation via the Congress.

DISCUSSION

I. The Origin and Impact of DOMA

DOMA was enacted in 1996 in response to the possible end to the exclusion of same-sex couples from civil marriage in Hawaii. In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the Hawaii Supreme Court held that denying same-sex couples the right to marry must be justified under strict scrutiny, and remanded for further proceedings consistent with this determination.[1] The House Judiciary Committee's Report on DOMA (the "House Report") described *Baehr* as part of an "orchestrated legal assault being waged against traditional heterosexual marriage." *See* H.R. Rep. No. 104-664, at 2-3 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-07 ("House Report" or "H. Rep.").

DOMA has two key provisions. Section 2, the choice-of-law section, states:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C. This provision expresses Congress's desire to prevent a situation where one state would be forced to recognize same-sex marriages performed and recognized in a different state.

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[1] Same-sex marriage never became law in Hawaii because, following *Baehr*, the Hawaii Constitution was amended to allow for the legislative prohibition of same-sex marriage. *See* Haw. Const. art. I, § 23. But, this did not occur until after DOMA was enacted.

Section 3, the definitional section of DOMA, provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7. This provision articulates Congressional recognition, for federal purposes, that marriage is the union of a man and a woman.

The House Report indicates that several motivations led Congress to pass DOMA. It identifies four "governmental interests advanced by this legislation: (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources." (H. Rep. at 12-18.) The House Report also justifies DOMA as a means to "encourag[e] responsible procreation and child-rearing," H. Rep. at 13, and as a way to reflect Congress's "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." (H. Rep. at 16.)

Given the broad range of federal laws to which marital status is relevant, the consequences of DOMA are far-reaching. In addition to preventing a surviving same-sex spouse like Windsor from inheriting money or property free from an estate tax, DOMA prevents same-sex married couples from lessening tax burdens by filing joint federal tax returns, *see* 26 U.S.C. § 1(a)-(c); prevents the surviving spouse of a same-sex marriage from collecting Social Security survivor benefits, *see, e.g.*, 42 U.S.C. § 402; and prevents federal employees from sharing their health insurance and certain other medical benefits with same-sex spouses. As a result of DOMA, married same-sex couples are deprived of many other, lesser-known rights, benefits, and privileges including, *inter alia*, benefits relating to intellectual property; housing benefits; veteran's benefits; immigration entitlements (same-sex spouses are the only legally married spouses of American citizens who can face deportation); employment benefits in the private sector (including sick leave to care for one's spouse under the Family and Medical Leave Act); and protections relating to domestic and intimate partner crimes and family violence.

In sum, DOMA codifies, for purposes of federal statutes, regulations, and rulings, the understanding of marriage as "only a legal union between one man and one woman as husband and wife," *see* 1 U.S.C. § 7, and it reserves to each state the ability to retain that definition as its policy if the state so chooses, or to alter it, as it sees fit. *See* 28 U.S.C. § 1738C. In enacting DOMA, therefore, Congress (1) maintained the status quo as to the federal definition of marriage for the purposes of federal programs and benefits; and

(2) recognized the right of any state to allow gays and lesbians to marry while, at the same time, permitting other states to adhere to their existing understandings of the institution of marriage.

II. Standard of Review

We review a grant of summary judgment de novo. *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 914 (2d Cir. 2010). Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material "if it 'might affect the outcome of the suit under the governing law,'" and "[a]n issue of fact is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 69 (2d Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

There being no dispute as to the material facts in this matter, I find, as a matter of law, that DOMA is constitutional.

III. The Precedential Effect of **Baker v. Nelson**

The majority concludes that Windsor's claim is not foreclosed by the Supreme Court's summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972). In *Baker*, a same-sex couple seeking the right to marry challenged a Minnesota law that limited marriage to opposite-sex couples on the grounds that it violated due process and equal protection, as it unconstitutionally discriminated on the basis of sex. *Baker v. Nelson*, 191 N.W.2d 185

(Minn. 1971). The Minnesota Supreme Court, applying rational basis review, upheld the statute because it found the right to marry without regard to sex was not fundamental, and because classifying who can marry based on sex was not "irrational or invidious discrimination." *Id.* at 187. The Court reasoned that "[i]t is unrealistic to think that the original draftsmen of our marriage statutes, which date from territorial days, would have used the term" to mean anything other than "the state of union between persons of the opposite sex." *Id.* at 186. In so doing, the Court found support in the 1966 version of Webster's Third New International Dictionary, the fourth edition of Black's Law Dictionary, the Book of Genesis, and *Skinner v. Oklahoma*, which declared that "[m]arriage and procreation are fundamental to the very existence and survival of the race." 316 U.S. 535, 541 (invalidating Oklahoma's Habitual Criminal Sterilization Act under the Fourteenth Amendment's Equal Protection Clause).

The Minnesota Supreme Court rejected petitioners' reliance on *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Loving v. Virginia*, 388 U.S. 1 (1967). The Minnesota Supreme Court held that the privacy right recognized in *Griswold* was "inherent in the marital relationship," and that *Loving* did not militate in favor of petitioners because "Virginia's anti-miscegenation statute . . . was invalidated solely on the grounds of its patent racial discrimination." *Id.* at 186-87. The Court concluded that in both a "commonsense and in a constitutional sense, there is a clear distinction between a martial restriction based merely upon race and one based upon the fundamental difference in sex." *Id.* at 187. The United States Supreme Court summarily dismissed the appeal of the Minnesota Supreme Court's ruling for "want of a substantial federal question." *Baker*, 409 U.S. at 810.

The equal protection guarantee of the Fifth Amendment, which applies to the federal government, functions identically to the Equal Protection Clause of the Fourteenth Amendment, which applies to the states. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995). Therefore, jurisprudence interpreting one applies to the other. It follows that any ruling of the Supreme Court on a Fourteenth Amendment equal protection challenge to the denial of same-sex marriage applies with equal force to an equal protection challenge to the denial of same-sex marriage under the Fifth Amendment.

According to the jurisdictional statement of the appellants in *Baker*, the case presented, *inter alia*, the question of "[w]hether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment." (JA-695.) The question presented here, by Windsor, can be formulated in a strikingly similar fashion: "Whether Section 3 of the Defense of Marriage Act is consistent with the equal protection component of the Fifth Amendment Due Process Clause." (DOJ Br. at 2.)

Baker is a disposition on the merits, not a mere denial of certiorari, *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), and any ruling inconsistent with its terms must be avoided. "[L]ower courts are bound by summary decisions by this Court until such time as the Court informs (them) that (they) are not." *Hicks*, 422 U.S. at 344-45 (internal quotation omitted).

A summary dismissal means that "the Court found that the decision below was correct and that no substantial question of the merits was raised." E. Gressman, et al., *Supreme Court Practice* § 5.18, p. 365 (9th ed. 2007). *See also Roxbury Taxpayers Alliance v. Del. Cnty. Bd. of Supervisors*, 80 F.3d 42, 48 (2d Cir. 1996) (recognizing dismissal for want of a substantial federal question as "a decision on the merits of the case"); *Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth.*, 387 F.2d 259, 262 n.3 (2d Cir. 1967) ("[U]nless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise."); *cf. Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir. 1973) (rejecting argument that summary dispositions have "very little precedential significance" and stating that "we are bound by the Supreme Court's summary affirmances until such time as the Court informs us that we are not") (internal quotation omitted). Thus, *Baker* squarely rejected the contention that prohibiting same-sex marriages violated equal protection.[2]

Whatever factual differences exist between the challenge to the Minnesota law presented in *Baker* and Windsor's challenge to DOMA, they are too attenuated to remove the instant case from the scope of *Baker's* precedential effect. Although the facts in this case are not identical to those in *Baker*, the "precedential value of a dismissal for want of a substantial federal question extends beyond the facts of the particular case to all similar cases." *Wright v. Lane Cnty. Dist. Court*, 647 F.2d 940, 941 (9th Cir. 1981); *see also League of Women Voters of Nassau Cnty. v. Nassau Cnty. Bd. of Supervisors*, 737 F.2d 155, 164 (2d Cir. 1984) (the court's "responsibility in gauging [a summary disposition's] authority . . . is to mark out the 'reach and content' of that prior disposition").

The same-sex couple in *Baker* argued that Minnesota's exclusion of same-sex couples from the institution of civil marriage violated the Equal Protection Clause because it was discrimination not rationally related to any legitimate governmental interest. Forty years may have passed, but Windsor makes the same claim today (based on, *inter alia*, similar arguments regarding the over-and under-inclusiveness of the limitation on the marriage right vis-à-vis the procreation rationale). Whatever differences exist between Windsor's claim and those advanced in *Baker*, they are insignificant compared to the central fact that both cases present equal protection challenges to laws prohibiting the recognition of any marriage entered into by two persons of the same sex. Thus, any distinctions do not render DOMA sufficiently different from Minnesota's marriage law at the time of *Baker* such that it can be said the issues in this case were not before and decided by the Supreme Court. The relevant facts of this case are substantially similar to those of *Baker*, which necessarily decided that a state law defining marriage as a union between a man and woman does not violate the Equal Protection Clause. *Baker* is the last word from the Supreme Court regarding the constitutionality of a state law limiting marriage to opposite-sex couples under the Equal Protection Clause and thus remains binding on this Court, given that the equal protection component of the Fifth Amendment is identical to and coextensive with the Fourteenth Amendment guarantee.

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[2] 1988 legislation curtailing the Supreme Court's appellate jurisdiction did not change the precedential import of summary dispositions. "Abolition of the [mandatory] appeal jurisdiction does not change this rule." 16B Charles Alan Wright & Arthur R. Miller, et al., *Federal Practice & Procedure* § 4014 (2d ed. 2012).

Since *Baker* holds that states may use the traditional definition of marriage for state purposes without violating equal protection, it necessarily follows that Congress may define marriage the same way for federal purposes without violating equal protection. *See Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 870 (8th Cir. 2006) ("In the nearly one hundred and fifty years since the Fourteenth Amendment was adopted, to our knowledge no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution."); *McConnell v. Nooner*, 547 F.2d 54, 56 (8th Cir. 1976) (per curiam) (*Baker* "constitutes an adjudication on the merits which is binding on the lower federal courts"); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (finding *Baker* controlling in case where same-sex spouse appealed denial of petition with INS to be classified as "immediate relative"), *aff'd*, 673 F.2d 1036, 1039 n.2 (9th Cir. 1982) (acknowledging precedential nature of *Baker*); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1305 (M.D. Fla. 2005) (*Baker* is "binding precedent" with "dispositive effect" requiring dismissal of equal protection challenge to DOMA).

The correctness of the *Baker* holding was placed squarely before the Supreme Court in that case's jurisdictional statement. The Court's summary dismissal for want of a substantial federal question is therefore a controlling precedent, unless and until re- examined by the Supreme Court. *Hicks*, 422 U.S. at 343-45. "The Court neither acknowledges nor holds that other courts should ever conclude that its more recent cases have, by implication, overruled an earlier precedent. Rather, lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 207 (1997).[3]

The close resemblance between the issue presented in *Baker* and the claim advanced by Windsor means that the scope of *Baker* controls the question raised by this appeal, foreclosing Windsor's claim. That is, both cases involve the validity of same-sex couples' deprivation of marriage rights, a question already presented to and adjudicated on the merits by the Supreme Court. In addition, if, as *Baker* held, denying same-sex couples the right to marry does not violate equal protection, it follows that denying same-sex couples a subset of the rights (*i.e.*, federal rights) associated with marriage is also constitutional. This conclusion is inescapable. For the sake of completeness, in the event that there is any doubt that *Baker* forecloses Windsor's claim, I now proceed to consider the merits.

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[3] Although we have noted that questions may stop being "insubstantial" when subsequent doctrinal developments so indicate, *Port Auth. Bondholders*, 387 F.2d at 263 n.3, the Supreme Court has never, despite the numerous developments in the last forty years, stated that its holding in *Baker* is invalid. I am not convinced by Windsor's arguments that the Supreme Court's decisions in *Romer v. Evans* and *Lawrence v. Texas* have eroded *Baker's* foundations such that it no longer holds sway.

In *Romer*, the Supreme Court applied rational basis scrutiny to laws that discriminated on the basis of sexual orientation. In *Lawrence*, the Supreme Court expressly stated that "[t]he present case does not involve . . . whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 539 U.S. at 578. Consequently, there are no doctrinal changes in Supreme Court jurisprudence implying that *Baker* is no longer binding authority and *Baker's* effect therefore hinges on whether the issues in this case were presented to and necessarily decided by the Supreme Court.

IV. Principles of Equal Protection Analysis

"The Due Process Clause of the Fifth Amendment assures every person the equal protection of the laws, 'which is essentially a direction that all persons similarly situated should be treated alike.'" *Able v. United States*, 155 F.3d 628, 631 (2d Cir. 1998) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)).

When the subject of unequal treatment is a mem ber of a class that historically has been the object of discrimination, or government conduct employs a classification—*inter alia*, race, alienage, nationality, sex, and illegitimacy—closely associated with inequality, "the Supreme Court has required a higher degree of justification than a rational basis, either strict or intermediate scrutiny. Under the strict scrutiny test the government must demonstrate a compelling need for the different treatment and that the provision in question is narrowly tailored to achieve its objective. Under intermediate scrutiny, the government must at least demonstrate that the classification is substantially related to an important governmental objective." *Id.* at 631-32 (internal citations omitted).

Where no suspect classification is employed or fundamental right infringed upon by government conduct, the constitutional guarantee of equal protection is satisfied where a classification bears a rational relationship to an appropriate governmental interest. *See Heller v. Doe*, 509 U.S. 312, 320 (1993). In evaluating whether the asserted purposes of a federal law are rationally related to its ends, we defer to the judgment of Congress. Congressional enactments that do not infringe upon a fundamental right or employ a suspect classification are entitled to "a strong presumption of validity," and must be sustained if "'there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* at 319-20 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). Rational basis review in an equal protection analysis does not authorize "'the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.'" *Id.* at 319 (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

Unlike under heightened scrutiny, in a rational basis equal protection analysis courts look to any "conceivable basis" for the challenged law, not limited to those articulated by or even consistent with the rationales offered by the legislature. *Beach Commc'ns*, 508 U.S. at 312.[4] Those attacking the rationality of a legislative classification have the burden "to negative every conceivable basis which might support it." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (internal quotation omitted). "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (footnote omitted). "[A] law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer v. Evans*, 517 U.S. 620, 632 (1996). Under the rational review framework, where there are "plausible reasons" for Congressional action, a court's "inquiry is at an end." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). This standard of review is "a paradigm of judicial restraint." *Beach Commc'ns*, 508 U.S. at 314. "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321. "Only by faithful adherence to th[e] guiding principle of [restraint in] judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Beach Commc'ns*, 508 U.S. at 315 (internal quotation omitted).

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[4] Indeed, in *Beach Communications*, the Supreme Court upheld the challenged law using a posited reason for a federal agency regulation, even though Congress had previously rejected that purpose and the regulation presented a conflict in the statutory scheme. *Id.* at 318.

Having a conceivable legitimate governmental interest is, alone, not sufficient for rational basis review. To survive rational basis review, a law must also have a rational relationship to the asserted legitimate governmental interest. In assessing the existence of a rational relationship, courts should be guided by the knowledge that rational basis review is "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989).

However, even under rational basis review, a law will fail if it seeks to further an illegitimate end. For example, "the accommodation of . . . bias or animosity can never serve as a legitimate government interest; mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in the circumstances, are not permissible bases for differential treatment by the government." *Able*, 155 F.3d at 634 (internal quotations omitted). Laws that single out a certain class of citizens for disfavored legal status "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 633-34. And such animosity cannot constitute a legitimate governmental objective. *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

Where the discrimination challenged is motivated both by impermissible purposes (*e.g.*, animus, negative attitudes, malice, fear, the desire to harm a group, moral disapproval, ignorance) and permissible purposes (under rational basis review, virtually any goal not forbidden by the Constitution), the law may still be constitutionally valid. While "negative attitudes," "fear" or other biases "may often accompany irrational (and therefore unconstitutional) discrimination, their presence alone does not a constitutional violation make." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001).

Because any single valid rationale is sufficient to support DOMA's constitutionality, I analyze only as many possible interests as necessary to sustain the law. *See F.C.C. v. Beach Commc'n, Inc.*, 508 U.S. 307, 317 (1993). I find that several of BLAG's rationale suffice to satisfy constitutional scrutiny.

V. DOMA Survives Rational Basis Review

The House Report identifies four governmental interests advanced by DOMA: "(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources." (H. Rep. at 12.)

BLAG contends that DOMA is supported by six rationales, all of which independently justify the legislation under rational basis review. DOMA, it is argued, advances governmental interest in: (1) maintaining a uniform federal definition of marriage, (2) preserving the public fisc and respecting prior legislative judgments, (3) exercising caution, (4) recognizing opposite-sex couples' unique ability to procreate, (5) incentivizing the raising of children by their biological parents, and (6) encouraging childrearing in a setting with both a mother and a father.

At oral argument, the Department of Justice confirmed that in 1996, in "a couple of different letters," it indicated to Congress that it believed "courts would uphold section three of DOMA." (Oral Arg. Tr. 42:8-14.) Specifically, in a letter dated May 14, 1996, the Department of Justice indicated to the Honorable Henry J. Hyde, Chairman of the House Committee on the Judiciary, that "[t]he Department of Justice believes that H.R. 3396 [DOMA] would be sustained as constitutional." (H. Rep. at 32.) On May 29, 1996, the Department of Justice again advised Congress, in a letter to the Honorable Charles T. Canady, Chairman of the House Subcommittee on the Constitution (Committee on the Judiciary), that DOMA "would be sustained as constitutional if challenged in court, and that it does not raise any legal issues that necessitate further comment by the Department." (*Id.* at 32-33.)

The Department of Justice maintained this position until early 2011, defending DOMA against numerous lawsuits in the intervening years. Indeed, from 2009 through early 2011, the Department of Justice took the position that uniformity and a desire to preserve the status quo vis-à-vis a federal definition of marriage provided a rationale for DOMA sufficient to sustain the law under rational basis review, which was argued to be the applicable standard of scrutiny. *See* Office of Pers. Mgmt. Mem. of Law in Supp. of Defs.' Mot. to Dismiss, *Gill v. Office of Pers. Mgmt.*, No. 09-cv-10309

(JLT), at 16-19 (D. Mass. Sept. 18, 2009) (docket entry no. 21); U.S. Dep't of Health and Human Servs. Mem. of P. & A. in Supp. of Defs.' Mot. to Dismiss, *Commonwealth of Mass. v. U.S. Dep't of Health and Human Servs.*, No. 09-cv-11156 (JLT), at 28-31 (D. Mass. Oct. 30, 2009) (docket entry no. 17); U.S. Dep't of the Treasury Mot. to Dismiss, *Dragovich v. Dep't of Treasury*, No. 10-cv-1564 (CW), at 18-24 (N.D. Cal. July 2, 2010) (docket entry no. 25); U.S. Office of Pers. Mgmt. Supplemental Br. in Resp. to Ct.'s Order of Oct. 15, 2010, *Golinski v. Office of Pers. Mgmt.*, No. 10-257 (JSW), at 10-15 (N.D. Cal. Nov. 19, 2010) (docket entry no. 83). As late as January of 2011, the Department of Justice told the First Circuit that DOMA was not unconstitutional. *See* Corrected Br. for the U.S. Dep't of Health and Human Servs., *Commonwealth of Mass. v. U.S. Dep't of Health and Human Servs.*, Nos. 10-2204, 10-2207, 10-2214, at 26-55 (1st Cir. Jan. 19, 2011). No relevant facts or law have changed since early 2011 when the Department of Justice last took this position. Indeed, at oral argument, the Department of Justice acknowledged that its current position on DOMA is, in part, a result of "a decision that has been made by the Attorney General and by the President, [a] constitutional judgment." (Oral Arg. Tr. 42:21-43:6.)

Even now the Department of Justice acknowledges that "a reasonable argument for Section 3's constitutionality may be proffered under" the rational basis standard, and that there exists "substantial circuit court authority applying rational basis review to sexual-orientation classifications." (JA-56, JA-53.) At argument, the Department of Justice summarized its most recent arguments for DOMA's rational basis as "maintaining the status quo" and achieving "a degree of uniformity for federal benefits, coupled with preserving room for state policy development." (Oral Arg. Tr. 44:3-7.)

As explained above, only if there is no conceivable legitimate governmental interest, or DOMA is not rationally related to any such interest, will the statute be unconstitutional under rational basis review.

A. *Responsible Procreation and Childrearing by Biological Parents*

In enacting DOMA, Congress sought to explicitly recognize, for federal purposes, the biological component of the marital relationship and the legal responsibility of rearing the offspring of such a union. Numerous state high courts have accepted this as a rational basis for excluding same-sex couples, even legally recognized same-sex parents, from the institution of civil marriage. DOMA advances the governmental interest in connecting marriage to biological procreation by excluding certain couples who cannot procreate simply by joinder of their different sexual being from the federal benefits of marital status.

Under rational basis review, courts must consider and credit all rationales for restricting federal marriage benefits to opposite-sex couples that do not evince unconstitutional animus. Numerous courts have recognized that denying same-sex couples federal marriage rights or even the right to marry at all can be grounded in reasons other than animus. *See Massachusetts v. U.S. Dep't of Health and Human Servs.*, 682 F.3d 1, 16 (1st Cir. 2012) ("*Massachusetts v. HHS*") ("we do not rely upon the charge that DOMA's hidden but dominant purpose was hostility to homosexuality"); *In re Kandu*, 315 B.R. 123, 147-48 (Bankr. W.D. Wash. 2004) (noting that DOMA can be explained by legitimate governmental interests); *Standhardt v. Superior Court*, 77 P.3d 451, 465 (Ariz. Ct. App. 2003) ("Arizona's prohibition of same-sex marriages furthers a proper legislative end and was not enacted simply to make same-sex couples unequal to everyone else."); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) ("We do not consider the refusal to issue the [marriage] license [to persons of the same sex] a punishment."); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 680 (Tex. Ct. App. 2010) (rejecting argument that limiting marriage and divorce to opposite-sex couples is "explicable only by class-based animus"). *See also Lawrence v. Texas*, 539 U.S. 558, 585 (2003) ("Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.") (O'Connor, J., concurring).

The interest in recognizing the connections between marriage and childrearing by biological parents can be broken down into several components. First, DOMA expresses Congressional recognition that "responsible begetting and rearing of new generations is of fundamental importance to civil society." (Amicus Br. of States of Indiana, et al. at 25.) Because the state has an interest in children, the state is thus also interested in preventing "irresponsible procreation," a phenomenon implicated exclusively by heterosexuals. (BLAG Br. at 49.) Because of these legitimate interests, reserving federal marriage rights to opposite-sex couples "protect[s] civil society," Amicus Br. of States of Indiana, et al. at 25, because without the inducement of marriage, opposite-sex couples would accidentally procreate, giving rise to unstable and unhealthy families. Marriage thus plays the important role of "channel[ing opposite-sex] sexual desires" which, in the absence of marriage, would result in unstable relationships, which have been documented to be harmful to children. (Amicus Br. of States of Indiana, et al. at 26.)

As stated by BLAG, "[m]arriage attempts to promote permanence and stability, which are vitally important to the welfare of the children of the marriage." (BLAG Br. at 48-49.) That is, marriage works to combat the risk of instability which is characteristic of inherently procreative opposite-sex relationships, but absent from same-sex relationships. *See* Amicus Br. of States of Indiana, et al. at 24 ("civil marriage recognition arises from the need to encourage biological parents to remain together for the sake of their children").[5] DOMA advances this interest, in that the state only needs to provide incentives to opposite-sex couples in the form of marriage, because only opposite-sex couples have unintended, unplanned, unwanted children. Same-sex couples, by contrast, reproduce only "deliberately choosing to do so and by devoting a serious investment of time, attention, and resources." (Amicus Br. of States of Indiana, et al. at 35.)

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[5] *See also Andersen v. King Cnty.*, 138 P.3d 963, 982-83 (Wash. 2006) ("[A]s *Skinner*, *Loving*, and *Zablocki* indicate, marriage is traditionally linked to procreation and survival of the human race.

Numerous courts have accepted this rationale as a basis for excluding same-sex couples from civil marriage. The New York Court of Appeals, for instance, determined that

> The Legislature could . . . find that [heterosexual] relationships are all too often casual or tem-

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Heterosexual couples are the only couples who can produce biological offspring of the couple. And the link between opposite-sex marriage and procreation is not defeated by the fact that the law allows opposite-sex marriage regardless of a couple's willingness or ability to procreate. The facts that all opposite-sex couples do not have children and that single-sex couples raise children and have children with third party assistance or through adoption do not mean that limiting marriage to opposite-sex couples lacks a rational basis. Such over- or under-inclusiveness does not defeat finding a rational basis."); *Lewis v. Harris*, 875 A.2d 259, 277 (N.J. App. Div. 2005) (Parrillo, J.A.D., concurring) ("[A] core feature of marriage is its binary, opposite-sex nature. . . . [T]he binary idea of marriage arose precisely because there are two sexes."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 979 n.1 (Mass. 2003) (Sosman, J., dissenting) ("[T]he reasons justifying the civil marriage laws are inextricably linked to the fact that human sexual intercourse between a man and a woman frequently results in pregnancy and childbirth . . . that fact lies at the core of why society fashioned the institution of marriage in the first place.").

> porary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement —in the form of marriage and its attendant benefits —to opposite-sex couples who make a solemn, long-term commitment to each other. The Legislature could find that this rationale for marriage does not apply with comparable force to same-sex couples. These couples can become parents by adoption, or by artificial insemination or other technological marvels, but they do not become parents as a result of accident or impulse. The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same- sex couples, and thus that promoting stability in opposite-sex relationships will help children more.

Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006) (plurality opinion). *See also Andersen*, 138 P.3d at 1002 (Johnson, J., concurring); *Morrison v. Sadler*, 821 N.E.2d 15, 24-25 (Ind. Ct. App. 2005).

DOMA furthers the interest in recognizing the link between marriage and procreation for the reasons noted by the Maryland Court of Appeals:

> [S]afeguarding an environment most conducive to the stable propagation and continuance of the human race is a legitimate government interest. The question remains whether there exists a sufficient link between an interest in fostering a stable envi-

> ronment for procreation and the means at hand used to further that goal, i.e., an implicit restriction on those who wish to avail themselves of State-sanctioned marriage. We conclude that there does exist a sufficient link. . . . This "inextricable link" between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding).

Conaway v. Deane, 932 A.2d 571, 630-31 (Md. 2007) (internal citations omitted).

Another component of the procreation and child-rearing rationale for restricting federal rights to opposite-sex marriage is the Congressional desire to have children raised in families with only biological mothers and fathers, which same-sex couples cannot provide. Thus, BLAG contends that DOMA "offer[s] special encouragement for relationships that result in mothers and fathers jointly raising their biological children," an interest which "simply does not apply to same-sex couples." (BLAG Br. at 54.) DOMA accomplishes this encouragement by limiting federal marriage rights to opposite-sex couples.

Congress might well have enacted DOMA after consulting "the entire history of civilization" regarding the "problems" that arise when there is no institution to encourage biological parents to remain together.

(Amicus Br. of States of Indiana, et al. at 35.) This, too, has been accepted as a rational reason for excluding same-sex couples (including legally recognized same-sex parents) from civil marriages. *See*, *e.g.*, *Hernandez*, 855 N.E.2d at 8 (plurality opinion) ("Plaintiffs seem to assume that they have demonstrated the irrationality of the view that opposite-sex marriages offer advantages to children by showing there is no scientific evidence to support it. Even assuming no such evidence exists, this reasoning is flawed. In the absence of conclusive scientific evidence, the Legislature could rationally proceed on the commonsense premise that children will do best with a mother and father in the home.").[6] I agree with BLAG that the evidence offered by Windsor and the professional organizations and child welfare amici who advocate for affirmance does not make Congress's "common sense" regarding the needs of children a forbidden governmental interest under rational basis review. (BLAG Br. at 55.)

As noted hereafter in the context of uniformity, the manner in which DOMA furthers the legitimate governmental interests in childrearing, responsible procreation, and biological parentage respects the principles of federalism. States may still arrive at individual determinations regarding who may and may not marry, and DOMA does nothing to change this functioning of our federal system.[7] DOMA simply excludes certain couples who are married under state law from eligibility for certain *federal* rights, benefits, privileges, and obligations.

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[6] Amici American Psychological Association, American Academy of Pediatrics, American Psychiatric Association, American Psychoanalytic Association, National Association of Social Workers, and New York State Psychological Association argue that no such credible evidence exists. *See* Amicus Br. of the American Psychological Association, et al. at 15-23.

DOMA's exclusion of married same-sex couples, under the rational basis review where means and ends need not match, *see Heller*, 509 U.S. at 321, is sufficiently related to the federal interest in recognizing the link between the marital relationship and the rearing of its offspring.

B. Maintaining the Status Quo of Uniformity

BLAG contends that DOMA is rationally related to the legitimate governmental "interest in uniform eligibility for federal marital benefits." (BLAG Br. at 39.) Congress, it is argued, has a "long history of enacting federal definitions of marriage that do not simply incorporate state definitions and inevitably will conflict with some of them." (*Id.* at 42-43.) A uniform federal definition of marriage "ensures that similarly-situated couples will have the same benefits regardless of which state they happen to live in." (*Id.* at 39-40.) The District Court expressed skepticism regarding the legitimacy of this end, but principally rejected this justification because DOMA "intrude[s] upon the states' business of regulating domestic relations." (JA-1007-09.) Windsor and various amici argue that "[t]he federal government [has always] accepted states' determinations of who was validly married-no matter how far states' criteria for validity diverged from one other," Historians Amicus Br. at 15, and that the promulgation of a federal definition of marriage "injects the federal government into domestic relations law and works to delegitimize both the lawful marriages of thousands of same-sex couples and the considered judgments of . . . [s]tates to sanction same-sex marriages, . . . intrud[ing] on core state powers." (States of New York, Vermont, and Connecticut Amicus Br. at 14.)

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[7] The majority's holding that DOMA's definition of marriage as between a man and a woman is unconstitutional will doubtless be used to invalidate the laws in those forty-one states. Such has to be so given the fact that the equal protection analysis by the majority in this case for federal purposes pursuant to the Fifth Amendment is the same as that to be applied as to the states pursuant to the Fourteenth Amendment and is, therefore, the yardstick by which to hold unconstitutional the law in the forty-one states. Indeed, an affirmance by the Supreme Court of the majority's view would likely doom the laws of the forty-one states which exclude same-sex couples from civil marriage.

The subject of domestic relations, including marriage, has been the province of the states. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) ("Long ago we observed that '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'") (quoting *In re Burrus*, 136 U.S. 586, 593 (1890)). But DOMA does not change this, and does nothing to strip the status that states confer on couples they marry. Instead, DOMA limits the *federal* benefits, rights, privileges, and responsibilities of marriage to a subset of those deemed married under state law.

That the federal government often defers to state determinations regarding marriage does not obligate it to do so. While a state may be perfectly disinterested in prying into the reasons a couple marries, the federal government remains deeply and properly concerned with the reason(s) why a couple weds. *See Massachusetts v. HHS*, 682 F.3d at 12 ("Congress surely has an interest in who counts as married. The statutes and programs that section 3 governs are federal regimes such as social security, the Internal Revenue Code and medical insurance for federal workers; and their benefit structure requires deciding who is married to whom.").

For example, when people marry for immigration purposes, the federal government may validly deem the marriage "fraudulent," even though it remains valid under state law. *See* 8 U.S.C. § 1325(c) ("Any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than $250,000, or both."); 8 U.S.C. §§ 1154(a)(2)(A), 1255(e). Courts have recognized this principle. *See, e.g.*, *Taing v. Napolitano*, 567 F.3d 19, 21 (1st Cir. 2009) (plaintiff remained a "spouse" and "immediate relative" under the Immigration and Naturalization Act, even if her marriage actually ceased under state law upon the death of her spouse); *Adams v. Howerton*, 673 F.2d 1036, 1040-41 (9th Cir. 1982) (even same-sex marriage valid under state law does not count as a marriage for federal immigration law purposes); *Lutwak v. United States*, 344 U.S. 604, 610-11 (1953) (noting a marriage's adherence to local law is immaterial if the marriage was "part of [a] conspiracy to defraud the United States"). Tellingly, Windsor does not argue that federal Immigration and Customs Enforcement interferes with traditional state functions when it leaves states free to recognize, for their own purposes, any marriage they like but refuses to grant legal residency to immigrants it believes married only to secure the benefits of marriage.

DOMA alters the general, but by no means unyielding, practice of the federal government accepting marriages recognized by state law. However, at the time Congress acted, all states recognized only opposite-sex marriages, and the fact that Congress chose to maintain that status quo in response to this new, evolving social issue does not invalidate its legislative interest. It may be that, prior to DOMA, any federal "definition" of marriage was limited to advancing the targeted goal of a particular federal program, not a blanket, undifferentiated policy choice imposed on statuses created by states. *See Massachusetts v. HHS*, 682 F.3d at 12. But this fact does not render the asserted interest in uniformity illegitimate or so lacking a "footing in the realities of the subject addressed by the legislation" as to fail rational basis review. *Heller*, 509 U.S. at 321.

Section 3 of DOMA was enacted as the debate regarding marriage equality was just beginning in the states. At that time, no state had actually permitted same-sex couples to marry. In the intervening years, six states and the District of Columbia have enacted statutes or issued court decisions that permit same-sex marriage.[8] On the other hand, thirty states have amended their founding documents by constitutional amendment to prohibit same-sex marriage, and eleven more states have enacted statutes to the same effect.[9]

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[8] *See* N.Y. Dom. Rel. Law § 10-a (McKinney 2011); N.H. Rev. Stat. § 457:1-a (2010); D.C. Stat. § 46-401 (2010); Vt. Stat. Ann. tit. 15 § 8 (2009); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Goodridge*, 798 N.E.2d 941 (Mass. 2003).

[9] *See* Ala. Const. Art. I, § 36.03; Ala. Code § 30-1-19; Alaska Const. Art. 1, § 25; Alaska Stat. § 25.05.013; Ariz. Const. Art. 30 § 1; Ariz. Rev. Stat. §§ 25-101 & 25-112; Ark. Const. Amend. 83, § 1; Ark. Code Ann. §§ 9-11-109, 9-11-107, 9-11-208; Cal. Const. Art. I, § 7.5; Colo. Const. Art. 2, § 31; Colo. Rev. Stat. § 14-2-104; 13 Del. Code Ann. § 101; Fla. Const. Art. 1 § 27; Fla. Stat. § 741.212; Ga. Const. Art. 1, § 4, I; Ga. Code Ann. § 19-3-3.1; Haw. Const. Art. 1, § 23; Haw. Rev. Stat. § 572-1; Idaho Const. Art. III, § 28; Idaho Code Ann. §§ 32-201 & 32-209; 750 Ill. Comp. Stat. 5/212; Ind. Code § 31-11-1-1; Kan. Const. Art. 15, § 16; Kan. Stat. Ann. §§ 23-101 & 23-115; Ky. Const § 233A; Ky. Rev. Stat. Ann. §§ 402.005 & 402.020; La. Const. Art. 12, § 15; La. Civ. Code Ann. Art. 86, 89; Me. Rev. Stat. Ann. tit. 19-A, § 701; Md. Code Ann., Fam. Law, § 2-201; Mich. Const. Art. 1, § 25; Mich. Comp. Laws § 551.1; Minn. Stat. § 517.03; Miss. Const. Art. 14, § 263A; Miss. Code Ann. § 93-1-1; Mo. Const. Art. I, § 33; Mo. Rev. Stat. § 451.022; Mont. Const. Art. XIII, § 7; Mont. Code Ann. § 40-1-401; Neb. Const. Art. I, § 29; Nev. Const. Art. 1, § 21; N.C. Gen. Stat. § 51-1.2; N.D. Const. Art.

Given the evolving nature of this issue, Congress was entitled to maintain the status quo pending further developments. Otherwise, "marriage" and "spouse" for the purposes of federal law would depend on the outcome of this debate in each state, with the meanings of those terms under federal law changing with any change in a given state. As Windsor rightly notes, prior to DOMA, a state's authorization of same-sex marriage had numerous implications for federal laws to the extent those laws were construed to incorporate state-law definitions of marriage. In order to avoid federal implications of state-law developments in the area of marriage, Congress, by enacting DOMA, reasonably froze federal benefits policy as it existed in 1996 with respect to same-sex marriage.

The federal government can legitimately limit the

XI, § 28; N.D. Cent. Code §§ 14-03-01 & 14-03-08; Ohio Const. Art. 15, § 11; Ohio Rev. Code Ann. § 3101.01(C); Okla. Const. Art. 2, § 35; Okla. Stat. Ann. tit. 43, § 3.1; Or. Const. Art. XV, § 5a; 23 Pa. Cons. Stat. §§ 1102, 1704; S.C. Const. Art. XVII, § 15; S.C. Code Ann. § 20-1-15; S.D. Const. Art. 21, § 9; S.D. Codified Laws § 25-1-1; Tenn. Const. Art. XI, § 18; Tenn. Code Ann. § 36-3-113; Tex. Const. Art. 1, § 32; Tex. Fam. Code Ann. §§ 2.001(b) & 6.204; Utah Const. Art. I, § 29; Utah Code Ann. §§ 30-1-2(5) & 30-1-4.1; Va. Const. Art. 1, § 15-A; Va. Code Ann. §§ 20-45.2 & 20-45.3; Wash. Rev. Code § 26.04.010(1); W. Va. Code § 48-2-603; Wis. Const. Art. XIII, § 13; Wis. Stat. §§ 765.001(2) & 765.04; Wyo. Stat. Ann. § 20-1-101. The statutory prohibitions or amendments of nineteen of these forty-one states forbid not only same-sex marriage, but any other form of relationship recognition, such as domestic partnership or civil union, between two persons of the same sex.

national impact of state-level policy development. Doing so facilitates the ability of the states to serve as laboratories of policy development. As the Massachusetts Supreme Court stated when it held that the Massachusetts state constitution required allowing same-sex couples to marry, "[t]he genius of our Federal system is that each State's Constitution has vitality specific to its own traditions, and that . . . each State is free to address difficult issues of individual liberty in . . . its own" manner. *Goodridge*, 798 N.E.2d at 967.

Windsor argues that DOMA upends, rather than preserves, the status quo of Congressional control over the meaning of marriage for federal purposes. But this argument is contrary to the clear legal landscape at the time of DOMA's enactment—that is, at the time, all states were in full accord in recognizing only opposite-sex marriages. Congress's actions allow it to maintain a "wait-and-see" approach in the face of evolving state approaches to same-sex marriages, thereby avoiding the need to immediately deal with the potentially significant impact on federal law that a state's recognition of same-sex marriage could have. Indeed, the far-reaching impact of the federal definition of marriage in terms of rights, benefits, responsibilities, and privileges (upon which Windsor places great emphasis) means that Congressional action can quite reasonably be understood to have perceived this potential impact and decided that it was in the federal government's interest to maintain consistency and uniformity in distributing federal benefits and administering federal programs.

Congress may, and both parties agree that it often does, borrow definitions from state law, but Windsor is incorrect to suggest that it is required to do so or is irrational when it does not. Put directly, Congress may also legitimately take an approach that attempts to create uniformity across the states. In DOMA, Congress chose to adopt a uniform federal definition of "marriage" and "spouse" for purposes of federal laws. Congress could rationally conclude that maintaining the status quo at the federal level during a period of flux would allow states that wish to make changes in the legal definition of marriage to retain their inherent prerogative to do so, while permitting others to maintain the traditional view.

Rational basis review embodies the principle that, as Congress did in enacting DOMA, legislatures are free to refine their "preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed." *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 524 (2007). Contrary to Windsor's contention, the preservation of the status quo—the definition of marriage that was uniform among all fifty states in the year of DOMA's passage—constitutes a legitimate governmental interest insofar as it allows Congress the ability to "wait and see" how the issue of same-sex marriage would take shape among the many and diverse states of our nation.

The uniformity that DOMA recognized and maintained has been recognized both explicitly and implicitly by courts for many years from various jurisdictions across the nation. Perhaps most explicitly, the Supreme Court stated:

> [N]o legislation can be supposed more wholesome and necessary in the founding of a free, self- governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Murphy v. Ramsey, 114 U.S. 15, 45 (1885).

Other courts have explained that this uniformity has not always been explicit or necessary to state. Almost forty years ago a Washington state court put it thus: "[A]lthough it appears that the appellate courts of this state until now have not been required to define specifically what constitutes a marriage, it is apparent from a review of cases dealing with legal questions arising out of the marital relationship that the definition of marriage as the legal union of one man and one woman who are otherwise qualified to enter into the relationship not only is clearly implied from such cases, but also was deemed by the court in each case to be so obvious as not to require recitation." *Singer v. Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974).

See also Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) ("In substance, the [marital] relationship proposed by the [same-sex] appellants does not authorize the issuance of a marriage license because what they propose is not a marriage.").

Cases predating *Murphy* demonstrate that the Supreme Court consistently lauded this conception of marriage as a critical social institution. *See Reynolds v. United States*, 98 U.S. 145, 165-66 (1878) ("Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties.").

Subsequent to *Murphy*, the Supreme Court has continued to view the biological link of parents to children as deserving of special recognition and protection. *See Michael H. v. Gerald D.*, 491 U.S. 110, 120 n.1 (1989) (indicating that where, *inter alia*, a "husband and wife" are "cohabiting," there is a presumption that they are in a "harmonious and apparently exclusive marital relationship"); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (noting the special "intimate relation of husband and wife"); *see also Lawrence v. Texas*, 539 U.S. 558, 567 (2003) ("[I]t would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."). And marriage has been noted to carry special legal entitlements for those men and women who enter into it. *See, e.g.*, *Griswold*, 381 U.S at 495 (noting it is hard to conceive of what "is more private or more intimate than a husband and wife's marital relations" and "the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected" in the Constitution) (Goldberg, J., concurring); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (determining right to "marry, establish a home and bring up children" is a liberty right under the Fourteenth Amendment).[10]

The Supreme Court also has taken care to preserve and distinguish the rights of the natural—that is, biological—family over "families" other than the biological. *See Lehr v. Robertson*, 463 U.S 248, 256-57 (1983) ("The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society. In recognition of that role . . . state laws almost universally express an appropriate preference for the formal family.") (footnotes omitted).[11] It has noted that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (Powell, J., plurality opinion). The Court has indicated repeatedly that "history and tradition" are the "source for 'supplying . . . content to th[e] Constitutional concept'" that biological family units are afforded additional protections under our nation's laws. *Id.* at 540 (citing *Poe v. Ulman*, 367 U.S. 497, 542

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[10] *See also Caban v. Mohammed*, 441 U.S. 380, 397 (1979) ("Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship . . . , it by no means follows that each unwed parent has any such right.") (internal citations omitted) (Stewart, J., dissenting); *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (recognizing that "the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected," and noting also that the "State" may "exert its power . . . to say who may marry") (Harlan, J., dissenting).

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[11] *See also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (noting the "absence of dispute" that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment," and noting that "[e]ven when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life"); *Trimble v. Gordon*, 430 U.S. 762, 769 (1977) (describing the "family unit" as "perhaps the most fundamental social institution of our society"); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 823, 843-45 (1977) (noting New York State's support of laudable policy that "natural parents" provide the "positive, nurturing family relationships" and "normal family life in a permanent home" that offers the "best opportunity for children to develop and thrive" and noting the "usual understanding of 'family' implies biological relationships") (internal citations omitted); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed essential, basic civil rights of man, and rights far more precious . . . than property rights.") (internal citations and quotations omitted); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents.").

(1961) (Harlan, J., dissenting)). Thus, it is and always has been the "'traditions and (collective) conscience of our people,'" not the "personal and private notions" of judges, that determine societal rights, including what marriage is as an institution and who is entitled to participate in it. *Griswold*, 381 U.S. at 493 (citing *Snyder v. Commonwealth of Mass.*, 291 U.S. 97, 105 (1934)) (Goldberg, J., concurring).

In light of these decisions relying on the traditional understanding of marriage as only between one man and one woman, I join Justice Black in the sentiment that "[o]ne of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning." *Griswold*, 381 U.S. at 509 (Black, J., dissenting).

Marriage today, according to the federal government, means what it has always meant—a holy union, essential to the survival of the species, between a man and a woman, the principal purpose of which is to encourage responsible child rearing. *Murphy* set forth this understanding, *Baker v. Nelson* reaffirmed it, and no Supreme Court case since *Murphy* gives me reason to doubt that definition should not still stand.

Having found the interest in maintaining uniformity (including in the form of the 1996 status quo) legitimate, the means employed to advance this goal appear appropriate. As noted above, BLAG argues that DOMA "ensures that *similarly-situated* couples [*i.e.*, married same-sex couples and all unmarried couples] will have the same federal benefits [*i.e.*, none] regardless of which state they happen to live in, and avoids a confusing situation in which same-sex couples would lose (or gain) federal marital status simply by moving between states with different policies on recognition of same-sex marriages." (BLAG Br. at 39-40 (emphasis added).) The relevant discrimination, however, to be justified by BLAG is DOMA's differential treatment of married couples based on the sex of the persons constituting the couple. Married same-sex couples are similarly-situated to married opposite-sex couples with respect to the relevant characteristic at issue: marital status.

Windsor claims that the line DOMA draws fails rational basis review because the purported justifications for the discrimination "make no sense" and "are impossible to credit" in light of how the groups at issue are similarly situated. However, the regulation of federal programs is emphatically the province of Congress. Having not previously defined the scope of federal programs the way DOMA does should not forever bind Congress's hands from doing so, or make Congressional action nonsensical, especially when viewed in light of the clear and unaltered judicial characterization of the nation's historical understanding of marriage.

Windsor contends that DOMA creates complexity and establishes two tiers of married couples in states that permit same-sex marriage. But the question of uniformity of marriage at the state level is not DOMA's concern. While the tension between state and federal policies in this area are real, they are no greater than those that have existed *among* the states—tensions which Windsor acknowledges reflect the essence of, and have endured under, our federal system.

I conclude, therefore, that it was rational for Congress to prefer uniform substantive eligibility criteria for federal marital benefits for same-sex couples over "uniform" deference to varying state criteria. Such a goal may be an exception to Congress's general deference to the states in the area of marriage (even in the face of contentious state-level variation) but this in no way makes the legislative classification employed in pursuit of uniformity irrational in light of the tremendous deference we afford acts of Congress under rational basis review. *See Heller*, 509 U.S. at 321 ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends.").

When, as here, an issue involves policy choices, the Supreme Court has cautioned that "the appropriate forum for their resolution in a democracy is the legislature." *Maher v. Roe*, 432 U.S. 464, 479 (1977). DOMA rationally serves the legitimate government interest in maintaining the status quo of the definition of marriage pending evolution of the issue in the states.

* * *

Because the recognition of the biological connection of marriage to childrearing and the pursuit of uniformity (including in the form of preserving the status quo) are sufficient to support DOMA under rational basis review, I choose not to discuss the other asserted rationales. *Beach Commc'ns*, 508 U.S. at 317. Nevertheless, I next address whether sexual orientation classifications should, as a matter of first impression in this Circuit, be subject to heightened scrutiny in an equal protection analysis.

VI. Appropriate Level of Review for Sexual Orientation Discrimination

The Supreme Court has reserved heightened scrutiny for a small number of subject classifications—principally race, alienage, nationality, sex, and illegitimacy. Heightened scrutiny attaches in recognition that these traits have been used to impose, and are therefore closely associated with, social inequality. Therefore, government conduct that employs these classifications is suspect and must have more than a legitimate or merely permissible justification.

The question of the appropriate level of scrutiny for laws that discriminate in respect of the definition of marriage on the basis of sexual orientation is an issue of first impression in this Circuit. *See Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998) (declining to consider, in military context where judicial deference is "at its apogee," the question whether sexual orientation discrimination would trigger heightened scrutiny because challengers did not argue for "any more onerous standard than the rational basis test" and therefore "the sole question before us is whether the Act survives rational basis review").

"[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42 (1985). The Supreme Court has repeatedly rejected arguments by litigants and rulings by lower courts that would grant heightened review to legislative distinctions based on mental handicap, *id.* at 442-47, kinship, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986), age, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976), and poverty, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973).

The Supreme Court, despite having the opportunity to apply heightened review, invalidated the provision of the Colorado Constitution challenged in *Romer* under rational basis review. *See* 517 U.S. 620 (1996). That *Romer* was decided under the rational basis standard without a need to employ a more exacting level of review does not mean that the question of the appropriate tier of equal protection scrutiny was not before the Court. Indeed, although the *Romer* plaintiffs "elected not to appeal" the lower court's determination that sexual orientation does not constitute a "suspect" or "quasi-suspect" classification, the Supreme Court "evidently agree[d] that 'rational basis' . . . is the governing standard." *Romer*, 517 U.S.

at 641 n.1 (Scalia, J., dissenting).

Until the majority's opinion, DOMA had never been held by the Supreme Court or any Circuit Court to involve a suspect or quasi-suspect classification. Indeed, in light of the Supreme Court's reluctance to apply heightened scrutiny to new categories of discrimination, and in consideration of the fact that it declined to do so in *Romer*, eleven other circuits have also not taken this step. *See Massachusetts v. HHS*, 682 F.3d at 9; *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Perry v. Brown*, 671 F.3d 1052, 1082 (9th Cir. 2012); *Cook v. Gates*, 528 F.3d 42, 61-62 (1st Cir. 2008); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *Nat'l Gay Task Force v. Bd. of Educ. of City of Okla. City*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd by an equally divided court*, 470 U.S. 903 (1985) (per curiam). In *Massachusetts v. HHS*, the First Circuit rejected the application of strict and intermediate scrutiny, recognized that DOMA satisfies rational basis review, and yet went on to create a novel "plus" level of scrutiny applicable to DOMA, in contravention of the Supreme Court's holding in *Baker*. Such judicial impositions of new levels of review deprive the American people of further consideration of DOMA through their democratically elected representatives.

Significantly, numerous Circuit Courts of Appeals decisions declining to extend heightened scrutiny to sexual orientation discrimination post-date both *Romer v. Evans* and *Lawrence v. Texas*. Windsor argues that the determinations made regarding the appropriate level of scrutiny in decisions such as *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (rational-basis review applies, and "*Lawrence* does not alter this conclusion") and *Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (Circuit precedent requiring rational-basis review "was not disturbed by *Lawrence*, which declined to address equal protection") are distinguishable because the cases arose in a military context where judicial deference is "at its apogee." *See Able*, 155 F.3d at 632. But as the voluminous authority cited above makes clear, *see* Section IV, *supra*, whatever additional deference courts afford Congressional action in the military context, rational basis review is, even in the civilian context, highly deferential to the legislature, not a mechanism for judges to second guess properly enacted legislative judgments, and the "paradigm of restraint." *See Beach Commc'ns*, 508 U.S. at 314. *See also Perry*, 671 F.3d at 1080 n.13 (relying, in the civilian context, on rulings that declined to apply heightened scrutiny to sexual orientation classifications in the military context).

Indeed, the Department of Justice so acknowledged last year—until it changed its constitutional position following the President's announcement of a change in policy.

Therefore, I would join these eleven circuits, driven not only by a reluctance to do that which the Supreme Court itself has not undertaken when given the chance, but also out of routine respect for extant precedent. Subjecting the federal definition of marriage to heightened scrutiny would defy or, at least, call into question the continued validity of *Baker*, which we are not empowered to do. *Baker* involved a law that prohibited same-sex marriage, and thus discriminated on the basis of sexual orientation. Holding that sexual orientation merits heightened scrutiny would be substantively inconsistent with *Baker* since (1) any legislative action faces a high likelihood of invalidation under heightened scrutiny, and (2) it would be curious to apply heightened scrutiny to a form of discrimination that does not raise a substantial federal question of constitutional law. *See Massachusetts v. HHS*, 682 F.3d at 9 ("[T]o create such a new suspect classification for same-sex relationships would have far-reaching implications—in particular, by implying an overruling of *Baker*, which we are neither empowered to do nor willing to predict."). Any such development must come from the elected representatives of the American people.[12]

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[12] Indeed, one elected representative—the President—has al-

Whatever the merits of doing so in a context other than the marital union, I conclude that, in respect of the unique institution of marriage it would be imprudent to announce a new rule under which sexual orientation is subject to heightened scrutiny.

CONCLUSION

For the foregoing reasons, I would hold that per

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ready taken steps to mitigate the harms visited upon same-sex couples by DOMA. The President has issued a memorandum requiring all executive departments and agencies to take steps, consistent with existing law, to extend benefits to the same-sex domestic partners of federal employees, and where applicable, to the children of same-sex domestic partners of federal employees. *See* Presidential Memorandum, Extension of Benefits to Same-Sex Domestic Partners of Federal Employees (June 20, 2010). The Office of Personnel Management ("OPM") was directed to clarify that for purposes of employee assistance programs, same-sex domestic partners and their children qualify as "family members." In addition, pursuant to a Presidential Memorandum Regarding Federal Benefits and Non-discrimination (June 17, 2009), OPM issued regulations expanding the definition of "qualified relatives" to include same-sex domestic partners of eligible federal employees in the federal long-term care insurance program. *See* 5 CFR 875.213 (June 1, 2010).

In Congress, efforts provide various types of federal benefits for same-sex domestic partners—such as health insurance, life insurance, pensions, and other employment-related benefits—are routinely introduced, if unsuccessful. *See, e.g.*, S. 2521, 110th Cong. (2007); H.R. 4838, 110th Cong. (2007) (bills died in committee); S. 1102, 111th Cong. (2009); H.R. 2517, 111th Cong. (2009) (no action taken on either version after being reported out of committees); S. 1910, 112th Cong. (2011) (reported out of committee); H.R. 3485, 112th Cong. (2011) (remains in committee).

Baker, the legislative distinction drawn by DOMA satisfies rational basis review and is therefore constitutional.

Whether connections between marriage, procreation, and biological offspring recognized by DOMA and the uniformity it imposes are to continue is not for the courts to decide, but rather an issue for the American people and their elected representatives to settle through the democratic process. Courts should not intervene where there is a robust political debate because doing so poisons the political well, imposing a destructive anti-majoritarian constitutional ruling on a vigorous debate. Courts should not entertain claims like those advanced here, as we can intervene in this robust debate only to cut it short.

I respectfully dissent from the majority opinion to the extent it holds otherwise.

SUPPLEMENTAL BRIEF

Supreme Court, U.S.
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OCT 29 2012

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No. 12-307

IN THE
Supreme Court of the United States

THE UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the estate of THEA CLARA SPYER,

Respondent,

On Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Second Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENT WINDSOR

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On October 18, 2012, the United States Court of Appeals for the Second Circuit ruled in Ms. Windsor's favor in this case; it held that Section 3 of the Defense of Marriage Act ("DOMA") violates the Constitution's guarantee of equal protection under the laws. That ruling makes the Second Circuit the second federal court of appeals to declare DOMA unconstitutional and the first to hold that heightened constitutional scrutiny applies to DOMA's discrimination against lesbians and gay men.

Following that decision, on October 26, 2012, the United States filed a Supplemental Brief with this Court. For the reasons stated by the United States in that brief and for the reasons stated in her prior briefing, Respondent Edith Windsor respectfully requests that this Court grant the petition filed by the United States.

Respectfully submitted,

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October 29, 2012

SUPPLEMENTAL BRIEF

NOS. 12-63 & 12-307

In the Supreme Court of the United States

EDITH SCHLAIN WINDSOR,
Petitioner,
v.
THE UNITED STATES OF AMERICA
and
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents;

THE UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR
and
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Petitions for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUPPLEMENTAL BRIEF 1

The Second Circuit's Decision 2

Standing 2

The Merits 3

Judge Straub's Dissent 4

ARGUMENT 5

I. The Second Circuit's Decision Confirms the Need for This Court to Review DOMA's Constitutionality 5

II. The Second Circuit's Decision Underscores the Difficulties of *Windsor* as a Vehicle for this Court's Review 6

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Arbaugh v. Y&H Corp.,
546 U.S. 500 (2006) 8

Baker v. Nelson,
409 U.S. 810 (1972) 3

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985) 8

California v. Rooney,
483 U.S. 307 (1987) 9

Camreta v. Greene,
131 S. Ct. 2020 (2011) 9

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 8

Elkins v. Moreno,
435 U.S. 647 (1978) 8

Gen. Elec. Co. v. Gilbert,
429 U.S. 125 (1976) 10, 11

Godfrey v. Spano,
13 N.Y.3d 358 (2009) 3, 7

Leavitt v. Jane L.,
518 U.S. 137 (1996) 8

Romer v. Evans,
517 U.S. 620 (1996) 5

Town of Castle Rock, Colo. v. Gonzales,
545 U.S. 748 (2005) 8

SUPPLEMENTAL BRIEF

The Bipartisan Legal Advisory Group of the United States House of Representatives ("the House") submits this Supplemental Brief regarding the Second Circuit's divided decision in *Windsor v. United States*, Nos. 12-2335 & 12-2435, 2012 WL 4937310 (2d Cir. Oct. 18, 2012), and the Supplemental Brief for the United States in No. 12-307.[1]

While this case was pending in the Second Circuit, Ms. Windsor and the United States filed Petitions for Certiorari Before Judgment in Nos. 12-63 and 12-307, respectively. The House opposed both Petitions, explaining why *Windsor* was a particularly problematic vehicle for reviewing the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"). The Second Circuit's decision does not change those vehicle problems.

Although the United States previously recognized that *Windsor* was the worst of the potential vehicles for this Court's review of DOMA, *see* Pet. in No. 12-307 at 13, it now claims that the Second Circuit's decision "materially strengthens this case as a vehicle." U.S. Supp. Br. 7. The United States was correct the first time. Indeed, the Second Circuit's decision only underscores that in *Windsor*, alone among all possible vehicles for review, the plaintiff's standing depends critically on a state-law issue. It also exacerbates the appellate-standing problems with both Petitions and introduces a procedural wrinkle—the need to convert a pre-judgment Rule 11 petition into a post-judgment petition, something this Court has not done since 1976, and even then in quite different circumstances.

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[1] The Bipartisan Legal Advisory Group is comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. The Democratic Leader and Democratic Whip decline to support the Group's position on the merits of DOMA Section 3's constitutionality.

There is no need for such machinations when the same constitutional issue is cleanly presented in an after-judgment petition filed by the party with clear appellate standing, *i.e.*, the House's Petition in No. 12-13. If this Court is inclined to bypass that decidedly superior vehicle, then the House respectfully suggests that *Golinski*, not *Windsor*, provides the better vehicle. *Golinski*, along with *Gill*, is the only case with no question concerning the plaintiff's standing that could distract the Court from the important question of DOMA's constitutionality.

The Second Circuit's Decision

Standing

The Second Circuit recognized that Ms. Windsor's standing turned on an issue of New York law. It acknowledged that, "[a]t the time of Spyer's death in 2009, New York did not yet license same-sex marriage itself" and therefore "*decisive for standing in this case*" is "whether in 2009 New York recognized same-sex marriages entered into in other jurisdictions." 2d Cir. Slip. Op. ("Op.") 12–13 (emphasis added). The Second Circuit denied the House's request to certify this sensitive question of

New York law to the New York Court of Appeals based largely on its observation that "the Court of Appeals has signaled its disinclination to decide this very question" in *Godfrey v. Spano*, 13 N.Y.3d 358 (2009). Op. 13. Instead, the panel predicted that "Windsor's marriage would have been recognized under New York law at the time of Spyer's death." *Id.* at 15. It based that prediction on three New York lower-court rulings, two of which were available to the *Godfrey* court. Op. 14–15.

The Merits

Turning to the merits, the panel majority recognized that this Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), "held that the use of the traditional definition of marriage for a state's own regulation of marriage status did not violate equal protection." Op. 10. Yet it concluded that "*Baker* has no bearing on this case," because DOMA is a federal law. Op. 20. It also suggested that *Baker* is no longer binding precedent. Op. 17–19.

The panel majority explained that "a party urging the absence of any rational basis takes up a heavy load" and "[t]hat would seem to be true in this case—the law was passed by overwhelming bipartisan majorities in both houses of Congress" and "the definition of marriage it affirms has been long-supported and encouraged." Op. 21–22. It did not dispute Judge Straub's conclusion that DOMA is rational. Op. 23 ("We therefore decline to join issue with the dissent, which explains why Section 3 of DOMA may withstand rational basis review."). It also declined to apply "rational basis plus" like "the district court in this case and the First Circuit" because this Court "has not expressly sanctioned such modulation in the level of rational basis review." Op. 22.

The panel majority ultimately determined—in express conflict with eleven other Circuits—that intermediate scrutiny applies to sexual-orientation classifications. It found that the factors this Court has looked to in applying heightened scrutiny justified treating sexual orientation as a "quasi-suspect" classification. Finally, the panel majority concluded that Section 3 of DOMA could not survive heightened scrutiny.

Judge Straub's Dissent

Judge Straub "dissent[ed] from the majority's holding that DOMA is unconstitutional under the Fifth Amendment's equal protection guarantee." Dissenting Op. ("Dissent") 1.

Judge Straub explained that *Baker v. Nelson* is both binding and controlling. Dissent 8–13. "Since *Baker* holds that states may use the traditional definition of marriage for state purposes without violating equal protection, it necessarily follows that Congress may define marriage the same way for federal purposes without violating equal protection." Dissent 12.

Judge Straub concluded that, even apart from *Baker*, DOMA satisfies rational basis review. Dissent 17–35; *id.* at 19 ("DOMA advances the governmental interest in connecting marriage to biological procreation"), 35 ("DOMA rationally serves the legitimate government interest in maintaining the status quo of the definition of marriage pending evolution of the issue in the states.").

Judge Straub also rejected the majority's conclusion that DOMA triggers heightened scrutiny. Dissent 35–40. He pointed out that this Court in *Romer v. Evans*, 517 U.S. 620 (1996), and eleven federal circuit courts, have declined to apply heightened scrutiny to sexual-orientation classifications. Dissent 36–37. He warned that heightened scrutiny and "[t]he majority's holding that DOMA's definition of marriage as between a man and a woman is unconstitutional will doubtless be used to invalidate the laws of th[e] forty-one states" that use that definition. Dissent 24 n.7. Finally, Judge Straub underscored that the definition of marriage is "an issue for the American people and their elected representatives to settle through the democratic process. Courts should not intervene where there is a robust political debate * * * as we can intervene in this robust debate only to cut it short." Dissent 40.

ARGUMENT

I. The Second Circuit's Decision Confirms the Need for This Court to Review DOMA's Constitutionality.

The Second Circuit's decision confirms beyond all doubt that this Court should review DOMA's constitutionality, with the only disputed question being the proper vehicle (or vehicles) for this Court's review. The Second Circuit has now joined the First Circuit in declaring DOMA unconstitutional, and has opened an express conflict with eleven other Circuits as to the proper standard for reviewing sexual-orientation classifications. Moreover, the Second Circuit disagrees with the First Circuit as to both the continuing vitality of *Baker v. Nelson* and the First Circuit's decision to apply "rational basis plus." The case for this Court's review, which was always strong, has become overwhelming.

II. The Second Circuit's Decision Underscores the Difficulties of *Windsor* as a Vehicle for this Court's Review.

The Justice Department previously recognized that, of the various potential vehicles for this Court's review, this case—via either Ms. Windsor's Petition in No. 12-63 or the Department's Petition in No. 12-307 (the last of all the DOMA Petitions filed)—was the most problematic. *See* Pet. in No. 12-307 at 13. Like the *Pedersen* case, *Windsor* features a standing issue that could distract this Court from the issue of DOMA's constitutionality. But unlike *Pedersen*, the standing issue here affects the only plaintiff in the case (and thus this Court's jurisdiction) and turns on state, rather than federal, law. The Department has now done an about-face and suggests that the Second Circuit's decision changes everything and makes *Windsor* the best vehicle for this Court's review. The Department was correct the first time, as the Second Circuit's decision only underscores the vehicle difficulties in *Windsor*.

First, the Second Circuit recognized that the state-law status of Ms. Windsor's foreign marriage certificate, issued when New York did not recognize same-sex marriage, was "*decisive for standing in this case.*" Op. 12–13 (emphasis added). While the Department gives short shrift to this aspect of the Second Circuit's decision and glibly labels this state-law issue as one the House "characterize[s] as implicating plaintiff's standing," U.S. Supp. Br. 2, the Second Circuit clearly viewed this issue as "decisive" for Article III jurisdiction. The District Court took the same view. Pet. in No. 12-307, Appendix 6a. Thus, there is nothing idiosyncratic about the House's view that this state-law issue goes to the heart of Ms. Windsor's standing and this Court's jurisdiction. Both courts to review the question have agreed that this state-law issue determines Ms. Windsor's standing.

To be sure, both courts have also resolved the state-law issue in favor of Ms. Windsor's standing. But here too the Second Circuit's decision underscores that this state-law question is not free from doubt. The Second Circuit declined to certify the question not because the answer would be obvious, but out of comity because the New York Court of Appeals had gone out of its way not to decide the issue in *Godfrey v. Spano*, 13 N.Y.3d 358 (2009). Recognizing that "the Court of Appeals has signaled its disinclination to decide this very question," the Second Circuit concluded that New York's high court would not welcome a federal-court invitation to do so. Whether or not that conclusion was correct, the fact that the New York Court of Appeals went out of its way to avoid this issue in November 2009—nine months after Ms. Spyer's passing—makes clear that this state-law issue is hardly free from doubt.

The Justice Department nonetheless suggests that this Court may ignore this state-law issue because two lower courts resolved it in Ms. Windsor's favor. The Department correctly notes (U.S. Supp. Br. 8 n.2) this Court's "custom" on state-law questions to defer to the interpretation of the Court of Appeals for the Circuit in which the state is located. But that "custom" cannot possibly trump this Court's responsibility to ensure for itself that it has Article III jurisdiction and that the plaintiff has standing. *See, e.g.*, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) ("[C]ourts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists").[2] For this reason, it is not surprising that none of the cases the Department invokes for this "custom" involved a question of state law that is "decisive for standing." Op. 13. *Cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16-18 (2004) (holding that respondent lacked prudential standing despite Ninth Circuit's contrary conclusion based on construction of California family law).

At this stage, the ultimate resolution of the underlying state-law question (which seems close) and the question whether this Court is free to ignore a state-law question that is decisive to its Article III jurisdiction (which does not seem close) is not critical. What is critical—indeed, dispositive—is that these questions arise uniquely in this case and could only distract this Court from the important question concerning DOMA's constitutionality. If *Windsor* were the only vehicle for this Court's review, the presence of these side issues might not be fatal, but in light of the alternative vehicles, including the House's Petition in No. 12-13, there is no reason to invite these distractions by granting either of the *Windsor* Petitions.

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[2] Even outside the standing context, this custom of deference "is not ironclad" as this Court "surely ha[s] the authority to differ with the lower federal courts" on state-law questions, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985), and has done so on numerous occasions. *E.g.*, *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 757 (2005) (declining to defer to Tenth Circuit on question of Colorado law); *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (per curiam) ("Our general presumption that courts of appeals correctly decide questions of state law reflects a judgment as to the utility of reviewing them in most cases, not a belief that the courts of appeals have some natural advantage in this domain." (internal citations omitted)), *Elkins v. Moreno*, 435 U.S. 647, 662 n.16 (1978) (certifying state-law question to Maryland Court of Appeals despite identical holdings of Fourth Circuit and federal district court in Maryland)

Second, the panel majority's acceptance of Ms. Windsor's and the Department's arguments only exacerbates the problems with their appellate standing. As the House has previously noted, *see* Br. in Opp. 16–20, No. 12-15, "[a]s a matter of practice and prudence," this Court "generally decline[s] to consider cases at the request of a prevailing party. *Camreta v. Greene*, 131 S. Ct. 2020, 2030 (2011) (citing cases). *See also California v. Rooney*, 483 U.S. 307, 310-311 (1987) (per curiam) (writ of certiorari dismissed as improvidently granted where the judgment below "was entirely in [petitioner]'s favor" and thus it was not appropriate "for the prevailing party to request us to review it"). While there is some question whether these principles are fully applicable in the certiorari-before-judgment context, there is no question that they apply squarely to petitions by parties whose arguments prevailed in the courts of appeals. At a minimum, granting either *Windsor* Petition would require realigning the parties to allow the House to file an opening and reply brief. But it would also force the Court to confront the question of why normal rules of appellate standing are inapplicable here.[3] None of that would be necessary if the Court granted the House's Petition in No. 12-13.

Third, the intervening Second Circuit decision creates a procedural wrinkle for the Petitions in Nos. 12-63 and 12-307, both of which were filed as extraordinary Rule 11 petitions for certiorari before judgment. Accepting either Petition would require procedural machinations that this Court has not employed for over thirty-five years. By contrast, accepting the House's Petition in No. 12-13 would allow this Court to employ the good old-fashioned process of accepting a Petition actually filed after judgment, as it does seventy or more times a Term.

The Department proposes that this Court ignore the fact that its Petition was filed long before the Second Circuit's decision and asks this Court to "consider the present petition as one for certiorari after judgment." U.S. Supp. Br. 7. The Department has searched the Court's records and unearthed exactly one prior instance of such a transformation, *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). But that case involved a very different situation. "All of the parties to the suit joined in petitioning for a writ of certiorari." *Id.* at 127 n.1. This Court treated the two petitions for certiorari as "a joint petition." *Id.* at 133 n.12. But here, the House—the only party that did not prevail in the Second

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[3] Additionally, it would require this Court to confront the question whether the executive branch may petition when it abandons the defense of a statute and operates as only a "nominal defendant," to borrow the Second Circuit's phrase Op 11 *See* House Opp. 21–25, No 12-307. Granting the House's Petition in No 12-13 would avoid this question as well

Circuit—has not petitioned for certiorari in *Windsor* (either before or after judgment), and does not join either Petition. This is no small difference. In *General Electric*, although both General Electric and Gilbert were petitioners, they "agreed that General Electric is to be deemed the petitioner for purposes of briefing and oral argument." *Id.* at 127 n.1. Here, by contrast, the only party that disagrees with the decision below and can fill the top-side role in this case—the House—has not petitioned.

But even if *General Electric* can be extended to this quite different context, there remains the burning question of why it would be necessary or prudent to engage in such extraordinary machinations when the House's Petition in No. 12-13 would allow this Court to review the exact same issue in the ordinary course. Indeed, despite the Department's apparent conclusion that *Windsor* is a superior vehicle to *Gill* for this Court's review, the Department's supplemental brief never advances any persuasive reason why this is so. The fact that *Gill* applied a form of rational basis review—the dominant view in the courts of appeal—is hardly problematic. And no matter which case this Court grants, the parties will be able to cite the analysis of the majority and dissent in *Windsor*. In the Department's view, the Second Circuit's decision alone seems to have transformed *Windsor* from worst to first as a vehicle for this Court's review. That is mystifying. If the existence of a circuit court decision is the most important criterion for Supreme Court review, then that only underscores the attractiveness of *Gill* as a vehicle.

In all events, if for some reason this Court is disinclined to grant plenary review in *Gill*, the House respectfully suggests that the Department's Petition in *Golinski* is the best of the remaining vehicles. Alone among the non-*Gill* DOMA petitions, *Golinski* presents no question concerning the plaintiff's standing. Moreover, although *Golinski*, like every Petition besides the House's in No. 12-13, presents an appellate-standing issue, it does so in the arguably distinguishable certiorari-before-judgment context. Thus, of the remaining vehicles, *Golinski* provides this Court with the best opportunity to focus on the critical issue that all agree merits this Court's review—DOMA's constitutionality.

CONCLUSION

The Petitions in Nos. 12-63 and 12-307 should be denied. The House's *Gill* Petition, No. 12-13, should be granted.

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November 1, 2012

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

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Nos. 12-144, 12-307

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL., *Petitioners*,
v.
KRISTIN M. PERRY, ET AL., *Respondents*.

UNITED STATES, *Petitioner*,
v.
EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
and
BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Ninth and Second Circuits

BRIEF OF *AMICUS CURIAE* HELEN M. ALVARÉ IN SUPPORT OF HOLLINGSWORTH AND BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS AND SUPPORTING REVERSAL

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 5

I. THE STATE HAS AT LEAST A LEGITIMATE, BUT MORE LIKELY A COMPELLING, INTEREST IN SINGLING OUT OPPOSITE-SEX MARRIAGE FOR PROTECTION, SUFFICIENT TO SATISFY THE EQUAL PROTECTION CLAUSE........ 5

II. THIS COURT HAS REGULARLY AND FREQUENTLY RECOGNIZED WITH APPROVAL THE IMPORTANCE OF STATES' INTERESTS IN THE PROCREATIVE ASPECTS OF OPPOSITE-SEX MARRIAGE. WHILE IT HAS ALSO RECOGNIZED THAT MARRIAGE SERVES ADULTS' INTERESTS IN HAPPINESS AND STABILITY, THE COURT HAS NOT ISOLATED THESE FROM THE PROCREATIVE ASPECTS OF MARRIAGE 9

A. States have substantial interest in the birth of children 10

B. States have substantial interest in the way marriage socializes children 12

C. The view of marriage advocated by Plaintiffs in *Perry* and *Windsor* ignores children and society 15

III. REDEFINING MARRIAGE IN A WAY THAT DE-LINKS SEX, MARRIAGE AND CHILDREN CAN HARM THE MOST VULNERABLE AMERICANS AND EXACERBATE THE "MARRIAGE GAP," WHICH IS RESPONSIBLE FOR INCREASING LEVELS OF SOCIAL INEQUALITY IN AMERICA 23

CONCLUSION 35

TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. Peña,
515 U.S. 200 (1995) 7

Bd. of Trs. of the Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 5

Boddie v. Connecticut,
401 U.S. 371 (1971) 14

Butler v. Wilson,
415 U.S. 953 (1974) 18

Califano v. Webster,
430 U.S. 313 (1977) 7

Cleveland Bd. of Educ. v. LaFleur,
414 U.S. 632 (1974) 16

Dandridge v. Williams,
397 U.S. 471 (1970) 7

Federal Commc'ns Comm'n v. Beach Commc'ns, Inc.,
508 U.S. 307 (1993) 7

Goodridge v. Dep't of Pub. Health,
798 N.E.2d 941 (Mass. 2003) 17, 18, 19

Heller v. Doe,
509 U.S. 312 (1993) 7

Johnson v. Robison,
415 U.S. 361 (1974) 5

Johnson v. Rockefeller,
365 F. Supp. 377 (S.D.N.Y. 1973) 18

Kimel v. Fla. Bd. of Regents,
528 U.S. 62 (2000) 6

Lehr v. Roberston,
463 U.S. 248 (1983) 15

Lindsley v. Natural Carbonic Gas Co.,
220 U.S. 61 (1911) 7

Loving v. Virginia,
388 U.S. 1 (1967) 10, 11, 16, 17

Maynard v. Hill,
125 U.S. 190 (1888) 13, 14

Metro Broad., Inc. v. Federal Commc'ns Comm'n,
497 U.S. 547 (1990) 7

Meyer v. Nebraska,
262 U.S. 390 (1923) 11

Moore v. City of East Cleveland,
431 U.S. 494 (1977) 11, 12

Murphy v. Ramsey,
114 U.S. 15 (1885) 13

Nordlinger v. Hahn,
505 U.S. 1 (1992) 7

Parham v. J.R.,
442 U.S. 584 (1979) 12, 13

Perry v. Brown,
671 F.3d 1052 (9th Cir. 2012) 6, 18, 20

Prince v. Massachusetts,
321 U.S. 158 (1944) 14

Reynolds v. United States,
98 U.S. 145 (1879) 10

Skinner v. Oklahoma ex rel. Williamson,
361 U.S. 535 (1942) 11, 17

Smith v. Org. of Foster Families for Equal. & Reform,
431 U.S. 816 (1977) 13, 15

Troxel v. Granville,
530 U.S. 57 (2000) 13

Tuan Anh Nguyen v. Immigration and Naturalization Serv., 533 US. 53 (2001) 7

Turner v. Safley, 482 U.S. 78 (1987) 16, 17, 18

Zablocki v. Redhail, 434 U.S. 374 (1978) 11, 17

STATUTES

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 (1996) 22

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is a law professor who has written extensively about family law in the United States, with a special focus on issues involving legislative and judicial treatment of marriage and parenting. She is committed to the public interest and in particular to the marriage and parenting circumstances of the least privileged Americans. Based upon her research into the history of constitutional marriage law and the evolving meaning of "marriage" among less-privileged Americans, she believes that states have a substantial interest in supporting and encouraging marriage among opposite-sex couples in order to highlight the procreative aspects of marriage, and in declining to extend similar recognition to same-sex couples.

SUMMARY OF THE ARGUMENT

I. The state has a substantial interest in *recognizing* and *encouraging* marriage between opposite-sex pairs of adults who consent to commit to one another for exclusive, long-run, sexually intimate relationships, on the explicit grounds of these pairs' intrinsically procreative capacity, and their suitednesss for caring for children. At the very same time, the state has a substantial state interest in disclaiming a *similar* interest in same-sex pairs of adults who wish to commit to exclusive, long-run, sexually intimate relationships, but who explicitly deny the link between marriage and children, and who seek to portray marriage as merely a "capstone" or prize for adults' emotional connection or as a reparation for past societal disapproval. To hold otherwise would not only undercut the state's most important interests in marriage, but would perpetuate a "retreat from marriage" that is already apparent among the most vulnerable Americans.

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[1] No counsel for a party authored this brief in whole or in part. Printing costs for the brief were provided by the Witherspoon Institute. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk.

II. This Court has repeatedly described states' interests in marriage as the interweaving of three benefits to society: (1) stable commitment between intimate, opposite-sex pairs of adults, (2) the procreation and the rearing of children, and thereby, (3) the formation of a decentralized, democratic society. These holdings derive from universally shared intuitions about the marital family and historical observations about the shape and functions of the marital family over millennia. In the words of a leading expert on the history of marriage in Western law:

> For nearly two thousand years, the Western legal tradition reserved the legal category of marriage to monogamous, heterosexual couples who had reached the age of consent, who had the physical capacity to join together in one flesh, and whose joining served the goods and goals of procreation, companionship and stability at once.[2]

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[2] John Witte, Jr., *Response to Mark Strasser, in Marriage and Same-Sex Unions* 43, 45 (Lynn Wardle et. al. eds., 2003).

This "core understanding of the form and function of sex and marriage" appeared not only in various religious doctrines, but also in the works of the Greek Platonists and Aristotelians, Roman jurists, and Enlightenment philosophers.[3]

III. The wisdom of the Court's precedents recognizing the states' interests in childbirth, childrearing, and societal stability is today more apparent than ever. New empirical studies reveal the consequences of diminishing the procreative aspects of marriage in favor of adults' interests.

In the United States, especially over the last 50 years, the links between sex, marriage, and procreation have weakened considerably in both law and culture, with repercussions for adults, children, and society as a whole. Marriage is understood less as the gateway to adult responsibilities, centered most often upon the needs of children, and more as the "capstone" or reward for establishing a "soulmate" relationship with another adult.

The harmful consequences of this diminished and adult-centered understanding of marriage have not been equally distributed across society. Rather, the most vulnerable Americans—those without a college education, the poor, and minority groups—have suffered more: they marry less, divorce more, experience lower marital quality, and have far more nonmarital births. Both adults and children suffer, as does the social fabric generally, with the "marriage gap" acting as a major engine of social inequality, which persists intergenerationally. There is also troubling evidence that an adult-centered view of marriage is taking hold of the upcoming generation of adults often called "Millennials."

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[3] *Id.* at 45–46.

The Plaintiffs in these cases, like other proponents of same-sex marriage, ask this Court to declare that states have no interest in the procreative aspects of marriage generally: bearing and rearing biologically related children. They ask the Court (and states) to re-frame marriage simply as the government's and society's stamp of approval for two persons' mutual emotional and romantic attachments. They view marriage as a kind of accolade to couples declaring their intentions to remain together as romantic partners, and wishing to use marriage as a means to the end of overcoming past stigma visited upon gays and lesbians.

Certainly, gays and lesbians have suffered stigma and discrimination. Yet the new, diminished understanding of marriage advocated by same-sex marriage proponents is dangerous, particularly for under-privileged Americans, because it is closely associated in a substantial body of literature with the retreat from marriage among the poor, the less-educated, and minority groups. States have a strong interest in affirming opposite-sex marriage, without any animus toward gays and lesbians, in order to preserve the vital link between sex, marriage, and children, and to avoid further rupture of the social fabric between the privileged and less-privileged.

ARGUMENT

I. THE STATE HAS AT LEAST A LEGITIMATE, BUT MORE LIKELY A COMPELLING, INTEREST IN SINGLING OUT OPPOSITE-SEX MARRIAGE FOR PROTECTION, SUFFICIENT TO SATISFY THE EQUAL PROTECTION CLAUSE.

Plaintiffs[4] in these cases claim that the Equal Protection Clause of the Fourteenth Amendment prohibits states from defining marriage as the union of a man and a woman. In addition to the many contrary arguments asserted by the *Hollingsworth* Petitioners, this *amicus* adds that this Court should recognize that states have governmental interests sufficient to justify their recognizing opposite-sex but not same-sex partnerships as "marriages."

States are constitutionally permitted in legislation to classify people into groups that "possess[] distinguishing characteristics relevant to interests the State has the authority to implement."[5] Even more relevant to the question of same-sex marriage, this Court has affirmed the constitutionality of state classifications where recognizing or benefitting one group "promotes a legitimate governmental purpose, and the addition of other groups would not."[6]

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[4] For simplicity, *amicus* refers to all proponents of same-sex marriage in *Perry*, *Hollingsworth*, and *Windsor* as "Plaintiffs."

[5] *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001) (quotation marks omitted).

[6] *Johnson v. Robison*, 415 U.S. 361, 383 (1974).

As described in Section III below, recognizing same-sex marriage as the institution defined by Plaintiffs—as an adult-centered, emotion-based accomplishment—would not only fail to promote the government's substantial interest in opposite-sex marriages, but contradict that interest in ways likely to harm the segment of society already suffering the most from a retreat from marriage.

In *Perry*, the Ninth Circuit held that California's Proposition 8 "operates with no apparent purpose but to impose on gays and lesbians . . . a majority's private disapproval of them and their relationships."[7] The district court concluded similarly, partially relying on the fact that "California, like every other state, has never required that individuals entering a marriage be willing or able to procreate."[8] Yet the lack of a pre-marital "procreation test" does not undermine the legitimacy of the state's classifying couples as same-sex or opposite-sex, and offering marriage only to the latter.

This Court has repeatedly stated that "[t]he rationality commanded by the Equal Protection Clause does not require States to match . . . distinctions and the legitimate interests they serve with razorlike precision"[9] or "mathematical nicety."[10]

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[7] *Perry v. Brown*, 671 F.3d 1052, 1095 (9th Cir. 2012).

[8] *Perry v. Schwarzenegger*, No. 3:09-2292-VRW (N.D. Cal.), Findings of Fact and Conclusions of Law 60, ECF No. 708 [hereinafter Findings of Fact; docket entries for court documents electronically filed under No. 3:09-2292-VRW shall be referred to only by their names and ECF numbers].

[9] *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 63–64 (2000) (age discrimination action brought by university employees).

Rather, classifications that neither involve fundamental rights nor suspect classifications are "accorded a strong presumption of validity."[11] For such classifications, the government is not required to "actually articulate at any time the purpose or rationale supporting its classification,"[12] and a court should uphold it against an Equal Protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[13]

Moreover, even if intermediate scrutiny applies (as for gender-based classifications) an exact fit is not required. Intermediate scrutiny mandates only a "substantial relation" between the classification and the underlying objective, not a perfect fit.[14] "None of our gender-based classification equal protection cases have required that the statute . . . be capable of achieving its ultimate objective in every instance."[15]

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[10] *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)).

[11] *Heller v. Doe*, 509 U.S. 312, 319 (1993).

[12] *Id.* at 320 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992)).

[13] *Id.* (quoting *Federal Commc'ns Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)).

[14] *See Califano v. Webster*, 430 U.S. 313, 318 (1977) (per curiam) (upholding statute providing higher Social Security benefits for women than men because "women *on the average* received lower retirement benefits than men;" *id.* n.5 (emphasis added)).

[15] *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 US. 53, 70 (2001); *see Metro Broad., Inc. v. Federal Commc'ns Comm'n*, 497 U.S. 547, 579, 582–83 (1990), overruled on other grounds, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that classification need not be accurate "in every case" if, "in the aggregate," it advances the objective).

In *Perry*, the voters of the State of California drew a distinction between same-sex and opposite-sex couples that is rationally and substantially related to California's interests in preserving the link between sex, marriage, and procreation. In *Windsor*, Congress made the same calculation in enacting the Defense of Marriage Act. No same-sex couples can procreate; the vast majority of opposite-sex couples can and do. According to the Census Bureau, by the age of 44, over 80% of married couples have children in the household. This figure does not even include couples whose children are older or have moved away from home.[16]

Given the invasions of privacy that would certainly be involved in ascertaining couples' procreative willingness and capacities prior to marriage, the possibility of unintended pregnancies, and couples' changing intentions, it would be impossible for states, effectively, to determine the procreative potential of any particular opposite-sex couple. Drawing a line between same-sex and opposite-sex couples is rationally related to the state's interests in maintaining in the public mind the links between sex, marriage, and children.

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[16] U.S. Census Bureau, *Family Households With Own Children Under Age 18 by Type of Family, 2000 and 2010, and by Age of Householder, 2010*, The 2012 Statistical Abstract: The National Data Book, Table 65, http://www.census.gov/compendia/statab/2012/tables/12s0065.pdf (last visited Jan. 24, 2013).

II. THIS COURT HAS REGULARLY AND FREQUENTLY RECOGNIZED WITH APPROVAL THE IMPORTANCE OF STATES' INTERESTS IN THE PROCREATIVE ASPECTS OF OPPOSITE-SEX MARRIAGE. WHILE IT HAS ALSO RECOGNIZED THAT MARRIAGE SERVES ADULTS' INTERESTS IN HAPPINESS AND STABILITY, THE COURT HAS NOT ISOLATED THESE FROM THE PROCREATIVE ASPECTS OF MARRIAGE.

Supreme Court decisions from the early nineteenth to the late twentieth century have repeatedly recognized, with approval, states' interests in the procreative features of marriage: childbirth and childrearing by the adults who conceived them, and the contribution of that childrearing to a stable democratic society.

The Court has written a great deal on the nature of the states' interests in the context of evaluating state laws affecting entry into or exit from marriage, or concerning parental rights and obligations. Typically, these statements recognize that states are vitally interested in marriage because of the advantages not only to adults but also to children and to the larger society. Children replenish communities, and communities benefit when children are reared by their biological parents because parents best assist children to grow to become well-functioning citizens. The Court does not give special attention to adults' interests nor accord them extra weight. Nor are the interests of some children vaulted over the interests of all children generally.

The material below considers the various manners in which this Court has, in the past, discoursed approvingly about marriage and parenting as expressing states' interwoven interests in the flourishing of adults, children, and society.

A. States have substantial interest in the birth of children.

While it is difficult to disentangle completely the Court's language recognizing a legitimate state interest in the very birth of children from the state's interest in the healthy *formation* of children within marriage, still it is possible to discern it.

In the case refusing to allow polygamy on the grounds of the Free Exercise Clause, *Reynolds v. United States*, this Court explained states' interests in regulating marriage with the simple declaration: "Upon [marriage] society may be said to be built."[17] Nearly 100 years later in *Loving v. Virginia*, striking down a state's anti-miscegenation law, the Court referred to marriage as "fundamental to our very existence and survival," necessarily endorsing the role of marriage in propagating society through childbearing.[18]

Even in cases where *only* marriage or childbearing was at issue, but not both, the Court has referred to "marriage and childbirth" together in the same phrase, nearly axiomatically. The following cases illustrate:

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[17] 98 U.S. 145, 165 (1879).

[18] 388 U.S. 1, 12 (1967).

- In *Meyer v. Nebraska*, which vindicated parents' constitutional right to have their children instructed in a foreign language, this Court referred not merely to parents' rights to care for children but to citizens' rights "to marry, establish a home and bring up children."[19]
- In *Skinner v. Oklahoma ex rel. Williamson*, concerning a law punishing certain classifications of felons with forced sterilization, the Court opined: "Marriage and procreation are fundamental to the very existence and survival of the race."[20]
- In *Zablocki v. Redhail*, which struck down a Wisconsin law restricting marriage for certain child support debtors, the Court wrote: "[I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."[21] As in *Loving*, *Zablocki* reiterated that marriage is "fundamental to our very existence and survival,"[22] and recognized, additionally the right to "deci[de] to marry and raise the child in a traditional family setting."[23]
- The 1977 opinion in *Moore v. City of East Cleveland*, announcing a blood-and-marriage-

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[19] 262 U.S. 390, 399 (1923).

[20] 361 U.S. 535, 541 (1942).

[21] 434 U.S. 374, 386 (1978).

[22] *Id*. at 383.

[23] *Id*. at 386.

related family's constitutional right to co-reside, nonetheless referenced the procreative aspect of family life stating: "the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[24]

- Similarly, in *Parham v. J.R.*, a case treating parents' rights to direct their children's health care, the Court stated: "Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."[25]

B. States have substantial interest in the way marriage socializes children.

A second prominent theme in this Court's prior cases touching upon marriage is the unique importance of the marital family for forming and educating citizens for the continuation of a free, democratic society.

Preliminarily, in cases in which natural parents' interests in directing children's upbringing have conflicted with the claims of another, this Court has approvingly noted the importance of the bond between parents and their natural children. This is found in its observations that states presume that biological parents' "natural bonds of affection" lead them to make decisions for their children that are in the children's best interests. Statements in this vein have been made in *Parham v. J.R.* ("historically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children"[26]), in *Smith v. Organization of Foster Families for Equality & Reform* (families' "blood relationship" forms part of the "importance of the familial relationship, to the individuals involved and to the society"[27]), and in the "grandparents' rights" case of *Troxel v. Granville* ("there is a presumption that fit parents act in the best interests of their children"[28]).

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[24] 431 U.S. 494, 503–04 (1977).

[25] 442 U.S. 584, 602 (1979).

Moreover, for over 100 years, this Court has reiterated the relationship between marriage and childrearing for the benefit of a functioning democracy. In *Murphy v. Ramsey*, for example, this Court opined:

> For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.[29]

The 1888 decision of *Maynard v. Hill* referred to marriage as "having more to do with the morals and civilization of a people than any other institution," and thus marriage is continually "subject to the control of the legislature."[30] And in 1943, in the course of an opinion affirming parents' authority over their children within the limits of child labor laws, this Court explicitly linked good childrearing practices to a healthy society, saying: "A democratic society rests, for its continuance, upon the healthy well-rounded growth of young people into full maturity as citizens, with all that implies."[31]

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[26] *Id.* at 602.

[27] 431 U.S. 816, 844 (1977).

[28] 530 U.S. 57, 68 (2000).

[29] 114 U.S. 15, 45 (1885).

Reflecting upon states' continual interest in marriage legislation, in a case concerning the affordability of divorce process, Justice Black's dissenting opinion (objecting to the expansion of the contents of the federal Due Process Clause) in *Boddie v. Connecticut*, asserted that: "The States provide for the stability of their social order, for the good morals of all their citizens and for the needs of children from broken homes. The States, therefore, have particular interests in the kinds of laws regulating their citizens when they enter into, maintain and dissolve marriages."[32]

In the 1977 case in which this Court refused to extend equal parental rights to foster parents, the court wrote about the relationships between family life and the common good stating: "Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children, as well as from the fact of blood relationship."[33]

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[30] 125 U.S. 190, 205 (1888).

[31] *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

[32] 401 U.S. 371, 389 (1971) (Black, J., dissenting).

As recently as 1983, in the single father's rights case, *Lehr v. Robertson*, the Court referenced the social purposes of the family quite explicitly in terms of states' legitimate interest in maintaining the link between marriage and procreation. Refusing to treat an unmarried father identically to a married father with respect to rights concerning the child, the Court wrote: "marriage has played a critical role . . . in developing the decentralized structure of our democratic society. In recognition of that role, and as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family."[34]

In summary, it is fair to conclude, upon a review of this Court's family law jurisprudence, that states' interests in the procreational aspects of marriage have been both recognized by this Court and affirmed to be not only legitimate, but essential.

C. The view of marriage advocated by Plaintiffs in *Perry* and *Windsor* ignores children and society.

Undoubtedly the state also values adults' interests in marriage: adult happiness, mutual commitment, increased stability, and social esteem. Yet a view of marriage that focuses solely on these adult-centric interests is incomplete and denies the

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[33] *Org. of Foster Families*, 431 U.S. at 844 (citation omitted).

[34] 463 U.S. 248, 257 (1983).

Court's decisions affirming the states' interests in procreation and healthy childrearing by stably linked, biological parents. It also risks institutionalizing, in law and culture, a notion of marriage that is at the core of an alarming "retreat from marriage" among disadvantaged Americans. (See, *infra*, Section III.)

Same-sex marriage proponents take great pains to excise references to children when quoting this Court's family law opinions. In their Complaint and Trial Memorandum in *Perry*, for example, Plaintiffs reference from *Loving v. Virginia* only the language about marriage as a "basic civil right[]" of adults, or a "vital personal right[] essential to the orderly pursuit of happiness by free men," leaving out *Loving*'s immediately adjoining reference to marriage as the fount of society.[35] Plaintiffs similarly quote *Cleveland Board of Education v. La Fleur*[36] without noting that the freedom at issue there was a married teacher's "deciding to bear a child."[37]

Perhaps the most egregious example of Plaintiffs' selectively quoting from this Court's opinions addressing the meaning of marriage is their misuse of *Turner v. Safley*, the case in which this Court held that certain prisoners were required to have access to state-recognized marriage.[38] Plaintiffs cite *Turner* for the proposition that civil marriage is an "'expression . . . of emotional support and public commitment,'" and "an exercise in spiritual unity, and a fulfillment of one's self."[39] The district court's Findings of Fact and Conclusions of Law does likewise, selectively quoting only the adult-related aspects of this Court's statements about the meaning of marriage and excising references to procreation.[40]

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[35] Compl. for Declaratory, Injunctive, or other Relief 1, E.C.F. No 1 [hereinafter Compl.]; Pls.' & Pl.-Intervenor's Trial Mem. 3, ECF. No. 281 [hereinafter Trial Mem.]. As noted, *Loving* concludes that marriage and family are "fundamental to our very existence and survival." 388 U.S. at 12.

[36] Trial Mem. 3–4, ECF. No. 281 (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974) ("personal choice in matters of marriage and family life")).

[37] 414 U.S. at 640.

However, *Turner* explicitly acknowledged, in two ways, both the adults' *and* the procreative interests in marriage. First, *Turner* concluded that adults' interests were only "elements" or "an aspect" of marriage,[41] and that marriage had other "incidents" that prisoners would eventually realize, referring specifically to consummation, *i.e.* heterosexual intercourse with a spouse.[42] Second, *Turner* distinguished the situation of prisoners who would someday be free, from that of prisoners whom a state *refused* to permit to marry, on the grounds that life imprisonment would foreclose the ability to parent and rear children.[43] *Turner* noted that in *Butler v. Wilson*[44] the Supreme Court had summarily affirmed the case of *Johnson v. Rockefeller*,[45] in which inmates imprisoned for life were denied marriage, in part upon the rationale that they would not have the opportunity to procreate or rear children. Said the *Johnson* court: "In actuality the effect of the statute is to deny to Butler only the right to go through the formal ceremony of marriage. Those aspects of marriage which make it 'one of the basic civil rights of man'—cohabitation, sexual intercourse, and the begetting and raising of children—are unavailable to those in Butler's situation because of the fact of their incarceration."[46]

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[38] 482 U.S. 78 (1987).

[39] Trial Mem. 6, ECF No. 281 (citing *Turner v. Safley*, 482 U.S. 78, 95–96).

[40] *See* Findings of Fact 110, ECF No. 708. This approach of Plaintiffs and the courts below is not unique. The plaintiffs in the Massachusetts same-sex marriage case similarly affirmed the ability of the law to affect social perceptions, and requested same-sex marriage recognition in order to attain "social recognition and security" for themselves and their daughter. *Goodridge v. Dep't of Pub. Health*, No. 01-1647 (Superior Court, Cnty. of Suffolk, MA (Aug. 2001), Mem. in Supp. of Pls.' Mot. for Summ. J. 1. They stated that marriage recognition would take away a social "badge of inferiority" and instead "instantly" communicate "their relationship . . . to third parties." *Id.* at 19. And the Massachusetts Supreme Court, like Judge Walker and the Ninth Circuit below, excised children from *Zablocki* and *Loving* and *Skinner* and misused *Turner* similarly. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 970 (Mass. 2003).

[41] 482 U.S. at 95–96.

In reality, proponents of same-sex marriage ask this Court to insist that every state enact and convey a *new* understanding of marriage. This new understanding would signify that what the state values about sexually intimate couples is their emotional happiness and willingness to commit to one another, exclusively, for a long time.[47] In the case of same-sex couples, marriage would additionally connote that the state and society are sorry for past discrimination and stigmatizing of gays and lesbians.[48] However, this understanding completely disregards the procreative aspects of marriage which this Court has recognized as essential. At the same time, it paints a picture of marriage closely associated with a retreat from marriage among the most vulnerable Americans.

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[42] *See id.* at 96.

[43] *Id.*

[44] 415 U.S. 953 (1974).

[45] 365 F. Supp. 377 (S.D.N.Y. 1973).

[46] *Id.* at 380 (citation omitted).

[47] *See* Compl. 2, 7, ECF No. 1; Findings of Fact 67, ECF No. 708; *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012). The *Goodridge* court and well-known same-sex marriage advocates

Notably, proponents of same-sex marriage acknowledge the power of marriage laws to affect citizens' perceptions and behavior. Indeed, a change of perceptions and behaviors is precisely what the Plaintiffs sought in bringing suit,[49] and what the

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urge a similar meaning for marriage. *See Goodridge*, 798 N.E.2d at 948 (Marriage is the "exclusive commitment of two individuals to each other."); *see, e.g.*, Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, New Republic (Aug. 28, 1989, 1:00 AM), http://www.tnr.com/article/79054/here-comes-the-groom# (describing marriage as a "deeper and harder-to-extract-yourself from commitment to another human being"); *Talking about Marriage Equality With Your Friends and Family*, Human Rights Campaign, www.hrc.org/resources/entry /talking-about-marriage-equality-with-your-friends-and-family (last visited Jan. 24, 2013) (describing marriage as "the highest possible commitment that can be made between two adults").

[48] Several times in Plaintiffs' Complaint in *Perry*, they refer to the theme of "gay and lesbian individuals['] . . . long and painful history of societal and government-sponsored discrimination," or to "stigma." Compl. 1, 4, 7–8, ECF No. 1.

[49] *See, e.g.*, Compl. 9–10, ECF No. 1 (asserting that recognition of same-sex marriage would produce the result of "hav[ing] society accord their unions and their families the same respect and dignity of opposite-sex unions and families"); Compl. 8, ECF

courts below attempted to achieve in upholding the Plaintiffs' claims.[50] Plaintiffs specifically urge that marriage *not* be understood to imply procreation.

There is only one group of children who consistently feature in Plaintiffs' and other same-sex marriage advocates' arguments: children currently being reared in same-sex households. Plaintiffs claim that these children will be helped, indirectly, via the social approval that would flow to the same-sex partners in the children's household if their "parents" were married.[51] Even this brief argument mentioning children, however, is flawed.

First, it is not at all clear that granting marriage to same-sex partners equates with bringing marriage into the lives of such children's "parents." Exact figures are unknown, but it appears from at least one nationally representative sample of children who lived in same-sex households before the age of 18, [52] and a recent analysis of the U.S. Census,[53] that the

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No. 1 (ameliorate the "stigmatizing" gays and lesbians experience and affect their "stature" in the community).

[50] *See* Findings of Fact 86–87, ECF No. 708 (marriage recognition would convey that gays and lesbians partake of the "most socially valued form of relationship"); *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012) (suggesting that the state's designation of a relationship as a "marriage," by itself "expresses validation, by the state and the community," and is "a symbol . . . of something profoundly important").

[51] *See* Trial Mem. 7, ECF No. 281.

[52] Mark Regnerus, *How different are the adult children of parents who have same-sex relationships? Findings from the new family structures study*, 41 Soc. Sci. Research 752 (2012).

[53] Garry J. Gates, *Family Focus on...LGBT Families: Family formation and raising children among same-sex couples*, National Council on Family Relations Report, Issue FF51, 2011.

majority of children were conceived in heterosexual relationships and are presently living with one biological parent and that person's same-sex partner. Tremendous uncertainty, therefore, surrounds the questions of whether state recognition of same-sex marriage would bring "married parents" to a large number of children and whether social approbation would follow.

Second, the "jury is still out" on whether parenting in a same-sex household advances the state's critical interest in children's, and therefore society's, formation. Since the district court rendered its decision in *Perry*, a peer-reviewed journal issued the first nationally representative study of children reared in a same-sex household.[54] These children's outcomes across a host of emotional, economic and educational outcomes were diminished as compared with children reared by their opposite-sex parents in a stable marriage. The author of the study acknowledged that the question of causation remains unknown; however, the children's outcomes might indicate problems with same-sex parenting, or even problems with family structure instability, given that most children were conceived in a prior heterosexual relationship by one of the adults later entering a same-sex relationship. The latter possibility raises further questions about the overall stability of same-sex couples and about the role played by bisexuality. This is relevant to child well-being given that a consensus is emerging among social scientists that many poor outcomes for children might be explained by instability in their parents' relationships.[55]

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[54] *See* Mark Regnerus, *supra*.

Importantly, same-sex marriage proponents' attempt to redefine "marriage" to excise childbearing, and childrearing comes at a time in history when new empirical data shows that childbearing and childrearing in marriage is threatened—a threat disproportionately visited upon the most vulnerable populations. (See Section III.) States have responded to the data. In fact, over the past 20 years, the legislatures in all 50 states have introduced bills to reform their marriage and divorce laws precisely to better account for children's interests in their parents' marriages.[56] The federal government has done the same, particularly via the marriage-promotion sections of the landmark "welfare reform" law passed in 1996 by bipartisan majorities, and signed into law by President Clinton.[57] Furthermore, Presidents Bush and Obama, in particular, have promoted extensive federal efforts on behalf of marriage and fatherhood.[58]

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[55] Pamela J. Smock & Wendy D. Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 Law & Policy 87, 94 (2004).

[56] *See, e.g.*, Lynn D. Wardle, *Divorce Reform at the Turn of the Millennium: Certainties and Possibilities*, 33 Fam. L.Q. 783, 790 (1999); Karen Gardiner et al., *State Policies to Promote Marriage: Preliminary Report*, The Lewin Group (Mar. 2002).

[57] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 (1996).

[58] *See* Helen M. Alvaré, *Curbing Its Enthusiasm: U.S. Federal Policy and the Unitary Family*, 2 Int'l J. Jurisprudence Fam. 107, 121–24 (2011).

In sum, the Court should reaffirm its many prior statements supporting the interests of states in childbearing, childrearing, and social stability that are advanced by opposite-sex marriages. It should resist Plaintiffs' effort to redefine marriage. That states and the federal government may have ignored children's interests too much in the past, is not a reason why states may not choose, and are not choosing today, to legislate to better account for both children's and society's robustly and empirically supported interests in marriage.

III. REDEFINING MARRIAGE IN A WAY THAT DE-LINKS SEX, MARRIAGE AND CHILDREN CAN HARM THE MOST VULNERABLE AMERICANS AND EXACERBATE THE "MARRIAGE GAP," WHICH IS RESPONSIBLE FOR INCREASING LEVELS OF SOCIAL INEQUALITY IN AMERICA.

The disappearing of children's interests in marriage, both at law and in culture, and the vaulting of adults' emotional and status interests, are, today, associated with a great deal of harm, particularly among the most vulnerable Americans. This, in turn, has led to a growing gap between the more and less privileged in the United States, threatening our social fabric. Recognizing same-sex marriage would confirm and exacerbate these trends. Consequently, states legitimately may wish to reconfirm their commitment to opposite-sex marriage on the grounds of its procreative aspects, and refuse to grant marriage recognition to same-sex couples.

Speaking quite generally, law and culture before the 1960s normatively held together sex, marriage, and children. Obviously, this was not true in the life of every citizen or family, but social and legal norms widely reflected it. In the ensuing decades, however, these links deteriorated substantially.

First, the link between sex and children weakened with the introduction of more advanced birth control technology and abortion, both of which came to fore in the 1960s and were announced to be constitutional rights by this Court in the 1960s and 1970s. Then, the link between marriage and children was substantially weakened by the passage of no-fault divorce laws during the 1970s. The transcripts of debates concerning the uniform no-fault divorce law reveal the degree to which children's interests were minimized in favor of adult interests, sometimes with mistaken beliefs about children's resiliency and sometimes on the false assertion that most failing marriages were acrimonious such that divorce would benefit, not harm children.[59]

New reproductive technologies further separated children from marriage and sex from children. Since the creation of the first "test tube baby" in 1978, which spawned a billion dollar industry in the United States, neither the federal government nor any states have passed meaningful restraints on such practices. There are today, still, almost no laws affecting who may access these technologies or obtain "donor" sperm, oocytes, or embryos.[60] This persists despite troubling indications that "donor children" experience an enhanced risk of physical or psychological difficulties.[61]

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[59] *See* Helen M. Alvaré, *The Turn Toward the Self in Marriage: Same-Sex Marriage and its Predecessors in Family Law*, 16 Stan. L. & Pol'y Rev. 101, 137–53 (2005).

Interwoven with these developments is the declining stigma of nonmarital sex, and even nonmarital pregnancies and births, which further separate sex from marriage, but not always from children.

The effects of these legal and social developments are not evenly distributed across all segments of the population. In fact, a robust and growing literature indicates that more privileged Americans—*i.e.* non-Hispanic Whites, and Americans with a college education—are economically and educationally pulling away from other social classes to an alarming degree.[62]

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[60] *See* The President's Council on Bioethics, *Reproduction and Responsibility: The Regulation of New Biotechnologies* 8–12 (2003).

[61] *See* Elizabeth Marquardt et al., *My Daddy's Name is Donor: A New Study of Young Adults Conceived through Sperm Donation*, Commission on Parenthood's Future (2010); Jennifer J. Kurinczuk & Carol Bower, *Birth defects in infants conceived by intracytoplasmic sperm injection: an alternative explanation*, 315 Brit. Med. J. 1260 (1997).

[62] *See, e.g.*, *The Decline of Marriage and Rise of New Families*, Pew Research Center (Nov. 18, 2010), http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/; Richard Fry, *No Reversal in Decline of Marriage*, Pew Research Center (Nov. 20, 2012), http://www.pewsocialtrends.org/2012/11/20/no-reversal-in decline-of-marriage/; Pamela J. Smock & Wendy D Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 Law & Pol'y

In the words of prominent sociologists W. Bradford Wilcox and Andrew J. Cherlin:

> In the affluent neighborhoods where many college-educated American live, marriage is alive and well and stable families are the rule . . . . [T]he divorce rate in this group has declined to levels not seen since the early 1970s. In contrast, marriage and family stability have been in decline in the kinds of neighborhoods that we used to call working class . . . . More . . . of them are having children in brittle cohabiting unions. . . . [T]he risk of divorce remains high. . . . The national retreat from marriage, which started in low-income communities in the 1960s and 1970s, has now moved into Middle America.[63]

By the numbers, Americans with no more than a high school degree, African Americans, and some groups of Hispanic Americans, cohabit more, marry less often, divorce more, have lower marital quality, and have more nonmarital births than those possessing a college degree, sometimes by very large margins. The situation for those with less than a high school degree is even more dire. A few comparisons portray the situation.

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87 (2004); The National Marriage Project and the Institute for American Values, *When Marriage Disappears: The Retreat from Marriage in Middle America*, State of Our Unions (2010), http://stateofourunions.org/2010/when-marriage-disappears.php (last visited Jan. 24, 2013).

[63] W. Bradford Wilcox & Andrew J. Cherlin, *The Marginalization of Marriage in Middle America*, Brookings, Aug. 10, 2011, at 2.

- Among Americans with a college degree or more, the nonmarital birth rate is a mere 6%. Among those with only a high school degree, the rate is 44%, and among those without a high school degree, the rate is 54%.[64]
- Poor men and women are only half as likely to marry as those with incomes at three or more times the poverty level.[65]
- The children of these less-privileged groups are far less likely to be living with both their mother and their father, more likely to have a nonmarital pregnancy, and less likely to graduate college or to obtain adequate employment as an adult.[66]

Experts attempting to diagnose this retreat from marriage in Middle America certainly identify economic factors, such as the decline in adequately paying work for men, and a belief by both sexes that a man should have a stable job before entering marriage. But economic factors cannot explain the entire retreat. Prior severe economic downturns in the U.S. were not accompanied by the same retreat from marriage or increases in nonmarital childbearing.[67]

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[64] *Id.*

[65] Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage among the Disadvantaged*, The Future of Children, Fall 15(2) 2005, at 117–18.

[66] Wilcox & Cherlin, *supra*, at 6; The National Marriage Project, *supra*, at 10–11, 17 (citing Ron Haskins & Isabel Sawhill, *Creating an Opportunity Society* (2009); Nicholas H. Wolfinger, *Understanding the Divorce Cycle: The Children of Divorce in Their Own Marriages* (2005)).

Similarly, law professor Amy Wax has concluded: "the limited research available suggests that men who were once regarded as marriageable and were routinely married—including many men with earnings in the lower end of the distributions—are now more likely to remain single than in the past." Furthermore, she points out, rationally speaking, that marriage would bring certain gains to any two persons: two incomes, economies of scale, divisions of labor, and gains from cooperation. But the less advantaged appear unmoved by such advantages, for themselves or for their children.[68]

What best explains these trends among the disadvantaged are changes in norms regarding the relationships between sexual activity, births and marriage. Among these, researchers note legal changes emphasizing parenthood but not marriage (*e.g.* strengthened child support enforcement laws), and emphasizing individual rights as distinguished from marriage. They also point to the declining stigma of nonmarital sex, particularly among the lesser educated, and the availability of the pill for separating sex and children.[69] Professor Cherlin writes that law and culture made other ways of living, as distinguished from marriage, not only more acceptable, but also more practically feasible.[70]

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[67] *See* Wilcox & Cherlin, *supra*, at 3.

[68] Amy L. Wax, *Diverging family structure and "rational" behavior: the decline in marriage as a disorder of choice*, *in Research Handbook on the Economics of Family Law* 29–30, 31, 33 (Lloyd R. Cohen & Joshua D. Wright, eds., 2011).

[69] Wilcox & Cherlin, *supra*, at 3–4.

Among the lesser privileged, stable employment for the man and a love relationship are the precursors for marriage. The disadvantaged are far less concerned than the more privileged about having children without marriage. To them, marriage is not about children, and children do not necessarily indicate the wisdom of marrying.

And there is further evidence that this trend away from linking children's well-being to a stable home with both a mother and a father is becoming characteristic not only of the disadvantaged, but also of the "millennial generation" as well.[71] Professor Cherlin confirms that among young adults who are not necessarily poor, the idea of "soulmate" marriage is spreading. Never-married Millennials report at a rate of 94% that "when you marry, your [sic] want your spouse to be your soul mate, first and foremost." They hope for a "super relationship," an "intensely private, spiritualized union, combining sexual fidelity, romantic love, emotional intimacy, and togetherness."[72]

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[70] Andrew J. Cherlin, *American Marriage in the Early Twenty-First Century*, The Future of Children, Fall 15(2) 2005, at 41.

[71] *See* Wendy Wang & Paul Taylor, *For Millennials, Parenthood Trumps Marriage*, Pew Research Center, 2 (Mar. 9, 2011), http://www.pewsocialtrends.org/2011/03/09/for-millennials-parenthood-trumps-marriage/ (on the question of a child's need for two, married parents, 51% of Millennials disagreed in 2008, compared to 39% of Generation Xers in 1997).

[72] Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. of Marriage & Fam. 848, 856 (2004).

There is also emerging evidence, concerning both the young and the less-privileged, that marriage—once the gateway to adulthood and parenting—is viewed by the less privileged as a "luxury good." In the words of sociologists Kathryn Edin and Joanna Reed: "Marriage has become a luxury, rather than a necessity, a status symbol in the true meaning of the phrase." These authors explain that the disadvantaged place very high expectations upon relationship quality within marriage. "If this interpretation is correct, the poor may marry at a lower rate simply because they are not able to meet this higher marital standard." Finally, there is a sense among the disadvantaged that marriage is reserved to those who have "arrived" financially.[73] This appears to be an increasingly widely shared view among experts.[74]

Professor Cherlin points to an emphasis on emotional satisfaction and romantic love and an "ethic of expressive individualism that emerged around the 1960s." There is a focus on bonds of sentiment, and the emotional satisfaction of spouses becomes an important criterion for marital success.[75] Professor Cherlin continues, stating that in the later 20th century, "an even more individualistic perspective on the rewards of marriage took root." It was about the "development of their own sense of self and the expression of their feelings, as opposed to the satisfaction they gained through building a family and playing the roles of spouse and parent. The result was a transition from the companionate marriage to what we might call the individualized marriage."[76]

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[73] Edin & Reed, *supra*, at 117, 121–122.

[74] *See, e.g.*, Pamela J. Smock, *The Wax and Wane of Marriage: Prospects for Marriage in the 21st Century*, 66 J. of Marriage & Fam. 966, 971 (2004) ("success is difficult because marriage means so much"; and the "current thinking [is] . . . that our high expectations for marriage are part of what is behind the retreat from marriage").

[75] Cherlin, *The Deinstitutionalization of American Marriage*, *supra*, at 851.

If this is all marriage means, why then do people continue to marry at all? Professor Cherlin opines that they may be seeking what he calls "enforceable trust," a lowering of the risk that one's partner will renege on agreements.[77] Rather than being any longer a foundation on which to build a family life then, marriage becomes the "capstone" of a preexisting, emotionally close relationship, with the wedding as a "symbol" of the couple's financial status and of their level of self development.[78] Yet marriage as merely a symbol of personal achievement is often beyond the experience or reach of the lesser privileged. Increasingly visible expert literature confirms that shifting cultural norms about marriage and procreation, the weakening of institutional structures, and changes in notions of role responsibilities affect the least advantaged to a greater degree.[79] Particularly for the disadvantaged, there is an "underappreciated role for traditional institutions in guiding behavior."[80]

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[76] *Id.* at 852.

[77] *Id.* at 854.

[78] *Id.* at 855, 857.

[79] *See, e.g.*, Wax, , *supra*, at 15, 59–60.

[80] *Id.* at 60.

Notwithstanding these troubling trends, Professor Wax concludes that a "strong marriage norm" is an opportunity to "shape[] the habits of mind necessary to live up to its prescriptions, while also reducing the need for individuals to perform the complicated calculations necessary to chart their own course."[81] Of course, individuals' decisions will be influenced by individual characteristics and circumstances, but "nonetheless, by replacing a complex personal calculus with simple prudential imperatives, a strong expectation of marriage will make it easier . . . for individuals to muster the restraint necessary to act on long-term thinking."[82]

A strong prescription in favor of marriage as the gateway to adult responsibilities and to caring for the next generation would therefore again likely influence behavior in favor of bearing and rearing children by stably linked, biological parents, ready and able to prepare children for responsible citizenship. Simple rules and norms "place[] less of a burden on the deliberative capacities and will of ordinary individuals." If, however, individuals are left to guide sexual and reproductive choices in a culture of individualism, "people faced with a menu of options engage in a personal calculus of choice. Many will default to a local [short-term, personal gain] perspective."[83]

The "retreat from marriage" and marital childbearing affects not only individuals and their communities. There is evidence that its problematic effects are being felt even at the national level. Largely as a consequence of changes to family structure, including the intergenerational effects of the absence or breakdown of marriage, there is a growing income and wealth gap in the United States among the least educated, the moderately educated, and the college educated. According to a leading study of this phenomenon, family structure changes accounted for 50% to 100% of the increase in child poverty during the 1980s, and for 41% of the increase in inequality between all Americans between 1976 and 2000.[84] The National Marriage Project even suggests that "it is not too far-fetched to imagine that the United States could be heading toward a 21st century version of a traditional Latin American model of family life, where only a comparatively small oligarchy enjoys a stable married and family life."[85]

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[81] *Id.*

[82] *Id.*

[83] *Id.* at 61.

In conclusion, marriage historian John Witte Jr. has observed that:

> The new social science data present older prudential insights about marriage with more statistical precision. They present ancient avuncular observations about marital benefits with more inductive generalization. They reduce common Western observations about marital health into more precise and measurable categories. These new social science data thus

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[84] Molly A. Martin, *Family Structure and Income Inequality in Families With Children, 1976-2000*, 43 Demography 421, 423–24, 440 (2006).

[85] The National Marriage Project and the Institute for American Values, *supra*, at 17.

> offer something of a neutral apologetic for marriage.[86]

The notion of marriage that same-sex advocates are describing, and demanding from this Court and from every state, closely resembles the adult-centric view of marriage associated with the "retreat from marriage" among disadvantaged Americans. It would intrinsically and overtly separate sex and children from marriage, for every marriage and every couple and every child. It promotes a meaning of marriage that empties it of the procreative interests understood and embraced by this Court (and every prior generation). Rather, as redefined by Plaintiffs, marriage would merely become a reparation, a symbolic capstone, and a personal reward, not a gateway to adult responsibilities, including childbearing, childrearing, and the inculcating of civic virtues in the next generation for the benefit of the larger society.

Of course, it is not solely the fault of same-sex marriage proponents that we have come to a "tipping point" regarding marriage in the United States, where if the procreational aspects of marriage are not explicitly preserved and highlighted, additional harm will come upon vulnerable Americans and our social fabric itself. The historic institution of marriage was already weakened, likely emboldening same-sex marriage advocates to believe that a redefinition of marriage was only a step, not a leap away. But in its essence, and in the arguments used to promote it, same-sex marriage would be the *coup de grâce* to the procreative meanings and social roles of marriage. It is hoped that the necessary movement for equality and nondiscrimination for gays and lesbians will choose a new path, and leave marriage to serve the crucial purposes it is needed to serve.

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[86] John Witte, Jr., *The Goods and Goals of Marriage*, 76 Notre Dame L. Rev. 1019, 1070 (2001).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgments in both these cases.

Respectfully submitted,

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Amicus Curiae

January 29, 2012

AMICUS
CURIAE
BRIEF

No. 12-307

IN THE

Supreme Court of the United States

United States of America,

Petitioner,

—v.—

Edith Schlain Windsor, in her capacity as
Executor of the Estate of Thea Clara Spyer, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT EDITH SCHLAIN WINDSOR ON THE MERITS QUESTION

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT................ 5

ARGUMENT 7

I. SECTION 3 SINGLES OUT MARRIED GAY AND LESBIAN COUPLES BY EXCLUDING THEM FROM THE FEDERAL BENEFITS THAT SUPPORT AND PROTECT ALL OTHER LEGALLY MARRIED COUPLES............... 8

  A. Health Care 11

  B. Retirement Planning.................. 14

  C. Immigration.......................... 17

  D. Military Benefits 19

  E. Taxes 21

  F. Ethical Responsibilities 24

II. SECTION 3'S UNPRECEDENTED EXCLUSION OF A DISCRETE GROUP OF LEGALLY MARRIED COUPLES FROM FEDERAL BENEFITS AND RESPONSIBILITIES CONTRAVENES EQUAL-PROTECTION PRINCIPLES 25

  A. Section 3's Unprecedented Intrusion into an Area Traditionally Reserved to the States Signals the Need for Careful Review 27

  B. Section 3 Cannot Survive Appropriate Scrutiny Under Equal-Protection Principles 29

CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

CASES

Ankenbrandt v. Richards,
504 U.S. 689 (1992) 27

BFP v. Resolution Trust Corp.,
511 U.S. 531 (1994) 29

Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 3

Brown v. United States,
164 F.2d 490 (3d Cir. 1947) 28

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) 25

De Sylva v. Ballentine,
351 U.S. 570 (1956) 27

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 27

Estate of Turner,
138 T.C. 14 (T.C. 2012) 22

Estin v. Estin,
334 U.S. 541 (1948) 9

Frontiero v. Richardson,
411 U.S. 677 (1973) 25

Page(s)

Golinski v. U.S. Office of Pers. Mgmt.,
824 F. Supp. 2d 968 (N.D. Cal. 2010) 12

Gonzales v. Oregon,
546 U.S. 243 (2006) 29

Gregory v. Ashcroft,
501 U.S. 452 (1991) 29

In re Adoption of Patricia S.,
976 A.2d 966 (Me. 2009)...................... 9

Lalli v. Lalli,
439 U.S. 259 (1978) 25

Lawrence v. Texas,
539 U.S. 558 (2003) 3

Lembcke v. United States,
181 F.2d 703 (2d Cir. 1950)................. 28

Mansell v. Mansell,
490 U.S. 581 (1989) 27

Massachusetts v. U.S. Dep't of Health & Human Servs.,
682 F.3d 1 (1st Cir. 2012)............... *passim*

Moore v. Sims,
442 U.S. 415 (1979) 27

Nat'l Fed. of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012)...................... 28

TABLE OF AUTHORITIES
(continued)

Page(s)

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) 31

Pedersen v. Office of Pers. Mgmt.,
881 F. Supp. 2d 294 (D. Conn. 2012). . . . . *passim*

Plyler v. Doe,
457 U.S. 202 (1982) 32

Romer v. Evans,
517 U.S. 620 (1996) . . . . *passim*

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs,
531 U.S. 159 (2001) 29

Sosna v. Iowa,
419 U.S. 393 (1975) 26, 27

U.S. Dep't of Agric. v. Moreno,
413 U.S. 528 (1973) 25

United States v. Alvarez,
132 S. Ct. 2537 (2012) 19

Zablocki v. Redhail,
434 U.S. 374 (1978) 8

STATUTES

1 U.S.C. § 7 7

2 U.S.C. § 31-2 24

TABLE OF AUTHORITIES
(continued)

Page(s)

5 U.S.C. § 3110(a)(3) 24

5 U.S.C. § 6382(a)(1)(C) 11

8 U.S.C. § 1151(b)(2)(A)(i) 17

8 U.S.C. § 1158(b)(3)(A) 19

8 U.S.C. § 1430(a). 17

18 U.S.C. § 208(a). 24

26 U.S.C. § 106(a). 13

26 U.S.C. § 219(c) 16

26 U.S.C. § 401(a)(11) 15

26 U.S.C. § 2056(a). 21

26 U.S.C. § 2503(e). 22

26 U.S.C. § 2523 22

29 U.S.C. § 1055(d)-(e) 15

29 U.S.C. §§ 1161-1163. 14

29 U.S.C. § 1167(3)(A)(i). 14

29 U.S.C. § 2612(a)(1)(C) 11

38 U.S.C. § 101(3), (31) 20

38 U.S.C. § 1311 21

TABLE OF AUTHORITIES
(continued)

Page(s)

42 U.S.C. § 402(b)-(c) 16

42 U.S.C. § 402(e)-(f), (i) 15

42 U.S.C. § 3796(a)(1) 21

American Taxpayer Relief Act of 2012, Pub. L. No. 112- 240, § 101(c)(1), (3)(A), 126 Stat. 2313 (2013) 22

Immigration Act of 1924, Pub. L. No. 68-139, ch. 190, 43 Stat. 153, 155, 157 17

Immigration and Nationality Act, Pub. L. No. 82-414, ch. 2, 66 Stat. 163, 244-45 (1952) 17

OTHER AUTHORITIES

139 Cong. Rec. S1260-61 (daily ed. Feb. 4, 1993) 12

ABA Leadership, House of Delegates, General Information 2

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Blake Ellis, *Same-Sex Spouses Lose Big on Taxes*, CNN.com (Dec. 31, 2011) 23

Complaint, *McLaughlin v. Panetta*, No. 11-cv-11905 (D. Mass. Oct. 27, 2011) 20

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H.R. Rep. No. 104-664 (1996) 28

Lauren Eichmann, *Carle Receives Guilty Verdict*, Daily Illini (Dec. 1, 2004) 12

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Mark W. Stanton, Agency for Healthcare Research & Quality, *Employer-Sponsored Health Insurance: Trends in Cost and Access*, Research in Action (Sept. 2004) 13

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Michael Martinez, *Gay Married Immigrant Fights Deportation in California*, CNN.com (Mar. 23, 2012) 18

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Rev. Proc. 2012-41(3.19) 22

S. Rep. No. 93-235 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1579 20

S. Rep. No. 97-144 (1981) 22

Soc. Sec. Admin., Fact Sheet (2012) 16

Treas. Reg. § 1.106-1 13

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STATEMENT OF INTEREST[1]

The American Bar Association ("ABA") as *amicus curiae* respectfully submits this brief in support of Respondent Edith Schlain Windsor. The ABA urges that Section 3 of the Defense of Marriage Act ("Section 3") imposes an unprecedented and discriminatory burden on a discrete minority of couples legally married under state law in contravention of the constitutional guarantee of equal protection.

The ABA is the largest voluntary professional membership organization and the leading association of legal professionals in the United States. Its membership comprises nearly 400,000 attorneys in all 50 states, the District of Columbia, and the U.S. Territories and includes attorneys in private firms, corporations, non-profit organizations, and government agencies. Membership also includes judges,[2] legislators, law professors, law students, and non-lawyer associates in related fields.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from all parties consenting to the filing of this brief are on file with the Clerk of the Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not

Since its founding in 1878, the ABA has taken special responsibility for protecting the rights guaranteed by the Constitution, including the elimination of bias and discrimination. Over the past 40 years, the ABA has repeatedly advocated for the elimination of discrimination against gay and lesbian people. In 1973, the ABA adopted a policy urging the repeal of laws that criminalized private sexual relations between consenting gay and lesbian adults.[3] Since that time, the ABA has adopted numerous policies that recognize and support the rights of gays and lesbians: in 1987, in response to bias-motivated crimes; in 1989, advocating the elimination of discrimination against gays and lesbians in employment, housing, and public accommodations; in 1991, against bias in the judicial system; and in 1992, against discrimination on university campuses.

In addition, the ABA has adopted positions supporting equal treatment of gay and lesbian families, including a 1995 policy advocating equal treatment in child-custody matters and visitation rights and a 1999 policy calling for the repeal of laws

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circulated to any member of the Judicial Division Council prior to filing.

[1] Only recommendations that are adopted by the ABA's House of Delegates ("HOD") become ABA policy. The HOD is comprised of more than 560 delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members, and the Attorney General of the United States, among others. *See* ABA Leadership, House of Delegates, General Information, *available at* http://www.abanet.org/leadership/delegates.html. The ABA policies discussed in this brief are reprinted in the Appendix.

that banned adoption by gay and lesbian parents. Similarly, the ABA adopted a 2002 policy urging that surviving partners of victims of terrorism and other crimes be eligible for governmental compensation and assistance funds available to eligible spouses.

The ABA also has worked to eliminate discrimination against gay and lesbian people who are, or wish to become, lawyers. In 1992, the ABA amended its constitution to make the National Lesbian and Gay Law Association an affiliated organization with a vote in the House of Delegates ("HOD"). In 1994, the ABA incorporated into its Standards of Approval of Law Schools a requirement that accredited law schools not discriminate on the basis of sexual orientation. In 1996, the ABA adopted a policy urging state and local bar associations to study bias against gay and lesbian persons within the legal profession and the criminal justice system. And in 2002, the ABA amended its constitution to prohibit state and local bar associations that discriminate on the basis of sexual orientation from having representation in the HOD.

In furtherance of these policies, the ABA participated as *amicus curiae* before this Court by filing briefs in *Romer v. Evans,* 517 U.S. 620 (1996), *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), and *Lawrence v. Texas,* 539 U.S. 558 (2003).

Finally, and of special relevance to the merits question before the Court, the ABA adopted policies in 2004, opposing efforts to amend the United States Constitution to ban same-sex marriages; in 2009, urging the repeal of Section 3; and in 2010, urging States, territories, and tribal governments to offer marriage rights to their gay and lesbian citizens. The report accompanying the ABA's 2009 policy noted that Section 3 "constitutes a radical departure from the federal government's tradition of deference to state and tribal determinations of marital status."[4] It explained that the ABA policy sought, consistent with the traditional recognition that domestic relations are a matter of state concern, "to ensure that state decisions to recognize [same-sex] marriages are respected."[5]

ABA members who represent gay and lesbian clients, including married couples, as well as ABA members who are gay or lesbian, understand that Section 3 presents serious obstacles to married gay and lesbian couples in ordering their affairs and providing security and stability for themselves and their children. ABA members observe firsthand the difficulties that Section 3 presents to married gay and lesbian couples in an array of contexts, including estate planning, navigating the tax laws, ensuring financial protection for their health and old age, addressing immigration issues, and other important yet quotidian legal and practical issues.

The ABA accordingly has a strong interest in seeing that the question presented to this Court is resolved in a manner that recognizes the dignity of gay and lesbian persons, upholds fundamental fairness, and respects the States' traditional primacy in matters of domestic relations. The ABA likewise has a strong interest in ensuring that married gay and lesbian couples do not suffer discrimination as they build their families and their lives together. For all of these reasons, the ABA urges this Court to affirm the judgment of the Court of Appeals.

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[4] Report at 4, *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2009_am_112.authcheckdam.pdf.

[5] *Id.* at 3.

SUMMARY OF ARGUMENT

Section 3's unprecedented discrimination against gays and lesbians legally married under state law bars them from legal protections and civic responsibilities that accrue under federal law to every other lawfully married couple. As attorneys, ABA members observe firsthand Section 3's damaging effects on fundamental aspects of their gay and lesbian clients' lives.

I. Among its consequences, Section 3 denies married gay and lesbian couples protections under the Family Medical Leave Act; for some, it deprives them of access to affordable health insurance and healthcare; it impairs the ability of married gay and lesbian couples to plan for their futures and save for retirement; it may compel them to pay higher taxes; it withholds benefits that our country bestows on married members of the U.S. Armed Forces; and it excludes gay and lesbian spouses who are non-U.S. citizens from some of the protections of our immigration laws.

II. Section 3 is an unprecedented intrusion by Congress into domestic relations law, which has historically been the exclusive province of the States. Section 3 is the first time that Congress has attempted to define marriage for purposes of all federal laws and regulations and the only time that Congress has sought to exclude a class of marriages valid under state law from all federal protections and benefits of marriage. "[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to" constitutional principles. *Romer*, 517 U.S. at 633. Moreover, laws, like Section 3, that upset the traditional federal-state balance should be carefully scrutinized to ensure that they comply with the Constitution's demands.

Even under the rational-basis review applied in *Romer*, none of the governmental interests advanced in support of Section 3 justifies its sweeping exclusion of lawfully married gay and lesbian couples from the rights and responsibilities of marriage. Section 3 does not enable the federal government to define marriage for itself, nor does it create a uniform definition of marriage. Federal law, by and large, still defers to the States' varied definitions of marriage, except in the case of gay and lesbian couples. Still less does Section 3 encourage the States to experiment with recognizing same-sex marriage; to the contrary, it prevents States from granting their married gay and lesbian citizens true equality with their heterosexual counterparts. And even if Section 3 saves the federal government money, that cannot by itself be a sufficient justification for excluding a specific group from government benefits. Finally, Section 3's exclusion of gay and lesbian married couples does nothing whatever to encourage heterosexual marriage and child-rearing. Section 3 discriminates against legally married gay and lesbian couples and rationally furthers no governmental interest except an illegitimate one of "mak[ing] them unequal to everyone else." *Romer*, 517 U.S. at 635.

ARGUMENT

Though only 65 words long, Section 3 is sweeping in its breadth and devastating in its effect. Section 3 provides that, for purposes of every federal statute, regulation, and administrative ruling, the word "marriage" "means only a legal union between one man and one woman," and the word "spouse" means "only [ ] a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7. For the first time, Section 3 creates a federal definition of "marriage" that applies to the entire United States Code, as well as every agency rule, and that excludes a specific group of persons legally married under state law.

Section 3's purpose and effect are to bar legally married gay and lesbian couples from the federal protections and civic responsibilities that accrue to every other married couple. In so doing, the statute seriously undermines gay and lesbian couples' ability to protect and provide for each other and for their children, and it likewise undermines lawyers' ability to help their gay and lesbian clients achieve those objectives. Section 3's unprecedented discrimination against a discrete minority of couples legally married under the laws of their States is not justified by the rationales that have been advanced for it. The statute therefore cannot survive appropriate scrutiny under the equal protection guarantee of the Fifth Amendment.

I. SECTION 3 SINGLES OUT MARRIED GAY AND LESBIAN COUPLES BY EXCLUDING THEM FROM THE FEDERAL BENEFITS THAT SUPPORT AND PROTECT ALL OTHER LEGALLY MARRIED COUPLES

By its terms, Section 3's restrictive definitions of "marriage" and "spouse" are incorporated into more than one thousand federal laws. *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 6 (1st Cir. 2012) ("DOMA affects a thousand or more generic cross-references to marriage in myriad federal laws."); Memorandum from Dayna K. Shah, Assoc. Gen. Counsel, Gen. Accounting Office, to Sen. Bill Frist (Jan. 23, 2004) (identifying, as of December 31, 2003, "a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges").[6] In virtually every instance, Section 3 works to the detriment of married gay and lesbian couples by withholding rights, benefits, and responsibilities that Congress has granted married heterosexual couples. The federal rights that accompany marriage are imparted to protect "the most important relation in life," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), yet on account of Section 3 gay and lesbian married couples are excluded from them.

When ABA members represent gay and lesbian clients in ordering their affairs and protecting the interests of their spouses and families, they observe firsthand Section 3's negative and sometimes dramatic effect on their clients' lives and marriages. They witness the ways in which Section 3 can prevent their married gay and lesbian clients from obtaining the security and stability for themselves and their children that federal law makes available automatically to heterosexual couples.

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[6] *Available at* http://www.gao.gov/new.items/d04353r.pdf.

These ABA members are also acutely aware that, because of Section 3, validly married gay and lesbian couples often must negotiate the legal complexities that result when state law regards them as married but federal law does not. Such "uncertainties [in marital status] are not merely technical, nor are they trivial; they affect fundamental rights and relations." *Estin v. Estin*, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting). Gay and lesbian couples are thus doubly disadvantaged by Section 3.

Moreover, attorneys often cannot adequately assist their married gay and lesbian clients in overcoming the obstacles erected by Section 3. While "creative" lawyering can sometimes be effective,[7] many married gay and lesbian couples may not even be aware of all of the ways in which they are excluded from the legal protections that most married couples take for granted. Section 3, in short, requires married gay and lesbian couples to exercise a degree of legal sophistication that most people do not possess and is not expected of most couples.

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[7] *See, e.g., In re Adoption of Patricia S.*, 976 A.2d 966, 967-68 (Me. 2009) (one partner adopts the other to form legally cognizable relationship for purposes of creating beneficiary status under a family trust where marriage is unavailable).

Even when aware of the need for legal counsel, married gay and lesbian couples may encounter difficulty finding an attorney with the expertise necessary to address problems that often do not have clear-cut answers. *Cf., e.g.*, U.S. Taxpayer Advocate Serv., 2012 Annual Report to Congress, Vol. 1, at 455 (2012) ("In an evolving legal landscape, the IRS has issued answers about domestic partners and same-sex spouses, but more questions have arisen. Despite requests, the IRS has yet to publish comprehensive, authoritative guidance.").[8] Moreover, the costs of legal services are often substantial and are prohibitive for many couples, especially those couples with low incomes. *See* Randy Albelda et al., *Poverty in the Lesbian, Gay, and Bisexual Community* at iii (2009) (concluding that after controlling for other factors, "gay and lesbian couples are significantly more likely to be poor than their married heterosexual counterparts");[9] *see generally* Legal Servs. Corp., *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income*

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[8] *Available at* http://www.taxpayeradvocate.irs.gov/userfiles/file/Full-Report/Status-Updates-Federal-Tax-Questions-Continue-to-Trouble-Domestic-Partners-and-Same-Sex-Spouses.pdf.

[9] *Available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf.

Americans 1 (2009) (finding that, among other things, fewer than one in five civil legal problems faced by low-income Americans is addressed with the assistance of a lawyer).[10]

Section 3 therefore not only withholds a wide array of federal rights and protections from married gay and lesbian couples, but it usually leaves them and their lawyers with few or no sound legal options for approximating those rights. The difficulties presented by Section 3 arise in a range of settings, from procuring affordable health care to achieving financial security and, for binational couples, to navigating the immigration system.

A. Health Care

Ensuring that a spouse is physically cared for "in sickness and in health" is one of the best-recognized responsibilities of marriage. Federal law offers an array of benefits that assist married couples in caring for one another's health and well-being. For example, under the federal Family and Medical Leave Act ("FMLA"), qualified employees of covered companies are entitled to 12 weeks unpaid leave during a 12-month period, *inter alia*, to care for a seriously ill spouse. *See* 5 U.S.C. § 6382(a)(1)(C); 29 U.S.C. § 2612(a)(1)(C). At its core, the FMLA recognizes that no one should have to choose between a job and caring for a sick husband or wife. *See* 139 Cong. Rec. S1261 (daily ed. Feb. 4, 1993) (statement of Sen. Levin) ("[E]mployees should not be punished because they need time to take care of their families."); *id.* at S1260 (statement of Sen. Kerry) ("[T]he [FMLA] is an example of what we ought to mean when we talk about helping families help themselves.").

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[10] *Available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

Because of Section 3, however, married gay and lesbian employees are ineligible for FMLA leave to care for their sick spouses. *See, e.g., Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 2012 U.S. Dist. LEXIS 106713, at *20 (D. Conn. 2012) (describing how lesbian postal employee was denied request for FMLA leave to care for spouse during treatments for debilitating neck injury); *cf.* Lauren Eichmann, *Carle Receives Guilty Verdict*, Daily Illini (Dec. 1, 2004) (explaining that lesbian nurse was fired for taking time off to care for her dying partner of 18 years).[11] Without the protection of the FMLA, unless they are eligible for state-mandated or employer-provided protections, these couples are left with little recourse.

Married gays and lesbians who are among the country's more than 4.4 million federal employees face additional obstacles. Section 3 precludes them from adding their spouses to their federal health insurance and vision plans. *See Pedersen*, 881 F. Supp. 2d 294, 2012 U.S. Dist. LEXIS 106713, at *18 (explaining that Section 3 precluded a Naval employee from adding her wife to her federal health insurance plan); *Golinski v. U.S. Office of Pers.*

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[11] *Available at* http://www.dailyillini.com/news/article_b1aae23c-fce6-5290-ae66-d05641ec9645.html.

Mgmt., 824 F. Supp. 2d 968, 974 (N.D. Cal. 2010) (describing how veteran staff attorney at the U.S. Court of Appeals for the Ninth Circuit was denied health insurance coverage for her wife because of Section 3).

As a result of Section 3, married gay and lesbian couples in which the sole breadwinner is a federal employee therefore have no options other than purchasing an individual policy for the nonworking spouse—typically more expensive than employer-provided insurance—or leaving the nonworking spouse uninsured. *See, e.g.*, Mark W. Stanton, Agency for Healthcare Research & Quality, *Employer-Sponsored Health Insurance: Trends in Cost and Access*, Research in Action, at 2 (Sept. 2004) ("[E]mployment-based health insurance is likely to be less expensive than individually purchased coverage (for the same set of benefits) and typically provides a broader scope of benefits than is available in individually purchased coverage.").[12]

Section 3 also adversely affects married gay and lesbian employees who work for private employers that extend health care coverage to same-sex spouses. To encourage private employers to offer health insurance to the spouses of their employees, the tax code typically exempts employer and employee contributions to a spousal health plan. *See, e.g.*, 26 U.S.C. § 106(a); *see also* Treas. Reg. § 1.106-1 (excluding from gross income employer contributions to spousal health plan). Section 3, however, ensures that the value of a gay or lesbian spouse's insurance coverage is treated as taxable compensation by the federal government. A gay or lesbian employee's contribution to a spouse's insurance premium also cannot be made on a pre-tax basis. These two extra taxes cost the average married or partnered gay or lesbian employee $1,069 per year. *See* M.V. Lee Badgett, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits* 7 (2007).[13]

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[12] *Available at* www.ahrq.gov/research/empspria/empspria.pdf.

Moreover, when a married gay or lesbian employee is laid off from a job, his or her spouse immediately will lose any employer-sponsored health insurance. Typically, the Consolidated Omnibus Budget Reconciliation Act ("COBRA") protects an employee's family by guaranteeing up to 18 months of continued health coverage after employment terminates, and up to 36 months of coverage after the employee dies. *See* 29 U.S.C. §§ 1161-1163. Although COBRA protection extends to the employee's "spouse," *id.* § 1167(3)(A)(i), Section 3 disqualifies husbands and wives of gay and lesbian employees.

B. Retirement Planning

Section 3 presents a tremendous obstacle to a married gay or lesbian couple's ability to plan for a financially secure future. Most married couples rely on Social Security, private savings plans, and, when available, pensions to ensure that both spouses are provided for in retirement. Section 3, however, sharply limits the utility of all three retirement planning tools for married gay and lesbian couples, and there is little that lawyers can do to mitigate these harms.

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[13] *Available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-UnequalTaxesOnEqualBenefits-Dec-2007.pdf.

This is particularly true for married couples who intend to live on one spouse's pension during retirement. Because of Section 3's interplay with the Employee Retirement Income Security Act ("ERISA"), married gays and lesbians are denied automatic survivorship rights to their spouses' pensions. *See* 26 U.S.C. § 401(a)(11) (limiting statutory survivorship rights to federally recognized "spouse"); 29 U.S.C. § 1055(d)-(e) (same). Gay and lesbian retirees who rely on a pension are therefore helpless to protect their non-pensioned spouses. *See, e.g., Pedersen*, 881 F. Supp. 2d 294, 2012 U.S. Dist. LEXIS 106713, at *19 (describing how surviving spouse was not permitted payments from deceased husband's pension due to Section 3).

Similarly, gay and lesbian widows and widowers have no survivorship rights to their spouses' Social Security benefits. Typically, a decedent's qualified surviving spouse automatically receives a lump-sum payment and the amount of the decedent's monthly Social Security benefits (if it is greater than the surviving spouse's monthly benefits). *See* 42 U.S.C. § 402(e)-(f), (i). These policies are designed to avoid the impoverishment of elderly widows and widowers. But when a gay or lesbian person dies, the Social Security system provides no protection to his or her surviving spouse because of Section 3. *See, e.g.*, *Massachusetts*, 682 F.3d at 12 ("[DOMA] . . . prevents the surviving spouse of a same-sex marriage from collecting Social Security survivor benefits.").[14] The denial of Social Security survivorship benefits can cause serious hardship to gay and lesbian widows and widowers. In fact, 53% of married elderly couples receiving Social Security payments rely on those payments for more than half of their income, and for 23% of such couples, Social Security represents at least 90% of their income. *See* Soc. Sec. Admin., Fact Sheet (2012).[15] In December 2012, 6.3 million widows and widowers received Social Security survivorship benefits. *See id.*[16]

Section 3 also complicates a married gay or lesbian couple's ability to invest in Individual Retirement Accounts ("IRAs"). Typically, the annual maximum allowable contribution to an IRA is based on a person's income. But federal tax law permits a spouse filing a joint income tax return to determine his or her IRA contribution limit by reference to the total compensation earned by the couple. *See* 26 U.S.C. § 219(c). As a result, many married couples can significantly boost retirement savings by having a working spouse contribute to an IRA opened in the name of a nonworking spouse. Pursuant to Section 3, however, married gay and lesbian couples are not entitled to this benefit.

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[14] The Social Security Act contains gender-specific definitions of terms such as "husband" and "wife" that arguably could provide the Social Security Administration with an alternative basis to deny gay and lesbian widows and widowers Social Security survivorship benefits. *See, e.g.*, 42 U.S.C. § 402(b). Section 3 nevertheless stands as an absolute bar to such benefits.

[15] *Available at* http://www.ssa.gov/pressoffice/factsheets/basicfact-alt.pdf.

[16] Section 3 disfavors gay and lesbian married couples in the Social Security context even while both spouses are alive. While certain low-earning heterosexual spouses are entitled to special spousal benefits when their husbands or wives reach retirement age, the same benefits are not offered to low-earning gay or lesbian spouses. *See* 42 U.S.C. § 402(b)-(c).

C. Immigration

The United States has long recognized the importance of the marital bond in its immigration policy. For more than 50 years, the federal government has offered foreign spouses of U.S. citizens an expedited pathway to citizenship. *See* Immigration and Nationality Act, Pub. L. No. 82-414, ch. 2, § 319, 66 Stat. 163, 244-45 (1952) (codified as amended at 8 U.S.C. § 1430(a)). An American citizen who marries a foreign national is also immediately eligible to petition for an immigrant visa on his or her spouse's behalf, and the foreign spouse can simultaneously apply for permanent resident status. *See id.*, ch. 1, § 205(b), 66 Stat. at 180 (codified as amended at 8 U.S.C. § 1151(b)(2)(A)(i)).[17]

These provisions are central to our Nation's immigration policy. Yet Section 3 denies marital recognition to binational gay and lesbian couples. As a result, binational gay and lesbian couples can be forcibly separated by the United States government notwithstanding their legally valid marriages.[18] *See, e.g.*, Michael Martinez, *Gay Married Immigrant Fights Deportation in California*, CNN.com (Mar. 23, 2012).[19]

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[17] As early as 1924, the United States began providing immigration visas to the wives (though not the husbands) of U.S. citizens. *See* Immigration Act of 1924, Pub. L. No. 68-139, ch. 190, §§ 4(a), 8, 43 Stat. 153, 155, 157.

Because our immigration system is based on federal rules and regulations, Section 3 poses enormous obstacles to lawyers who wish to aid their gay and lesbian clients in this area. This is no small problem: According to a recent study, an estimated 40,000 gay and lesbian couples living in the United States include at least one partner who is not a citizen. *See* Craig J. Konnoth & Gary J. Gates,

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[18] The Obama administration recently declared that it would consider the existence of a same-sex relationship when exercising prosecutorial discretion in commencing, closing, or staying removal proceedings. *See* Letter from Janet Napolitano, Sec'y of Dep't of Homeland Sec., to Rep. Nancy Pelosi (Sept. 27, 2012), *available at* http://www.metroweekly.com/poliglot/12-3384%20Pelosi%20S1%20signed%20response%2009.27.12.pdf. The new policy, however, does not carry the force of law and therefore can be reversed by this or any future administration. Moreover, the policy does not provide the pathway to legal status that heterosexual foreign nationals who marry American citizens are granted. A gay or lesbian foreign national therefore must have an independent basis to live or work legally in the United States alongside a citizen spouse.

[19] *Available at* http://www.cnn.com/2012/03/22/us/california-gay-deportation/index.html.

Same-sex Couples and Immigration in the United States 1 (2011).[20]

Section 3 also undermines the marital bonds of gay and lesbian couples in which both spouses are foreign.[21] For example, the heterosexual spouse of a foreign national granted asylum is automatically entitled to asylum so that the couple can live together in the United States (even if the spouse would not have been entitled to asylum independently). *See* 8 U.S.C. § 1158(b)(3)(A). For married gay and lesbian couples, however, each spouse must prove entitlement to asylum.

D. Military Benefits

From our founding, American society has expressed its "high regard for the special place that military heroes hold in our tradition." *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (plurality opinion). Our federal laws embody that commitment and offer an array of benefits to veterans and current members of the armed services. *See, e.g.*, U.S. Dep't of Veterans Affairs, Federal Benefits for Veterans, Dependents and Survivors (2012).[22] Many of these benefits extend to military spouses and children. Among other things, military spouses are entitled to military health insurance, survivorship payments, and burial alongside a spouse at a VA national cemetery. *Id.* at 70, 98-109. These benefits recognize not only the sacrifices made by service members' families but also that service members perform their duties better if they know that their loved ones are being cared for. *See* S. Rep. No. 93-235 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1579, 1585.

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[20] *Available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Konnoth-Binational-Report-Nov-2011.pdf.

[21] Same-sex civil marriages are validly performed in 11 countries as well as parts of Mexico. *See* BBC News, *Gay Marriage: Party Leaders Hail Vote* (Feb. 5, 2013), http://www.bbc.co.uk/news/world-21321731.

[22] *Available at* http://www.va.gov/opa/publications/benefits_book/2012_Federal_benefits_ebook_final.pdf.

Section 3 denies many of these benefits from the husbands and wives of gay and lesbian service members.[23] Although the Department of Defense recently extended a handful of benefits to gay and lesbian military spouses, more than 100 other benefits available to opposite-sex military spouses remain inaccessible because of Section 3. *See* Ernesto Londoño, *Pentagon to Extend Certain Benefits to Same-Sex Spouses*, Washington Post.com (Feb. 5, 2013).[24]

One such benefit is health insurance. Lawyers cannot mitigate the harm Section 3 causes to gay and lesbian military spouses when they cannot afford or otherwise obtain health insurance. *See, e.g.*, Complaint, *McLaughlin v. Panetta*, No. 11-cv-

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[23] The eligibility of gay and lesbian military spouses for military benefits may also be limited by 38 U.S.C. § 101(3), (31) (limiting definition of "spouse" in context of veterans' benefits to married persons of opposite sex).

[24] *Available at* http://articles.washingtonpost.com/2013-02-05/world/36758629_1_openly-gay-troops-couples-gay-service-members.

11905, at ¶¶ 42-45, 50-53 (D. Mass. Oct. 27, 2011) (describing how one uninsured military spouse travels to Mexico for affordable medical procedures and another has put off necessary surgery).

Gay and lesbian spouses also may be ineligible for certain financial protections when a service member spouse dies. Typically, upon the death of a service member or veteran, the military provides a surviving spouse with a monthly survivorship stipend. *See* 38 U.S.C. § 1311. Low-income surviving spouses of war veterans additionally receive the Survivors' Pension.[25] None of these financial protections are offered to the spouses of gay and lesbian service members or veterans, however.[26]

E. Taxes

As demonstrated by this very case, when gay and lesbian couples' marriages are not recognized by the federal government, they may bear substantial tax burdens that married heterosexual couples do not face. For example, federal law typically exempts from estate taxes all property that passes to a surviving spouse who is an American citizen. *See* 26 U.S.C. § 2056(a). This exemption recognizes that a married couple is a unit, and taxation on marital property is therefore deferred until both spouses have died or the property is otherwise relinquished. *See Estate of Turner*, 138 T.C. 14, 20 (T.C. 2012). But because Section 3 prevents the I.R.S. from recognizing her marriage, Edith Windsor was forced to pay more than $300,000 in federal estate taxes on her own marital property.

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[25] *See* http://benefits.va.gov/pensionandfiduciary/pension/spousepen.asp.

[26] Similarly, the spouses of gay and lesbian public safety officers who die in the line of duty are not eligible for the death benefits that are paid to the spouses of all other safety officers. *See* 42 U.S.C. § 3796(a)(1).

The gift tax is a related example. Federal law recognizes that spouses transfer money and items of value to each other all the time. *See* S. Rep. No. 97-144, at 127 (1981). The tax code therefore provides heterosexual married couples with an unlimited exemption from the federal gift tax. *See* 26 U.S.C. § 2523. Almost any transfer of value[27] from one gay or lesbian spouse to the other, however, is viewed as a "gift" by the federal government, and a spouse who transfers more than $14,000 in value in any given year must report that "gift" to the I.R.S. *See* Rev. Proc. 2012-41(3.19).[28] Once a couple exceeds a lifetime exclusion amount, every transfer of wealth within the marital relationship in excess of the annual exemption—everything from Christmas presents to half the value of a jointly owned home to the value of a deceased spouse's estate—may be taxed by the federal government at a marginal rate as high as 40%. *See* American Taxpayer Relief Act of 2012, Pub. L. No. 112- 240, § 101(c)(1), (3)(A), 126 Stat. 2313 (2013).

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[27] Certain medical and educational payments are exempt from the gift tax rules. *See* 26 U.S.C. § 2503(e).

[28] This threshold is easily surpassed. Indeed, it can happen if one spouse purchases a new car for the other or even pays the mortgage for the couple's home.

Married gay and lesbian couples also face significant burdens related to their income taxes. In seven of the jurisdictions where same-sex marriage is recognized,[29] married gay and lesbian couples must file their state and local income taxes as married but their federal income taxes as single. Filing with different statuses in different jurisdictions is complicated and often requires assistance from tax lawyers and accountants. Moreover, according to one recent analysis, the inability to file federal income taxes as "married" costs the average gay or lesbian couple several thousand dollars each year.[30] *See* Blake Ellis, *Same-Sex Spouses Lose Big on Taxes*, CNN Money.com (Dec. 31, 2011);[31] *see also* M.V. Lee Badgett, *The Same-Sex Marriage Divide: The Economic Value of Marriage for Same-Sex Couples*, 58 Drake L. Rev. 1081, 1089 (2010) (concluding that 66% of married gay couples in Massachusetts would save on average

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[29] The seven jurisdictions are Connecticut, Iowa, Maine, Massachusetts, New York, Vermont, and the District of Columbia. New Hampshire and Washington also issue marriage licenses to gay and lesbian couples but have no state income tax. In Maryland, the tenth jurisdiction that recognizes same-sex marriage, married gay and lesbian couples presently must file as single.

[30] Although the average gay or lesbian couple pays higher income taxes, some married gay and lesbian couples may pay lower income taxes when they are required to file separately, as explained by *amicus* Citizens for Responsibility and Ethics in Washington. (Br. at 12-20.)

[31] *Available at* http://money.cnn.com/2011/12/26/pf/taxes/gay_marriage_taxes/index.htm?hpt=hp_t2.

$2,325 on their federal income taxes if they could file as married).[32]

F. Ethical Responsibilities

Beyond withholding critical rights from married gay and lesbian couples, Section 3 also exempts them from certain legal obligations. Federal anti-nepotism laws provide a case in point. Federal officials with hiring or supervisory authority are barred by statute from appointing, employing, promoting, or advancing their spouses to positions within governmental agencies. *See* 5 U.S.C. § 3110(a)(3). By virtue of Section 3, however, married gay or lesbian federal officials are not bound by this law as to their spouses. By the same token, federal decision-makers are typically precluded from participating in any decision in which they or their spouses have a financial stake. *See* 18 U.S.C. § 208(a). But because Section 3 bars federal recognition of same-sex marriages, gay and lesbian employees can decide an issue that directly affects their spouses. *See also* 2 U.S.C. § 31-2 (Senate restrictions on accepting gifts extends to recognized "spouse").

Attorneys who advise on government ethics issues are left in a difficult position when counseling clients because Section 3 authorizes conduct that most observers would argue, but for Section 3, would be illegal. In enacting Section 3, however, Congress seems not to have considered this practical effect of the law. *See Massachusetts*, 682 F.3d at 13 (noting that "only one day of hearings was held on DOMA" and "none of the testimony concerned DOMA's effects on the numerous federal programs at issue"). Now that nearly one-fifth of the States have exercised their prerogative to allow gay and lesbian couples to marry, the sweeping, harsh, and, in this instance, unintended impact of Section 3 has become clear.

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[32] As discussed above, *see supra* at 13-14, Section 3 also causes gay and lesbian couples to suffer negative tax ramifications if one spouse is added to the other's employer-based health insurance plan.

II. SECTION 3'S UNPRECEDENTED EXCLUSION OF A DISCRETE GROUP OF LEGALLY MARRIED COUPLES FROM FEDERAL BENEFITS AND RESPONSIBILITIES CONTRAVENES EQUAL-PROTECTION PRINCIPLES

The governmental interests advanced in support of Section 3 cannot justify the unprecedented exclusion of one group, legally married gay and lesbian couples, from all of the federal benefits and responsibilities of marriage. Whether Section 3 is subjected to the heightened scrutiny accorded suspect classifications, *see, e.g., Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (plurality opinion) (illegitimacy); *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (plurality opinion) (gender), or the type of rational-basis review this Court has employed for similar non-economic regulations targeting a particular minority group, *see Romer*, 517 U.S. at 631-35 (gays and lesbians); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985) (the mentally disabled); *U.S. Dep't of Agric. v. Moreno*, 413 U.S.

528, 534-38 (1973) (households with unrelated members), it fails to pass constitutional muster.

The ABA will not repeat the parties' arguments on this issue but will focus on one specific point: Section 3 is without precedent in federal law. Never before has the federal government adopted a definition of marriage that applies across the board to every federal statute and regulation and that excludes a class of people who are legally married under the laws of their States. Indeed, the regulation of domestic relations in general, and marriage in particular, is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

The novelty of Section 3's intrusion into an area traditionally reserved to the States strongly supports two conclusions. *First*, Section 3 warrants careful review. As this Court noted in *Romer*, "[t]he absence of precedent for [a law] is itself instructive; 'discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to [equal protection].'" 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). *Second*, the "unique federal interests" proffered by the Bipartisan Legal Advisory Group ("BLAG") (Br. at 21) in support of Section 3—which essentially amount to assertions that Section 3 preserves each sovereign's ability to define marriage and that there is a need for a uniform federal definition of marriage—cannot support Section 3's singular withdrawal of the benefits of marriage from gay and lesbian couples.

Section 3 accordingly cannot survive appropriate scrutiny under equal-protection principles.

A. Section 3's Unprecedented Intrusion into an Area Traditionally Reserved to the States Signals the Need for Careful Review

This Court stated long ago that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *In re Burrus*, 136 U.S. 586, 593 (1890)). Subject to constitutional constraints, the States have always had "the absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created." *Sosna*, 419 U.S. at 404 (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878)); *see also, e.g., Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) (recognizing traditional exception to statutory federal diversity jurisdiction for domestic relations matters); *Mansell v. Mansell*, 490 U.S. 581, 587 (1989) ("[D]omestic relations are preeminently matters of state law."); *Moore v. Sims*, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern."); *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) ("[T]here is no federal law of domestic relations, which is primarily a matter of state concern."). Indeed, Congress acknowledged when it enacted Section 3 that "[t]he determination of who may marry in the United States is uniquely a function of state law." H.R. Rep. No. 104-664, at 3 (1996).

Before Section 3, then, there was no general federal definition of "marriage." Almost without exception, federal law simply deferred to state law, treating as married any couple legally married under the laws of their State. *See, e.g.*, *Lembcke v. United States*, 181 F.2d 703, 706 (2d Cir. 1950) (concluding that the validity of a marriage for purposes of qualifying for military spousal survivorship benefits depended on whether the marriage was recognized by state law); *Brown v. United States*, 164 F.2d 490, 490 (3d Cir. 1947) (deferring to state law to determine whether claimant on deceased soldier's federal life insurance policy was his wife).[33]

By barring a specific class of couples legally married under state law from the federal rights and responsibilities that accompany marriage, Section 3 broke with two centuries of tradition reserving the realm of domestic relations to the States. "[S]ometimes the most telling indication of a severe constitutional problem is the lack of historical precedent for Congress's action." *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (quotation marks and alterations omitted). Section 3's unprecedented incursion into the traditional province of the States, at a minimum, calls for careful examination.

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[33] When Congress has defined terms relating to marriage in the past, it has done so in the context of specific statutes and in furtherance of a specific governmental interest other than the exclusion of an entire class of married persons from all of the federal benefits accompanying marriage. *See Massachusetts*, 682 F.3d at 12 (citing as example 8 U.S.C. § 1186a(b)(1)(A)(i), which guards against immigration fraud).

Moreover, it is a commonplace that federal statutes are presumed not to alter the traditional federal-state balance. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 275 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001); ***BFP** v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). A statute that *does* alter that balance—and does so as dramatically as Section 3—should be examined carefully to ensure that its classifications, in light of the justifications advanced for them, satisfy the Constitution's demands. *See, e.g.*, ***Massachusetts***, 682 F.3d at 6 ("Given that DOMA intrudes broadly into an area of traditional state regulation, a closer examination of the justifications that would prevent DOMA from violating equal protection . . . is uniquely reinforced by federalism concerns.").

B. Section 3 Cannot Survive Appropriate Scrutiny under Equal-Protection Principles

By "deem[ing] a class of [married] persons a stranger to [federal] laws," ***Romer***, 517 U.S. at 635, notwithstanding recognition by a couple's State of their marriage, Section 3 denies that class of persons—here, legally married gay and lesbian couples—equal protection. Even under the rational-basis review applied in *Romer*, none of the governmental interests proffered in support of Section 3 can justify its sweeping exclusion of lawfully married gay and lesbian couples from the federal rights and responsibilities of marriage.

BLAG offers four "unique federal interests" that purportedly justify Section 3: (1) it "preserves each sovereign's ability to define marriage for itself" (Br. at 30-33) (capitalization omitted); (2) it fills the need for a "uniform federal definition" of marriage (Br. at 33-37); (3) it permits States to "act as laboratories of democracy" while the federal government reserves judgment on same-sex marriage (Br. at 41-43); and (4) it protects the public fisc (Br. at 37-41). BLAG also contends that Section 3 promotes traditional marriage and child-rearing (Br. at 43-49). Section 3 rationally furthers none of these asserted interests.

BLAG's first three justifications for Section 3 founder in light of the States' long-standing primacy in defining marriage. *First*, Section 3 does not "preserve each sovereign's ability to define marriage for itself." The federal government, as one of those sovereigns, has never defined marriage for itself, and even under Section 3's regime it still does not. As *amici curiae* Family Law Professors explained in detail in the court below, the regulation of marriage has always varied from State to State in numerous ways. *See* Family Law Prof. Br. at 7-9. For instance, the minimum age to marry, the permitted and proscribed degree of consanguinity, and recognition of common-law marriage differ in different States. *See id.* Section 3 does not change this and thus does not enable the federal government to define marriage for itself. Federal law continues, by and large, to treat as married anyone who is validly married under state law, notwithstanding differences among the States—except that it repudiates, across the board, one particular class of marriages that certain States have chosen to permit.

Second, if the goal were to create a "uniform federal definition" of marriage or to ensure national uniformity in eligibility for federal benefits, Section 3 again fails. BLAG asserts (Br. at 36) that "when state definitions of marriage vary only in the details, it is understandable and commendable for federal law to borrow those definitions," but "when a state is on the verge of making a fundamental change to the definition, that creates a need for Congress to choose between uniformity and borrowing (a need that simply did not exist before)." But if the goal is uniformity, it should not matter what the differences are; a common-law marriage valid in some States but not others does not fit within a uniform definition of marriage or ensure national uniformity in eligibility for federal benefits. The need for Congress to choose between uniformity and borrowing has always existed, and Congress has historically chosen to borrow, and continues to borrow, except in the case of valid same-sex marriages.

Third, the notion that Section 3 permits the States to "act as laboratories of democracy" simply ignores what Section 3 actually says and does. BLAG invokes Justice Brandeis's famous statement that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory" for "novel social and economic experiments." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). But far from promoting such efforts by the States, Section 3 hinders them. While Section 3 does not, by its terms, prevent a State from recognizing same-sex marriage or preempt its decision to do so, it nonetheless "burden[s] the choice of [S]tates . . . to regulate the rules and incidents of marriage." *Massachusetts*, 682 F.3d at 12. For example, a State that permits married gay and lesbian couples to combine their income for Medicaid purposes—as married heterosexual couples may do—could have its federal funding rescinded for noncompliance with Section 3. *Id.* at 7.

More fundamentally, Section 3 thwarts the democratic process by preventing States from allowing their gay and lesbian citizens a truly equal share in the benefits and responsibilities of civil marriage. If Congress wanted to encourage the States to choose freely which marriages they would permit, it would have continued to recognize all marriages valid under state law. As it is, Section 3 undermines States' ability to treat their gay and lesbian citizens equally by ensuring that no matter what a State does, married gay and lesbian couples will not enjoy the same rights and responsibilities as married heterosexual couples in that same State.

Likewise, protecting the public fisc is not a sufficient reason for excluding a discrete minority group from benefits otherwise offered to all. *See Romer*, 517 U.S. at 635 (rejecting interest in "conserving resources" as a rational basis for law excluding gays and lesbians from civil-rights protections); *Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."); *see also* U.S. Br. at 46-47; Windsor Br. at 53-54.

Finally, Section 3 does nothing to promote traditional marriage and child-rearing; it merely penalizes gay and lesbian married couples without affecting heterosexual couples. *See* U.S. Br. at 41-44; Windsor Br. at 39-47. As a purely logical matter, excluding gay and lesbian couples from federal benefits cannot create an incentive for heterosexual couples to marry or raise children responsibly. "This is not merely a matter of poor fit of remedy to perceived problem, but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage." *Massachusetts*, 682 F.3d at 15 (citations omitted).

Ultimately, none of these purported governmental interests can justify Section 3's disparate treatment of legally married persons similarly situated in all respects except for the gender of their spouses. Whatever Congress's reasons may have been in enacting it, Section 3 contravenes the equal protection of the laws.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

OFFICIAL POLICIES AND CONSTITUTIONAL AMENDMENTS OF THE AMERICAN BAR ASSOCIATION

1. Policy adopted by the House of Delegates, August 1973

   Be It Resolved, That the legislatures of the several states are urged to repeal all laws which classify as criminal conduct any form of non-commercial sexual conduct between consenting adults in private, saving only those portions which protect minors or public decorum.

2. Policy adopted by the House of Delegates, August 1987

   BE IT RESOLVED, That the ABA condemns crimes of violence including those based on bias or prejudice against the victim's race, religion, sexual orientation, or minority status, and urges vigorous efforts by federal, state, and local officials to prosecute the perpetrators and to focus public attention on this growing national problem.

3. Policy adopted by the House of Delegates, August 1989

   BE IT RESOLVED, That the American Bar Association urges the Federal government, the states and local governments to enact legislation, subject to such exceptions as may be appropriate, prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations. "Sexual orientation" means heterosexuality, bisexuality and homosexuality.

4. Policy adopted by the House of Delegates, August 1991

BE IT RESOLVED, That the American Bar Association supports the enactment of authoritative measures requiring studies of the existence, if any, of bias in the federal judicial system, including bias based on race, ethnicity, gender, age, sexual orientation and disability, and the extent to which bias may affect litigants, witnesses, attorneys and all those who work in the judicial branch.

BE IT FURTHER RESOLVED, That the American Bar Association urges that such studies include the development of remedial steps to address and eliminate any bias found to exist.

5. Policy adopted by the House of Delegates, February 1992

BE IT RESOLVED, That the American Bar Association opposes any efforts by government to withhold funds from, or otherwise penalize, educational institutions for denying access to campus placement facilities to government employers who contravene university policies by discriminating on the basis of sexual orientation.

6. Amendment adopted by the House of Delegates, August 1992

PROPOSAL: Amend the Constitution to provide that the National Lesbian and Gay Law Association (hereinafter "NLGLA") is an affiliated organization.

Amend Section 6.8(a)(1) to read as follows:

(1) The American Judicature Society, the American Law Institute, the Association of American Law Schools, the Conference of Chief Justices, the Hispanic National Bar Association, the National Asian Pacific American Bar Association, the National Association of Attorneys General, the National Association of Bar Executives, the National Association of Women Judges, the National Bar Association, the National Conference of Bar Examiners, the National Conference of Commissioners on Uniform State Laws, the National Conference of Women's Bar Associations, the National Lesbian and Gay Law Association and the National Organization of Bar Counsel.

7. Policy adopted by the House of Delegates, August 1995

RESOLVED, That the American Bar Association supports the enactment of legislation and the implementation of public policy providing that child custody and visitation shall not be denied or restricted on the basis of sexual orientation.

8. Policy adopted by the House of Delegates, August 1996

RESOLVED, That the American Bar Association urges state, territorial and local bar associations to study bias in their community against gays and lesbians within the legal profession and the justice system and make appropriate recommendations to eliminate such bias.

9. Policy adopted by the House of Delegates, February 1999

RESOLVED, That the American Bar Association supports the enactment of laws and implementation of public policy that provide that sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interests of the child.

10. Policy adopted by the House of Delegates, August 2002

RESOLVED, That the American Bar Association urges federal, state, territorial, and local governments to enact legislation, promulgate regulations, or take other necessary action to ensure that an unmarried surviving partner who shared a mutual, interdependent, committed relationship with a victim of terrorism or other crime can qualify for crime victim compensation and assistance funds provided by that government to eligible spouses.

FURTHER RESOLVED, That eligibility for such funds should be determined without reference to intestate succession laws and should not affect the operation of such laws.

11. Amendment adopted by the House of Delegates, August 2002

Amend §6.4(e) of the Constitution to read as follows:

§6.4(e) A state or local bar association may not be represented in the House if its governing documents discriminate with respect to membership because of race, sex, religion, creed, color, national origin, ethnicity, age, persons with disabilities and/or sexual orientation.

ADOPTED BY THE HOUSE OF DELEGATES
February 9, 2004

RESOLVED, That to preserve the authority of the states and territories to regulate marriage under our federal system, the American Bar Association opposes any federal enactment that would restrict the ability of a state to:

(a) prescribe the qualifications for civil marriage between two persons within its jurisdiction; and

(b) determine when effect should be given to a civil marriage validly contracted between two persons under the laws of another jurisdiction.

RECOMMENDATION (2009)

RESOLVED, That the American Bar Association urges Congress to repeal 1 U.S.C. § 7, which denies federal marital benefits and protections to lawfully married same-sex spouses.

RECOMMENDATION (2010)

RESOLVED, That the American Bar Association urges state, territorial, and tribal governments to eliminate all of their legal barriers to civil marriage between two persons of the same sex who are otherwise eligible to marry.

STANDARD 211 FOR APPROVAL OF LAW SCHOOLS. NON-DISCRIMINATION AND EQUALITY OF OPPORTUNITY

(a) A law school shall foster and maintain equality of opportunity in legal education, including employment of faculty and staff, without discrimination or segregation on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability.

(b) A law school shall not use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability.

(c) This Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of students and employment of faculty and staff that directly relate to this affiliation or purpose so long as (i) notice of these policies has been given to applicants, students, faculty, and staff before their affiliation with the law school, and (ii) the religious affiliation, purpose, or policies do not contravene any other Standard, including Standard 405(b) concerning academic freedom. These policies may provide a preference for persons adhering to the religious affiliation or purpose of the law school, but shall not be applied to use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability. This Standard permits religious affiliation or purpose policies as to admission, retention, and employment only to the extent that these policies are protected by the United States Constitution. It is administered as though the First Amendment of the United States Constitution governs its application.

(d) Non-discrimination and equality of opportunity in legal education includes equal opportunity to obtain employment. A law school shall communicate to every employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principles of non-discrimination and equality of opportunity on the basis of race, color, religion, national origin, gender, sexual orientation, age and disability in regard to hiring, promotion, retention and conditions of employment.

AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

Nos. 12-144 & 12-307

IN THE
Supreme Court of the United States

DENNIS HOLLINGSWORTH, *et al.*,
Petitioners,
v.
KRISTEN M. PERRY, *et al.*,
Respondents.

UNITED STATES,
Petitioner,
v.
EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS THE EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, AND BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals to the Ninth and Second Circuits

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF HOLLINGSWORTH AND BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS AND SUPPORTING REVERSAL

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TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. *LAWRENCE* ADDRESSED CRIMINALIZATION OF PRIVATE CONDUCT, WHEREAS AFFIRMING THE TRADITIONAL DEFINITION OF MARRIAGE CONCERNS PUBLIC GOVERNMENTAL RECOGNITION OF A RELATIONSHIP 8

A. *Lawrence* Protected Privacy and Liberty 8

B. The Court in *Lawrence* Said Its Holding and Reasoning Did Not Involve Whether Government Must Provide Any Recognition to Gay Relationships 11

C. Statutes Reaffirming Traditional Marriage, Unlike the Statute in *Lawrence*, Do Not Unconstitutionally Infringe on Privacy or Liberty 12

II. STATES CAN CONSTITUTIONALLY PROMOTE OR FACILITATE ONLY TRADITIONAL MARRIAGE, EVEN THOUGH CITIZENS HAVE A CONSTITUTIONAL RIGHT UNDER *LAWRENCE* TO ENTER SAME-SEX RELATIONSHIPS 14

TABLE OF CONTENTS—Continued

Page

A. Even When the Constitution Protects Certain Conduct, Government Can Promote or Facilitate Different Conduct 14

B. The Constitution Does Not Require Government to Strictly Tailor Its Definition of Marriage to Cover Only Procreative Couples 19

III. UNLIKE THE STATUTE IN *LAWRENCE*, TRADITIONAL MARRIAGE LAWS HAVE BEEN ENFORCED FOR CENTURIES AND REAFFIRMED BY A SUBSTANTIAL MAJORITY OF STATES AND THE FEDERAL GOVERNMENT 23

CONCLUSION 27

TABLE OF AUTHORITIES

CASES Page

Adams v. Howerton,
486 F.Supp. 1119, 1124-25 (C.D. Cal. 1980), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982) 22

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 21

Bowers v. Hardwick,
478 U.S. 186 (1986) 19

Califano v. Webster,
430 U.S. 313 (1977) 21

Carey v. Population Services Int'l,
431 U.S. 678 (1977) 10, 11

Christian Legal Soc'y v. Martinez,
130 S.Ct. 2971 (2010) 15

Dudgeon v. United Kingdom,
45 Eur. Ct. H.R. (ser. A) (1981) 16

Eisenstadt v. Baird,
405 U.S. 438 (1972) 9, 11

Griswold v. Connecticut,
381 U.S. 479 (1965) 9, 17, 18, 20

Harris v. McRae,
448 U.S. 297 (1980) 16, 17, 18

Hernandez v. Robles,
855 N.E.2d 1 (N.Y. 2006) 13

In re Marriage Cases,
143 Cal. App. 4th 873 (2006), *rev'd*, 183 P.3d 384 (Cal. 2008) 13

Page

Lawrence v. Texas,
539 U.S. 558 (2003)....................................*passim*

Loving v. Virginia,
388 U.S. 1 (1967).. 24

Maher v. Roe,
432 U.S. 464 (1977)................................15, 16, 18

Massachusetts Bd. of Retirement v. Murgia,
427 U.S. 307 (1976)...................................... 21

Metro Broadcasting, Inc. v. FCC,
497 U.S. 547 (1990)...................................... 21

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932)...................................... 26

Nguyen v. INS,
533 U.S. 53 (2001).. 21

Nollan v. Cal. Coastal Comm'n,
483 U.S. 825 (1987)...................................... 22

Norwood v. Harrison,
413 U.S. 455 (1973)...................................... 15

Pickering v. Bd. of Educ.,
391 U.S. 563 (1968)...................................... 22

Pierce v. Society of Sisters,
268 U.S. 510 (1925)................................15, 17, 18

Planned Parenthood of Southeastern Pa. v. Casey,
505 U.S. 833 (1992).........................10, 13, 16, 18

Roe v. Wade,
410 U.S. 113 (1973)..................................9, 16, 18

TABLE OF AUTHORITIES—Continued

Page

Romer v. Evans,
517 U.S. 620 (1996) 3, 25

Rostker v. Goldberg,
453 U.S. 57 (1981) 21

Rust v. Sullivan,
500 U.S. 173 (1991) 16, 18

Schalk and Kopf v. Austria,
App. No. 30141/04 (Eur. Ct. H.R. June 24, 2010) 18

Standhardt v. Superior Ct.,
77 P.3d 451 (Ariz. App. 2003) 22

Washington v. Glucksberg,
521 U.S. 702 (1997) 7, 24, 25, 26

Webster v. Reproductive Health Servs.,
492 U.S. 490 (1989) 16, 18

OTHER AUTHORITIES

Catholic Canon Law, 1983 Code c.1084, §3 ... 20

Monte Neil Stewart, *Marriage Facts*, 31 HARV. J. L. & PUB. POL'Y 313, 345 (2008) 22, 23

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard

---

[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to protect the constitutional rights of all Americans, regardless of political correctness, including those who believe in and choose to act on traditional family values.

STATEMENT OF THE CASE

Hollingsworth v. Perry

In 2000, the people of California passed Proposition 22, enacting by public Initiative a statute defining marriage as a relationship between a man and a woman. CAL. FAM. CODE §308.5. In 2008, the California Supreme Court held that Proposition 22 as passed by vote of the People was unconstitutional under the California Constitution, even though the Proposition merely reaffirmed the definition of marriage that had prevailed in the state since California first became a state in 1848. The Court interpreted the state Constitution to require that same age old definition of marriage that had prevailed for millennia throughout the world to be redefined to include same sex couples.

Less than 6 months later, the people of California passed Proposition 8, which amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."

Plaintiff respondents sued public officials responsible for enforcing California's marriage laws, arguing that Prop 8 violates the 14th Amendment of the U.S. Constitution. The public official defendants informed the Court they would not defend Prop 8. The proponents of Prop 8 and their ballot measure committee intervened.

After trial, the district court ruled that Prop 8 does violate the Equal Protection Clause of the 14th Amendment because the definition of marriage it adopts does not include same sex couples. Pet. App. 137a. The Ninth Circuit stayed the ruling pending appeal by the Defendant Petitioners.

A divided panel of the Ninth Circuit affirmed the district court, "on the narrow grounds" that the effect of Proposition 8 would be to "take away" from same sex couples "the official designation of 'marriage,'" while "leaving in place all of its incidents," which are available to same sex couples under California's domestic partnership laws. Pet.App.17a-18a. The majority ruled that under this Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), this combined "unique and strictly limited effect of Proposition 8" left its traditional definition of marriage followed in throughout the history of mankind unsupportable by any conceivable legitimate rational basis. Judge Smith dissented.

The Ninth Circuit denied Petitioner's petition for rehearing en banc, Pet.App.444a, Judges O'Scannlain, Bybee, and Bea dissenting on the grounds that the panel majority had declared unconstitutional the "definition of marriage that has existed for millennia" based on a "gross misapplication of *Romer v. Evans*." Pet.App.445a. Judge Smith also dissented from the denial. Pet.App.443a.

United States of America v. Edith Schlain Windsor

Congress passed the Defense of Marriage Act (DOMA) in 1996, signed into law by President Bill Clinton. Pub. L. No. 104-199, 110 Stat. 2419. Section 2 of that Act provides that no State is required to give effect to any public act, record, or judicial proceeding of another state that authorizes same sex marriage under it's state laws. DOMA Section 2, 110 Stat. 2419 (28 U.S.C. 1738C).

Section 3 defines "marriage" and "spouse" under federal law to exclude same sex marriages, regardless of whether they are recognized under any state law. The Section states that for any federal law, ruling, regulation, or administrative decision, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. DOMA Section 3, 110 Stat. 2419 (1 U.S.C. 7).

DOMA consequently does not invalidate same sex marriages in any state that authorizes them. But it defines marriage as a union between one man and one woman for the more than 1,000 federal laws and programs for which qualification turns in part on marital status, as was originally intended when those laws and programs were enacted. See U.S. Gen. Accounting Office, *Defense of Marriage Act: Update to*

Prior Report 1 (2004), http://www.gao.gov/assets/100/92441.pdf.

The Plaintiff in this case, Edith Schlain Wilson, married her same sex partner Thea Spyer, in Canada in 2007. The couple resided in New York when Spyer died in 2009, leaving her estate to Plaintiff. App., *infra*, 3a; Am. Compl. paras 10, 11. As executor of Spyer's estate, Plaintiff paid $363,000 in federal estate taxes, and then filed a refund claim under 26 U.S.C. 2056(a), which provides for property passing from a decedent to a surviving spouse to pass free of federal estate taxes. But the Internal Revenue Service denied the refund claim, holding that Plaintiff was not a spouse of the decedent under DOMA Section 3, and therefore could not be a surviving spouse under Section 2056(a). App., *infra*, 3a-4a; Am. Compl. paras 72-78.

Plaintiff consequently filed this suit seeking declaratory and injunctive relief that DOMA Section 3 is unconstitutional in violation of the Equal Protection Clause, since it treats married same sex couples in New York differently from married opposite sex couples. The complaint also sought return of the federal estate taxes paid by paid by Spyer's estate. App., *infra*, 4a; Am. Compl. paras 82-85.

The United States District Court for the Southern District of New York granted summary judgment to the Plaintiff, holding that Section 3 of DOMA does violate the Equal Protection Clause, as the court concluded it could find no legislative purpose of

Section 3 that bears a rational relationship to a legitimate government interest. App., *infra*, 15a-22a.

The defendants filed timely notices of appeal to the United States Court of Appeals for the Second Circuit. App., *infra*, 25a-29a. Under 28 U.S.C. 1254, the Plaintiff filed a petition for a writ of certiorari directly to this Court on July 16, 2012. The Court granted certiorari on

SUMMARY OF ARGUMENT

Lawrence v. Texas, 539 U.S. 558 (2003), does not apply to this case for at least three independent reasons.

First, *Lawrence* was a privacy and liberty case, which is why *Lawrence* itself said that its holding and reasoning did not involve the issue whether government must redefine marriage to include same-sex relationships. The redefinition of marriage involves *public* recognition of a relationship—not privacy or liberty. This case involves no governmental infringement on plaintiffs' constitutional privacy or liberty rights. The traditional definition of marriage does not limit personal autonomy, and it does not prevent citizens from defining or living according to their own individual concepts of existence.

Second, even when the Constitution prevents governments from prohibiting certain conduct, it does not require them to promote or facilitate it. For example, States cannot ban all abortions, but they can refuse to fund abortion and even actively promote childbirth. Analogously, while the state certainly cannot ban same-sex relationships under *Lawrence*, the government is under no obligation to recognize or facilitate them to the same degree as traditional marriages. The European Court of Human Rights drew this precise distinction in holding that member states could adhere to traditional marriage even though they cannot ban same-sex relationships. Furthermore, the same privacy concerns that animated *Lawrence* preclude the argument (often advanced by same-sex marriage advocates) that traditional marriage cannot serve the interest of responsible procreation unless government limits marriage to fertile couples. Such a bizarre and invasive rule would stand *Lawrence*, and this Court's privacy jurisprudence, on its head.

Third, the traditional definition of marriage has existed throughout the world for centuries and has been reaffirmed by a substantial majority of States and the Federal Government. ***Washington v. Glucksberg***, 521 U.S. 702 (1997), is therefore a better analog to this case than *Lawrence*. As in ***Glucksberg***, this Court should allow the States and Congress to continue the ongoing democratic debate over the wisdom of extending marriage to same-sex relationships, instead of interpreting the Constitution to mandate a definition of marriage that lacks any support in our nation's history, traditions, or practices and that tens of millions of Americans fundamentally oppose.

ARGUMENT

I. *LAWRENCE* ADDRESSED CRIMINALIZATION OF PRIVATE CONDUCT, WHEREAS AFFIRMING THE TRADITIONAL DEFINITION OF MARRIAGE CONCERNS PUBLIC GOVERNMENTAL RECOGNITION OF A RELATIONSHIP.

A. *Lawrence* Protected Privacy and Liberty.

Lawrence held that criminalization of private, consensual sex—whether by heterosexuals or homosexuals—violates the Due Process Clause of the Fourteenth Amendment. Specifically, the Court struck down laws that criminalize "the most private human conduct, sexual behavior, and in the most private of places, the home." 539 U.S. at 567.

The Court stressed, multiple times, that its holding was based on the severe deprivation of personal privacy and liberty that such laws impose:

- "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendental dimensions." *Id.* at 562.
- "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." *Id.* at 567.
- "[L]iberty gives substantial protection to adult persons in deciding how to conduct their

private lives in matters pertaining to sex." *Id.* at 572.

- "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id.* at 578.

- "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.*

The Court in *Lawrence* reached its holding by relying on five cases that recognize the right to privacy as a matter of substantive due process. The Court analyzed and described these cases as protecting against governmental infringement of liberty, even distinguishing between liberty interests and governmental recognition of a relationship:

- *Griswold v. Connecticut*, 381 U.S. 479 (1965), recognized "a right to privacy," particularly in "the protected space of the marital bedroom." *Lawrence*, 539 U.S. at 564-65.

- *Eisenstadt v. Baird*, 405 U.S. 438 (1972), "established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship," thus distinguishing between liberty interests and governmental recognition of a relationship. *Lawrence*, 539 U.S. at 565.

- *Roe v. Wade*, 410 U.S. 113 (1973), "recognized the right of a woman to make certain fundamental decisions affecting her destiny" as a matter of the "liberty" protected under the "substantive dimension" of the Due Process Clause. *Lawrence*, 539 U.S. at 565.

- *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), "confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults," again recognizing *Eisenstadt*'s distinction between personal liberty and public governmental recognition of a relationship. *Lawrence*, 539 U.S. at 566.

- *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), reaffirmed constitutional protection for certain "personal decisions" that are "central to personal dignity and autonomy." *Lawrence*, 539 U.S. at 574.

This Court in *Lawrence* took considerable care to explain how these five cases involved severe governmental restrictions on privacy and liberty precisely because *Lawrence*'s holding was predicated on the severe deprivation of privacy and liberty. *Lawrence*, consequently, does not address whether the government must publicly recognize a relationship or promote particular conduct, even if a person has a constitutional privacy and liberty right to engage in that relationship or conduct.

B. The Court in *Lawrence* Said Its Holding and Reasoning Did Not Involve Whether Government Must Provide Any Recognition to Gay Relationships.

Given that *Lawrence*'s holding and reasoning addressed privacy and liberty, it is no surprise that the Court explicitly said that *Lawrence* did not require States to redefine marriage.

Lawrence, like *Eisenstadt* and *Carey*, distinguished "the *liberty* of persons to choose" to engage in a "personal relationship" from "*formal recognition* in the law" of that relationship. *Lawrence*, 539 U.S. at 567 (emphases added). As the Court explained, the Texas law in *Lawrence* unconstitutionally infringed on the liberty to engage in a personal relationship, regardless of "whether or not [that relationship is] entitled to formal recognition in the law." *Id.*

After recognizing that liberty is distinct from the public, governmental recognition of a relationship, the Court stated that *Lawrence* "d[id] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 539 U.S. at 578. Justice O'Connor's concurrence in the judgment echoed this point:

> That this law as applied to private, consensual conduct is unconstitutional . . . does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, *such as . . . preserving the traditional institution of marriage*.

> Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—*other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group*.

Id. at 585 (emphases added).

The holding in *Lawrence*, therefore, has no bearing on whether government must redefine marriage. *Lawrence* was about privacy, personal autonomy, and the right to engage in sexually intimate conduct—not public, governmental recognition or affirmation of a sexual relationship.

C. Statutes Reaffirming Traditional Marriage, Unlike the Statute in *Lawrence*, Do Not Unconstitutionally Infringe on Privacy or Liberty.

The democratic decision to legally reaffirm the traditional definition of marriage has no adverse effect whatsoever on plaintiffs' constitutional privacy or liberty rights. Unlike *Lawrence*, plaintiffs here are not asking to be spared from punishment, invasion of privacy, or even official disapproval. Rather, they seek official recognition and affirmation of their intimate relationships.

Plaintiffs' claims would turn *Lawrence* (and *Casey*) upside down. As *Lawrence* stated:

> "At the heart of liberty is the right to define one's concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851). Plaintiffs, however, want to compel others to adopt their concept of marriage and discard the centuries-old traditional definition of marriage. Yet this Court has recognized, "Our obligation is to define the liberty of all, not to mandate our own moral code." *Lawrence*, 539 U.S. at 571 (quoting *Casey*).

Here, plaintiffs do not seek protection of privacy. They seek *public* governmental recognition of same-sex relationships to the same degree as opposite-sex relationships. As the California Court of Appeal aptly explained, "[t]he right to be let alone from government interference is the polar opposite of insistence that the government acknowledge and regulate a particular relationship, and afford it rights and benefits that have historically been reserved for others." *In re Marriage Cases*, 143 Cal. App. 4th 873, 926 (2006), *rev'd*, 183 P.3d 384 (Cal. 2008). Likewise, New York's highest court stated: "Plaintiffs here do not, as the petitioners in *Lawrence* did, seek protection against state intrusion on intimate, private activity. They seek from the courts access to a state-conferred benefit that the Legislature has rationally limited to opposite-sex couples." *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006). These rulings establish the irrefutable and uncontested proposition that plaintiffs cannot possibly rely on privacy rights to challenge Proposition 8.

Nor do plaintiffs seek protection of a constitutional liberty interest. The government's decision about the degree to which relationships are recognized, without corresponding limits on privacy or liberty, does not interfere with an *individual*'s concept of existence, meaning, or the mystery of human life. The law at issue here does not prohibit same-sex couples from engaging in any conduct. No constitutionally cognizable privacy or liberty interests are implicated by a government's decision not to recognize same-sex relationships to the same degree as traditional marriage. *See infra* Part II.

In short, *Lawrence* holds that each individual has a constitutionally-protected privacy and liberty right to define his or her intimate relationships. Absent limits on personal conduct, however, whether government elects to formally recognize or endorse these relationships cannot abridge that right. *Lawrence* does not support plaintiffs' claims for governmental recognition of same-sex marriage.

II. STATES CAN CONSTITUTIONALLY PROMOTE OR FACILITATE ONLY TRADITIONAL MARRIAGE, EVEN THOUGH CITIZENS HAVE A CONSTITUTIONAL RIGHT UNDER *LAWRENCE* TO ENTER SAME-SEX RELATIONSHIPS.

A. Even When the Constitution Protects Certain Conduct, Government Can Promote or Facilitate Different Conduct.

This Court's decisions make clear that there is no necessary correlation between the right to engage in particular conduct and the right to have the government promote or facilitate that conduct. The Constitution allows the government to further legitimate policy goals without having to affirmatively facilitate the entire range of constitutionally-protected conduct. In other words, government need not promote or facilitate what it cannot prohibit. Thus, for example, although the Constitution protects the right of parents to choose private rather than public schools for their children, *see Pierce v. Society of Sisters*, 268 U.S. 510 (1925), it does not require a State to facilitate that choice by subsidizing private schools, *see Norwood v. Harrison*, 413 U.S. 455, 462 (1973). As the Court explained, "[i]t is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid." *Id*. Justice Scalia's *Lawrence* dissent did not account for this crucial constitutional distinction when it surmised that the Court's opinion in *Lawrence* somehow "dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned." 539 U.S. at 604. With respect, that reading of *Lawrence* is incorrect.

Indeed, even when the Constitution prohibits government from banning a certain type of conduct, government not only may refuse to subsidize that conduct but also may affirmatively promote or facilitate different conduct. Hence, the Constitution allows government to recognize traditional opposite-sex relationships to a greater degree than same-sex relationships, even if under *Lawrence* government cannot intrude on the privacy of intimate same-sex relationships. As this Court has taught, "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475 (1977); *see Christian Legal Soc'y v. Martinez*, 130 S.Ct. 2971, 2989 n.17 (2010) (emphasizing "the distinction between state prohibition and state support").

The abortion/childbirth-funding cases are a primary example of how the government may properly decline to promote one category of constitutionally-protected conduct and instead promote an entirely different—even the opposite—category. This Court has held that with few exceptions government cannot prohibit abortions. *See, e.g.*, *Casey*; *Roe v. Wade*. Nevertheless, this Court has also held that government is not required to pay for abortions even when it directly facilitates childbirth. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 201 (1991); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 510 (1989); *Harris v. McRae*, 448 U.S. 297, 315 (1980); *Maher*, 432 U.S. at 474-76. As the Court explained decades ago, "The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over abortion and 'implement that judgment by the allocation of public funds' for medical services relating to childbirth but not to those relating to abortion.'" *Rust*, 500 U.S. at 201 (quoting *Webster*, 492 U.S. at 510). This Court has invalidated governmental prohibitions on protected conduct while upholding the government's refusal to formally subsidize or promote that conduct because the former infringes on liberty whereas the latter does not: The government's "decision to fund childbirth but not abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest.'" *Id.* (quoting *Harris*, 448 U.S. at

315). *See also Harris*, 448 U.S. at 317-18 ("Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.").

Abortion may be the primary example of this constitutional doctrine, but it applies to all contexts involving constitutionally protected conduct. As the Court explained in *Harris*, 448 U.S. at 318, the government has no affirmative duty to facilitate contraception or private-school enrollment, even though the Due Process Clause prevents the government from banning contraception, *Griswold*, 381 U.S. 479, or (as noted above) prohibiting parents from sending their children to private schools, *see Pierce*, 268 U.S. 510. Similarly, the government has no duty to promote a whole host of other conduct protected by the Constitution, such as the right to travel or the right to free speech. "To hold otherwise would mark a drastic change in [this Court's] understanding of the Constitution." *Harris*, 448 U.S. at 318.

The basic distinction between governmental prohibition and governmental promotion is deeply rooted in Western law. The European Court of Human Rights, for instance, has held that while the 47 member states of the Council of Europe cannot under human rights norms criminalize same-sex relationships, they are not required to redefine traditional marriage to include same-sex relationships. *Compare Dudgeon v. United Kingdom*, 45 Eur.

Ct. H.R. (ser. A) (1981) (criminalizing homosexual conduct violates the European Convention for the Protection of Human Rights and Fundamental Freedoms), *with Schalk and Kopf v. Austria*, App. No. 30141/04 (Eur. Ct. H.R. June 24, 2010) (Convention does not require members to extend traditional marriage to same-sex relationships).

The Constitution, in brief, does not prohibit government from promoting opposite-sex relationships through traditional marriage, even though under *Lawrence* it may not prohibit same-sex relationships. By way of analogy, *Roe/Casey/Griswold/Pierce* are to *Maher/Harris/Webster/Rust/Norwood*, as *Lawrence* is to this case. The former cases (*Roe*, *Casey*, *Griswold*, *Pierce*, and *Lawrence*) prohibit governments from banning certain constitutionally conduct, while the latter (*Maher*, *Harris*, *Webster*, *Rust*, *Norwood*) allow governments to promote or facilitate a different or even opposing category of conduct.

Here, the government chose a "legislative policy" that promotes or privileges traditional marriage. *Maher*, 432 U.S. at 475. Facilitating traditional marriage advances multiple legitimate social goals, such as encouraging responsible procreation and child-rearing. The challenged policy recognizing only heterosexual couples as "marriages" does not punish homosexuals or their relationships, just as it doesn't punish the many other close personal relationships that the law likewise declines to specially recognize or promote. *See, e.g.*, *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring in the judgment) ("[O]ther reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."). In fact, the law at issue here leaves intact any material benefits the State legislature has conferred or in the future may choose to confer on same-sex couples. But because the challenged law involves no governmental prohibition of same-sex relationships, government is free not to recognize same-sex relationships to the same degree as opposite-sex relationships, if at all.

B. The Constitution Does Not Require Government to Strictly Tailor Its Definition of Marriage to Cover Only Procreative Couples.

In his *Lawrence* dissent, Justice Scalia also raised the concern that overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986), would undermine "encouragement of procreation" as a valid justification for limiting "marriage" to opposite-sex couples, "since the sterile and the elderly are allowed to marry." *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting). That concern was unwarranted. On the contrary, the holding in *Lawrence* actually *shields* the procreation argument from the facile retort that such an interest could be valid only if government limited marriage to fertile couples. While *Lawrence* provides no support for a right to governmental endorsement of one's sexual relationships, its holding and logic assuredly limit the government's power to intrude into the precincts of intimate relationships to ensure that heterosexual couples seeking to marry intend and are able to naturally procreate. The supporting and dissenting opinions in *Lawrence* disagreed on whether tradition and precedent supported a constitutional right to engage in private sexual conduct that the majority disapproves of. But there can be little disagreement that our Nation's history, traditions, and practices would bar the conditioning of marriage on a couple's passing a governmental interrogation into their procreative intentions and abilities. Such a practice would be utterly alien to our laws and in deepest tension with this Court's procreation jurisprudence. *See, e.g.*, *Griswold*, 381 U.S. at 485 (emphasizing the elevated status of the traditional marriage relation and the protected status of private marital intimacy).

Much as *Lawrence* does not require government to promote every intimate relationship as a condition to supporting traditional conjugal unions, so too the Constitution does not require government, as the price of maintaining the unique status of traditional marriage, to adopt Orwellian, burdensome, and ineffective definitions of marriage that would eviscerate the privacy rights of couples. Societies have long recognized marriage regardless of fertility, and no American jurisdiction has ever conditioned marriage on that ground. Even Catholic Canon Law, with its social and natural-law understanding of marriage as an inherently procreative union, has permitted infertile couples to marry for centuries. *See* 1983 CODE c.1084, §3 ("Sterility neither prohibits nor nullifies marriage"). Government's important procreative interest in facilitating traditional marriage is not negated by allowing ostensibly "sterile" or "elderly" opposite-sex couples to marry, and any attempt to narrowly tailor marriage to fertile couples would run headlong into privacy protections secured by nearly half a century of this Court's decisions, from *Griswold* to *Lawrence*.

In carrying out its marriage policies, government can rationally enact "an easily administered scheme" to avoid "the subjectivity, intrusiveness, and difficulties of proof" that would inevitably arise from "an inquiry into any particular bond or tie." *Nguyen v. INS*, 533 U.S. 53, 69 (2001). That is precisely what government has done for decades in adhering to the traditional definition of marriage. For example, states have adopted a reasonable, yet imperfect, irrebuttable presumption instead of conducting intrusive individualized testing for fertility, and this Court has held that such presumptions are constitutional. *See, e.g., Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 315-16 (1976).

Moreover, even when heightened intermediate scrutiny applies, this Court has not "required that the statute under consideration must be capable of achieving its ultimate objective in every instance." *Nguyen v. INS*, 533 U.S. 53, 70 (2001); *see, e.g., Rostker v. Goldberg*, 453 U.S. 57, 81 (1981) (classification did not have to be perfect, under intermediate scrutiny, where "Congress simply did not consider it worth the added burdens"). Thus, government can further its important interest in promoting procreation by adopting a classification that *generally* achieves the intended objective; the classification need not be accurate "in every case." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 582-83 (1990), *overruled on other grounds by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Opposite-sex couples "on the average" are able to procreate, and that is sufficient to uphold this classification under intermediate scrutiny. *Califano v. Webster*, 430 U.S. 313, 318 & n.5 (1977) (per curiam). Same-sex couples, in contrast, are categorically unable to procreate within the confines of their relationship.

There would be myriad other problems with requiring the States to redefine marriage to include only couples capable of procreation. Legally, the unconstitutional conditions doctrine probably precludes the government from conditioning the right to marry on couples' publicly revealing sensitive fertility information. *Cf., e.g., Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). Again, such a rule would stand *Lawrence* on its head and contravene this Court's privacy jurisprudence. *See, e.g., Standhardt v. Superior Ct.*, 77 P.3d 451, 462 (Ariz. App. 2003); *Adams v. Howerton*, 486 F.Supp. 1119, 1124-25 (C.D. Cal. 1980), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982). It would also result, as a practical matter, in an absurd and arbitrary scheme.[3] Allowing "legal marriage as between all couples of opposite sex" is "the least intrusive alternative available to protect the procreative relationship" in a rational way. *Adams v. Howerton*, 486 F.Supp. at 1124-25.

To carry the point even further, bare procreation is not the only policy goal advanced by traditional marriage, so government is not required to tailor its definition of marriage simply to further procreative relationships. Government can conclude that traditional marriage promotes *responsible* procreation—that is, procreation that furthers the government's powerful interest not only in more children but in children that are well raised and cared for. For example, when one spouse is infertile, the other spouse could still potentially engage in sexual activity with a third party. Promotion of traditional marriage decreases the likelihood that such sexual activity will occur outside of stable family units, and it increases the chances that "children receive from birth onward the maximum amount of private welfare" from stable family units. Monte Neil Stewart, *Marriage Facts*, 31 HARV. J. L. & PUB. POL'Y at 344.

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[3] Problems would not be limited to premarital fertility testing. States would presumably have to annul childless marriages after the couple reached a certain age if marriage had to be predicated on fertility. And yet, this intrusive regime to determine fertility would be inherently unreliable. There is the "scientific (i.e., medical) difficulty or impossibility of securing evidence of such [procreative] capacities," not to mention "the costs associated with that endeavor if attempted." Monte Neil Stewart, *Marriage Facts*, 31 HARV. J. L. & PUB. POL'Y 313, 345 (2008).

In sum, nothing in *Lawrence* undermines procreation arguments for traditional marriage. Rather, as shown, *Lawrence*'s privacy limitations support the traditional definition—including the ancient and ubiquitous practice of allowing infertile and elderly couples to marry.

III. UNLIKE THE STATUTE IN *LAWRENCE*, TRADITIONAL MARRIAGE LAWS HAVE BEEN ENFORCED FOR CENTURIES AND REAFFIRMED BY A SUBSTANTIAL MAJORITY OF STATES AND THE FEDERAL GOVERNMENT.

History and tradition may not be the "ending point" for the constitutional analysis "in all cases"; but if ever there were a case where history and tradition controlled, this is it. *Lawrence*, 539 U.S. at 572. The traditional definition of marriage has existed for centuries, which is precisely why a substantial majority of States and the Federal Government have expressly reaffirmed it during the last 15 years.

In light of the substantial history and tradition supporting traditional marriage, *Washington v. Glucksberg*, 521 U.S. 702 (1997), not *Lawrence*, is the relevant substantive due process case to which this Court should look for guidance. *Glucksberg* upheld a State ban on assisted suicide, noting that "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide." *Id.* at 711 The Court also recognized that a substantial majority of States banned assisted suicide. *Id.* at 710 & n.8. And these laws were not, according to *Gluckberg*, "innovations" but were rather "longstanding expressions of the States' commitment to the protection and preservation of all human life." *Id.* at 710.

Similarly, here, the traditional definition of marriage has existed for much more than 700 years, and a substantial majority of States and the Federal Government have recently reaffirmed this definition to support traditional marriage and procreative relationships that are "fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Some States may be "currently engaged in serious, thoughtful examinations" about whether the traditional definition of marriage should be extended to same-sex relationships, just as States were contemplating "physician-assisted suicide" in *Glucksberg*. *Glucksberg*, 521 U.S. at 719. And attitudes about same-sex relationships may have changed over the years, just like "[a]ttitudes toward suicide itself have changed since [the 13th Century]." *Id.* But *Glucksberg* confirms that those are not sufficient reasons for invalidating state laws that reaffirm century-old concepts ingrained in the Anglo-American common-law tradition.

The history and tradition in *Lawrence* was far different from that in *Glucksberg* and this case. *Lawrence* found that "American laws targeting same-sex couples did not develop until the last third of the 20th century." 539 U.S. at 570. In contrast, the traditional definition of marriage has existed throughout the world for centuries, like the assisted-suicide prohibitions in *Glucksberg*.

Moreover, *Lawrence* implicitly recognized that laws establishing the traditional definition of marriage do not target same-sex relationships through discriminatory animus. If the fact that "American laws targeting same-sex couples did not develop until the last third of the 20th century" was evidence that such laws were not deeply rooted in the American legal tradition, then the fact that the traditional definition of marriage predates the United States itself is evidence that such laws were never meant to target same-sex couples. *Id.* at 570. *Lawrence* supports the common sense understanding that traditional marriage laws were not enacted out of animus towards same-sex couples. *Cf. Romer v. Evans*, 517 U.S. 620, 634 (1996) (invalidating law that deprived homosexuals of protection under state antidiscrimination laws, because the law was "born of animosity toward the class of persons affected"). Plus, far from criminalizing same-sex relationships like in *Lawrence*, the challenged measure here leaves undisturbed laws that recognize same-sex relationships through domestic partnerships. *Cf. Lawrence*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."). It merely declines to denominate such relationships as "marriages."

Reasonable minds can differ on whether the historically entrenched concept of traditional marriage should be extended to same-sex relationships. Most States have retained traditional marriage laws; a minority have extended marriage to same-sex relationships. "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality" of same-sex relationships. *Glucksberg*, 521 U.S. at 735. This is democracy at work in a pluralistic society, *see id.*, where different jurisdictions acting in their own respective spheres can "serve as a laboratory" and "try novel social and economic experiments," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Whatever the outcome of that debate, this Court's decision in *Lawrence* provides no support for the present effort to redefine marriage. That case involved historically novel and extremely invasive prohibitions on intimate relations between adults in the privacy of the home. By contrast, whether the Constitution requires the redefinition of "marriage" to include same-sex couples involves not a prohibition on private conduct such as occurred in *Lawrence* but rather the right of the people through democratic means to refuse to publicly promote one type of

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Courts of Appeals
For the Second Circuit**

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORANIZATIONS, CHANGE TO WIN, AND THE NATIONAL EDUCATION ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENT EDITH SCHLAIN WINDSOR AND SUGGESTING AFFIRMANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. DOMA Significantly Impairs Married Gay and Lesbian Workers Access to Employer-Provided Healthcare Benefits for Their Spouses 5

  A. DOMA Denies Married Gay and Lesbian Workers Access to Healthcare Coverage for Their Spouses and the Dependent Children of Their Spouses.. 6

  B. DOMA Results in Unequal Tax Treatment of Employer-Provided Healthcare Benefits for Married Gay and Lesbian Workers 9

  C. DOMA Denies Married Gay and Lesbian Workers Access to Federal Guarantees of Uninterrupted Healthcare Coverage for Their Spouses 12

  D. DOMA Denies Married Gay and Lesbian Federal Employees Healthcare Coverage for Their Spouses and the Dependent Children of Their Spouses 13

II. DOMA Significantly Restricts Married Gay and Lesbian Workers' Access to Critical Programs That Protect Married Workers in the Event of Illness, Workplace Injury or Death 18

TABLE OF CONTENTS—Continued

Page

A. DOMA Precludes Gay and Lesbian Spouses from Receiving Social Security Survivor Benefits 18

B. DOMA Denies Married Gay and Lesbian Workers Access to Family and Medical Leave 20

C. DOMA Precludes Gay and Lesbian Spouses of Public Safety Officers and Federal Employees From Receiving Survivors' Benefits 21

III. DOMA Imposes Significant Burdens on Married Gay and Lesbian Workers as They Plan for Retirement 23

A. DOMA Denies Married Gay and Lesbian Workers Access to Social Security Retirement and Medicare Benefits Designed to Protect Lower Earning Spouses 24

B. DOMA Denies Married Gay and Lesbian Workers Equal Rights and Benefits under Defined Pension Plans 27

C. DOMA Precludes Married Gay and Lesbian Workers from Contributing to Their Spouses' Retirement Accounts and Denies to Them Plan Rollover and Distribution Options 30

TABLE OF CONTENTS—Continued

Page

D. DOMA Denies Married Gay and Lesbian Federal Employees the Ability to Participate Equally in Retirement Plans 32

IV. DOMA Diminishes Financial and Familial Stability for Married Bi-National and Foreign-National Gay and Lesbian Couples Seeking to Work in the United States 33

A. DOMA Forecloses the Option of Immigration Through Family Sponsorship for Married Bi-National Gay and Lesbian Couples...................... 35

B. DOMA Makes it Difficult for Married Gay and Lesbians Couples to Immigrate to the United States 37

CONCLUSION.. 40

TABLE OF AUTHORITIES

CASES Page

Borsa v. U.S. Dep't of the Treasury, MSPC Case No. AT-0752-13-0291-I-2, 2012 WL 6202332, 112 LRP 58573 (MSPB Nov. 6, 2012) 17

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Matter of Paul Wilson Dorman, 25 I. & N. Dec. 485, 2011 BIA LEXUS 8 (Op. Att'y Gen. Apr. 26, 2011) 37

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STATUTES

1 U.S.C.
  § 7 .... 2, 4

5 U.S.C.
  § 1101 17
  § 2302(a)(2)(A)(ix) 17
  § 2302(b)(10) 17
  § 6382(a) 20
  § 8133(a) 23
  § 8901(5) 14
  §§ 8901 – 8914 14
  §§ 8951 – 8962 15
  §§ 8981 – 8992 15

8 U.S.C.
  § 1101(a)(15)(H) 37
  § 1151(b) 35

Page

- § 1151(b)(2) 35
- § 1153(d) 33, 38
- § 1154(a)-(b) 35
- § 1430 35

26 U.S.C.
- § 25B(d)(2)(D) 30
- § 105 9
- § 105(b) 10
- § 106(a) 9, 10
- § 125(f) 11
- § 152 9
- § 152(a) 10
- § 219 30
- § 401(a)(11) 28
- § 402(c)(11) 32
- § 408 30
- § 408A 30
- § 414(p)(1)(A) 28
- § 417(a)(2) 31
- § 9801(f) 13

28 U.S.C.
- § 1738C 2

29 U.S.C.
- § 1055(a) 28
- § 1056(d)(3)(B) 28
- §§ 1161 – 1169 12
- § 1167(3) 13
- § 2601(b)(1) 20
- § 2612(a) 20

42 U.S.C.
- § 402 19, 24

Page

§ 402(e), (f) 19
§ 402(i) 19
§ 415 19
§ 426(a)-(b) 26
§ 1395c 26
§ 3796(a) 22
§ 3796d-1 22

PUBLIC LAWS

Pub. L. No.
99-272, 100 Stat. 82 12
104-191, 110 Stat. 1936 12

REGULATIONS AND ADMINISTRATIVE RULINGS

20 C.F.R.
§ 10.410 23
§ 404.335 25

26 C.F.R.
§ 1.106-1 .... 9, 11
§ 1.401(a)(9)-3, A-3(a) 31
§ 1.401(a)-20, A-24(a) 31
§ 54.9801-6 13

42 C.F.R.
§ 406.5(a) 26

77 Fed. Reg. 42914 (July 20, 2012) 15

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	Page
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Page

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Page

PLEADINGS, MOTIONS AND AFFIDAVITS

Complaint, *Blesch v. Holder*, 2012 U.S. Dist. LEXIS 75999 (E.D.N.Y. May 31, 2012) (No. 12-1578) 36, 37

Jennifer Tobit's Opp'n to Pl. Cozen O'Connor, P.C.'s Mot. for J. on the Pleadings, *Cozen O'Connor, P.C. v. Tobits* (E.D. Penn. filed Sept. 22, 2011) (No. 11-00045) 29, 30

Pl. Cozen O'Connor, P.C.'s Mot. for J. on the Pleadings Pursuant to Rule 12(c), *Cozen O'Connor, P.C. v. Tobits* (E.D. Penn. filed Sept. 8, 2011) (No. 11-00045) ... 29

Aff. of Dean Hara, *Gill v. OPM*, 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 09-10309) 33

Aff. of Herbert Burtis, *Gill v. OPM*, 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 09-10309) 19, 20

Joint Aff. of Martin Koski & James Fitzgerald, *Gill v. OPM*, 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 09-10309) 16

Joint Aff. of Mary Ritchie & Kathleen Bush, *Gill v. OPM*, 699 F. Supp. 2d 374 (D. Mass. 2010) (09-10309) 22, 31

Joint Aff. of Pls. Nancy Gill & Marcelle Letourneau, *Gill v. OPM*, 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 09-10309) 15, 16

TABLE OF AUTHORITIES—Continued

Page

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INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* is submitted, with the consent of the parties,[1] on behalf of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), Change to Win (CTW), and the National Education Association (NEA). The AFL-CIO is a federation of 56 labor unions representing more than 12 million working men and women in the public and private sectors in every industry and level of government in the United States. CTW is a federation of four labor unions representing 5.5 million working men and women, including farm workers, food service workers, janitors, security guards, healthcare workers, truck drivers, and others employed in both the public and private sectors. The NEA is a nationwide employee organization with over 3 million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges, and universities including the approximately 8,000 federal educators who staff schools at U.S. military bases at home and throughout the world.

Amici and our affiliated labor unions, which together represent every corner of the American labor movement, are dedicated to the equal and fair treatment of all workers. Protecting the economic rights of working men and women, including gay and lesbian Americans, is an important part of our collective mission. Accordingly, we bargain and advocate for domestic partner benefits in union contracts, for prohibitions forbidding employers from firing lesbian and gay workers because of sexual orientation, and for programs to help end discrimination in the workplace.

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[1] Letters from Petitioner United States and Respondent Bipartisan Legal Advisory Group consenting to the filing of this brief are on file with the Clerk. Written consent by Respondent Edith Schlain Windsor has been submitted with this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

The Defense of Marriage Act (DOMA),[2] by intention and design, ensures that workers with same-sex spouses earn less money, pay higher taxes on their wages and benefits, and have available to them fewer valuable benefits than their counterparts with different-sex spouses. *Amici*, therefore, stand united in our belief that DOMA impermissibly relegates an entire class of working families to a lower stratum of economic security by irrationally depriving married gay and lesbian workers of employment benefits extended to their colleagues. As such, DOMA deprives these union members and other workers of the equal protection of the law.

SUMMARY OF ARGUMENT

Several of the *amicus* briefs filed in support of Respondent Edith Schlain Windsor vividly illustrate DOMA's psychological, familial, and social harms. This brief is focused on a separate set of harms that flow from DOMA—namely, the myriad of concrete economic injuries DOMA inflicts on married gay and lesbian workers and their families. Those tangible economic injuries, as illustrated by the stories recounted in the pleadings and affidavits of the plaintiffs in this and other cases, can be quantified in the dollars married gay and lesbian workers spend because of higher costs and taxes; denials of access to publicly and privately provided benefits; and refusals of entry into, and deportations out of, the U.S.

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[2] 1 U.S.C. § 7; 28 U.S.C. § 1738C.

DOMA circumscribes the employment-related rights and benefits available to same-sex spouses by recognizing only marriages of different-sex spouses.[3]

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[3] Nine states, Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont and Washington, as well as the District of Columbia, currently grant marriage licenses to same-sex couples. Nat'l Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws* (Feb. 2013), http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx. Rhode Island, Illinois, New Jersey, Nevada, and likely New Mexico recognize out-of-state marriages between two people of the same sex. *See* Jéanne Rauch-Zender & Jessica Lechuga, *Federal and State Restrictions on Marriage Create a Cumbersome Tax Filing Environment for Same-Sex Couples*, Bloomberg BNA (Feb. 8, 2013), http://www.bna.com/federal-state-restrictions-n17179872259/. Two Native American tribes, the Coquille Tribe of Oregon and the Suquamish Tribe of Washington, also extend full marital rights to same-sex couples. *See* Coquille Indian Tribal Code §740.010(3)(b) (2008), *available at* http://www.coquille tribe.org/documents/740Marriage and DomesticPartnership.pdf; William Yardley, *A Washington State Indian Tribe Approves Same-Sex Marriage*, N.Y. Times, A12 (Aug. 12, 2011), *available at* http://www.nytimes.com/2011/08/12/us/12tribe.html. In recent months, two states movedcloser to granting marriage rights to same-sex couples, with the Rhode Island House of Representatives' approval of a marriage equality bill in January 2013, and the Illinois Senate's approval of such a bill in February

Section 3 of DOMA defines the terms "marriage" and "spouse" for purposes of federal law and limits the application of these terms solely to unions between a man and a woman.[1] Because marital status plays a key role in determining eligibility for a myriad of workplace benefits, rights, and privileges, as well as the level of taxation of many benefits, DOMA deprives married gay and lesbian workers and their families of significant economic protections associated with employment that are enjoyed by their coworkers married to different-sex spouses. Indeed, federal employees who are married to persons of the same sex under the laws of their home states are denied altogether many crucial spousal benefits. DOMA also allows and at times requires private sector employers to reduce or withhold workplace benefits from spouses and families of married gay and lesbian workers.

DOMA's effects reverberate throughout the American workforce as it deprives married gay and lesbian workers of the employment benefits, as well as the state and federal program benefits, upon which working families rely for retirement and financial assistance in the event of illness, injury, disability, or death. Such benefits and programs are particularly crucial for families in which only one adult

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2013. *See* State of R.I. Gen. Assembly, *In Historic Vote, House Approves Same-Sex Marriage* (Jan. 24, 2013), http://webserver.rilin.state.ri.us/News/pr1.asp?prid=8805; Steven Yaccino, *Illinois Senate Votes to Back Gay Marriage*, N.Y. Times, A15 (Feb. 14, 2013), *available at* http://www.nytimes.com/2013/02/15/us/illinois-senate-approves-same-sex-marriage-bill.html.

[1] 1 U.S.C. § 7.

works outside of the home or is eligible for employer-provided benefits. These families generally depend exclusively on workplace benefits—including healthcare, retirement, and Social Security—provided through the employment of one spouse.

ARGUMENT

DOMA deprives married gay and lesbian working people and their children of significant benefits associated with employment. Because most Americans obtain health insurance through their own employer or through their spouse's employer, DOMA prevents or substantially restricts access to spousal healthcare benefits. DOMA also denies married gay and lesbian couples important protections and benefits provided to other married couples when one spouse suffers a workplace injury or illness. DOMA further impinges on the ability of married same-sex couples to plan and provide for retirement. Finally, DOMA unfairly eliminates opportunities for married gay and lesbian couples to work and remain lawfully in the United States.

I. DOMA Significantly Impairs Married Gay and Lesbian Workers Access to Employer-Provided Healthcare Benefits for Their Spouses

Employer-provided healthcare benefits provide the most common source of medical insurance for working Americans and their families.[5] But for families of married same-sex couples, DOMA creates a litany of impediments that complicate, penalize, or flatly prohibit full family coverage.

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[5] Carmen DeNavas-Walt, Bernadette D. Proctor & Jessica C. Smith, *Income, Poverty, and Health Insurance Coverage in the United States: 2011*, U.S. Census Bureau, 2 (Sept. 2012), *available at* http://www.census.gov/prod/2012pubs/p60-243.pdf (55.1% of Americans, or 170.1 million people, were covered by employer-based health insurance in 2011).

A. DOMA Denies Married Gay and Lesbian Workers Access to Healthcare Coverage for Their Spouses and the Dependent Children of Their Spouses

Due in part to the effects of DOMA, one or both partners in gay and lesbian long-term committed relationships are more likely to be uninsured than spouses in married different-sex couples.[6] Without access to employer-provided spousal health coverage, some non-covered gay and lesbian spouses are forced to rely on coverage available through public assistance or to go without health insurance entirely. And, as explained below, even for workers whose employers extend coverage to gay and lesbian spouses or who can afford to purchase insurance for the non-covered spouse on the open market, DOMA raises healthcare expenditures for married same-sex couples significantly, adding thousands of dollars annually in costs due to DOMA's preclusion of otherwise available tax benefits.[7]

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[6] Ninez A. Ponce, *et al.*, *The Effects of Unequal Access to Health Insurance for Same-Sex Couples in California*, Health Affairs, 1539-40 (Aug. 2010), *available at* http://www.britecenter.org/wp-content/uploads/2013/02/The-effects-of-unequal-access-to-health-insurance-for-same-sex-couples-in-California.pdf.

[7] *See* Kaiser Family Foundation & Health Research & Educational Trust, *Employer Health Benefits 2011 Annual Survey*, 20 (2011), *available at* http://ehbs.kff.org/pdf/2011/8225.pdf.

The burdens that DOMA imposes on married same-sex couples seeking healthcare coverage can have consequences for the well-being of their entire families. The lack of spousal coverage often forces individuals to remain in the workforce when they might otherwise choose to stay home or work part-time in order to care for children or for elderly or infirm family members. Even when non-covered spouses qualify for coverage through their own employers, families often face higher insurance costs or lower levels of coverage because coverage under a family enrollment is generally less expensive than coverage under two separate individual enrollments.[8] In addition, one spouse's employer-provided coverage may charge higher premiums or out-of-pocket costs than those charged by the other spouse's employer-provided coverage, denying married same-sex workers the ability to choose which spouse's benefit plan is the most advantageous for their economic and health needs. These additional expenses impose significant burdens on working families and consume resources that might otherwise be invested elsewhere, such as college funds or retirement savings.

One analysis quantified DOMA's discriminatory effect on a hypothetical same-sex couple partnered for 46 years, who were the parents of two children, and whose combined annual income was

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[8] *See, e.g.*, *Pedersen v. OPM*, 881 F. Supp. 2d 294, 302-05 (D. Conn. 2012) (finding DOMA unconstitutional in denying equal access to employer-provided healthcare coverage), *appeal docketed*, No. 12-3273 (2d Cir. Aug. 21, 2012), *petition for cert. filed*, No. 12-231 (U.S. Aug. 21, 2012).

$140,000.[9] In the worst case scenario, the couple, who lived in New York State, would incur an additional $211,993 in health insurance costs over the course of their lifetimes.[10] In the best case scenario, healthcare coverage would cost the same couple at least $28,595 more in insurance premiums over their lifetimes than it would cost similarly situated married different-sex couple.[11] Nearly all of the extra costs would be eliminated if the federal government recognized the marriages of same-sex couples.[12]

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[9] Tara Siegel Bernard & Ron Lieber, *The High Price of Being a Gay Couple*, N.Y. Times, A1 (Oct. 3, 2009), *available at* http://www.nytimes.com/2009/10/03/your-money/03money.html.

[10] In the worst case scenario, one partner earned $110,000 and the other partner earned $30,000. *Id.* The lower earning partner's employer did not provide health insurance coverage and her partner's employer did not provide domestic partner coverage. *Id.* Consequently, the higher earning partner provided coverage for herself and the couple's two children and the lower earning partner purchased individual healthcare coverage on the private market. *Id.*

[11] In the best case scenario, both partners earned identical incomes and were eligible for employer-provided health insurance coverage. *Id.* One partner's employer provided domestic partner coverage which the couple used for five years while the other partner stayed home to care for their two children. *Id.* After five years, the second partner returned to work and resumed her employer-provided coverage. *Id.*

[12] *Id.*

B. DOMA Results in Unequal Tax Treatment of Employer-Provided Healthcare Benefits for Married Gay and Lesbian Workers

As part of their employees' overall compensation packages, many private sector employers extend healthcare and other benefits to their employees, their employees' spouses and domestic partners, and their dependent children. These employers often recognize the importance of providing such benefits in order to attract and retain valued employees. They may also be motivated by a basic sense of fairness and a desire to promote employee morale through a commitment to non-discrimination. And still others may provide such benefits based on the give-and-take of collective bargaining with a union committed to equality for the employees it represents. In states that allow gay and lesbian couples to join in marriage, state and local governments generally extend employee benefits to the spouses of all public employees as well. The application of DOMA to the federal tax code, however, limits the ability of these private and public employers to extend equal benefits to all married employees because it imposes disparate payroll and income tax requirements on both employees with same-sex spouses and on their employers.

The Internal Revenue Code allows employees to exclude from gross income the value of employer-provided health insurance coverage for spouses and children.[13] This exclusion represents a significant tax advantage because the fair-market value of employer-provided healthcare insurance would otherwise be taxable as income. DOMA, however, forecloses married same-sex couples from enjoying this tax benefit and forces both employers and employees to treat the fair-market value of coverage as taxable income.[14] This is true even when an employer provides coverage under a "family plan," in which the addition of a spousal beneficiary would not add to the premium cost. In that circumstance, an employee who elects such coverage for her same-sex spouse or for the children of her same-sex spouse is taxed on the imputed fair-market value of that coverage, unless the individuals covered qualify as tax dependents through independent means.[15]

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[13] 26 U.S.C. §§ 105, 106(a), 152; 26 C.F.R. § 1.106-1 (excluding from gross income "contributions which his employer makes to an accident or health plan for compensation . . . to the employee for personal injuries or sickness incurred by him, [or] his spouse").

The tax burdens DOMA imposes on married same-sex couples do not end there. Married couples may generally pay for health insurance premiums incurred on behalf of themselves and certain family members with pre-tax dollars, thereby both lowering the actual cost of coverage and reducing their taxable income.[16] Married couples may also make contributions to a "cafeteria" plan on behalf of a spouse, or be reimbursed on a pre-tax basis for spousal medical expenses from a health savings account or flexible savings account.[17] But DOMA precludes the use of these tax-saving mechanisms for married same-sex couples, which significantly increases the cost of benefits for these employees and—in some cases—even forces them into a higher tax bracket.

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[14] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 200339001 (June 13, 2003); I.R.S. Priv. Ltr. Rul. 9850011 (Sept. 10, 1998); I.R.S. Priv. Ltr. Rul. 9717018 (Jan. 22, 1997).

[15] I.R.S. Priv. Ltr. Rul. 9850011 (Sept. 10, 1998); *see also* 26 U.S.C. § 152(a) (defining "dependent").

[16] 26 U.S.C. §§ 105(b), 106(a) (limiting pre-tax treatment of medical expenses to employees' different-sex spouses and certain dependents).

Several studies have confirmed and quantified DOMA's economic impact on the families of married same-sex couples. One study calculated that the average employee who receives same-sex spousal or domestic partner benefits pays $1,069 more in taxes per year than a heterosexual married employee with the same coverage.[18] In the analysis cited above of the hypothetical New York-based same-sex couple, one scenario demonstrated that it was less expensive for the couple to use their separate, employer-provided coverage because of the onerous tax treatment of domestic partner benefits.[19]

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[17] *See* 26 U.S.C. § 125(f) (limiting "qualified benefits" under a cafeteria plan to benefits that are "not includible in the gross income of the employee"); 26 C.F.R. § 1.106-1.

[18] M.V. Lee Badgett, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits*, Williams Institute, 7-8 (Dec. 2007), *available at* http://www.americanprogress.org/wp-content/uploads/issues/2007/12/pdf/domestic_partners.pdf.

[19] Bernard, *supra* note 9.

C. DOMA Denies Married Gay and Lesbian Workers Access to Federal Guarantees of Uninterrupted Healthcare Coverage for Their Spouses

In the past 25 years, Congress enacted two landmark statutes—the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA)[20] and the Health Insurance Portability and Accountability Act of 1996 (HIPAA)[21]—that were intended to give workers and their families greater healthcare security and continuity. Due to DOMA, however, married same-sex couples are largely excluded from these statutory protections.

COBRA requires public and private employers with twenty or more employees to offer continued healthcare coverage, at group rates, for a defined period of time to employees and their dependents under certain circumstances, such as termination, reduction in employment hours, or death of the employee.[22] The aim of this requirement is to maintain the portability of healthcare coverage and to ensure that employees who change jobs or become unemployed may maintain coverage.[23] Because of DOMA, however, covered employers are not required to continue coverage for same-sex spouses.[24] Although an employer may voluntarily extend continued coverage to the same-sex spouse of an employee, the coverage would not be subject to the protections of COBRA. Therefore, an employer would remain free to terminate coverage at any time, thereby exposing the couple to precisely the healthcare insecurity COBRA was enacted to prevent.

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[20] Pub. L. No. 99-272, 100 Stat. 82.

[21] Pub. L. No. 104-191, 110 Stat. 1936.

[22] 29 U.S.C. §§ 1161-69.

[23] *See* U.S. Dep't of Labor, *An Employee's Guide to Health Benefits under COBRA* (Nov. 2012), http://www.dol.gov/ebsa/publications/cobraemployee.html.

Congress likewise designed HIPAA to promote portability of healthcare coverage and ease transfers of coverage in the event of a change in family circumstances. In particular, HIPAA allows an employee to add a spouse to his or her healthcare plan immediately upon marriage or in the event of certain special circumstances, such as a loss of the spouse's existing coverage resulting from termination of employment.[25] Once again, DOMA prevents married gay and lesbian couples from taking advantage of this protection that is guaranteed to other married couples, thereby placing gay and lesbian couples at an increased risk of loss of continuity in coverage.

D. DOMA Denies Married Gay and Lesbian Federal Employees Healthcare Coverage for Their Spouses and the Dependent Children of Their Spouses

Because DOMA defines "spouse" and "marriage" for purposes of all federal law, its economic hardships fall with particular severity on federal employees in same-sex marriages. DOMA deprives married gay and lesbian federal employees of many of the valuable health benefits that are otherwise available to active and retired federal employees, their spouses, and their children.

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[24] *See* U.S. Dep't of Labor, *Frequently Asked Questions: Participants and Beneficiaries*, http://www.dol.gov/ebsa/faqs/faq_911_1.html (last visited Feb. 26, 2013); *see also* 29 U.S.C. § 1167(3) ("qualified beneficiary" defined as covered employee's "spouse").

[25] *See* 26 U.S.C. § 9801(f); 26 C.F.R. § 54.9801-6.

The Federal Employee Health Benefits Act (FEHBA) provides significantly subsidized healthcare coverage to federal employees, retirees, and their families.[26] Karen Golinski, the plaintiff in a Ninth Circuit case challenging DOMA, has received health insurance coverage through a plan offered under FEHBA during her two-decade tenure as a staff attorney with the U.S. Court of Appeals for the Ninth Circuit.[27] She paid bi-weekly premiums in the amount of $108.91 for her and her young son's health insurance during the 2010 calendar year.[28] DOMA, however, denies Golinski the spousal and dependent care coverage provided to her heterosexual married colleagues.[29] Consequently, Golinski's spouse, Amy

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[26] 5 U.S.C. §§ 8901-14.

[27] Decl. of Pl. Karen Golinski in Supp. of Mot. for Prelim. Inj. at 1, *Golinski v. OPM*, 781 F. Supp. 2d 967 (N.D. Cal. 2011) (No. 10-257).

[28] *Id.* at 1.

[29] *See* U.S. Office of Pers. Mgmt., *Family Members* in *Federal Employees Health Benefits Program Handbook*, http://www.opm.gov/healthcare-insurance/healthcare/reference-materials/reference/family-members/ (last visited Feb. 26, 2013). Legally-recognized children of covered workers are covered automatically, 5 U.S.C. § 8901(5), but because of DOMA

Cunninghis, who is ineligible for health insurance through her own employer, has had to purchase separate, private individual health insurance.[30] That separate insurance is both more expensive and inferior to what she would have received under FEHBA.[31]

DOMA similarly precludes same-sex spouses of federal employees and their dependent children[32] from enrolling in the Federal Employees Dental and Vision Insurance Program (FEDVIP).[33] Thus, Nancy Gill, a long-term employee of the U.S. Postal Service and the named plaintiff in *Gill v. Office of Personnel Management*, was unable to add her spouse, Marcelle Letourneau, to her vision plan.[34] Because

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the children of a worker's same-sex spouse are not necessarily covered, whereas the children of a different-sex spouse automatically receive coverage. In July 2012, the U.S. Office of Personnel Management issued a proposed rule that would allow children of a same-sex domestic partner of a FEHBA enrollee to be covered under FEHBA. Federal Employees Health Benefits Program and Federal Employees Dental and Vision Insurance Program: Expanding Coverage of Children Federal Flexible Benefits Plan: Pre-Tax Payment of Health Benefits Premiums, 77 Fed. Reg. 42914 (July 20, 2012) (to be codified at 5 C.F.R. pts. 890, 892, 894). This rule is not yet final.

[30] Golinski Decl., *supra* note 27, at 2-3, Exs. B & F.

[31] *Id.* at 3.

[32] Children of same-sex spouses of federal employees do receive coverage when the federal employee also has a legal relationship with the child.

[33] 5 U.S.C. §§ 8951-62, 8981-92; *but see supra* note 29 (discussing proposed regulation).

[34] Joint Aff. of Pls. Nancy Gill & Marcelle Letourneau at 5, *Gill v. OPM*, 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 09-10309).

Gill's family was denied FEDVIP's savings, Letourneau incurred hundreds of dollars of expenses every year for her eye examinations and eye glasses.[35]

Similarly, Martin Koski, another plaintiff in the *Gill* lawsuit, cannot add his spouse, James Fitzgerald, to his FEHBA coverage.[36] As a result, the couple has incurred higher healthcare costs because Fitzgerald's employer-provided coverage is not only more expensive, but also less comprehensive than Koski's coverage.[37] In 2009, they paid $912 more for their separate plans than they would have paid under a family plan through Koski's employer.[38] During the same year, they also spent an additional $2,000 that they would not have incurred under Koski's plan due to higher co-payments, uncovered medical expenses, and higher prescription costs.[39]

Thus, DOMA forces the same-sex spouses of federal employees to rely on coverage from the other spouse's employer (if available), to purchase costly or substandard private healthcare insurance, or to go without healthcare insurance altogether. Not only does the denial of benefits to the same-sex spouses of federal employees inflict real economic harm, it also directly contravenes a "fundamental undergirding" of federal personnel law: nondiscrimination.[40] It is a basic principle of federal personnel law that "[f]ederal personnel management should be . . . free from prohibited personnel practices."[41] In particular, federal government agencies are prohibited from discriminating against employees—including in "decision[s] concerning pay, benefits, or awards"—"on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others."[42] The denial of spousal employment benefits to federal employees because they are married to a spouse of the same sex is, therefore, fundamentally at odds with the antidiscrimination principles that ensure a competent and productive federal workforce.[43]

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[35] *Id.*

[36] Joint Aff. of Martin Koski & James Fitzgerald at 2-3, *Gill*, 699 F. Supp. 2d 374 (No. 09-10309).

[37] *Id.* at 4-5.

[38] *Id.* at 4.

[39] *Id.* at 4-5.

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[40] Mem. from Raymond A. Pagliarini, Dir., Pers. Staff, *Merit System Principles and Prohibited Personnel Practices*, U.S. Dep't of Justice (Sept. 28, 2007), *available at* http://www.justice.gov/jmd/hr/docs/msppp-practices.pdf.

[41] 5 U.S.C. § 1101; *see also* Pagliarini, *supra* note 40.

[42] *Id.* § 2302(a)(2)(A)(ix), (b)(10).

[43] Several administrative judges for the Merit Systems Protection Board, the quasi-judicial body that adjudicates federal personnel matters, have held that discrimination on the basis of sexual orientation is prohibited under merit system principles and the prohibited personnel practices statute, 5 U.S.C. § 2302 (b)(10). *See, e.g.*, *Borsa v. U.S. Dep't of the Treasury*, MSPC Case No. AT-0752-13-0291-I-2, 2012 WL 6202332, *3, 112 LRP 58573, 2 (MSPB Nov. 6, 2012); *Cowart v. U.S. Postal Serv.*, 2012 WL 620235, *14, 112 LRP 59216, 12 (MSPB Nov. 5, 2012).

II. DOMA Significantly Restricts Married Gay and Lesbian Workers' Access to Critical Programs That Protect Married Workers in the Event of Illness, Workplace Injury or Death

Several federal programs provide monetary and other assistance to workers if a worker or her spouse becomes ill, is injured, or dies. The best-known of these programs is Social Security, which provides benefits to surviving spouses of workers who paid into the Social Security system. Many workers are also guaranteed the right to unpaid leaves of absence to care for a sick spouse. Federal and some state public sector workers are beneficiaries of a number of programs that provide care for a spouse in the event a worker becomes injured or dies on the job. Because of DOMA, these benefits are generally denied to married gay and lesbian couples.

A. DOMA Precludes Gay and Lesbian Spouses From Receiving Social Security Survivor Benefits

The Social Security system provides a variety of disability and survivor benefits to spouses and surviving spouses of covered workers.[44] Social Security provides benefits to some surviving spouses who have not yet retired and whose deceased spouses have paid into the system.[45] This provision is particularly beneficial to a surviving spouse who earned less income than her deceased spouse, due to the fact that Social Security benefits are computed based on an individual's lifetime earnings.[46] Surviving spouses may also be eligible for a "Lump-Sum Death Benefit"[47] and/or the "Widower's Insurance Benefit," which grants the surviving spouse the insurance benefits of the deceased spouse, if they are higher than what the surviving spouse is already receiving.[48] DOMA prevents same-sex spouses from receiving Social Security death benefits.

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[44] According to the 2000 Census data, 28% of gay and lesbian couples have at least one partner with a disability, and 7% of same-sex couples have one partner who is 65 or older. Adam P. Romero, *et al.*, *Census Snapshot: United States*, Williams Institute, 3 (Dec. 2007), *available at* http://escholarship.org/uc/item/6nx232r4.

For 79-year-old Herbert Burtis, a plaintiff in the *Gill* lawsuit, his deceased spouse's Social Security benefits would have helped him pay for his Medicare Part B coverage, as well as his asthma and high blood pressure medications.[49] Burtis had done what any loving spouse would do when his husband and life partner of over 60 years became ill; he provided steadfast care to John Ferris during his long battle with Parkinson's disease.[50] When Ferris finally succumbed to the disease, the government did not recognize their marriage because the legally married couple did not meet DOMA's definitions of "marriage" and "spouse."[51] Burtis would otherwise be entitled to a "One-Time Lump-Sum Death Benefit" of $255, along with a Social Security survivor benefit of approximately $700 per month.[52] By treating Burtis and other same-sex surviving spouses differently, DOMA denies them the security and protection provided to different-sex surviving spouses during this most vulnerable time.

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[45] 42 U.S.C. § 402.

[46] *Id.* § 415.

[47] *Id.* § 402(i).

[48] *Id.* § 402(e), (f).

[49] Aff. of Herbert Burtis at 5, *Gill*, 699 F. Supp. 2d 374 (No. 09-10309).

[50] *Id.* at 3-4.

B. DOMA Denies Married Gay and Lesbian Workers Access to Family and Medical Leave

The Family and Medical Leave Act (FMLA) entitles employees of qualified employers up to twelve weeks of unpaid leave to care for a spouse who has a serious health condition.[53] The FMLA is intended "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."[54] As a result of DOMA, however, employers are not required to provide FMLA leave to their married lesbian and gay workers who need time off from work to care for a seriously ill spouse.

The experience of Lynda DeForge and Raquel Ardin, plaintiffs in *Pedersen v. OPM*, concretely illustrates the resulting hardship. DOMA means that DeForge, a U.S. Postal Service employee and Navy veteran, has had to exhaust her vacation time to care for her spouse.[55] Ardin experiences debilitating pain caused by scar tissue from two neck fusion surgeries and degenerative arthritis in her neck, a condition which has rendered her unemployable.[56] DeForge drives Ardin, also a military veteran, to a VA facility two and a half hours from their home for Ardin's quarterly injection treatments.[57] DeForge requested FMLA leave for these appointments, but her application was denied because of DOMA.[58] Due to these circumstances, DeForge has had to postpone her own knee surgery so that she can accrue more sick and vacation time.[59] As her experience demonstrates, DOMA both undermines the FMLA's goal of protecting workers from loss of employment and burdens working families when a spouse falls ill.

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[51] *Id.* at 4-5.

[52] *Id.* at 5.

[53] 5 U.S.C. § 6382(a); 29 U.S.C. § 2612(a).

[54] 29 U.S.C. § 2601(b)(1).

C. DOMA Precludes Gay and Lesbian Spouses of Public Safety Officers and Federal Employees From Receiving Survivors' Benefits

DOMA precludes spouses of gay and lesbian employees who work in particularly dangerous fields from qualifying for specialized workers' compensation benefits provided by the federal Public Safety Officers' Benefits Program. If a married public safety officer with a different-sex spouse dies or becomes permanently disabled as a result of an injury sustained on duty, her spouse receives a lump-sum death benefit, currently $328,612.73, and may also be eligible for educational financial assistance.[60] However, if Mary Ritchie, a Massachusetts State Police Lieutenant and a plaintiff in the *Gill* lawsuit, is killed in the line of duty, her same-sex spouse Kathleen Bush, who is the full-time caretaker of the couple's two young children, would receive neither the lump-sum death benefit nor the education benefit.[61] Although Ritchie's children are eligible to receive the benefits, her spouse would be constrained in how she could use the funds, whereas a different-sex spouse would be free to use the benefits as she thought best for her family.[62] Put simply, DOMA deprives public safety enforcement officers with same-sex spouses of the rights enjoyed by their counterparts married to different-sex spouses despite the fact that they perform the same duties and undertake the same risks.

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[55] Joint Aff. of Raquel Ardin & Lynda DeForge at 4-6, *Pedersen*, 881 F. Supp. 2d 294 (No. 10-1750).

[56] *Id.* at 3-4.

[57] *Id.* at 3, 5.

[58] *Id.* at 6.

[59] *Id.* at 7.

Other programs specifically protect federal employees and their families in the event of the death or injury of the federal employee. The Federal Employee Retirement System (FERS), for example, provides death and survivor benefits to the current or former spouse of a federal employee if the employee dies before retirement and has worked for the federal government for a minimum of 18 months.[63] Because of the application of DOMA to FERS, however, same-sex spouses of deceased federal employees are barred from receiving these benefits.

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[60] 42 U.S.C. §§ 3796(a), 3796d-1; Office of Justice Programs, *Public Safety Officers' Benefits Programs* (2013), https://www.psob.gov/index.html.

[61] Joint Aff. of Mary Ritchie & Kathleen Bush at 2, 4, *Gill*, 699 F. Supp. 2d 374 (09-10309); *see also* 42 U.S.C. § 3796d-1.

[62] *Id.* at 4.

Another program designed to protect federal employees is the Federal Employees' Compensation Act, which provides workers' compensation benefits to federal employees injured in the performance of duty. If a federal employee dies as a result of such injury, her surviving spouse is entitled to receive up to 75% of the deceased employee's monthly pay.[64] DOMA denies these protections to surviving gay and lesbian spouses. Married gay and lesbian federal employees who desire such protection must purchase life insurance from a private vendor, a financial hardship not faced by similarly situated heterosexual married federal employees.

III. DOMA Imposes Significant Burdens on Married Gay and Lesbian Workers as They Plan for Retirement

Married gay and lesbian workers across the employment spectrum—whether in private, federal, state, or local employment—are denied access by DOMA to retirement, pension, Social Security, and other benefits provided to those married to a person of a different sex.

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[63] *See* U.S. Office of Pers. Mgmt., *FERS Information Survivors*, http://www.opm.gov/retire/pre/death/index.asp#FERS (last visited Feb. 26, 2013).

[64] 5 U.S.C. § 8133(a); 20 C.F.R. § 10.410.

A. DOMA Denies Married Gay and Lesbian Workers Access to Social Security Retirement and Medicare Benefits Designed to Protect Lower Earning Spouses

Social Security and Medicare are the foundation of our nation's commitment to ensuring that older workers and their spouses can retire with a modicum of dignity and stability. Yet, DOMA prevents married same-sex couples from fully sharing in that commitment and thereby places them at greater risk of economic insecurity in retirement.

Upon retirement, a married worker covered by Social Security may opt to receive the larger of either her own retirement benefit or one-half of her covered spouse's benefit, by adding a spousal benefit to the married worker's lower benefit.[65] Because of the application of DOMA to the Social Security laws, however, married gay and lesbian workers are denied the right to such spousal benefits. Social Security also permits married persons at full retirement age to elect to receive only the spousal benefit, while at the same time continuing to accrue delayed retirement credits in their own accounts, a benefit that DOMA denies to same-sex spouses.[66]

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[65] 42 U.S.C. § 402.

[66] Soc. Sec. Admin., *Soc. Sec. Retirement Benefits*, 9-10 (July 2012), *available at* http://www.ssa.gov/pubs/10035.pdf.

Moreover, when one spouse receiving Social Security retirement benefits dies, the surviving spouse is entitled to receive the deceased spouse's benefits if they would be greater than those of the surviving spouse.[67] This provision allows a lower earning spouse to maintain her standard of living in the event the higher earning spouse predeceases her. Once again, DOMA precludes same-sex widows and widowers from taking advantage of those crucial benefits. For such couples, when the higher earning spouse dies first, the surviving spouse loses the higher earner's Social Security payment and continues to receive only her own (lower) payment, if she is eligible to receive any payment whatsoever. Thus, Randell Lewis-Kendell, a plaintiff in the *Gill* lawsuit, will not be able to access Social Security survivor benefits when he is otherwise eligible to receive Social Security.[68] Due to his deceased spouse's higher lifetime earnings, Lewis-Kendell would likely have been entitled to approximately twice what he will receive based on his own earnings record but for DOMA.[69] As his business has faltered in the weakened economy, he faces a precarious financial situation due in part to his inability to access benefits to which other surviving spouses are entitled.[70]

The impact of DOMA on the Social Security benefits of married same-sex couples can result in the loss of thousands of dollars of retirement benefits annually. According to a 2009 study, the average difference in annual Social Security income between same-sex spouses and different-sex spouses is approximately $5,700.[71] In the worst case, the lower earning surviving same-sex spouse could lose up to $28,152 per year in Social Security payments.[72] This loss of income makes it more likely that a surviving same-sex spouse will live her elder years at or below the poverty line.

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[67] *See* 20 C.F.R. § 404.335.

[68] Aff. of Randell Lewis-Kendell at 5, *Gill*, 699 F. Supp. 2d 374 (No. 09-10309).

[69] *Id.* at 5-6.

[70] *Id.* at 4-6.

DOMA imposes comparable restrictions on same-sex spouses seeking Medicare coverage. Individuals generally become eligible for Medicare coverage by meeting the same work-history criteria necessary to receive Social Security retirement benefits.[73] The spouses of those individuals are also automatically eligible for Medicare benefits, even if they lack the work history to become eligible in their own right.[74]

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[71] Naomi G. Goldberg, *The Impact of Inequality for Same-Sex Partners in Employer-Sponsored Retirement Plans*, Williams Institute, 9 (Oct. 2009), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Goldberg-Retirement-Plans-Report-Oct-2009.pdf.

[72] This assumes that the deceased spouse earned the maximum Social Security payout and the surviving spouse would not qualify for Social Security on her own. Services & Advocacy for Gay, Lesbian, Bisexual & Transgender Elders & Movement Advancement Project, *Improving the Lives of LGBT Older Adults*, 13 (Mar. 2010), *available at* http://www.lgbtagingcenter.org/resources/pdfs/ImprovingtheLivesofLGBTOlderAdultsFull.pdf.

[73] 42 U.S.C. §§ 426(a)-(b), 1395c; 42 C.F.R. § 406.5(a).

[74] 42 U.S.C. § 426(a).

Because of DOMA, however, married same-sex couples must qualify for Medicare independently of one another.

Taken together, DOMA's restrictions on Social Security and Medicare greatly increase the economic insecurity of married same-sex couples in retirement. Moreover, these restrictions have the perverse effect during those couples' working lives of discouraging one spouse from caring for the couples' children on a full-time basis or foregoing employment to care for sick or disabled family members.

B. DOMA Denies Married Gay and Lesbian Workers Equal Rights and Benefits under Defined Pension Plans

Many private employers provide traditional pension plans—*i.e.*, "defined benefit plans"—to their employees as a benefit of employment. Under these plans, employees, upon retirement, are guaranteed fixed monthly payments for life and often for the lives of their spouses. These plans confer several tax deduction and income-deferral benefits on both employers and employees, provided the plans conform to certain requirements of federal tax law. Among those prerequisites are numerous nondiscrimination rules, many of which are designed to protect spouses of covered employees. DOMA removes those protections for married gay and lesbian workers.

The Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code require defined benefit plans and certain other pension plans to provide automatic survivor benefit payments to a surviving spouse of a plan participant who dies prior to retirement, unless the participant elects another payment form and the participant's spouse consents to that election.[75] DOMA precludes gay and lesbian surviving spouses from receiving these annuities. Additionally, while ERISA prohibits assignment or alienation of benefits provided under a qualified retirement plan, state court alimony or child support orders in divorce cases may require that pension plan amounts be assigned to alternate payees.[76] Because DOMA prohibits recognition of marriages between persons of the same sex, however, a pension plan may not be required to comply with such an order from a state court in which a same-sex spouse is named the alternate payee.[77]

Many employers believe that DOMA prevents them from defining or interpreting the term "spouse" for purposes of their pension plans to encompass marriages between people of the same sex and that if they recognize such marriages their pension plan's qualified tax status could be jeopardized. Gerald Passaro II, a plaintiff in the *Pedersen* lawsuit, was deemed ineligible to serve as the beneficiary of his deceased spouse's, Thomas M. Buckholz's, pension plan, despite the fact that his employer had previously acknowledged Passaro's beneficiary status.[78] Buckholz, a chemist, qualified as a fully vested participant in his employer's pension plan program after having devoted 20 years to the company.[79] He was entitled to receive a monthly single life annuity of $1,169.01 when he reached 65 years of age, and he may have been entitled to receive some portion of it when he turned 55.[80] Buckholz's life was cut short due to lymphoma. Passaro contacted Buckholz's employer after his death and he was informed that, because of DOMA, he would not be recognized as the beneficiary of his spouse's pension plan.[81] Despite having been lawfully married under the laws of their home state of Connecticut, DOMA served as the basis for the pension plan ignoring Buckholz and Passaro's marriage.[82]

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[75] 29 U.S.C. § 1055(a). Analogous provisions may be found in the Internal Revenue Code. *See* 26 U.S.C. § 401(a)(11).

[76] 29 U.S.C. § 1056(d)(3)(B); *see also* 26 U.S.C. § 414 (p)(1)(A).

[77] *See* Albert Feuer, *Who Is Entitled To Survivor Benefits From ERISA Plans?*, 40 J. Marshall L. Rev. 919 (2007).

Similarly, Sarah Ellyn Farley's employer asserted that DOMA prevented it from recognizing her surviving spouse, Jennifer Tobits, as the beneficiary of Farley's profit sharing plan, despite the absence of any reference to the statute in the plan.[83] Following her death, Farley's employer commenced an interpleader action in the Eastern District of Pennsylvania to resolve the distribution of her profit sharing plan. Her employer argued that it could not interpret its ERISA-governed plan in a way that conflicts with DOMA without jeopardizing its status as a qualified plan.[84] Thus, in a myriad of ways, DOMA undermines the fairness objectives of ERISA by denying employees married to a same-sex spouse many of the benefits and rights that are extended to married different-sex couples.

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[78] Aff. of Gerald V. Passaro II at 3-4, *Pedersen*, 881 F. Supp. 2d 294 (No. 10-1750).

[79] *Id.* at 3-4.

[80] *Id.* at 4.

[81] *Id.* at 4-6.

[82] *Id.* at 3-4.

[83] Pl. Cozen O'Connor, P.C.'s Mot. for J. on the Pleadings Pursuant to Rule 12(c) at 13-14, *Cozen O'Connor, P.C. v. Tobits* (E.D. Penn. filed Sept. 8, 2011) (No. 11-00045); Jennifer Tobit's Opp'n to Pl. Cozen O'Connor, P.C.'s Mot. for J. on the Pleadings at 2, *Cozen O'Connor, P.C.* (No. 11-00045).

C. DOMA Precludes Married Gay and Lesbian Workers from Contributing to Their Spouses' Retirement Accounts and Denies to Them Plan Rollover and Distribution Options

Federal law provides tax benefits to working individuals who make contributions to qualified retirement programs, such as individual retirement accounts (IRA) and 401(k) plans.[85] For example, working people who file joint tax returns may deduct contributions made to a retirement account on behalf of a spouse who is out of work.[86] Married gay and lesbian couples cannot take advantage of these tax benefits, and are thereby denied equal footing in saving for a secure retirement. Due to the inability to file joint tax returns, for example, Mary Ritchie—the Massachusetts State Police Lieutenant and plaintiff in the *Gill* lawsuit—is ineligible to receive tax incentives available to different-sex couples for contributing to a spousal IRA on behalf of her spouse, who is the full-time caretaker of the couple's two young children.[87]

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[84] Tobit's Opp'n, *supra* note 83, at 4.

[85] 26 U.S.C. § 219.

[86] *See id.* §§ 25B(d)(2)(D), 408, 408A.

The divide furthers when one member of the couple dies. Surviving spouses of different-sex couples are permitted to roll over a deceased spouse's IRA or 401(k) plan into their own account and to defer withdrawing funds from the account until they reach 70½ years of age.[88] By contrast, a surviving spouse in a same-sex couple designated as the beneficiary of her spouse's retirement account is required to commence withdrawing distributions by the end of the year following the year of death.[89] In addition, because of DOMA, the participant with a same-sex spouse is permitted to change her beneficiary, obtain a loan from the retirement account, or change the form of benefit (*e.g.*, to a lump sum from an annuity) without her spouse's written approval or knowledge.[90] Indeed, because of DOMA, IRAs and 401(k) plans are only required to offer the option of joint annuity benefit distribution to married couples. The types of rollovers available to same-sex spouses upon the death of their participant spouses are also limited.[91] Here again, DOMA denies married gay and lesbian couples retirement planning tools and benefits, thus undermining their financial security in retirement.

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[87] Ritchie-Bush Aff., *supra* note 61, at 7.

[88] M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 Drake L. Rev. 1081, 1096-97 (2010).

[89] *See* 26 C.F.R. § 1.401(a)(9)-3, A-3(a).

[90] *See* 26 U.S.C. § 417(a)(2); 26 C.F.R. § 1.401(a)-20, A-24(a).

D. DOMA Denies Married Gay and Lesbian Federal Employees the Ability to Participate Equally in Retirement Plans

Federal employees may opt for a retirement annuity that provides a defined benefit payable to a surviving spouse in the event the federal employee predeceases her spouse.[92] Retired federal employees who choose this option receive a smaller retirement benefit payment while alive to ensure that a surviving spouse will continue to receive benefits in the event the retiree dies first. DOMA, however, precludes federal employees from designating a same-sex spouse as a survivor beneficiary under this important retirement program.

Prior to the passage of DOMA, openly gay Congressman Gerry E. Studds aptly summarized this inequality: "I have paid every single penny as much as every Member of this House has for that pension, but my partner, should he survive me, is not entitled to one penny. I do not think that is fair, Mr. Speaker."[93] Notwithstanding Studds' contributions and financial planning, the Office of Personnel Management denied his surviving spouse's application for a monthly survivor annuity.[94] Because of DOMA, Studds' spouse, Dean Hara, and other surviving same-sex spouses of federal employees, do not receive the financial protections available to different-sex spouses of federal employees.

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[91] *See* 26 U.S.C. § 402(c)(11).

[92] U.S. Office of Pers. Mgmt., *supra* note 63.

IV. DOMA Diminishes Financial and Familial Stability for Married Bi-National and Foreign-National Gay and Lesbian Couples Seeking to Work in the United States

Foreign nationals seeking to work and live in the United States do so either through family sponsorship or employment-based preferences.[95] While lawful immigrants are normally permitted to immigrate with a spouse,[96] DOMA denies this entitlement to married gay and lesbian couples, even when their marriages are fully recognized under the laws of their home country.[97]

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[93] Aff. of Dean Hara at 4, *Gill*, 699 F. Supp. 2d 374 (No. 09-10309).

[94] *Id.* at 5.

[95] An individual not married to a U.S. citizen may also seek to immigrate to this country through diversity visas and refugee visas, both of which include the right to bring a different-sex, but not a same-sex, spouse. *See* U.S. Dep't of State, *Visa Types for Immigrants*, http://travel.state.gov/visa/immigrants/types/types_1326.html (last visited Feb. 26, 2013).

[96] 8 U.S.C. § 1153(d).

According to a 2010 study based on Census Bureau data, an estimated 28,574 bi-national same-sex couples and approximately 11,422 dual non-citizen same-sex couples currently reside in the U.S.[98] Although U.S. immigration policy generally places spousal relationships above all others—protecting U.S. citizens' right to marry non-citizens while providing safeguards to facilitate the bi-national, married couple's ability to remain in the U.S. to work, seek employment, and pursue higher education—DOMA categorically denies these protections to married same-sex couples.

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[97] Eleven countries permit gay and lesbian couples to marry: Argentina, Belgium, Canada, Denmark, Iceland, Netherlands, Norway, Portugal, Spain, South Africa, and Sweden. Same-sex marriage is also legal in parts of Mexico. Marriage Equality USA, *Current Status Around-the-World* (Sept. 7, 2012), http://www.marriageequality.org/Around%20the%20World. At least twenty-five countries recognize gay and lesbian couples for immigration purposes. *See* Human Rights Campaign, *Uniting American Families Act*, http://www.hrc.org/resources/entry/uniting-american-families-act (last modified Feb. 14, 2013).

[98] Craig J. Konnoth & Gary J. Gates, *Same-Sex Couples and Immigration in the United States*, Williams Institute, 1 (Nov. 2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Konnoth-Binational-Report-Nov-2011.pdf ("bi-national" refers to couples where only one member is a U.S. citizen).

A. DOMA Forecloses the Option of Immigration Through Family Sponsorship for Married Bi-National Gay and Lesbian Couples

U.S. immigration policy puts the highest priority on reuniting non-citizen spouses with their spouses who are either U.S. citizens or lawful permanent residents. U.S. citizens who marry non-citizens are generally automatically granted the rights and benefits of "Family Sponsorship," enabling the U.S. citizen to sponsor her spouse for conditional permanent residence.[99] To effect the timely reunification of married couples, non-citizen spouses of U.S. citizens are not subject to the numerical limitations on immigration generally applicable to other types of immigrant visa holders. This allows a non-citizen to join her U.S. citizen spouse expeditiously, bypassing the quota system, waiting lists, and priority dates applicable to other types of family-sponsored immigration.[100] If a lawful permanent resident becomes a U.S. citizen while her spouse is waiting for a visa, her spouse immediately receives a visa as well.[101] In addition, a non-citizen spouse of an American citizen becomes eligible for U.S. citizenship after only three years, in contrast to the five-year wait required of other lawful permanent residents.[102] Regardless of whether a same-sex couple is lawfully married in this country or another, these opportunities are unavailable to them.

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[99] 8 U.S.C. §§ 1430, 1151(b), 1154(a)-(b).

[100] The quota system can often stall family reunification for years and even decades. For example, the wait time for an F-1 family visa for unmarried sons and daughters of U.S. citizens from Mexico is nearly 20 years. U.S. Dep't of State, *Visa Bulletin: Immigrant Numbers for September 2012*, No. 48, Vol. IX, 2 (Aug. 9, 2012), *available at* http://www.travel.state.gov/pdf/visabulletin/visabulletin_september2012.pdf; 8 U.S.C. § 1151(b)(2).

Because of DOMA, married, same-sex bi-national couples, such as the plaintiffs in *Blesch v. Holder*, are denied spousal sponsorship rights.[103] In 1998, Heather Morgan, a U.S. citizen, and Maria del Mar Verdugo, a Spanish citizen, met in Madrid, Spain, while Morgan was there teaching English.[104] Morgan returned to New Jersey, and Verdugo eventually secured a temporary H1-B skilled worker visa through a Spanish-language newspaper in New York.[105] After the couple married, Morgan filed an I-130 Petition for Alien Relative on behalf of her spouse, which will most certainly be denied due to DOMA.[106] As a result, the couple's life is riddled with uncertainty.[107] Verdugo's ability to remain in the U.S. is contingent on her continued employment, and the couple has postponed starting a family because they are not sure whether they will be able to raise their children together in this country.[108] Because DOMA precludes U.S. citizens married to non-citizen same-sex spouses from sponsoring their spouses' immigration to this country, Morgan and Verdugo, like thousands of others, are deprived of the security and stability afforded to other similarly situated married different-sex couples.[109]

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[101] U.S. Citizenship & Naturalization Servs., *How Do I Help My Relative Become a U.S. Permanent Resident*, M-561, 2 (Aug. 2008), *available at* http://www.uscis.gov/USCIS/Resources/B1en.pdf.

[102] *See* U.S. Citizenship & Naturalization Serv., *Citizenship through Naturalization* (2011), http://www.uscis.gov/portal/site/uscis.

[103] Compl. at 11-12, *Blesch v. Holder*, 2012 U.S. Dist. LEXIS 75999 (E.D.N.Y. May 31, 2012) (No. 12-1578).

[104] *Id.* at 12.

[105] *Id.* at 12-13.

B. DOMA Makes it Difficult for Married Gay and Lesbian Couples to Immigrate to the United States

Workers may also immigrate to the United States through sponsorship by an employer.[110] Employment-based visas normally provide immigrants the right to bring their spouses, who in turn are provided the right to live and work in the United States.[111] DOMA denies an immigrating worker the right to be accompanied by a spouse if the spouse is of the same sex—even if the worker's marriage is otherwise lawfully recognized in her country of origin and the state in the United States where the immigrant intends to work.

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[106] *Id.* at 12-13.

[107] *Id.*

[108] *Id.*

[109] *See* Rebecca Walters, *The Uniting American Families Act: A Critical Analysis of Legislation Affecting Bi-National Same-Sex Couples*, 17 Am. U. J. Gender Soc. Pol'y & L. 521, 525 (2009) (Immigration and Nationality Act does not explicitly exclude married bi-national same-sex couples, but is constrained by DOMA's definition of spouse); *but see Matter of Paul Wilson Dorman*, 25 I. & N. Dec. 485, 2011 BIA LEXIS 8 (Op. Att'y Gen. Apr. 26, 2011).

[110] 8 U.S.C. § 1101(a)(15)(H).

The denial of this right profoundly affects the ability of married gay and lesbian legal immigrants to maintain family relationships and financial stability. Without lawful permanent resident status, same-sex spouses of employment-based visa holders must be able to obtain their own visitor visas or other types of visas to remain with a spouse in the United States. However, many married gay and lesbian spouses of employment-based visa holders cannot qualify for a visitor visa or may not be permitted to renew the visitor visa. Under these circumstances, the same-sex spouse may need to return to her home country for extended periods of time, resulting in costly travel expenses and extended periods of separation from her spouse and children, who are permitted to remain lawfully in the United States.[112] Such extended visits can also hinder the occupational advancement of either or both members of the couple, reducing earnings over the course of a lifetime.[113]

Even when the spouse can obtain a visitor visa, such visas generally require the applicant to prove that she does not intend to remain permanently in the United States, and that she maintains strong ties to her home country. This can be difficult—if not impossible—to do given her marriage to a lawful resident of the United States. Not only must gay and lesbian couples deliberate about whether they can tolerate DOMA's harsh constraints on their immigration prospects when considering U.S. employment opportunities, employers may also be reluctant to hire immigrant workers who may be compelled to return home regularly.[114]

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[111] *Id.* § 1153(d).

[112] Badgett, *supra* note 88, at 1097-98.

[113] *Id.*

DOMA's impact on U.S. immigration policy cruelly forces many married, bi-national, same-sex couples into painful and untenable dilemmas. As a consequence of DOMA, families are either broken apart or qualified workers who are married to persons of the same sex choose not to immigrate to the United States for employment. DOMA leaves gay and lesbian couples who are legally married under state law or the laws of a foreign nation with a choice between three equally poor options: the citizen must leave the United States, the non-citizen must reside in the United States illegally, or the couple must separate.[115] Each unfortunate alternative directly contravenes longstanding U.S. immigration policy favoring family reunification.

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[114] Immigration Policy Ctr., *The Migrant Integration Policy Index* (2011), *available at* http://www.immigrationpolicy.org/just-facts/migrant-integration-policy-index-mipex-iii.

[115] Jessica Feinberg, *The Plus One Policy: An Autonomous Model of Family Reunification*, 11 Nev. L.J. 629, 630 (2011).

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

UNITED STATES OF AMERICA, *PETITIONER,*
v.
EDITH SCHLAIN WINDSOR, *et al.*, *RESPONDENTS.*

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN HUMANIST ASSOCIATION AND AMERICAN ATHEISTS, INC., AMERICAN ETHICAL UNION, THE CENTER FOR INQUIRY, MILITARY ASSOCIATION OF ATHEISTS AND FREETHINKERS, SECULAR COALITION FOR AMERICA, SECULAR STUDENT ALLIANCE, AND SOCIETY FOR HUMANISTIC JUDAISM, IN SUPPORT OF RESPONDENTS ADDRESSING THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. DOMA VIOLATES EQUAL PROTECTION BECAUSE IT REFLECTS AND PERPETUATES PREJUDICE TOWARDS A PROTECTED CLASS AND IS NOT JUSTIFIED BY ANY VALID GOVERNMENTAL INTEREST 5

   A. Laws such as DOMA, which divide people on the basis of sexual orientation, draw a suspect legislative classification requiring heightened judicial scrutiny 6

   B. There is no legitimate governmental interest, compelling or otherwise, that can justify denying federal recognition of the marriages of gays and lesbians 10

   C. Traditional notions of religious morality are not a valid governmental interest that can justify discrimination in their name. 12

   D. DOMA lacks a legitimate secular purpose in violation of the Establishment Clause. ... 20

II. STRIKING DOWN THIS DISCRIMINATORY LAW DOES NOT IN ANY WAY IMPAIR RELIGIOUS LIBERTY 22

CONCLUSION 30

IDENTIFICATION OF *AMICI CURIAE* .... App. 1

TABLE OF AUTHORITIES

Cases

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) .. 18

Bethel School Dis. No. 403 v. Fraser, 478 U.S. 675 (1986) 18

Board of Directors of Rotary Intern. v. Rotary Club of Duarte, 481 U.S. 537 (1987) 27

Bob Jones University v. U.S., 461 U.S. 574 (1983)... 27

Bolling v. Sharpe, 347 U.S. 497 (1954) 6

Bowers v. Hardwick, 478 U.S. 186 (1986) 15, 16

Boy Scouts of America v. Dale, 530 U.S. 640 (2000). 28, 29

Buckley v. Valeo, 424 U.S. 1 (1976). 6

Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 130 S. Ct. 2971 (2010) 29

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 24

City of Erie v. Pap's A.M., 529 U.S. 277 (2000) 18

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 17

Cohen v. California, 403 U.S. 15 (1971) 18

County of Allegheny v. ACLU, 492 U.S. 573 (1989). .... .21

Craig v. Boren, 429 U.S. 190 (1976) 10

Crowley v. Christensen, 137 U.S. 86 (1890) 19

Davis v. Beason, 133 U.S. 333 (1890) 19

Estin v. Estin, 334 U.S. 541 (1948) 19

Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1 (1947). 21

Frontiero v. Richardson, 411 U.S. 677 (1973) 7

Haddock v. Haddock, 201 U.S. 562 (1906) 9

Heller v. Doe, 509 U.S. 312 (1993) 10

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694 (2012). 25

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) 28

Lawrence v. Texas, 539 U.S. 558 (2003). 10, 15, 16, 17

Lemon v. Kurtzman, 403 U.S. 602 (1971). 21

Loving v. Virginia, 388 U.S. 1 (1967). 5, 9

McGowan v. Maryland, 366 U.S. 420 (1961) 22

Miss. Univ. Women v. Hogan, 458 U.S. 718 (1982).. 12

New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988) 27

Norwood v. Harrison, 413 U.S. 455 (1973) 30

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) .... .18

Phalen v. Commonwealth of Virginia, 49 U.S. 163 (1850) 19

Plyler v. Doe, 457 U.S. 202 (1982). 7, 8

Posadas de Puerto Rice Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) 19

Roberts v. United States Jaycees, 468 U.S. 609 (1984). 27

Romer v. Evans, 517 U.S. 620 (1996). 17, 26

Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006) 28, 29

Schneider v. Rusk, 377 U.S. 163 (1964) 6

Shapiro v. Thompson, 394 U.S. 618 (1969)............ 10

U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973). 16, 20

U.S. v. Lee, 455 U.S. 252 (1982). 25

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) .. 6, 20

West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943) 5

Windsor v. U.S., 699 F. 3d 169 (2nd Cir. 2012)...... 8, 9

Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976) 17

Other Authorities

Mason I. Lowance, *A House Divided: The Antebellum Slavery Debates in America, 1776-1865*, 60 (2003). 14

Constitutional and Statutory Provisions

U.S. CONST. AMEND. XIV, § 1........ 6

42 U.SC. 2000a........ 26

INTERESTS OF *AMICI CURIAE* [1]

This *amici curiae* brief in support of the Respondents is being filed on behalf of the American Humanist Association ("AHA") and American Atheists, Inc., the American Ethical Union, the Center for Inquiry, the Military Association of Atheists and Freethinkers, the Secular Coalition for America, the Secular Student Alliance and the Society for Humanistic Judaism. *Amici* comprise a diverse array of secular and humanist organizations that advocate on behalf of the separation of church and state and equality rights and offer a unique viewpoint concerning the history of civil liberties and rights in the United States of America.

AHA has a long history of supporting equal rights for gays and lesbians. It remains committed to advancing equality for lesbian, gay, bisexual and transgender people and their families. AHA's LGBT Humanist Council seeks to improve the lives of LGBT individuals through education, public service and outreach, and serves as a resource for its members, the greater freethought community and the public on LGBT issues. Humanists celebrate the happiness brought into the lives of LGBT couples by their love for each other, and reject discrimination against gays and lesbians because it finds no basis in reason.

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[1] *Amici* file this brief with the consent of all parties. Consents of the parties are on file with the Clerk of the Court. No counsel for any party in this case authored in whole or in part this brief. No person or entity, other than *amici*, their members or their counsel made a monetary contribution for the preparation or submission of this brief. The *amici* have no parent corporations, and no publicly held companies own 10% or more of their stock.

This case concerns core humanist and atheist interests regarding the equal, fair and just application of our laws to all of citizens and the separation of church and state.

SUMMARY OF ARGUMENT

This is not simply a case about gay rights. It is a case about human rights, which find their compelling moral imperative in a consideration of our common humanity. Empathy for our fellow man and woman, grounded in the recognition that each of us could be him or her, is the force that compels the just among us to insist on upholding the ideal of legal equality for all.

Nor is this case, properly considered, merely about the civil institution of marriage, the right to build a committed and stable life with the one you love on the same legal basis as any other human being. The denial of *any* civil right on the basis of traits that make up the core identity of another human, absent a compelling justification, violates our most foundational constitutional values.

An application of these general principles resolves the particular case before the Court. It is a violation of equal protection to discriminate against gays and lesbians, including but not limited to denial of legal recognition of their marriages, as the Defense of Marriage Act ("DOMA") does. The purported governmental interests that its defenders put forward to justify its passage are illusory, having either no logical connection to the legislation or embodying an illegitimate interest, such as animus toward homosexuals or the promotion of a particular religious view.

Some who oppose this conclusion, including many *amici curiae* who have filed briefs in favor of the appellants, claim that their "religious liberty," to use their own intentionally overbroad, yet vague, phrasing, would be violated if this Court confirms a right to legal equality for gays and lesbians. The fundamentalist Christians among them cite their Bible's condemnation of homosexuality. Of course, no decision of this Court striking down a law denying recognition to such marriages would require these individuals to engage in any sexual activity their religion forbids. Instead, the only "right" they can claim is one that, given the secular nature of our government as guaranteed by the Establishment Clause, cannot exist: the right to have their religious views written into law so that others may be compelled to follow them.

Because the First Amendment forbids, rather than requires, any law solely grounded in or codifying a religious "moral" commandment, such objections can be accorded no weight.

Our Constitution prohibits any law or practice that leaves any group of us in second-class citizen status. DOMA, by denying federal recognition of the marriages of gays and lesbians simply because of who they are, does just this. This Court should therefore strike it down as a betrayal of the Fourteenth Amendment and a step backwards in the long struggle for genuine equality in American society.

ARGUMENT

I. DOMA VIOLATES EQUAL PROTECTION BECAUSE IT REFLECTS AND PERPETUATES PREJUDICE TOWARDS A PROTECTED CLASS AND IS NOT JUSTIFIED BY ANY VALID GOVERNMENTAL INTEREST.

It is a fundamental democratic ideal of the American republic, forged in the crucible of the Civil War and codified in the Fourteenth Amendment enacted in its wake, that "we are a free people whose institutions are founded upon the doctrine of equality." *Loving v. Virginia*, 388 U.S. 1, 11 (1967). The late date of this Court's decision in *Loving*, however, is telling. The promise of legal equality has all too frequently been empty for those groups deemed by the ruling white, Christian majority to be alien, unworthy, abnormal or inferior. It has been left to this Court to be a bulwark against such majoritarian discrimination and to stand up for the Constitution's guarantees of liberty and equality to every individual. As this Court summarized its role in *West Virginia Bd. of Ed. v. Barnette*, our fundamental civil liberties and rights, including that to legal equality, must be "place[d] . . . beyond the reach of majorities and . . . establish[ed] . . . as legal principles to be applied by the courts. . . . [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections." 319 U.S. 624, 638 (1943).

The passage of the Fourteenth Amendment was a milestone in the long, unfinished struggle for equality in American society. Although it was racial slavery that was the issue at the forefront of the Civil War, the language of the Equal Protection Clause was not limited to preventing discrimination on the basis of race. It defends equality for all, forbidding the government to "deny to *any* person . . . the equal protection of the laws." U.S. Const. Amend. XIV, §1 (emphasis added).[2] This provision enshrines, as a cornerstone value of the republic, a command that our government strive for equality in how it treats *every* person.

A. Laws such as DOMA, which divide people on the basis of sexual orientation, draw a suspect legislative classification requiring heightened judicial scrutiny.

The question in this case is not whether DOMA discriminates on the basis of sexual orientation. It clearly does. See e.g. *Varnum v. Brien*, 763 N.W.2d 862, 884 (Iowa 2009) (stating that laws that ban recognition of "civil marriages between two people of the same sex classif[y] on the basis of sexual orientation"). Instead, the question is whether the government can justify such discrimination as a means to protect a sufficiently important governmental interest. It cannot.

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[2] The same restriction on state action in the Fourteenth Amendment applies to federal action under the Fifth Amendment (and, for the sake of convenience and simplicity, will be referred to as "equal protection" herein). The Due Process Clause of the Fifth Amendment "forbid[s] [federal] discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider v. Rusk*, 377 U.S. 163, 168 (1964) (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)); see also *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (stating that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment").

In interpreting the Constitution's guarantee of legal equality, this Court has developed a jurisprudence that requires courts to subject to strict judicial scrutiny any law or policy that treats people differently on the basis of arbitrary "suspect" classifications. See e.g. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). Courts must "treat[] as presumptively invidious those [legislative] classifications that disadvantage a 'suspect class.'" *Id.* It is not, of course, a particular class of citizens that is "suspect," but rather the government's discrimination against them that is. Governmental line-drawing that "likely . . . reflect[s] deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective" is suspect. *Id.* at n.14.

Amici support and endorse, and will not duplicate in their entirety here, the plaintiff's arguments that discrimination against gays and lesbians is, upon application of this Court's precedents, suspect and therefore subject to heightened judicial scrutiny. Sexual orientation is a core element of personal identity and has no relationship to the ability to function or excel in society. Gays and lesbians have suffered a history of unequal treatment motivated by outright bigotry. They represent a small proportion of the population and so are in need of protection from hostile political majorities. Cf. *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973) (plurality) (applying heightened scrutiny to gender classifications even though women constitute a majority of the populace). The very fact that this case is before the Court itself illustrates that gays and lesbians frequently have been unable politically to prevent the passage of discriminatory laws.

B. There is no legitimate governmental interest, compelling or otherwise, that can justify denying recognition of the marriages of gays and lesbians.

When a law discriminates among individuals on the basis of a suspect classification, or burdens a fundamental right, it may only be upheld if the government can "demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Plyler*, 457 U.S. at 217.

There is a variety of supposed governmental interests that the defendants in this case have scrambled to cook up for litigation purposes as they seek to obscure their true motivations. As summarized by the court below, these included "protection of the fisc, uniform administration of federal law notwithstanding recognition of same-sex marriage in some states but not others, the protection of traditional marriage generally, and the encouragement of 'responsible' procreation." *Windsor v. U.S.*, 699 F. 3d 169, 180 (2nd Cir. 2012).

As to the asserted interest in uniformity, it "is suspicious because Congress and the Supreme Court have historically deferred to state domestic relations laws, irrespective of their variations." *Id.* at 185. In fact "[t]o the extent that there has ever been 'uniform' or 'consistent' rule in federal law concerning marriage, it is that marriage is 'a virtually exclusive province of the States,'" rather than the Congress. *Id.* at 186. As this Court has emphasized, "the Constitution delegated no authority to the Government of the United States on the subject of marriage." *Haddock v. Haddock,* 201 U.S. 562, 575 (1906). In addition, DOMA does not in fact create a uniform national marriage law; each state's law continues to operate. DOMA simply evinces a refusal by the federal government to accept a state's rule as to the parties to marriage if it is one that the Congress did not like. If the federal government were truly seeking a uniform rule, that rule would be simple: a person is married for purposes of federal law if he is or she is married under state law where he or she lives. The result DOMA creates is decidedly unequal, however: some of those legally married in their state of residence are treated as such for the purposes of federal law and others are not.

The proper role of the federal government as to the institution of marriage is to ensure that states, in exercising their prerogative to legislate on the subject, do not violate the right of their citizens to marry, including by denying disfavored classes thereof the right to do so. See *e.g. Loving.* It is a rather perverse betrayal of this duty for Congress to intrude into the regulatory province of the states to discriminate rather than to prevent discrimination.

As to saving money, while government may in general have "a valid interest in preserving the fiscal integrity of its programs . . . [it] may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969); see also *Craig v. Boren*, 429 U.S. 190, 198 (1976) (stating that "administrative ease and convenience [are not] . . . sufficiently important objectives to justify" discrimination). Just as a state could not decide to exclude African Americans from its schools in order to reduce its education budget, Congress cannot exclude gays and lesbians from receiving federal marriage benefits simply because doing so is cheaper. Our constitutional rights are not fiscal burdens to be shirked simply because protecting them is not without cost. See *Frontiero*, 411 U.S. at 690 ("[A]lthough efficacious administration of governmental programs is not without some importance, the Constitution recognizes higher values than speed and efficiency") (internal quotation omitted).

The purported governmental interest in refusing to change a statutory scheme of long standing for the sake of maintaining a "tradition" of doing so is not much in the way of a justification. As this Court has noted, the "[a]ncient lineage of a legal concept does not give it immunity from attack" for being discriminatory. *Heller v. Doe*, 509 U.S. 312, 326 (1993). To the contrary, "neither history nor tradition" could justify the discriminatory restrictions on who could marry whom at issue in *Loving*. *Lawrence*, 539 U.S. at 577-78. It is quite a weak argument indeed to seek to justify something on the basis that it has been done in the past. In fact, the past is exactly where discrimination on the basis of sexual orientation belongs.

In addition, DOMA does not actually have any effect on state laws barring marriage equality, other than barring the effect for federal purposes of those that do so. It therefore cannot be said to serve the purpose of preserving traditional laws, which could be repealed or overturned at any time without any violation of DOMA.

Finally, and for similar reasons, DOMA does not serve any purported governmental interest in "responsible" procreation (by means of promoting "natural" conception and an allegedly optimal mother-father parenting arrangement). Even if these were somehow valid ends to induce, the fact that they are "incentives for heterosexual couples . . . [means] that DOMA does not affect [them] in any way." *Windsor*, 699 F. 3d at 188. DOMA denies recognition to gay marriages but leaves straight marriages untouched, and therefore can logically have no connection to the childrearing choices of heterosexual couples. The only possible argument that reconciles this disconnect would necessarily include an assertion that denying marriage equality preserves the institution of marriage as a straights-only institution, preserving it from the "degradation" of sharing it with an inferior group. Needless to say, this reprehensible rationale is one grounded in bigotry, and so is not one that can *legitimately* justify the very discrimination in embodies.

In the end, these asserted governmental interests, having no actual relationship to the issue at hand, can provide no logical justification for DOMA. It is therefore immaterial whether, within this Court's estimation, such interests must be merely "legitimate" or as strong as "compelling." They are neither, but instead the illusory, *post hoc* phantasms that appear to be grounded in either their own discriminatory animus or a desire to see the weight of law put behind their particular religious views.

All of the foregoing logical arguments against marriage equality having been shown to be unfounded, we are left with those founded in religious interests, often in the guise of "morality" or "tradition," to which we now turn.

C. Traditional notions of religious morality are not a valid governemental interest that can justify discrimination in their name.

In developing and applying its equal protection jurisprudence, this Court has rightly cautioned against a reliance on history or tradition as an acceptable reason to uphold a discriminatory law. Such "justifications" may simply embody the very discrimination at issue. See *e.g. Miss. Univ. Women v. Hogan*, 458 U.S. 718, 724-725 (1982) (stating that the "test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females" and that "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions").[3] This is a sensible approach upon consideration; after all, the foremost purpose in enacting the Fourteenth Amendment was to reject and remedy the long history of deeply entrenched racial discrimination that stained American society from its earliest days. It was intended to force a new beginning, changing the law in order to change society by repudiating its long-standing norms of discrimination. Its broad language did not limit such change to protecting former slaves and their descendants, but guaranteed the right to equality to all.

These traditional norms took the form not only of discriminatory laws, but also of the "moral" justifications for them. Consider, for example, the justifications that a Christian slaveholder found in his Bible. Leviticus 25:44-46 says that "you may buy male and female slaves from among the nations that are around you . . . and they may be your property." Once acquired, he could rely on Ephesians 6:5 to compel obedience with its command to slaves to "obey [their] earthly masters with fear and trembling, with a sincere heart, as [they] would Christ." As Jefferson Davis, president of the secessionist Confederate States of America, put it, "[s]lavery was established by the decree of Almighty God . . . . It is sanctioned in the Bible, in both

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[3] How America traditionally defined marriage is therefore material to this litigation not, as the proponents of DOMA would have it, to justify rejecting a change to it, but rather as contrary evidence showing the longstanding nature of discrimination against gays and lesbians in American society.

Testaments, from Genesis to Revelation."[4] Following the abolition of slavery itself, many Christian racists continued to look to the Bible to justify enduring racial discrimination, citing the story in Genesis 9:25 of the "mark of Cain" for their view that dark-skinned peoples are cursed by God, and therefore must be treated as inferiors.

Racial discrimination is in no way unique in finding its justification in long-standing history and traditional religious views. Opponents of equal rights for women could point to Timothy 2:12, which said "suffer not a woman to teach, nor to usurp authority over the man, but to be in silence." Opponents of equal legal rights for gays and lesbians likewise frequently ground their position in what they say are the moral commands of their religion. Many of them who are Christians cite the story of Sodom and Gomorrah (found in Genesis 19:1-11) or Leviticus 20:13, which calls for the murder of those who engage in gay sex, saying that "[i]f a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death; their blood is upon them."[5]

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[4] Mason I. Lowance, *A House Divided: The Antebellum Slavery Debates in America, 1776-1865*, 60 (2003).

[5] Of course, not all Christians read these portions of the Bible as compelling them to discriminate against African Americans, women and gays and lesbians, but it is clear that sufficiently large portions of the Christian-majority electorate have voted to discriminate on the basis of sexual orientation in approving the myriad of anti-marriage equality measures that have been enacted in recent years, often as constitutional amendments requiring a super majority vote. As a counterpoint, *amici* AHA, AEU and SHJ would like to state that their humanist beliefs require them to respect and honor the wishes of those gay or

As this Court has recognized, "for centuries there have been powerful voices to condemn homosexual conduct as immoral . . . shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." *Lawrence v. Texas*, 539 U.S. 558, 571 (2003). Noting that "[t]hese considerations do not answer the question before us, however . . . [which is] whether the majority may use the power of the State to enforce these views on the whole society." *Id.* In rejecting lawmaking grounded in religious moral commands, the Court declared that its "obligation is to define the liberty of all, not to mandate our own moral code." *Id.* Rather than bowing to a "history and tradition" of legal discrimination against gays and lesbians, the new, more inclusive direction of "our laws and traditions in the past half century are of most relevance here." *Id.* at 571-72. The Court noted, in overruling an earlier contrary decision, *Bowers v. Hardwick*, 478 U.S. 186 (1986), that decision's misguided reliance on "the history of Western civilization and Judeo-Christian moral and ethical standards." *Id.* at 572. It advised us to look instead forward, just as did the authors of the Fourteenth Amendment, who "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Id.* at 579. Indeed, the time has long since come for this Court to make the promise of liberty and equality real for *all* of our fellow Americans, including gays and lesbians, and

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lesbian individuals seeking to be married in ceremonies involving their organizations.

to reject any law that codifies ancient religious bigotry against them.

Opposing *amici curiae*, representing a range of conservative religious special interest groups, argue that *Lawrence* did not overturn a supposedly pre-existing rule that moral condemnation, without any other governmental interest, can be a legitimate basis for legislation. They are correct in asserting that *Lawrence* did not change the law. They are wrong as to what that law was. *Lawrence* reaffirmed that this Court has "*never* held that moral disapproval, without any other asserted governmental interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Lawrence,* 539 U.S. at 582 (O'Connor, J., concurring) (emphasis added). *Bowers*, the sole outlier, "was not correct when it was decided, and it is not correct today." *Id.* at 578. As Justice Stevens recognized in his *Bowers* dissent, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Bowers,* 478 U.S. at 216. This statement was expressly adopted by the Court in overruling *Bowers*. *Lawrence,* 539 U.S. at 577-78.

In fact, "[m]oral disapproval of [a] group . . . is an interest that is insufficient to satisfy [even] rational basis review under the Equal Protection Clause." *Id.* at 582 (O'Connor, J., concurring) (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (rejecting moral disapproval of hippies as a legitimate interest, stating that a "bare . . . desire to harm a politically unpopular group" is not a legitimate governmental interest) and *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (noting that such laws "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected").

Opposing *amici curiae* point to the *Lawrence* dissent's suggestion that, if morality is an insufficient governmental interest, a number of state laws would be "called into question." *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) (referring to "laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity"). Even putting aside the repulsive calumny inherent in lumping together marriage equality with bestiality and incest, a careful review of each instance in which this Court has considered such laws reveals that morality has never stood alone as justification for them. In every instance, the decision relied on the governmental interest in preventing other *concrete* harms of the prohibited conduct and not on a bare assertion of immorality.

This is true of this Court's decisions regarding sexual speech. See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 52 (1976) (upholding a zoning ordinance that dispersed sexually explicit adult movie theatres geographically, based on the city's interest in preventing crime and prostitution as a "secondary effect"); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (upholding a similar statute as a means to "prevent crime, protect the city's retail trade, maintain property values, and generally protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (rejecting a reliance on an asserted "government interest in protecting . . . morality" and instead relying on the secondary effects doctrine, finding a governmental interest in "preventing prostitution, sexual assault, and associated crimes"); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 291 (2000) (upholding a similar nudity statute finding it was "aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments"); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973) (upholding an injunction against the showing of two films, finding that states have a right to make a "morally neutral judgment" that the film would "injure the community" or "endanger public safety").

Similarly, in cases involving supposedly obscene or offensive speech, the Court has refused to rest its reasoning on morality alone. *See Bethel School Dis. No. 403 v. Fraser*, 478 U.S. 675, 683-86 (1986) (upholding the suspension of a high school student for a sexually explicit speech, but only after describing the harm it caused to young students, finding that schools had a legitimate interest in developing civility and protecting children, and finding that the speech "would undermine the school's basic educational mission"); *Cohen v. California*, 403 U.S. 15, 22-23 (1971) (rejecting an asserted right of "States, acting as guardians of public morality, [to] properly remove [an] offensive word from the public vocabulary").

In considering bans on polygamy and bigamy, the Court in doing so has always cited the harm that such practices cause, in addition to any moral arguments. See *Estin v. Estin*, 334 U.S. 541, 546 (1948) (protecting children); *Davis v. Beason*, 133 U.S. 333, 341 (1890) (disturbing the peace of families, degrading women, and debasing men).[6]

Similarly, the Court has upheld legislation targeting the harms associated with various practices considered by some to be immoral vices, independent of their supposed "immorality." See *Crowley v. Christensen*, 137 U.S. 86, 91 (1890) (finding alcohol leads to "neglect of business and waste of property" and is associated with crime and misery); *Phalen v. Commonwealth of Virginia*, 49 U.S. 163, 168 (1850) (finding that lotteries harm the poor and ignorant); *Posadas de Puerto Rice Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986) (finding that restrictions on lotteries protect the health, safety, and welfare of citizens).

Opposing *amici curiae* also have argued that if morality is no longer a basis for legislation, laws such as those setting a minimum wage, establishing legal and medical ethics codes, or forbidding discrimination or animal cruelty would all be left without a sufficient justification to survive rational basis review. These laws, of course, are all justified by an interest in seeking to prevent harm to or promote the welfare of those in need of protection. Preventing harm may be a moral value, but it is the prevention of harm itself that is a proper motivation for legislation, not any morality behind it. Concern for *concrete* effects removes such justifications from the same category as the empty "morality" of mere disapproval grounded in repugnance and nothing more.

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[6] Whether these other interests are still sufficient today is a question we do not address. It is sufficient to observe that the Court in its ruling explicitly did not rely on morality, standing alone, as a governmental interest justifying these laws.

As discussed *supra*, DOMA can be justified by no actual governmental interests that can logically be shown to prevent harm or promote welfare. All that is left to its defenders is a moral argument that homosexuals are sinful and therefore not to be permitted to share the institution of marriage with heterosexuals. This kind of spiteful, self-righteous "desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Moreno*, 413 U.S. at 534. Because moral disapproval of a group cannot be the foundation for a law discriminating against it, DOMA does not satisfy the judicial scrutiny required of it.

D. **DOMA lacks a legitimate secular purpose in violation of the Establishment Clause.**

Recognizing the difficulty in finding the real interest furthered by DOMA, "we consider the reason left unspoken by [its proponents]: religious opposition to same-sex marriage." *Varnum*, 763 N.W.2d at 904. As the Iowa Supreme Court recognized, "religious sentiment most likely motivates many, if not most, opponents of same-sex civil marriage." *Id.*

The aforementioned *amici curiae* do not hide the fact that their religious views underpin their opposition to marriage equality. See e.g. ***Brief for Westboro Baptist Church as Amici Curiae in Support of Neither Party*** (claiming that "[i]t is no small matter for a nation to accept the sin of sodomy . . . [t]he description of the utter annihilation of Sodom and Gomorrah and three nearby cities is stark, and directly tied to homosexuality"). They are of course free to hold and express such views. However, because our government must not only provide legal equality for all but also must remain secular, their religious rules cannot be written into law.

This Court has made clear that the "First Amendment has erected a wall between church and state. That wall must be kept high and impregnable." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 18 (1947). To do so, "the Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs." *County of Allegheny v. ACLU,* 492 U.S. 573, 610 (1989). In order to secure this freedom from state-backed religion, the Constitution requires that every law must have a "secular purpose" and not "advance . . . religion." *Id.* at 592 (citation omitted). Rather than be codified into law, "religion must be a private matter for the individual, the family, and the institutions of private choice." *Lemon v. Kurtzman,* 403 U.S. 602, 625 (1971).

Religion has been a driving force behind legislation denying recognition of gay marriages, including DOMA. Religious support can, of course, constitutionally coincide with legislation. A law is not unconstitutional merely because it "happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). For example, the fact that the biblical Ten Commandments forbid murder and theft does not necessarily invalidate laws that criminalize such conduct. However, in enacting such laws, "legislatures [must] conclude that the general welfare of society, *wholly apart from any religious considerations*, demands such regulation." *Id.* (emphasis added). The concrete harms mitigated by murder laws are apparent. But when there is no such legitimate secular governmental interest, as has been established as to DOMA *supra*, such laws do not merely "harmonize" with religious views; they embody, promulgate and establish them as legally binding even on those who do not follow that religion's rules, thereby violating the Establishment Clause.

II. STRIKING DOWN THIS DISCRIMINATORY LAW DOES NOT IN ANY WAY IMPAIR RELIGIOUS LIBERTY.

The various anti-gay religious *amici curiae* have attempted to justify DOMA by claiming that it is necessary to protect what they call their "religious liberty." What they mean by this phrase is not clear, perhaps intentionally so. Regardless of the outcome of this case, such groups remain free, under the Free Speech and Free Exercise Clauses, to form anti-gay churches, to spread their anti-gay message, and to refuse to perform religious wedding ceremonies for same-sex couples.

The Becket Fund, for example, claims, without apparent irony, in its brief that laws such as DOMA serves to prevent "wide-ranging church-state conflict" (rather than itself breaching the wall of separation). *Brief Amicus Curiae of the Becket Fund for Religious Liberty* at 4. They assert that anti-gay religious institutions and individuals "will face an increased risk of lawsuits under . . . anti-discrimination laws" and "a range of penalties from federal, state and local governments, such as denial of access to public facilities, loss of accreditation and licensing, and the targeted withdrawal of government contracts and benefits." *Becket Br.* at 5.

At heart, this objection amounts to a claim that anti-gay religious institutions should have a special right to ignore the law. Because, as will be shown below, antidiscrimination laws do not violate the First Amendment, they have no such right and this claim is therefore meritless. To the extent that these objections amount to a plea that legislatures exempt them from such laws, they are not properly directed in a brief submitted to this Court. It is the exclusive role of legislatures, not judges, to create religious exceptions to neutral statutes of general applicability, such as public accommodations laws. See *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990) (noting that "to say that a[n] . . . exemption is permitted . . . is not to say that it is constitutionally required" and that such accommodations should be left "to the political process").

This Court has rightly made clear that the Constitution requires that our laws apply to and govern the conduct of all equally, religious and secular alike. The Free Exercise Clause does not give a religious actor a special right to ignore a law by claiming that complying with it conflicts with its religion. As this Court recognized, doing so would undermine the rule of law, permitting anyone who wants to break the law the ability to claim some "religious" reason that he must be allowed to do so. Pursuant to *Smith*, a Free Exercise Clause challenge to a law is *only* available if the law is not neutral and of general applicability (*i.e.* only if it discriminatorily singles out particular religious conduct *as such* for regulation). If a law is "not specifically directed at . . . religious practices," it does not violate the Free Exercise Clause. *Id.* at 878. In other words, it is only when "the object of a law is to infringe upon or restrict practices *because of* their religious motivation, [that] the law [is] . . . not neutral," and therefore unconstitutional. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (emphasis added).

Accordingly, when considering an asserted Free Exercise Clause defense to the application of a law to a defendant who claims that the law inhibits in some way his free exercise of religion, a court, applying the *Smith* test, must reject this challenge unless the defendant can prove that the law was enacted with the *express* purpose of discriminating against a *particular* religious practice *because of* its religious nature. Religion-neutral laws that incidentally burden religion are not unconstitutional.

In refusing to require courts to undertake a strict scrutiny analysis of any law to which a defendant asserts a right to a religious exemption, this Court reasoned that doing so "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," noting in particular that this would include "laws providing for equality of opportunity." *Id.* at 889. The Court unequivocally concluded that "[t]he First Amendment's protection of religious liberty does not require this." *Id.*

Applying the *Smith* test, this Court concluded that an antidiscrimination statute is a "valid and neutral law of general applicability" (so long as it does not dictate "internal church decision[s]," such as ministerial hiring). *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 707 (2012).

Even pre-*Smith*, this Court found that when religious believers enter into commerce, they must comply with the law and cannot justify law-breaking that infringes the legal rights of others by claiming some special religious privilege. The Court held that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *U.S. v. Lee*, 455 U.S. 252, 261 (1982).

Although the federal public accommodations law[7] fails to protect against discrimination on the basis of sexual orientation, the laws of 21 states plus the District of Columbia now do so. Such laws provide invaluable "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer* at 631. It may well be all too easy for some to discount the great value of such laws, because, "[t]hese are protections taken for granted by most people either because they already have them or do not need them." *Id.*

These laws may rightly require that religious actors engaged in business with the public serve all customers, regardless of sexual orientation. If these religious actors are engaged in commerce in an industry in which marriage is implicated, the same rule would apply. If they find this offends their religious beliefs, they may restrict their activities to avoid coming within the ambit of the law. A church may always choose to wed only its own members and avoid offering services to the public if it wishes to do so, thereby not becoming a place of public accommodation.

Additionally, public accommodations laws do not impinge on the Free Speech Clause rights of religious institutions when they choose to do business with the public at large. Although the First Amendment creates a right to expressive association, *Roberts v. United States Jaycees,* 468 U.S. 609, 622 (1984), as well as its necessary corollary, the "freedom not to associate," *id.* at 623, this latter right "is not, however, absolute. Infringements on [it] may be justified by regulations adopted to serve compelling state interests." *Id.*

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[7] 42 U.S.C. 2000a.

The state's interest in "eradicating [private] discrimination" is, as this Court has repeatedly recognized, just such a "compelling interest of the highest order." *Id.* at 623, 624.[8] This interest recognizes "the importance, both to the individual and to society, of removing barriers to . . . social integration that have historically plagued certain disadvantaged groups." *Id.* at 626. The compelling nature of this interest is not diminished by the defendant's assertion of "religious liberty" interests. See e.g. *Bob Jones University v. U.S.*, 461 U.S. 574, 604 (1983) (holding that the government's compelling interest in eradicating discrimination "substantially outweighs *whatever burden* denial of tax benefits places on [a racist religious university's] exercise of their religious beliefs") (emphasis added).

Public accommodations laws therefore apply in general even to private religious institutions in those limited circumstances in which they choose to engage in commerce with members of the public. This does not mean that anti-gay groups can be forced to accept gay members. See *Boy Scouts of*

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[8] See also *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 17 n.5 (1988) (recognizing "the State's 'compelling interest' in combating invidious discrimination" when considering a challenge to an antidiscrimination law on expressive association grounds) and *Board of Directors of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (same).

America v. Dale, 530 U.S. 640 (2000). They also have the right to control their own message when engaging in an inherently expressive activity. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995) (rejecting application of public accommodations law to require private parade organizer to include a gay group because "a speaker has the autonomy to choose the content of his own message"); see also *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006) (stating that the "expressive nature of a parade was central to our holding in *Hurley*").

In its other activities, however, a religious group may properly come within the ambit of such neutral and generally applicable laws. Because a religiously-affiliated business is "not speaking" when it does business with a gay customer as required by a public accommodations statute, the First Amendment is not implicated. *Id.* at 64. This sort of conduct "does not sufficiently interfere with any message" of the business because compliance with the law cannot "be viewed as sending the message that they see nothing wrong with" equal rights for gays and lesbians. *Id.* at 64-65. Even if it were speech, the public "can appreciate the difference between speech a [group] sponsors and speech [it] permits because legally required to do so, pursuant to an equal access policy." *Id.* at 65.

Nor can allowing gays and lesbians access to a group's facilities to do business with it as it does with other members of the public violate any right to expressive association. This sort of "association" with them is in no way akin to forcing them to be accepted as members of the group. This "distinction is critical"; the First Amendment is implicated in this instance only when a group is "force[d] . . . 'to accept members it does not desire.'" *Id.* at 69, (quoting *Dale*, 530 U.S. 640). Mere "association," in the sense of interaction, is not speech. A group may "object to having to treat [gay people] like other [people], but [a] regulation of [such] conduct does not violate the First Amendment." *Id.* at 70.

Therefore, no actual First Amendment interests would be protected by carving out exceptions for religious anti-gay groups from public accommodations laws; their limited rights to exclude members and control their own message when speaking are already protected.

Amici also claim that they may lose access to certain governmental benefits because of their discriminatory views. This may be true, but it is likewise no violation of the First Amendment. When the government conditions the receipt of benefits on compliance with its nondiscrimination policies, it does not violate free exercise rights. See *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2995, n.27 (2010) (holding that "[i]n seeking an exemption from [a governmental] policy [prohibiting discrimination], [a religious group] . . . seeks preferential, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause"). Any group that does not like the conditions placed on such benefits may simply forego them. The government is permitted to "dangl[e] the carrot of subsidy" to encourage private groups to stop discriminating. *Id.* at 2987, citing *Norwood v. Harrison*, 413 U.S. 455, 463 (1973) (stating that the fact that "the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination").

In conclusion, the application of laws that prohibit discrimination on the basis of sexual orientation to anti-gay religious organizations does not violate the First Amendment. To the extent that such groups wish to be exempted from such laws, their pleas are properly directed to legislators. Finally, the fact that such laws apply *vel non* to such institutions regardless of the legal status of marriage for gays and lesbians makes these arguments particularly inapposite in this case. These concerns are simply red herrings. False cries of "religious liberty" do not give religious groups the right to have the laws be whatever they would like them to be.

CONCLUSION

This Court would not, in deciding this case, be taking sides in the *Kulturkampf* over homosexuality in American culture. Whether the love of a man for another man or a woman for another woman should be labeled morally repugnant, or is instead to be celebrated for the joy it brings into their lives, is not before the Court. This Court does not, and cannot, decide issues of religion or its morality. The Court is instead presented with a much different question: whether legislation may be used as a sword to deny the basic humanity and civil rights of gays and lesbians, or whether the Constitution acts as a shield, protecting such individuals from the codification of deeply ingrained social bias against them. The answer is clear: our Constitution requires that our laws treat each of us with equality and forbids them to create any class of second class citizens. There being no legitimate basis for the discriminatory law denying legal recognition of the marriages of gays and lesbians at issue here, it must be struck down.

For the foregoing reasons, *Amici Curiae* request that the judgment of the United States Court of Appeals for the Second Circuit be upheld.

Respectfully submitted,

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APPENDIX

IDENTIFICATION OF *AMICI CURIAE*

The American Humanist Association ("AHA") advocates for the rights and viewpoints of humanists. Founded in 1941 and headquartered in Washington, D.C., its work is extended through more than 100 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The Mission of the American Humanist Association is to promote the spread of humanism, raise public awareness and acceptance of humanism and encourage the continued refinement of the humanist philosophy. Most recently, the American Humanist Association filed *amicus curiae* briefs with this Court in *Christian Legal Society v. Martinez*, *Salazar v. Buono*, *Pleasant Grove City v. Summum*, *Arizona Christian School Tuition Organization v. Winn*, and *Hosanna-Tabor Evangelical Church and School v. E.E.O.C.*

American Atheists, Inc., is a nonprofit educational organization dedicated to the complete and absolute separation of religion and government, accepting the explanation of Thomas Jefferson that the First Amendment to the Constitution of the United States was meant to create a "wall of separation" between state and church. Protecting our secular government includes protecting citizens whose right to marriage is thwarted by laws dictated by the religion of the majority. American Atheists' members live in a nation of Christian privilege that every day makes them second-class citizens. American Atheists seeks in this amicus brief to assist in ensuring that the majority's religious preference does not dictate how citizens' marital rights are determined under the law in the United States.

The American Ethical Union ("AEU") is a federation of Ethical Culture/Ethical Humanist Societies and circles throughout the United States. Ethical Culture is a humanistic educational movement inspired by the ideal that the supreme aim of human life is working to create a more humane society. AEU has participated over the years in a number of *amicus curiae* briefs in defense of religious freedom and church-state separation.

The Military Association of Atheists and Freethinkers ("MAAF") is an independent 501(c)(3) project of Social and Environmental Entrepreneurs. MAAF is a community support network that connects military members from around the world with each other and with local organizations. In addition to our community services, MAAF takes action to educate and train both the military and civilian communities about atheism in the military and the issues that face us. Where necessary, MAAF identifies, examines and responds to insensitive practices that illegally promote religion over nonreligion within the military or unethically discriminate against minority religions or differing beliefs. MAAF supports separation of church and state and First Amendment rights for all service members.

The Center for Inquiry ("CFI") is a nonprofit educational organization dedicated to fostering a secular society based on science, reason, freedom of inquiry, and humanist values. Consistent with its commitment to fundamental human rights for all persons, regardless of sexual orientation, CFI has been a steadfast advocate for LGBT rights, in particular the right of same-sex couples to marry. CFI has previously appeared as an amicus in this Court and has filed amicus briefs in the California Supreme Court (*In re Marriage Cases* (2008) 43 Cal. 4th 757 [76 Cal.Rptr.3d 683, 183 P.3d 384],) and the Iowa Supreme court (*Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)) in support of same-sex marriage.

The Secular Coalition for America ("SCA") is a 501(c)4 advocacy organization located in Washington, D.C. whose purpose is to amplify the diverse and growing voice of the nontheistic community in the United States. SCA lobbies the U.S. Congress on issues relevant to secular Americans including the federal funding of religious schools and separation of church and state.

The Secular Student Alliance ("SSA") is a network of over 400 atheist, agnostic, humanist and skeptic groups on high school and college campuses. Although it has a handful of international affiliates, the organization is based in the United States with the vast majority of its affiliates at U.S. high schools and colleges. The mission of the SSA is to organize, unite, educate and serve students and student communities that promote the ideals of scientific and critical inquiry, democracy, secularism and human-based ethics.

The Society for Humanistic Judaism ("SHJ") mobilizes people to celebrate Jewish identity and culture, consistent with Humanistic ethics and a nontheistic philosophy of life. Humanistic Jews believe each person has a responsibility for their own behavior, and for the state of the world, independent of any supernatural authority. The SHJ is concerned with protecting religious freedom for all, and especially for religious, ethnic and cultural minorities such as Jews, and most especially for Humanistic Jews, who do not espouse a traditional religious belief. The SHJ's members want to ensure that they, as well as people of all faiths and viewpoints, will not be discriminated against by government favoring of any one religion over another or theistic religion over humanistic religion. SHJ supports the legal recognition of marriage between adults of the same sex, and affirms the rights of these couples to all benefits provided to married couples. SHJ, with rabbis and madrikhim solemnizing same-sex couples' lawful marriages within the United States, has a compelling interest in this litigation, which bears directly on the legal recognition, with all human rights, to be accorded those marriages.

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

Nos. 12-144 and 12-307
OCTOBER TERM 2012

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, *et al.*,

Petitioners,

—v.—

KRISTIN M. PERRY, *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

—v.—

EDITH SCHLAIN WINDSOR, in her capacity as
Executor of the Estate of THEA CLARA SPYER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH AND SECOND CIRCUITS

BRIEF *AMICUS CURIAE* OF THE AMERICAN JEWISH COMMITTEE IN SUPPORT OF THE INDIVIDUAL RESPONDENTS ON THE MERITS

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B. Marriage is Both a Legal and a Religious Relationship, and Religious Organizations Must Remain Free to Define Religious Marriage 19

C. Religious Refusal to Recognize Same-Sex Marriage Will Give Rise to Many Religious Liberty Issues 22

III. Doctrinal Tools Are Available to Protect Religious Liberty with Respect to Marriage 27

A. Religious Organizations Have the Right to Make Internal Decisions That Affect Their Faith and Mission 27

B. Religious Organizations Have a Right to Take "External" Actions, Subject to the Compelling Interest Test, If a Religiously Burdensome Law Has Secular Exceptions 29

C. Religious Liberty Is Also Protected by State Constitutions and by State and Federal Statutes 31

D. In an Appropriate Future Case, the Court Should Reconsider Free Exercise Exemptions from Generally Applicable Laws 32

Conclusion 35

TABLE OF AUTHORITIES

Cases

Alicea-Hernandez v. Catholic Bishop, 320 F.3d 698 (7th Cir. 2003) 28

Bob Jones University v. United States, 461 U.S. 574 (1983) 25

Bowen v. Roy, 476 U.S. 693 (1986). 11

Bowers v. Hardwick, 478 U.S. 186 (1986) 10

Boy Scouts of America v. Wyman, 335 F.3d 80 (2d Cir. 2003) 25

Catholic Charities v. City of Portland, 304 F. Supp. 2d 77 (D. Me. 2004). 24

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). 5, 30, 33

City of Boerne v. Flores, 521 U.S. 507 (1997) 33

Elane Photography, LLC v. Willock, 284 P.3d 428 (N.M. Ct. App. 2012) 26

Employment Division v. Smith, 494 U.S. 872 (1990) 5, 14, 29, 31-34

Equal Employment Opportunity Commission v. Catholic University, 83 F.3d 455 (D.C. Cir. 1996) 28

Evans v. City of Berkeley, 129 P.3d 394 (Cal. 2006). 25

Fraternal Order of Police v. City of Newark, 170 F.3d 359 (3d Cir. 1999) 30

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) 33

Goodridge v. Department of Public Health,
798 N.E.2d 941 (Mass. 2003). 17, 20, 22

Griswold v. Connecticut, 381 U.S. 479 (1965). 8

Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission,
132 S. Ct. 694 (2012) 5, 27, 33-34

Kerrigan v. Commissioner of Public Health,
957 A.2d 407 (Conn. 2008). 14, 17, 22

Lawrence v. Texas, 539 U.S. 558 (2003) 8

Levin v. Yeshiva University,
754 N.E.2d 1099 (N.Y. 2001). 23

Locke v. Davey, 540 U.S. 712 (2004) 33

Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988) 11

Loving v. Virginia, 388 U.S. 1 (1967) 7

Marriage Cases, In re,
183 P.3d 384 (Cal. 2008). 14, 17, 22

Meyer v. Nebraska, 262 U.S. 390 (1923). 8

Natal v. Christian and Missionary Alliance,
878 F.2d 1575 (1st Cir. 1989) 28

Petruska v. Gannon University,
462 F.3d 294 (3d Cir. 2006) 28

Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360 (8th Cir. 1991) 28

Shaliehsabou v. Hebrew Home,
363 F.3d 299 (4th Cir. 2004) 28

Sherbert v. Verner, 374 U.S. 398 (1963) 29

Skinner v. Oklahoma, 316 U.S. 535 (1942) 7

Turner v. Safley, 482 U.S. 78 (1987) 8

Varnum v. Brien,
763 N.W.2d 862 (Iowa 2009) 14, 17, 22

Ward v. Polite, 667 F.3d 727 (6th Cir. 2012) 23

Zablocki v. Redhail, 434 U.S. 374 (1978) 7-8

Constitutional Provisions

Cal. Const., art. I, §7.5 (Proposition 8) 10, 17

U.S. Const., amend. I, Free Exercise Clause . . 11, 29

U.S. Const., amend. V, Due Process Clause 7

U.S. Const., amend. XIV

- Due Process Clause 7-8
- Equal Protection Clause 7

Statutes

Defense of Marriage Act, 1 U.S.C. § 7 (2006) . . 10, 31

Marriage Equality Laws (religious
liberty provisions in)

- Cal. Fam. Code § 400(a)
(Deering Supp. 2012) 17
- Conn. Gen. Stat. Ann. §§ 46b-22b,
46b-35a, 46b-35b (West Supp. 2012) 17
- D.C. Code § 46-406 (West Supp. 2012) 16
- Me. Rev. Stat. tit. 19-A §655.3
(Westlaw 2012) 16

Laycock, Douglas, Picarello, Anthony R., Jr., & Wilson, Robin Fretwell, eds., *Same-Sex Marriage & Religious Liberty* (Rowman & Littlefield 2008), generally........ 22

Matthew 20

Missouri State U. Settles Lawsuit Filed by Student, St. Louis Post-Dispatch, Nov. 9, 2006, at D4............................ 23

Smith, D., *Accreditation Committee Decides to Keep Religious Exemption*, 33 Monitor on Psychology No. 1, at 16 (Jan. 2002).......... 24-25

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INTEREST OF AMICUS

The American Jewish Committee, a national organization of more than 125,000 members and supporters with 26 regional offices, was founded in 1906 to protect the rights of American Jews. AJC has long believed that one of the most effective ways to achieve that goal is to ensure that all citizens enjoy the equal protection of the laws and equal rights of citizenship. These equal rights include the right to marry.[1]

As is the case with much of American society, AJC's position on official recognition of same-sex relationships has evolved. In 2004, AJC agreed to support civil unions for same-sex couples, but did not agree to support same-sex marriage. Over the last two years, the issue was debated intensely within the organization, culminating in a Resolution by AJC's Board of Governors adopted in October 2012. That Resolution insists that the basic American principles of equality and human dignity require that the federal and state governments extend the legal and economic benefits of marriage to those Americans who love people of the same gender. That right cannot be denied merely because other citizens find such relationships offensive or religiously objectionable.

AJC is also a strong supporter of religious liberty. Accordingly, it believes that just as religious objections should not bar official recognition of same-sex marriage, neither should official recognition of such marriages compel religious recognition. We do not believe that this is a zero-sum game. It is possible to protect both liberties. This case does not call for resolution of any particular dispute about religious liberty. But neither should the Court's recognition of same-sex marriage be understood to preclude religious liberty with respect to marriage.

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[1] This brief was prepared entirely by amicus and its counsel. No person other than amicus and its counsel made any financial contribution to the preparation or submission of this brief. The consents of the parties are on file with the Clerk.

Each of these twin principles has been challenged, both in the briefing in these cases and elsewhere in the debate over same-sex marriage. To defend both principles, the AJC files this brief.

SUMMARY OF ARGUMENT

The Court must protect the right of same-sex couples to marry, and it must protect the right of synagogues, churches, and other religious organizations not to recognize those marriages. This brief is an appeal to protect the liberty of both sides in the dispute over same-sex marriage.

The choice of whom to marry is one of the most intimate and personal decisions that any human being can make. The right to marry has long been recognized as fundamental. Heightened scrutiny is therefore appropriate.

The reasons proffered for refusing civil marriage to same-sex couples do not come close to justifying denial of a fundamental right. Marriage is about far more than children. But even if children were the only purpose of marriage, it should not matter, because same-sex couples raise many children. Concern for children can neither explain civil marriage nor explain the exclusion of same-sex couples.

This brief is principally devoted to the serious issues of religious liberty that arise in the wake of same-sex marriages. But it is not appropriate to prohibit same-sex civil marriage to avoid having to address those issues. No one can have a right to deprive others of their important liberty as a prophylactic means of protecting his own. And there is no burden on religious exercise when the state recognizes someone else's civil marriage. Burdens on religious exercise arise only when the state demands that religious organizations or believers recognize or facilitate a marriage in ways that violate their religious commitments.

The proper response to the mostly avoidable conflict between gay rights and religious liberty is to protect the liberty of both sides. Both sexual minorities and religious minorities make essentially parallel claims on the larger society. Both sexual orientation and religious faith, and the conduct that follows from each, are fundamental to human identity. Both same-sex couples, and religious organizations and believers committed to traditional understandings of marriage, face hostile regulation that condemns their most cherished commitments as gravely evil.

The American solution to this conflict is to protect the liberty of both sides. Same-sex couples must be permitted to marry, and religious dissenters must be permitted to refuse to recognize those marriages.

If this Court holds that same-sex marriage is constitutionally required, it must take responsibility for the resulting issues of religious liberty. Every state that has enacted same-sex civil marriage by legislation has included provisions to protect religious liberty. But in the four states where same-sex marriage was first recognized by judicial decision, only one state has enacted more than a minimalist provision for religious liberty, and two have enacted no religious liberty provision at all. When courts constitutionalize same-sex civil marriage, those who would add religious liberty provisions to a marriage bill are deprived of a legislative vehicle and deprived of bargaining leverage. A constitutional decision by this Court will have similar effects on legislative efforts. If the Court protects same-sex marriage, it must also protect religious liberty with respect to marriage.

Marriage is both a legal relationship and a religious relationship. The two relationships are conceptually distinct, even though they are intertwined in law and especially in the culture. A state, or this Court, can change the definition of *civil* marriage. But neither can change the definition of *religious* marriage.

Many religious organizations and believers view marriage as an inherently religious institution, with civil marriage resting on a foundation of religious marriage. They will therefore refuse to recognize same-sex civil marriages as marriages. These religious refusals to recognize same-sex civil marriages will give rise to numerous religious liberty issues, from whether clergy must perform the wedding or provide pastoral counseling, to employment and spousal fringe benefits, to married student housing at religious colleges, to placement of children for adoption at religious social service agencies. Religious organizations will face lawsuits, civil penalties, and loss of government benefits.

Doctrinal tools are available to protect religious liberty with respect to marriage. Government may not interfere "with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012). Whether to recognize a marriage, for purposes internal to the religious organization, is such a protected decision.

Some religious refusals to recognize same-sex civil marriages will likely be characterized as external rather than internal, as in the case of placing children for adoption. In those cases, religious liberty is still protected, subject to the compelling interest test, from laws that are not neutral, or not generally applicable. A law is not generally applicable if it has "at least some" secular exceptions. *Emp't Div. v. Smith*, 494 U.S. 872, 884 (1990). Regulating religious conduct but not secular conduct that causes the same or similar alleged harms necessarily implies that the government "devalues religious reasons for [the regulated conduct] by judging them to be of lesser import than nonreligious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38 (1993).

Many laws are not generally applicable under this standard, and there will often be no compelling interest in requiring religious organizations to recognize a same-sex marriage, even when the context can be characterized as external. For example, in applying the compelling interest test, a court might consider whether a religious organization that provides some service to married couples has a local monopoly, or whether same-sex couples can readily obtain comparable services from secular agencies. In the latter case, there might be no compelling interest in forcing the religious organization to violate its faith commitments.

Religious liberty is also protected by state constitutions and state Religious Freedom Restoration Acts. This Court should be clear that it is requiring only that governments recognize same-sex civil marriage, and that it is not suggesting any constitutional obstacle to state protection of religious liberty with respect to religious recognition of marriage.

In an appropriate future case, involving a law that is truly generally applicable, this Court should reconsider the rule that neutral and generally applicable laws may be applied in ways that burden or suppress the exercise of religion. That rule was never briefed or argued, and it has not been further developed in subsequent free exercise decisions, all of which were decided on other grounds.

ARGUMENT

I. THIS COURT SHOULD, AND SOONER OR LATER MUST, RECOGNIZE A RIGHT TO SAME-SEX MARRIAGE.

A. The Right to Marry Is Fundamental, and the Grounds Asserted in This Case Are Insufficient to Justify Denial of That Right.

The argument in support of the judgments below has been made effectively by the individual respondents, and by many other amici, and we will not repeat all of that analysis here. We will emphasize a few of the most salient points.

The choice of whom to marry is one of the most intimate and personal decisions that any human being can make. Government should not interfere with that choice without a very important reason. Nor should government leave a substantial class of people, on any realistic view of the matter, with no one to marry. A state's refusal to permit same-sex civil marriages, and federal refusal to recognize such marriages in states where they are already permitted, prima facie violates both the Due Process Clauses and the Equal Protection Clause. At the very least, some form of heightened scrutiny is required.

This Court has long recognized "the right to marry" as a right "of fundamental importance." *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978). It is a "fundamental freedom" and "one of the 'basic civil rights of man.'" *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). It is protected from discrimination, as in *Loving*, and it has long been understood to be part of the liberty protected by the Due Process Clause. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). It is a relationship that is "intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479. 486 (1965).

The Court has unanimously protected the right to marry even for prisoners. *Turner v. Safley*, 482 U.S. 78, 94-100 (1987). The laws at issue in these cases deprive law-abiding gays and lesbians of a right so fundamental that it is protected even for incarcerated felons.

The alleged government interests offered in defense of this deprivation do not fit the laws they are claimed to justify. They do not come close. Just as marriage is about much more than sexual intercourse, *Lawrence v. Texas*, 539 U.S. 558, 567 (2003), so it is about much more than procreation. Few if any married couples experience their marriage as exclusively, or even primarily, about procreation. Children are one important part of most marriages, and no part at all of many others. And if the only or principal purpose of state recognition of marriage were to enable children to live with two biological parents, then that policy has manifestly failed. A theoretical government interest, not remotely implemented in practice, cannot be a basis for denying the fundamental right to marry.

Moreover, as this Court recognized in *Zablocki*, denying the right to marry does little or nothing to prevent procreation. 434 U.S. at 390. Same-sex couples raise children resulting from assisted reproduction and from failed attempts to go straight — attempts generally induced by societal pressure and discrimination. They raise children from adoption, and they raise children as foster parents. Denying these couples the stability and commitment of legally recognized civil marriage does nothing to protect any of these children, and may on occasion affirmatively harm them.

The government's interest in protecting children is undoubtedly important. But the claim that that interest is the reason for marriage does not fit the existing marriage laws, or the social understanding of marriage, or the lived experience of millions of married couples — all of which treat marriage as first and foremost a relationship between two adult spouses. The reasons offered to justify the bans on same-sex civil marriage are insufficient to justify such a profound intrusion into the fundamental right to marry.

In *Windsor*, the federal decision to override state definitions of civil marriage serves no legitimate federal interest. The United States cannot choose to save money, either on tax benefits or social welfare benefits, by arbitrarily cutting off a subclass of otherwise eligible beneficiaries who are legally married under the law of their state of residence. And the administration of the estate tax, which mostly affects the elderly and their grown children, is unusually far removed from any interest in protecting children, which is itself far removed from restrictions on same-sex civil marriage.

In *Perry*, wholly excluding same-sex couples from civil marriage deprives them of a fundamental right. And as implausible as it is to explain civil marriage in terms of protecting children, it is even more implausible to use children to explain the difference between civil marriage and a civil union that would

— if it were sufficiently well understood to be enforceable as a practical matter — confer all the same rights as civil marriage. If the Court prefers to proceed cautiously, deciding one case at a time, it should affirm the judgment in *Perry* on the narrow ground stated by the Court of Appeals.

The Court should not reverse on the merits. To do so would be wrong, for the reasons we have stated; it would also be unstable. In the area of same-sex relationships, where public understanding of the underlying facts is rapidly changing, the Court cannot reach a stable constitutional resolution by broadly rejecting constitutional claims. The last time it attempted to do so, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), it overruled the decision just seventeen years later, and parts of the *Bowers* opinions are now a permanent embarrassment in the United States Reports. The Court should not repeat its *Bowers* mistake in these cases.

B. Legitimate Concerns For Religious Liberty Are Not a Reason to Deny Same-Sex Couples the Right to Marry.

Both Proposition 8 and the Defense of Marriage Act have been defended on the ground that they protect the religious liberty of those with conscientious objections to same-sex marriage. The most complete exposition of this argument appears in the brief of the Becket Fund for Religious Liberty, filed in both cases.

As discussed in greater detail below, we agree that significant religious liberty issues will follow in the wake of same-sex civil marriage. But it is not an appropriate response to prohibit same-sex civil marriage in order to avoid addressing issues of religious liberty. No one can have a right to deprive others of *their* important liberty as a prophylactic means of protecting his own important liberty. Just as one's right to extend an arm ends where another's nose begins, so each claim to liberty in our system must be defined in a way that is consistent with the equal and sometimes conflicting liberty of others. Religious liberty, properly interpreted and enforced, can protect the right of religious organizations and religious believers to live their own lives in accordance with their faith. But it cannot give them any right or power to deprive others of the corresponding right to live the most intimate portions of *their* lives according to *their* own deepest values.

The mere recognition of same-sex civil marriage *by the state* presents no issue of religious liberty. "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng v. Nw. Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 451 (1988) (internal quotation omitted). A conscientious objector can raise a free exercise claim only when the government has restricted or penalized the objector's own religiously motivated behavior. *See Lyng*, 485 U.S. at 450-52 (finding no burden on religious exercise from building of road on government land, even though resulting noise would interfere with longstanding religious use of the land); *Bowen v. Roy*, 476 U.S. 693, 699-701 (1986) (finding no burden on religious exercise from government's internal use of social security number to maintain records on plaintiffs' child, despite claims that spiritual harms would result).

Religious liberty issues begin not when a same-sex couple marries, but when the state pressures religious organizations or believers to recognize or facilitate that marriage in ways that would require them to violate their religious commitments. The Court should acknowledge these issues, and commit itself to addressing them. But the existence of these issues cannot justify denying millions of other Americans the fundamental right to marry.

We teach our children that America is committed to "liberty and justice *for all.*" We must protect religious liberty *and* the right to marry.

C. Same-Sex Couples and Religious Conscientious Objectors Make Essentially Parallel Claims, and Both Should Be Protected.

Same-sex civil marriage would be a great advance for human liberty. But failure to attend to the religious liberty implications could create a whole new set of problems for the liberties of those religious organizations and believers who cannot conscientiously recognize or facilitate such marriages. The net effect for human liberty will be no better than a wash if same-sex couples now oppress religious dissenters in the same way that those dissenters, when they had the power to do so, used to oppress same-sex couples. And that is what will happen, unless this Court clearly directs the lower courts to protect religious liberty as well as same-sex civil marriage.

There is a sad irony to the bitter conflict between supporters of same-sex civil marriage and religious organizations and believers committed to the view that marriage is for opposite-sex couples only. Sexual minorities and religious minorities make essentially parallel claims on the larger society, and the strongest features of the case for same-sex civil marriage make an equally strong case for protecting the religious liberty of dissenters. These parallels have been elaborated by scholars who work principally on religious liberty[2] and also by scholars who work principally on sexual orientation.[3]

First, both same-sex couples and committed religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct. For same-sex couples, the conduct at issue is to join personal commitment and sexual expression in a multi-faceted intimate relationship with the person they love. For religious believers, the conduct at issue is to live and act consistently with the demands made by the Being that they believe made us all and holds the whole world together.

No person who wants to enter a same-sex marriage can change his sexual orientation by any act of will, and no religious believer can change his understanding of divine command by any act of will. Religious beliefs can change over time; far less commonly, sexual orientation can change over time. But these things do not change because government says they must, or because the individual decides they should; for most people, one's sexual orientation and one's understanding of what God commands are experienced as involuntary, beyond individual control. The same-sex couple cannot change its sexual orientation, and the religious believer cannot change God's mind.

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[2] *See* Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claimants Have in Common*, 5 Nw. J.L. & Soc. Pol'y 206, 212-26 (2010).

[3] *See* William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in America*, 106 Yale L.J. 2411, 2416-30 (1997).

In finding rights to same-sex civil marriage, courts have rejected the argument that marriage is simply conduct, presumptively subject to state regulation. They have rejected a distinction between sexual orientation and sexual conduct because, they have correctly found, both the orientation and the conduct that follows from that orientation are central to a person's identity. *Sec In re Marriage Cases*, 183 P.3d 384, 442-43 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 438 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 885, 893 (Iowa 2009).

Religious believers face similar attempts to dismiss their claims as involving mere conduct, subject to any and all state regulation. This is the premise of refusing judicial review to religiously burdensome laws that are truly generally applicable. *Emp't Div. v. Smith,* 494 U.S. 872 (1990). But believers cannot fail to act on God's will, and it is no more reasonable for the state to demand that they do so than for the state to demand celibacy of all gays and lesbians. Both religious believers and same-sex couples feel compelled to act on those things constitutive of their identity, and they face parallel legal objections to their actions.

Both same-sex couples and religious dissenters also seek to live out their identities in ways that are public in the sense of being socially apparent and socially acknowledged. Same-sex couples claim a right beyond private behavior in the bedroom: they claim the right to participate in the social institution of civil marriage. Religious believers likewise claim a right to follow their faith not just in worship services, but in the charitable services provided through their religious organizations and in their daily lives.

Finally, both same-sex couples and religious dissenters face the problem that what they experience as among the highest virtues is condemned by others as a grave evil. Where same-sex couples see loving commitments of mutual care and support, many religious believers see disordered conduct that violates natural law and scriptural command. And where those religious believers see obedience to a loving God who undoubtedly knows best when he lays down rules for human conduct, many supporters of gay rights see intolerance, bigotry, and hate. Because gays and lesbians and religious conservatives are each viewed as evil by a substantial portion of the population, each is subject to substantial risks of intolerant and unjustifiably burdensome regulation.

The classically American solution to this problem is to protect the liberty of both sides. There is no reason to let either side oppress the other. Same-sex couples should not be denied the right to civil marriage: that is the immediate issue in this case. And when that right is secured, same-sex couples should not be allowed to force dissenting religious organizations to recognize or facilitate their marriages.

II. WHEN THE COURT INVALIDATES LAWS PROHIBITING SAME-SEX CIVIL MARRIAGE, IT MUST TAKE RESPONSIBILITY FOR THE RESULTING RELIGIOUS LIBERTY ISSUES.

A. Judicial Protection of the Right to Same-Sex Marriage Tends to Displace Legislative Protection of Religious Liberty with Respect to Marriage.

All six jurisdictions that enacted same-sex civil marriage legislatively also enacted religious liberty protections for religious organizations that do not recognize same-sex marriages.[4] We are aware of pending bills for same-sex civil marriage in three additional states, all of which contain religious liberty protections.[5]

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[4] D.C. Code § 46-406 (West Supp. 2012); Me. Rev. Stat. tit. 19-A § 655.3 (Westlaw 2012); Md. Code Ann., Fam. Law § 2-202 note (Westlaw 2012), 2012 Md. Laws ch. 2 §§ 2-4; N.H. Rev. Stat. Ann. § 457:37 (LexisNexis Supp. 2012); N.Y. Dom. Rel. Law §§ 10-b, 11 (LexisNexis Supp. 2012); Vt. Stat. Ann. tit. 8 § 4501(b) (LexisNexis Supp. 2012), tit. 18 § 5144(b) (LexisNexis 2012); Wash. Rev. Code §§ 26.04.010, 26.04.900 (2012).

[5] A Bill for an Act Relating to Marriage Between Persons of the Same Sex, H.B. 1109 § 2 (Hawaii 2013); Religious Freedom and Marriage Fairness Act, S.B. 0010 §§ 15, 20 (Illinois 2013); An Act Relating to Domestic Relations — Persons Eligible to Marry, H. 5015 Substitute A § 4 (R.I. 2013)

In the four states that recognized same-sex marriage judicially, by constitutional interpretation, the situation is very different. There is no legislation to protect religious liberty with respect to marriage in Iowa[6] or Massachusetts.[7] In California, there is an extremely narrow provision that protects only the right not to perform the wedding ceremony.[8] Only Maine has so far enacted such a narrow exemption in the legislated states, and that was enacted by initiative and referendum, bypassing the legislative process. Among the judicial states there is more robust protection, more like that enacted in most of the legislative states, only in Connecticut.[9]

The reason is clear. When a legislature considers same-sex civil marriage legislation, there are supporters and opponents and undecided legislators. There may be supporters who also care about religious liberty. There may be undecideds or even opponents who will become supporters if adequate provision is made for religious liberty. In the democratic bargaining that is part of the legislative process, bills emerge that protect same-sex civil marriage *and* religious liberty.

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[6] The judicial decision was *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

[7] The judicial decision was *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

[8] Cal. Fam. Code § 400(a) (Deering Supp. 2012). The judicial decision was *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). This decision was overturned by Proposition 8, the ballot initiative at issue in this case.

[9] Conn. Gen. Stat. Ann. §§ 46b-22b, 46b-35a, 46b-35b (West Supp. 2012). The judicial decision was *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008).

The religious liberty provisions are sometimes inserted or redrafted at the last minute. They are sometimes poorly drafted, incomplete, and ambiguous. Most of them are far from ideal. But most of them at least attempt to provide meaningful protecttion for the liberty of religious organizations.

This bargaining process can break down when there is lopsided support for same-sex civil marriage. And it entirely breaks down when same-sex civil marriage becomes the law through a judicial decision on constitutional grounds. Those who would add religious liberty protections to a civil marriage bill are deprived of a vehicle and deprived of bargaining power. The result is that the legislature often does not attend to the specific issues of religious liberty raised by same-sex civil marriage. Those issues are left to litigation under the general religious liberty provisions of state and federal constitutions and state and federal Religious Freedom Restoration Acts.

The lesson is clear. If this Court constitutionalizes same-sex civil marriage for the country, it must attend to the resulting issues of religious liberty. The Court's decision will have made it far more difficult for legislatures to do so. Of course the Court cannot render advisory opinions on specific cases, but it should indicate that it understands the range of religious liberty implications, and that it understands that those issues will have to be addressed in future cases. The issues are judicially manageable, but this Court must acknowledge their existence, so that lower courts and legislatures will take them seriously when they arise in the wake of this Court's decision.

B. Marriage Is Both a Legal and a Religious Relationship, and Religious Organizations Must Remain Free to Define Religious Marriage.

Judges focused on discriminatory definitions of civil marriage have often failed to appreciate the range of religious liberty issues raised by same-sex marriage. The question is not simply whether clergy must perform same-sex wedding ceremonies, although that is certainly important. And it is not, as the Court of Appeals in *Perry* seemed to think, simply a matter of existing anti-discrimination laws. *Perry v. Brown*, 671 F.3d 1052, 1091 (9th Cir. 2012).

The religious disagreement over marriage equality begins with a disagreement over the nature of marriage. Marriage is a both a legal relationship and a religious relationship. Advocates of marriage equality tend to see the *legal* relationship as primary, but most religious organizations and many religious believers see the *religious* relationship as primary. Of course it is possible to distinguish the two relationships, but in our law and especially in our culture, they are deeply intertwined. If this Court invalidates discriminatory definitions of legal marriage — civil marriage in the more common usage — it must take pains not to interfere with the right of religious organizations to define religious marriage.

Civil marriage — the legal relationship — defines property rights, mutual duties of support, inheritance rights, pension rights, insurance coverage, social security benefits, tax liabilities, evidentiary privileges, rights to sue for personal injury or file for bankruptcy, and much more. Massachusetts told its highest court that "hundreds of statutes" create rules or authorize benefits on the basis of marriage. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003). Equality with respect to these important consequences of civil marriage — most of them financial consequences — is of course part of the reason that civil marriage equality is so important.

The religious relationship is overlapping but very different. Marriage is a sacrament in the Catholic faith and an important religious commitment in most other faiths. Marriage is ordained in both the Jewish and Christian scriptures. *Genesis* 2:24; *Matthew* 19:6. Both scriptures repeatedly condemn adultery. *See, e.g., Exodus* 20:14; *Matthew* 19:18.

Sex and sexual morality are central to religious marriage, but increasingly peripheral to legal provisions for civil marriage. Consensual sex has been deregulated, both in and out of marriage. Adultery and fornication are no longer crimes, and alienation of affections is no longer a tort. It is possible, and of course extremely common, to have sex without marriage. And it is entirely possible, although presumably rare, to have a fully valid legal marriage without sex. Understandings about sex in a civil marriage are left to the married couple, and appropriately so. There is very little about sex among the hundreds of things defined by law as part of civil marriage.[10]

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[10] These distinctions between civil and religious marriage are further elaborated in Douglas Laycock, *Afterword*, in *Same-*

The state, or this Court as a matter of constitutional interpretation, can change the legal definition of civil marriage. But neither the state nor the Court can change the religious definition of religious marriage if religious authorities persist in their own definitions. Some synagogues, churches, and other religious organizations will refuse to recognize same-sex marriages, because for them, marriage is a religious relationship at its foundation, and a same-sex marriage is religiously invalid or religiously impossible.

It is this issue of religious recognition of same-sex civil marriages that gives rise to novel issues of religious liberty. Conflicts have arisen, and will continue to arise, between religious teachings and laws prohibiting discrimination on the basis of sexual orientation, with or without same-sex marriage. But same-sex marriage will increase the frequency and religious intensity of these conflicts. Once same-sex couples are civilly married, the existing discrimination laws suddenly apply to a relationship of profound religious significance, demanding that religious organizations and believers recognize a relationship that they believe to be both inherently religious and religiously invalid.

Every court that has held marriage discrimination unconstitutional has carefully explained that it is changing only civil marriage and not religious

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Sex Marriage and Religious Liberty 189, 202-03 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson, eds., Rowman & Littlefield 2008) (hereafter Laycock, Picarello, & Wilson).

marriage.[11] That explanation is important, but it has done little to assuage religious objections. In part this is because the culture often fails to make the distinction. And in part it is because those who oppose same-sex marriage on religious grounds understand civil marriage to rest on the foundation of religious marriage. On this view, a civil marriage that departs too radically from the foundation of religious marriage is simply not a marriage. To treat it as though it were a marriage, for many religious organizations and believers, is to violate fundamental religious commitments. And when the inevitable lawsuits come, those charging churches and synagogues with discrimination will also be conflating civil marriage and religious marriage.

It is essential to distinguish the two relationships, and to commit to protecting the right to maintain religious understandings of the religious relationship.

C. Religious Refusal to Recognize Same-Sex Marriages Will Give Rise to Many Religious Liberty Issues.

The only book devoted to the issue, *Same-Sex Marriage and Religious Liberty*,[12] collected contributions from seven scholars — four who supported same-sex marriage and three who did not.

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[11] *See In re Marriage Cases*, 183 P.3d 384, 400, 407 n.11, 434 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 475 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 905-06 (Iowa 2009); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 954, 965 n.29 (Mass. 2003).

[12] Laycock, Picarello, & Wilson, *supra* note 10.

All seven agreed that legalizing same-sex civil marriage without providing robust religious exemptions would create widespread legal conflicts — conflicts that, as one contributor said, would work a "sea change in American law" and "reverberate across the legal and religious landscape."[13]

Both as organizations and as individuals, those committed to traditional understandings of religious marriage may refuse to recognize, assist, or facilitate same-sex marriages. Of course this means not performing the wedding ceremony or hosting the wedding reception. But it means much more than that.

Must rabbis, priests, and pastors provide religious marriage counseling to same-sex couples?[14] Must religious colleges provide married student housing to same-sex couples?[15] Must churches and synagogues employ spouses in same-sex marriages, even though such employees would be persistently and publicly flouting the religious teachings they would be hired to promote? Must religious organizations provide spousal fringe benefits to the same-sex spouses of any such employees they do hire?[16] Must religious social service agencies place children for adoption with same-sex couples? Already, Catholic Charities in Illinois, Massachusetts, and the District of Columbia has closed its adoption units because of this issue.[17]

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[13] Marc D. Stern, *Same-Sex Marriage and the Churches*, in Laycock, Picarello, & Wilson, *supra* note 10. at 1.

[14] *Cf. Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012) (reversing summary judgment against religious counseling student expelled from graduate school for refusing to counsel with respect to problems in a same-sex relationship); Stern, *supra* note 13, at 22-23 (describing attempt by St. Cloud State University to require all social work students, as a condition of admission, to affirm the moral validity of same-sex relationships); *Missouri State U. Settles Lawsuit Filed by Student*, St. Louis Post-Dispatch, Nov. 9, 2006, at D4 (describing settlement with social work student disciplined for refusing to write legislator in support of gay adoption).

[15] *See Levin v. Yeshiva Univ.*, 754 N.E.2d 1099 (N.Y. 2001) (holding that lesbian couple stated a claim).

Religious colleges, summer camps, day care centers, retreat houses, counseling centers, meeting halls, and adoption agencies may be sued under public accommodations laws for refusing to offer their facilities or services to same-sex couples.[18] Or they may be penalized by loss of licensing,[19] accreditation,[20] government contracts, access to public facilities,[21] or tax exemption.[22] Tax exemption is a particular concern because of this Court's decision in *Bob Jones University v. United States*, 461 U.S. 574, 602-04 (1983), rejecting a free-exercise claim to tax exemption for a racially discriminatory religious college. The Court in *Bob Jones* was at pains to emphasize that it was considering only schools, not "churches or other purely religious institutions," and that it relied on the government's compelling interest "in denying public support to racial discrimination in education." *Id.* at 604 n.29. *Bob Jones* should not be extended to religious organizations that refuse to recognize same-sex civil marriages.

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[16] *See Catholic Charities v. City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004) (upholding ordinance forcing religious charity either to extend spousal benefits to registered same-sex couples, or to lose access to all city housing and community development funds); Don Lattin, *Charities Balk at Domestic Partner, Open Meeting Laws*, San Francisco Chronicle, July 10, 1998, at A1 (describing how the Salvation Army lost $3.5 million in social service contracts with the City of San Francisco because it refused, on religious grounds, to provide benefits to the same-sex partners of its employees).

[17] Laurie Goodstein, *Illinois Bishops Drop Program over Bias Rule*, N.Y. Times, Dec. 29, 2011, at A16.

[18] *See* Stern, *supra* note 13, at 37-43 (assessing reach of public accommodation laws).

[19] *Id.* at 19-22 (describing licensing issues in both commercial and not-for-profit sectors).

[20] *See id.* at 23-24 (describing accreditation disputes in various academic disciplines); D. Smith, *Accreditation Committee Decides to Keep Religious Exemption*, 33 Monitor on

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Psychology No. 1, at 16 (Jan. 2002) (describing a proposal of the American Psychology Association to revoke the accreditation of religious colleges and universities with statements of faith that preclude sex outside of marriage), *available at* http://www.apa.org/monitor/jan02/exemption.html.

[21] *See Evans v. City of Berkeley*, 129 P.3d 394 (Cal. 2006) (upholding revocation of a boat berth at public marina due to Boy Scouts' refusal to pledge not to discriminate against gay members); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (holding that the Boy Scouts may be excluded from the state's combined charitable campaign for denying membership to openly gay individuals); Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices*, in Laycock, Picarello, & Wilson, *supra* note 10, at 69-76 (assessing implications of these cases).

[22] *See* Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in Laycock, Picarello, & Wilson, *supra* note 10, at 103 (describing threat to tax exemption for religious organizations with objections to same-sex marriage); Turley, *supra* note 21, at 62-69 (same).

There will also be disputes, on which the American Jewish Committee has taken no position, about individuals who provide creative and personal services that directly assist or facilitate marriages. Must a wedding planner, or a wedding photographer, plan or photograph a same-sex wedding, even though she thinks the ceremony makes a mockery of the religious institution of marriage?[23] Must a counselor in private practice counsel same-sex couples about their relationship difficulties, even though he thinks their relationship is religiously prohibited or intrinsically disordered? Of course no same-sex couple would ever *want* to be counseled by such a counselor. But disputes have arisen in such cases, facilitated by professional societies and educational programs that treat commitment to the gay-rights view of these issues as a matter of professional ethics.[24] Such efforts do not obtain counseling for same-sex couples, but they do threaten to drive from the helping professions all those who adhere to older religious understandings of marriage.

These religious liberty disputes can arise across a wide range of factual circumstances. But they involve a discrete and bounded set of potential claimants: churches, synagogues, and other places of worship, not-for-profit organizations with strong religious commitments, and individuals in a few occupations offering personal services closely connected to marriage. What is newly at issue in the wake of same-sex marriage is the right to refuse religious recognition to civil marriages that are fundamentally inconsistent with religious definitions of marriage.

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[23] *Elane Photography, LLC v. Willock*, 284 P.3d 428 (N.M. Ct. App.), *cert. granted*, 2012-NMCERT-008 (2012) (photographer fined for refusing on religious grounds to photograph a same-sex commitment ceremony).

[24] *See* cases cited in note 14 *supra*.

III. DOCTRINAL TOOLS ARE AVAILABLE TO PROTECT RELIGIOUS LIBERTY WITH RESPECT TO MARRIAGE.

A. Religious Organizations Have the Right to Make Internal Decisions That Affect Their Faith and Mission.

In *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694 (2012), this Court confirmed the longstanding rule that "ministers" cannot sue their religious employers for employment discrimination. But *Hosanna-Tabor* does not merely recognize the ministerial exception to employment discrimination law, as important as that is. The decision rests on a broader principle: that government may not interfere "with an internal church decision that affects the faith and mission of the church itself." *Id.* at 707. This plainly covers the religious body's definition of marriage and its willingness or unwillingness to solemnize or celebrate a marriage, or to provide the space for doing so. But it also extends prima facie to the ongoing decision of whether to recognize, for purposes internal to the religious organization, a marriage solemnized elsewhere.

This right to define religious doctrine and apply that doctrine to internal decisions extends beyond places of worship. *Hosanna-Tabor* involved a religious school, and the lower courts have applied the doctrine to ministers employed in religious colleges,[25] nursing homes,[26] hospitals,[27] mission agencies,[28] and diocesan bureaucracies.[29]

The ministerial exception imposes an absolute bar to regulation within its scope. This may be an exception to the more common approach of strict scrutiny, or it may reflect a categorical judgment that the state never has a compelling interest in forcing an unwanted minister on an unwilling religious organization. There may be other internal decisions for which compelling interests are more readily conceivable — say, protecting children — and for which the appropriate standard of protection is strict scrutiny. But cases in which government will have a compelling interest in regulating religious decisions inside a religious organization must be quite rare. And religious recognition of religiously invalid marriages is not such a case.

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[25] *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006); *EEOC v. Catholic Univ.*, 83 F.3d 455 (D.C. Cir. 1996).

[26] *Shalichsabou v. Hebrew Home*, 363 F.3d 299 (4th Cir. 2004).

[27] *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991).

[28] *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989).

[29] *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698 (7th Cir. 2003).

B. Religious Organizations Have a Right to Take "External" Actions, Subject to the Compelling Interest Test, If a Religiously Burdensome Law Has Secular Exceptions.

Some decisions are crucial to "the faith and mission" of a religious organization or individual but cannot easily be characterized as "internal." This is often the case when religious organizations offer services to the general public, as when Catholic Charities places children for adoption, or a religious college admits students of many faiths and of none. Where ever the line is ultimately drawn between internal and external, decisions on the external side of the line are protected by the rule in *Employment Division v. Smith*, 494 U.S. 872 (1990).

That rule is more protective than has sometimes been assumed. *Smith* held that the Free Exercise Clause creates no right to exemption from neutral and generally applicable laws, such as the "across-the-board criminal prohibition" at issue in that case. *Id.* at 884. *Smith*'s understanding of "generally applicable law" is indicated by its explanation of *Sherbert v. Verner*, 374 U.S. 398 (1963). *Sherbert* held that a worker who lost her job for refusing to work on her Sabbath was constitutionally entitled to unemployment compensation. The state required her to be available for work or lose eligibility, but that rule contained "at least some" secular exceptions. *Smith*, 494 U.S. at 884. And therefore, the Court said, the Constitution required a religious exception as well. Obviously there cannot be many acceptable reasons for refusing available work and claiming a government check instead, but there were "at least some." The implication is that even rather narrow secular exceptions make a law less than generally applicable.

The Court subsequently made clear that categorical exceptions are as relevant as individualized exceptions. "[C]ategories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993). *See id.* at 543-44 (relying on categorical exclusions such as fishing, extermination, euthanasia, and hunting to show that ban on animal sacrifice was not generally applicable). The facts of *Lukumi* were extreme, but the Court was clear that its decision was not limited to such extreme cases. The ordinances in *Lukumi* fell "well below the minimum standard" of general applicability. *Id.* at 543.

Many laws of course contain exceptions or gaps in coverage. When a law exempts some category of secular conduct, but prohibits religious conduct that causes the same or similar alleged harms, the state "devalues religious reasons for [the regulated conduct] by judging them to be of lesser import than nonreligious reasons." *Id.* at 537-38. Sometimes explicitly, but always and inescapably implicitly, a secular exception without a religious exception indicates a "value judgment" that secular motivations "are important enough to overcome" the government's asserted interest, "but that religious motivations are not." *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.). Not every federal judge has read *Smith* and *Lukumi* so carefully as then-Judge Alito. But his reading is the most faithful to this Court's opinions and to the underlying constitutional provision read in light of those opinions.

Some anti-discrimination laws are neutral and generally applicable under this standard, but others are not. If, for example, an anti-discrimination law exempts very small businesses, then the Constitution prima facie requires exemptions for religious conscience, subject to the compelling interest test. Religious liberty can be protected, in a wide range of cases, under the rule of *Employment Division v. Smith*.

C. Religious Liberty Is Also Protected by State Constitutions and by State and Federal Statutes.

With respect to federal law, the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2006), will protect against any substantial burdens imposed on religious liberty after the Defense of Marriage Act is invalidated.

With respect to state law, additional protection for religious liberty is to be found in state constitutions and state Religious Freedom Restoration Acts (RFRAs). Sixteen states have now enacted state RFRAs,[30] and fourteen additional states have held that their state constitutions protect the exercise of religion from neutral and generally applicable laws.[31] That is, Congress and thirty states have rejected the rule of *Employment Division v. Smith.*

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[30] Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Louisiana, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. For citations, see Douglas Laycock, *The Religious Exemptions Debate*, 11 Rutgers J.L. & Religion 139, 142 n.16 (2009) (online journal available on Westlaw); La. Rev. Stat. Ann. §§ 13:5231 to 13:5242 (West 2012).

These state-law protections for religious liberty are of course not this Court's responsibility. But if the Court invalidates California's ban on same-sex civil marriage, it should clearly indicate that it does not mean to preclude state-law protections for religious liberty in this context. The Court would be protecting same-sex couples from discrimination by the state. It would not be directing states to override the free exercise of religion by religious organizations or by individual believers.

D. In an Appropriate Future Case, the Court Should Reconsider Free Exercise Exemptions from Generally Applicable Laws.

Some religious refusals to recognize same-sex marriages may be fundamental exercises of conscience, but may not be fairly viewed as "internal decisions," and may be subject to a law with no exceptions — a law that is truly generally applicable. In such a case, the Court should be open to reconsidering the rule announced in *Employment Division v. Smith.*

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[31] Alaska, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New York, North Carolina, Ohio, Washington, and Wisconsin. For citations, see Laycock, *supra* note 30, at 142-43 n.17.

As Justice Souter once explained, there are many reasons to reconsider *Smith*, beginning with the fact that the rule there announced was neither briefed nor argued. *Church of the Lukumi*, 508 U.S. 520, 571-77 (1993) (Souter, J., concurring in the judgment).

Although twenty-three years have now elapsed, *Smith* cannot be said to have become embedded in the law. *Smith*'s rule about generally applicable laws has been interpreted only in *Lukumi*, which would have come out the same way under any standard. *Smith* was merely a background assumption in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which interpreted a completely different clause of the Constitution. Individual Justices debated *Smith* in separate opinions, but *Smith* was not argued by the parties or interpreted by the Court.

Smith was not applied in *Locke v. Davey*, 540 U.S. 712 (2004). The ban on theology scholarships in that case was neither neutral nor generally applicable; it was upheld on the ground that a refusal to fund does not impose a cognizable burden on the exercise of religion. *Id.* at 720-21. *Smith* was not applied in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), which was decided under the federal RFRA, nor in *Hosanna-Tabor*, which was decided under the separate doctrine about internal church decisions.

These are all the significant free exercise decisions since *Smith*. The Court's remaining citations to *Smith* are little more than passing references and occasional cursory resolutions of secondary issues that were left unexplored. It is not too late to have full briefing and argument on the rule announced in *Employment Division v. Smith.*

Heightened scrutiny of laws burdening the free exercise of religion would provide a means of protecting the essential interests of both same-sex couples and those with religious objections. In the example of adoption services, a court might consider whether comparable services are readily available from a secular agency. If so, it might conclude that there is no compelling interest in forcing religious adoption agencies to the hard choice of closing down or repeatedly violating their religious teachings on the nature of marriage.

Smith appears to mean that if a rule is generally applicable, government can refuse religious exemptions whether or not it has a plausible reason, or any reason at all. A rule of law that takes account of the weight of the competing constitutional interests would do justice more often than a rule of law that ignores those interests.

Whether or not *Smith* is reconsidered, there are important tools available to protect religious liberty within *Smith* itself, in the doctrine of *Hosanna-Tabor*, in the federal RFRA, and in state law. The Court should use these tools to protect religious liberty with respect to marriage, and it should make clear that state courts are free to use state law to the same end.

CONCLUSION

The judgments below should be affirmed. And this Court should make clear its commitment to protect the religious liberty of churches, synagogues, and other religious organizations that refuse to recognize same-sex civil marriages.

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 12-307

In The
Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,
v.
EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION, THE AMERICAN ACADEMY OF PEDIATRICS, THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE AMERICAN PSYCHOANALYTIC ASSOCIATION, THE CALIFORNIA MEDICAL ASSOCIATION, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AND ITS NEW YORK CITY AND STATE CHAPTERS, AND THE NEW YORK STATE PSYCHOLOGICAL ASSOCIATION AS *AMICI CURIAE* ON THE MERITS IN SUPPORT OF AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY 3

ARGUMENT 5

I. The Scientific Evidence Presented in This Brief. 5

II. Homosexuality Is a Normal Expression of Human Sexuality, Is Generally Not Chosen, and Is Highly Resistant to Change 7

III. Sexual Orientation and Relationships 11

IV. The Children of Same-Sex Couples 14

- A. Many Same-Sex Couples Are Raising Children. 14
- B. The Factors That Affect The Adjustment of Children Are Not Dependent on Parental Gender or Sexual Orientation 14
- C. There Is No Scientific Basis for Concluding That Gay And Lesbian Parents Are Any Less Fit or Capable Than Heterosexual Parents, or That Their Children Are Any Less Psychologically Healthy and Well Adjusted. 18

V. Challenges to the Evidence on Same-Sex Parents by Other *Amici* Are Unfounded 27

  A. The Methodological Criticisms Fail to Recognize the Cumulative Nature of Scientific Research 27

  B. The Regnerus Study Does Not Provide Evidence That Parental Sexual Orientation Affects Child Development Outcomes 29

VI. Denying Federal Recognition To Legally Married Same-Sex Couples Stigmatizes Them. 34

CONCLUSION 37

TABLE OF AUTHORITIES

CASES: **PAGE(S)**

Baker v. Wade, 106 F.R.D. 526 (N.D. Tex. 1985) 24

Heckler v. Mathews, 465 U.S. 728 (1984) 36

STATUTES:

42 U.S.C. § 402(g) 34

LEGISLATIVE HISTORY:

Defense of Marriage Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. (1996) 3, 4

142 Cong. Rec. H7444 (daily ed. July 11, 1996) 3

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INTEREST OF *AMICI CURIAE*[1]

The American Psychological Association, the world's largest professional association of psychologists, is a scientific and educational organization dedicated to increasing and disseminating psychological knowledge. The Association has adopted multiple research-based policy statements supporting the rights of gay and lesbian people, including a 2011 policy statement supporting full marriage equality and calling on the federal government "to extend full recognition to legally married same-sex couples, and to accord them all of the rights, benefits, and responsibilities that it provides to legally married different-sex couples." Am. Psychol. Ass'n, *Resolution on Marriage Equality For Same-Sex Couples* (2011), *available at* http://www.apa.org/about/policy/same-sex.pdf.

The American Medical Association (AMA) is the largest professional association of physicians, residents, and medical students in the United States, substantially all of whom are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. Its policies regarding gay and lesbian issues promote those objectives.

The American Academy of Pediatrics (AAP) is the largest professional association of pediatricians in the world, with over 62,000 members. Through education, research, advocacy, and the provision of expert advice, AAP seeks the optimal physical, mental, and social health and well-being for infants, children, adolescents, and young adults. The AAP supports marriage equality for all capable and consenting couples, including those who are of the same gender, as a means of guaranteeing all federal and state rights and benefits, and long term security for their children.

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[1] No party's counsel authored this brief in whole or in part, and no party or a party's counsel nor any other person other than the *Amici* contributed money that was intended to fund preparing or submitting the brief.

The American Psychiatric Association is the Nation's largest organization of physicians specializing in psychiatry. It joins this brief for the reasons expressed in its 2005 position statement, *Support of Legal Recognition of Same-Sex Civil Marriage*, *available at* http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200502.aspx ("In the interest of maintaining and promoting mental health, the American Psychiatric Association supports the legal recognition of same-sex marriage with all rights, benefits, and responsibilities conferred by civil marriage, and opposes restrictions to those same rights, benefits, and responsibilities.").

The American Psychoanalytic Association is the oldest and largest national psychoanalytic membership organization, with more than 3,500 members and associates. It believes that marriage is a basic human right and that same gender couples should be able to share equally in the rights and responsibilities of civil marriage.

The California Medical Association (CMA) is a non-profit association of approximately 37,000 California physicians working to promote the science and art of medicine, the care and well-being of patients, the protection of public health, and the betterment of the medical profession. Toward such ends, the CMA supports efforts to reduce health care disparities among members of same-sex households, including measures to afford such households equal rights and privileges to health care, health insurance, and survivor benefits.

The National Association of Social Workers (NASW) is the largest association of professional social workers in the world, with nearly 140,000 members. NASW develops policy statements on issues of importance to the social work profession and, consistent with those statements, NASW and its New York State and New York City Chapters (also *Amici* herein) support full social and legal acceptance of lesbian, gay, and bisexual people.

With more than 2500 members, the New York State Psychological Association seeks to advance the science and practice of psychology as a means of promoting human welfare by supporting excellence in education, training, research, advocacy, and service.

All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY

The floor debate on the Defense of Marriage Act ("DOMA") evidences a generalized congressional disapproval of homosexuality. 142 Cong. Rec. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn); 142 Cong. Rec. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer); *id.* at H7494 (statement of Rep. Smith) ("'immoral,' 'depraved,' 'unnatural,' 'based on perversion,' and 'an attack upon God's principles.'"). Other statements in the debate reflect a belief that permitting homosexuals to marry would harm the institution of marriage and be inimical to the welfare of children of same sex couples. For example, one Representative said that it is a "fundamental, unavoidable fact of our human nature" that heterosexual marriage is "the ideal structure within which" to raise children. *Defense of Marriage Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 1 (1996) (statement of Rep. Canady, Chairman, H. Subcomm. on the Constitution). Another said that heterosexual marriage is "uniquely capable of * * * nurturing children." *Id.* at 1-2. Another said that the bill will deter "erosion of the family and the erosion of marriage because marriage is the bond that keeps the family together." *Id.* at 33 (statement of Rep. Sensenbrenner, Member, H. Comm. on the Judiciary). And yet another, quoting the Declaration of Independence, said that the bill reflects "truths that are self-evident." *Id.* at 36 (statement of Rep. Inglis, Member, H. Subcomm. on the Constitution).

These statements stand in sharp contrast to what scientific evidence shows about homosexuality, same-sex couples, and their families. Scientific evidence strongly supports the conclusion that homosexuality is a normal expression of human sexuality; that most gay, lesbian, and bisexual adults do not experience their sexual orientation as a choice; that gay and lesbian people form stable, committed relationships that are equivalent to heterosexual relationships in essential respects; and that same-sex couples are no less fit than heterosexual parents to raise children and their children are no less psychologically healthy and well-adjusted than children of heterosexual parents. In short, the claim that legal recognition of marriage for same-sex couples undermines the institution of marriage and harms their children is inconsistent with the scientific evidence.

The body of research presented below demonstrates that discrimination by the federal government between married same-sex couples and married heterosexual couples in awarding benefits unfairly stigmatizes same-sex couples. The research also contravenes the stereotype-based rationales that were advanced to support passage of DOMA and that the Equal Protection component of the Due Process Clause was designed to prohibit.

ARGUMENT

I. The Scientific Evidence Presented in This Brief.

Representing the leading associations of psychological, psychiatric, medical, and social work professionals, *Amici* have sought in this brief to present an accurate and responsible summary of the current state of scientific and professional knowledge concerning sexual orientation and families relevant to this case.

In drawing conclusions, *Amici* rely on the best empirical research available, focusing on general patterns rather than any single study. Before citing a study herein, *Amici* have critically evaluated its methodology, including the reliability and validity of the measures and tests it employed, and the quality of its data-collection procedures and statistical analyses.

Scientific research is a cumulative process and no empirical study is perfect in its design and execution.

Even well-executed studies may be limited in their implications and the generalizability of their findings.[2] Accordingly, *Amici* base their conclusions as much as possible on general patterns rather than any single study.

All scientific studies can be constructively criticized, and scientists continually try to identify ways to improve and refine their own work and that of their colleagues. Thus, many studies cited herein discuss their limitations and provide suggestions for further research. This is consistent with the scientific method and does not impeach the overall conclusions.

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[2] For example, to confidently describe the prevalence or frequency with which a phenomenon occurs in the population at large, it is necessary to collect data from a "probability" or "representative" sample. A probability sample consists of individuals selected from the study population through a process that gives each member of the population a calculable chance of being included. Nonprobability samples do not give all members of the study population a chance of being included—such as, for example, a study of voters that relies on volunteers who phone in to a telephone number advertised in a newspaper. Case studies and nonprobability samples can be used to document the existence of a phenomenon in the study population. For studies of groups that constitute a relatively small proportion of the population, obtaining a probability sample can be extremely expensive or otherwise not feasible. Consequently, researchers studying such groups may rely on nonprobability samples. If they wish to compare members of the smaller group with members of the majority group (*e.g.*, lesbian mothers with heterosexual mothers), they may recruit nonprobability samples of both groups that are matched on relevant characteristics (*e.g.*, educational level, age, income). Regardless of the sampling method used, greater confidence can be placed in findings that have been replicated by others using different samples.

Most of the studies and literature reviews cited herein have been peer-reviewed and published in reputable academic journals. In addition, other academic books, book chapters, and technical reports, which typically are not subject to the same peer-review standards as journal articles, are included when they report research employing rigorous methods, are authored by well-established researchers, and accurately reflect professional consensus about the current state of knowledge. *Amici* have made a good faith effort to include all relevant studies and have not excluded any study because of its findings.

II. Homosexuality Is a Normal Expression of Human Sexuality, Is Generally Not Chosen, and Is Highly Resistant to Change.

Sexual orientation refers to an enduring disposition to experience sexual, affectional, and/or romantic attractions to one or both sexes. It also encompasses an individual's sense of personal and social identity based on those attractions, on behaviors expressing those attractions, and on membership in a community of others who share those attractions and behaviors.[3] Although sexual orientation ranges along a continuum from exclusively heterosexual to exclusively homosexual, it is usually discussed in three categories: *heterosexual* (having sexual and romantic attraction primarily or exclusively to members of the other sex), *homosexual* (having sexual and romantic attraction primarily or exclusively to members of one's own sex), and *bisexual* (having a significant degree of sexual and romantic attraction to both sexes).

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[3] *See* A.R. D'Augelli, *Sexual Orientation, in* 7 Am. Psychol. Ass'n, Encyclopedia of Psychology 260 (A.E. Kazdin ed., 2000); G.M. Herek, *Homosexuality, in* 2 The Corsini Encyclopedia of Psychology 774-76 (I.B. Weiner & W.E. Craighead eds., 4th ed. 2010); Institute of Medicine, The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding (2011).

Although homosexuality was classified as a mental disorder when the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, only five years later a study sponsored by the National Institute of Mental Health found no evidence to support the classification.[4] On the basis of that study and others demonstrating that the original classification reflected social stigma rather than science,[5] the American Psychiatric Association declassified homosexuality as a mental disorder in 1973. In 1974, the American Psychological Association adopted a policy reflecting the same conclusion. For decades, then, the consensus of mental health professionals and researchers has been that homosexuality and bisexuality are normal expressions of human sexuality and pose no inherent obstacle to leading a happy, healthy, and productive life, and that gay and lesbian people function well in the full array of social institutions and interpersonal relationships.[6]

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[4] E. Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. Projective Techs. 18 (1957).

[5] B.F. Riess, *Psychological Tests in Homosexuality*, *in* Homosexual Behavior: A Modern Reappraisal 296 (J. Marmor ed., 1980); J.C. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality*, *in* Homosexuality: Research Implications for Public Policy 115 (J.C. Gonsiorek & J.D. Weinrich eds., 1991).

Most gay men and lesbians do not experience their sexual orientation as resulting from a voluntary choice. In a U.S. national probability sample of 662 self-identified lesbian, gay, and bisexual adults, 88% of gay men and 68% of lesbians reported feeling they had no choice at all about their sexual orientation, while another 7% of gay men and 15% of lesbians reported only a small amount of choice. Only 5% of gay men and 16% of lesbians felt they had a fair amount or a great deal of choice.[7]

Several *amici* supporting DOMA challenge the conclusion that for most people sexual orientation is not a matter of choice, but they offer no credible scientific support for their position.[8] Moreover, although some groups and individuals have offered clinical interventions that purport to change sexual orientation from homosexual to heterosexual—sometimes called "conversion" therapies—these interventions have not been shown to be effective or safe. A review of the scientific literature by an American Psychological Association task force concluded that sexual orientation change efforts are unlikely to succeed and indeed can be harmful.[9]

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[6] *See, e.g.*, Am. Psychiatric Ass'n, Position Statement: *Homosexuality and Civil Rights* (1973), *in* 131 Am. J. Psychiatry 497 (1974); Am. Psychol. Ass'n, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975).

[7] G. Herek et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample*, 7 Sexuality Res. & Soc. Pol'y 176 (2010). *See also* G. Herek et al., *Internalized Stigma Among Sexual Minority Adults: Insights From a Social Psychological Perspective*, 56 J. Counseling Psychol. 32 (2009).

[8] *See Amicus Br.* of Liberty Counsel, at 30-31; *Amicus Br.* of David Boyle, at 35; *Amicus Br.* of Parents and Friends of Ex-Gays and Gays, *passim*; *Amicus Br.* of Family Research Council, at 22-23; *Amicus Br.* of Dr. Paul McHugh, at 14-28.

All major national mental health organizations—including *Amici*—have adopted policy statements cautioning the profession and the public about treatments that purport to change sexual orientation.[10]

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[9] Am. Psychol. Ass'n, ***Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*** (2009); ***see also*** Am. Psychol. Ass'n, ***Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*** (2009), both ***available at*** http://www.apa.org/pi/lgbt/resources/sexual-orientation.aspx.

[10] ***See*** Am. Psychol. Ass'n, ***Resolution, supra*** note 9; Am. Psychiatric Ass'n, Position Statement: ***Psychiatric Treatment and Sexual Orientation*** (1998), ***available at*** http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/199820.aspx; Am. Ass'n for Marriage & Fam. Therapy, ***Reparative/Conversion Therapy*** (2009), ***available at*** http://www.aamft.org/iMIS15/AAMFT/MFT_Resources/Content/Resources/Position_On_Couples.aspx; Am. Med. Ass'n, Policy H-160.991, ***Health Care Needs of the Homosexual Population, available at*** http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding-sexual-orientation.page; Nat'l Ass'n of Soc. Workers, Position Statement: ***"Reparative" and "Conversion" Therapies for Lesbians and Gay Men*** (2000), ***available at*** http://www.naswdc.

III. Sexual Orientation and Relationships.

Sexual orientation is commonly discussed as a characteristic of the *individual*, like biological sex or age. This perspective is incomplete because sexual orientation necessarily involves relationships with other people. Sexual acts and romantic attractions are categorized as homosexual or heterosexual according to the biological sex of the individuals involved in them, relative to each other. Indeed, it is only by acting with another person—or desiring to act—that individuals express their heterosexuality, homosexuality, or bisexuality. Thus, sexual orientation is integrally linked to the intimate personal relationships that human beings form with others to meet their deeply felt needs for love, attachment, and intimacy. One's sexual orientation defines the universe of persons with whom one is likely to find the satisfying and fulfilling relationships that, for many individuals, comprise an essential component of personal identity.

Like heterosexuals, most gay and lesbian people want to form stable, long-lasting relationships,[11] and

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org/diversity/lgb/reparative.asp; Am. Psychoanalytic Ass'n, Position Statement: *Attempts to Change Sexual Orientation, Gender Identity, or Gender Expression* (2012), *available at* http://www.apsa.org/about_apsaa/position_statements/attempts_to_change_sexual_orientation.aspx; B.L. Frankowski, *Sexual Orientation and Adolescents*, 113 Pediatrics 1827 (2004).

[11] In a 2005 U.S. national probability sample of 662 self-identified lesbian, gay, and bisexual adults, of those who were currently in a relationship, 78% of the gay men and 87% of the lesbian women said they would marry their partner if it was legal, and, of those not currently in a relationship, 34% of gay

many of them do: numerous studies using nonprobability samples of gay and lesbian people have found that the vast majority of participants have been in a committed relationship at some point in their lives, that large proportions are currently in such a relationship (40-70% of gay men and 45-80% of lesbian women), and that many of those couples have been together 10 or more years.[12] Survey data from probability samples support these findings.[13]

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men and 46% of lesbian women said that they would like to marry someday. Herek et al., *Demographic*, *supra* note 7. *See also* Henry J. Kaiser Fam. Found., *Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation* 31 (2001), *available at* http://www.kff.org/kaiserpolls/upload/New-Surveys-on-Experiences-of-Lesbians-Gays-and-Bisexuals-and-the-Public-s-Views-Related-to-Sexual-Orientation-Report.pdf; A.R. D'Augelli et al., *Lesbian and Gay Youth's Aspirations for Marriage and Raising Children*, 1 J. LGBT Issues Counseling 77 (2007).

[12] *See* A.W. Fingerhut & L.A. Peplau, *Same-Sex Romantic Relationships*, *in* Handbook of Psychology and Sexual Orientation 165 (C.J. Patterson & A.R. D'Augelli eds., 2013); L.A. Peplau & A.W. Fingerhut, *The Close Relationships of Lesbians and Gay Men*, 58 Ann. Rev. Psychol. 405 (2007); L.A. Peplau & N. Ghavami, *Gay, Lesbian, and Bisexual Relationships*, *in* Enclyclopedia of Human Relationships (H.T. Reis & S. Sprecher eds., 2009).

[13] Herek et al., *Demographic*, *supra* note 7; T.C. Mills et al., *Health-Related Characteristics of Men Who Have Sex with Men: A Comparison of Those Living in "Gay Ghettos" with Those Living Elsewhere*, 91 Am. J. Pub. Health 980, 982 (Table 1) (2001); S.D. Cochran et al., *Prevalence of Mental Disorders, Psychological Distress, and Mental Services Use Among Lesbian, Gay, and Bisexual Adults in the United States*, 71 J. Consulting & Clinical Psychol. 53, 56 (2003); Henry J. Kaiser Fam. Found., *supra* note 11.

Data from the 2010 US Census show that same-sex couples headed more than 600,000 US households and more than 45,000 in New York.[14]

Empirical research demonstrates that the psychological and social aspects of committed relationships between same-sex partners largely resemble those of heterosexual partnerships. Like heterosexual couples, same-sex couples form deep emotional attachments and commitments. Heterosexual and same-sex couples alike face similar issues concerning intimacy, love, equity, loyalty, and stability, and they go through similar processes to address those issues.[15] Empirical research also shows that gay and lesbian couples have levels of relationship satisfaction similar to or higher than those of heterosexual couples.[16]

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[14] Same-Sex Unmarried Partner or Spouse Households by Sex of Householder by Presence of Own Children: 2010 Census and 2010 American Community Survey, *available at* http://www.census.gov/hhes/samesex/files/supp-table-AFF.xls.

[15] L.A. Kurdek, *Change in Relationship Quality for Partners from Lesbian, Gay Male, and Heterosexual Couples*, 22 J. Fam. Psychol. 701 (2008); L.A. Kurdek, *Are Gay and Lesbian Cohabiting Couples Really Different from Heterosexual Married Couples?*, 66 J. Marriage & Fam. 880 (2004); G.I. Roisman et al., *Adult Romantic Relationships as Contexts for Human Development: A Multimethod Comparison of Same-Sex Couples with Opposite-Sex Dating, Engaged, and Married Dyads*, 44 Developmental Psychol. 91 (2008); *see generally* L.A. Kurdek, *What Do We Know About Gay and Lesbian Couples?*, 14 Current Directions Psychol. Sci. 251 (2005); Peplau & Fingerhut, *supra* note 12; Peplau & Ghavami, *supra* note 12.

[16] K.F. Balsam et al., *Three-Year Follow-Up of Same-Sex Couples Who Had Civil Unions in Vermont, Same-Sex Couples Not in Civil Unions, and Heterosexual Married Couples*, 44

IV. The Children of Same-Sex Couples.

A. *Many Same-Sex Couples Are Raising Children.*

The 2010 Census reported 111,033 households headed by same-sex couples with their own children under 18 years. Among the more than 45,000 New York household heads who reported cohabiting with a same-sex partner, 8,025 had their own children under 18 living at home.[17] The number of same-sex couple households reported by the Census is not an estimate of the total number of gay and lesbian parents.[18]

B. *The Factors That Affect The Adjustment of Children Are Not Dependent on Parental Gender or Sexual Orientation.*

Hundreds of studies over the past 30 years have elucidated the factors that are associated with healthy adjustment among children and adolescents—*i.e.*, the influences that allow children

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Developmental Psychol. 102 (2008); Kurdek, *Change in Relationship Quality*, *supra* note 15; L.A. Peplau & K.P. Beals, *The Family Lives of Lesbians and Gay Men*, *in* Handbook of Family Communication 233, 236 (A.L. Vangelisti ed., 2004).

[17] 2010 Census and 2010 American Community Survey, *supra* note 14.

[18] The Census does not directly assess participants' sexual orientation. Thus, the Census data only include gay and lesbian parents who were co-habiting with a same sex partner and who were willing to report their relationship status to the Census. 2010 Census and 2010 American Community Survey, *supra* note 14.

and adolescents to function well in their daily lives.[19] The three most important are (1) the qualities of parent-child relationships, (2) the qualities of relationships among significant adults (*e.g.*, parents) in children's or adolescents' lives, and (3) available economic and other resources. As one noted authority in developmental psychology explained:

> Many studies have shown that adjustment is largely affected by differences in the quality of parenting and parent-child relationships, the quality of the relationships between the parents, and the richness of the economic and social resources available to the family; more recent research signals the importance of congenital differences as well. Dimensions of family structure – including such factors as divorce, single parenthood, and the parents' sexual orientation – and biological relatedness between parents and children are of little or no predictive importance once the process variables are taken into account,

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[19] S. Golombok, Parenting: What Really Counts? (2000); M.E. Lamb & C. Lewis, *The Role of Parent-Child Relationships in Child Development*, *in* Developmental Science: An Advanced Textbook 429-68 (M.H. Bornstein & M.E. Lamb eds., 5th ed. 2005); C.J. Patterson, & P.D. Hastings, *Socialization in the Context of Family Diversity*, *in* Handbook of Socialization: Theory and Research 328-51 (J.E. Grusec & P.D. Hastings eds., 2007).

because the same factors explain child adjustment regardless of family structure.[20]

In short, many years of research have shown that, when parent-child and parent-adolescent relationships are characterized by warmth, love and affection, emotional commitment, reliability, and consistency, as well as by appropriate guidance and limit-setting, children and adolescents are likely to show more positive adjustment than when these qualities are absent. Children whose parents provide loving guidance in the context of secure home environments are more likely to flourish, regardless of their parents' sexual orientation.[21]

Research also shows that the quality of relationships among significant adults in a child's life is associated with adjustment. When parental relationships are characterized by love, warmth, cooperation, security, and mutual support, children are more likely to show positive adjustment. In contrast, when parental relationships are conflict-ridden and acrimonious, adjustment is likely to be less favorable. Family instability, household disruption, and parental divorce are often associated with poorer adjustment and problems that can last into adulthood.[22] These correlations are just as true for children reared by same-sex couples as for children reared by heterosexual couples.[23]

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[20] M.E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment*, 16 Applied Developmental Sci. 98 (2012).

[21] Lamb & Lewis, *supra* note 19; Patterson & Hastings, *supra* note 19.

[22] *See, e.g.*, P.R. Amato, *Children of Divorce in the 1990s: An Update of the Amato and Keith (1991) Meta-Analysis*, 15 J. Fam. Psychol. 355 (2001).

Research with children reared by heterosexual parents indicates that they do better with two parenting figures than with one.[24] This finding, however, has not been tested directly with children reared by same-sex couples versus a single lesbian, gay, or bisexual parent.

Finally, researchers acknowledge the association between child adjustment and access to economic and other resources. Children with access to sufficient economic resources are likely to live in safer neighborhoods, breathe cleaner air, and eat more nutritious food. They are also more likely to have opportunities to participate in positive after-school activities and hence to have access to social and emotional resources from teammates, coaches, youth leaders, and others. These children are more likely to show positive adjustment, regardless of their parents' sexual orientation.[25]

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[23] The Family Context of Parenting in Children's Adaptation to Elementary School (P.A. Cowan et al. eds., 2005); R.W. Chan et al., *Psychosocial Adjustment Among Children Conceived Via Donor Insemination By Lesbian and Heterosexual Mothers*, 69 Child Dev. 443 (1998); E.M. Cummings et al., *Children's Responses to Everyday Marital Conflict Tactics in the Home*, 74 Child Dev. 1918 (2003); E.M. Cummings et al., *Everyday Marital Conflict and Child Aggression*, 32 J. Abnormal Child Psychol. 191 (2004); Golombok, *supra* note 19; D. Potter, *Same-Sex Parent Families and Children's Academic Achievement*, 74 J. Marriage & Fam. 556 (2012); M.J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, 47 Demography 755 (2010).

[24] *See, e.g.*, S. McLanahan & G. Sandefur, Growing Up With a Single Parent: What Hurts, What Helps 39 (1994).

In short, the very same factors that are linked to positive development of children with heterosexual parents are also linked to positive development of children with lesbian and gay parents.[26]

C. There Is No Scientific Basis for Concluding That Gay and Lesbian Parents Are Any Less Fit or Capable Than Heterosexual Parents, or That Their Children Are Any Less Psychologically Healthy and Well Adjusted.

Assertions that heterosexual couples are better parents than same-sex couples, or that the children of lesbian or gay parents fare worse than children of heterosexual parents, are not supported by the cumulative scientific research in this area.[27] Rather, the vast majority of scientific studies that have directly compared gay and lesbian parents with heterosexual parents has consistently shown that the former are as fit and capable parents as the latter and that their children are as psychologically healthy and well adjusted. More research has focused on lesbian mothers than on gay fathers,[28] but the

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[25] Neighborhood Poverty: Context and Consequences for Children (J. Brooks-Gunn et al. eds., 1997); Consequences of Growing Up Poor (G.J. Duncan & J. Brooks-Gunn eds., 1997); Patterson & Hastings, *supra* note 19; Potter, *supra* note 23; Rosenfeld, *supra* note 23.

[26] *See* Chan et al., *supra* note 23; C.J. Patterson, *Lesbian and Gay Parents and Their Children: A Social Science Perspective*, *in* Contemporary Perspectives on Lesbian, Gay, and Bisexual Identities, Nebraska Symposium on Motivation 141 (D.A. Hope ed., 2009); J. Stacey & T.J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159 (2001); C.J. Telingator & C.J. Patterson, *Children and Adolescents of Lesbian and Gay Parents*, 47 J. Am. Acad. Child & Adolescent Psychiatry 1364 (2008); J.L. Wainright et al., *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents With Same-Sex Parents*, 75 Child Dev. 1886 (2004).

[27] The research on gay, lesbian, and bisexual parents includes dozens of empirical studies. Their findings are summarized in

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reviews of empirical literature published in respected, peer-reviewed journals and academic books. Recent reviews include T.J. Biblarz & J. Stacey, *How Does the Gender of Parents Matter?*, 72 J. Marriage & Fam. 3 (2010); A.E. Goldberg, Lesbian and Gay Parents and Their Children: Research on the Family Life Cycle (2010); C.J. Patterson, *Family Lives of Lesbian and Gay Adults*, *in* Handbook of Marriage and the Family 659, 668-71 (G.W. Peterson & K.R. Bush eds., 3d ed. 2013); C.J. Patterson, *Children of Lesbian and Gay Parents: Psychology, Law, and Policy*, 64 Am. Psychologist 727 (2009). For earlier reviews, *see, e.g.*, Stacey & Biblarz, *supra* note 26; E.C. Perrin & Comm. on Psychosocial Aspects of Child & Fam. Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 341 (2002); C.J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J. Marriage & Fam. 1052 (2000); N. Anderssen et al., *Outcomes for Children with Lesbian or Gay Parents: A Review of Studies from 1978 to 2000*, 43 Scand. J. Psychol. 335 (2002).

[28] *See, e.g.*, H. Bos & T.G.M. Sandfort, *Children's Gender Identity in Lesbian and Heterosexual Two-Parent Families*, 62 Sex Roles 114 (2010); R.H. Farr et al., *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14 Applied Developmental Sci. 164, 176 (2010); S. Golombok et al., *Children with Lesbian Parents: A Community Study*, 39 Developmental Psychol. 20 (2003); I. Rivers et al., *Victimization, Social Support, and Psychosocial Functioning Among Children of Same-Sex and Opposite-Sex Couples in the United Kingdom*, 44 Developmental Psychol. 127 (2008); J.L. Wainright & C.J. Patterson, *Delinquency,*

published studies that have included gay fathers also find that they are as fit and able parents as heterosexual fathers.[29]

A 2001 comprehensive survey of peer-reviewed scientific studies concluded that the evidence from empirical research "shows that parental sexual orientation per se has no measurable effect on the quality of parent-child relationships or on children's mental health or social adjustment."[30] A more recent review by the same authors noted "the ubiquitous findings of no differences" in comparisons of the families of heterosexual couples to those of lesbian or gay couples, but focused on the relatively small number of differences that have been reported, concluding that overall the differences were positive for the families of same-sex couples at least as often as they were for the families of heterosexual couples.[31]

Victimization, and Substance Use Among Adolescents With Female Same-Sex Parents, 20 J. Fam. Psychol. 526 (2006).

[29] Farr et al., *supra* note 28, at 176; *see also* S. Erich et al., *Gay and Lesbian Adoptive Families: An Exploratory Study of Family Functioning, Adoptive Child's Behavior, and Familial Support Networks*, 9 J. Fam. Soc. Work 17 (2005); S. Erich et al., *A Comparative Analysis of Adoptive Family Functioning with Gay, Lesbian, and Heterosexual Parents and Their Children*, 1 J. GLBT Fam. Stud. 43 (2005). For a review of earlier research, see C.J. Patterson, *Gay Fathers*, *in* The Role of the Father in Child Development 397, 413 (M.E. Lamb ed., 4th ed. 2004).

[30] Stacey & Biblarz, *supra* note 26, at 176.

[31] Biblarz & Stacey, *supra* note 27, at 13; *see also* E.L. Sutfin et al., *How Lesbian and Heterosexual Parents Convey Attitudes*

These conclusions are bolstered by three recent studies using national probability (i.*e*., representative) samples. One used data from the National Longitudinal Study of Adolescent Health to compare adolescents parented by a female couple with adolescents parented by a heterosexual couple. The researchers found no differences between the two groups of adolescents on measures of a large number of key variables, including psychosocial adjustment, school outcomes, substance use, delinquency, victimization experiences, and relationships with peers.[32]

Another study used data from the Early Childhood Longitudinal Study – Kindergarten cohort (ECLS-K) to compare the academic achievement of children growing up in various family structures. When the effects of significant family transitions (*e.g.*, related to parental divorce, separation, or death) were taken into account, children in same-sex family structures showed slightly higher achievement levels than children living with their biological mother and

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about Gender to their Children: The Role of Gendered Environments, 58 Sex Roles 501 (2008) (finding that the children of lesbian mothers were more tolerant of other children engaging in behaviors that violate traditional gender norms). Similarly, a recent report by the National Academy of Sciences' Institute of Medicine concluded that "[s]tudies show that [the children of lesbian and gay parents] are well adjusted and developmentally similar to the children of different-sex parents." Institute of Medicine, *supra* note 3, at 234.

[32] J.L. Wainright & C.J. Patterson, *Peer Relations Among Adolescents With Female Same-Sex Parents*, 44 Developmental Psychol. 117 (2008); Wainright & Patterson, *supra* note 28; Wainright et al., *supra* note 26.

father (although this difference was not statistically significant).[33]

In the third study, US Census data were used to compare educational outcomes among children residing in homes with various types of family structure. When differences in household income and parental educational levels (SES) were statistically controlled, the differences in school progress between children of married heterosexual couples and same-sex cohabiting couples were not statistically significant. As the study's author concluded, "[t]he analysis in this article, the first to use large-sample nationally representative data, shows that children raised by same-sex couples have no fundamental deficits in making normal progress through school."[34]

Studies also show that children with gay or lesbian parents do not differ from the children of heterosexual parents in their *gender identity* (one's psychological sense of being male or female).[35]

Similarly, although some studies have found that children of lesbian mothers or children raised in same-sex parent families were more accepting of gender nonconformity in others[36] and less gender-stereotyped or more flexible in their patterns of gender-role behaviors (*e.g.*, during play[37]) than those of children in heterosexual parent families, most published studies have found no reliable differences between the children of lesbian and heterosexual mothers in *social gender role* conformity (adherence to cultural norms defining feminine and masculine behavior).[38] A recent study also found that adoptive children of gay fathers showed typical gender role development, as did those of lesbian mothers and those of heterosexual mothers and fathers.[39]

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[33] Potter, *supra* note 23. Data about parents' sexual orientation were not collected in the study. Consequently, parental sexual orientation and relationship were inferred from a series of questions about the household composition and caretakers.

[34] Rosenfeld, *supra* note 23.

[35] *E.g.*, Bos & Sandfort, *supra* note 28. For literature reviews, see Goldberg, *supra* note 27; Patterson, *Family Lives*, *supra* note 27; Perrin & Comm., *supra* note 27, at 342.

The available evidence also suggests that parental sexual orientation has no effect on child sexual orientation[40] and that the vast majority of gay and lesbian adults were raised by heterosexual parents and the vast majority of children raised by gay and lesbian parents grow up to be heterosexual.[41]

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[36] Sutfin et al., *supra* note 31; M. Fulcher et al., *Individual Differences in Gender Development: Associations with Parental Sexual Orientation, Attitudes, and Division of Labor*, 58 Sex Roles 330 (2008).

[37] A.E. Goldberg et al., *Gender-Typed Play Behavior in Early Childhood: Adopted Children with Lesbian, Gay, and Heterosexual Parents*, 67 Sex Roles 503 (2012); R. Green et al., *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 Archives Sexual Behav. 167 (1986). An earlier paper (M.E. Hotvedt & J.B. Mandel, *Children of Lesbian Mothers*, *in* Homosexuality: Social, Psychological, and Biological Issues 275 (W. Paul et al. eds., 1982)) reported data from the same study.

[38] Farr et al., *supra* note 28. For reviews of the literature, see Goldberg, *supra* note 27; Patterson, *Family Lives*, *supra* note 27.

[39] *See* Farr et al., *supra* note 28.

[40] Golombok et al., *supra* note 28; S. Golombok & F. Tasker, *Do Parents Influence the Sexual Orientation of Their Children?*

Amici emphasize that the abilities of gay and lesbian persons as parents and the positive outcomes for their children are *not* areas where credible scientific researchers disagree.[42] Thus, after careful scrutiny of decades of research, the American Psychological Association concluded in 2004 that (a) "there is no scientific evidence that parenting effectiveness is related to parental sexual orientation: Lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children" and (b) that

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Findings from a Longitudinal Study of Lesbian Families, 32 Developmental Psychol. 3 (1996).

[41] Goldberg, *supra* note 27; Patterson, *Family Lives*, *supra* note 27.

[42] One unreplicated 1996 Australian study purports to show deficits in lesbian and gay parents and their children. *See* S. Sarantakos, *Children in Three Contexts: Family, Education and Social Development*, 21 Child. Australia 23 (1996). But the anomalous Sarantakos results are likely the result of multiple methodological problems, especially confounding the effects of parental sexual orientation with the effects of parental divorce, which is known to correlate with poor adjustment and academic performance. *See, e.g.*, Amato, *supra* note 22. Some commentators have cited publications by Paul Cameron, but his work has been repeatedly discredited for bias and inaccuracy. *See* G.M. Herek, *Bad Science in the Service of Stigma: A Critique of the Cameron Group's Survey Studies*, *in* Stigma and Sexual Orientation: Understanding Prejudice Against Lesbians, Gay Men, and Bisexuals 223 (G.M. Herek ed., 1998); *Baker v. Wade*, 106 F.R.D. 526, 536 (N.D. Tex. 1985) (ruling that Cameron made "misrepresentations" to the court).

"research has shown that the adjustment, development, and psychological well-being of children are unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish." Am. Psychol. Ass'n, *Resolution on Sexual Orientation, Parents, and Children* (2004), *available at* http://www.apa.org/about/governance/council/policy /parenting.pdf.

Similarly, the American Academy of Pediatrics has recently adopted a policy statement which states: "Scientific evidence affirms that children have similar developmental and emotional needs, and receive similar parenting, whether they are raised by parents of the same or different genders. If a child has 2 living and capable parents who choose to create a permanent bond by way of civil marriage, it is in the best interests of their child(ren) that legal and social institutions allow and support them to do so, irrespective of their sexual orientation." Am. Acad. of Pediatrics, Committee on Psychosocial Aspects of Child and Family Health, Policy Statement: *Promoting the Well-Being of Children Whose Parents are Gay or Lesbian*, 131 Pediatrics (forthcoming 2013).

NASW has similarly determined that "[t]he most striking feature of the research on lesbian mothers, gay fathers, and their children is the absence of pathological findings. The second most striking feature is how similar the groups of gay and lesbian parents and their children are to heterosexual parents and their children that were included in the studies." Nat'l Ass'n of Soc. Workers, Policy Statement: *Lesbian, Gay, and Bisexual Issues*, *in*

Social Work Speaks 193, 194 (4th ed. 1997). *See also* Nat'l Ass'n of Soc. Workers, Policy Statement: *Family Planning and Reproductive Choice, in* Social Work Speaks 129, 132 (9th ed. 2012).

The American Psychoanalytic Association has likewise determined that "[t]here is no credible evidence that shows that a parent's sexual orientation or gender identity will adversely affect the development of the child." Am. Psychoanalytic Ass'n, Position Statement: *Parenting* (2012), *available at* http://www.apsa.org/about_apsaa/position_statements/parenting.aspx.

In adopting an official Position Statement in support of legal recognition of same-sex civil marriage, the American Psychiatric Association observed that "no research has shown that the children raised by lesbians and gay men are less well adjusted than those reared within heterosexual relationships." Am. Psychiatric Ass'n, Position Statement: *Support of Legal Recognition of Same-Sex Civil Marriage* (2005), *available at* http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200502.aspx.

Finally, the American Medical Association likewise has adopted a policy supporting legislative and other reforms to allow adoption by same sex partners.[43]

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[43] *See* Am. Med. Ass'n, Policy H-60.940, *Partner Co-Adoption, available at* http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding-sexual-orientation.page.

V. Challenges to the Evidence on Same-Sex Parents by Other *Amici* Are Unfounded.

A. The Methodological Criticisms Fail to Recognize the Cumulative Nature of Scientific Research.

Scientific research is a cumulative process. Empirical studies inevitably have limitations. Simply because a particular study's methodology has imperfections or its results warrant qualifications does not mean that the entire study should be dismissed. Rather, it should be evaluated within the context of the cumulative relevant research, recognizing that some studies' strengths can offset other studies' corresponding limitations.

Amici who challenge all empirical findings in this area because some studies used small nonprobability samples[44] ignore the fact that many findings from those studies have been replicated in national probability samples.[45] They also fail to acknowledge that studies with nonprobability samples can answer important scientific questions, especially when they include appropriate comparison groups.[46]

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[44] *E.g.*, *Amicus Br.* of Social Science Professors, at 13-21.

[45] Wainright & Patterson, *Delinquency*, *supra* note 28 (finding no differences due to parent sexual orientation between 44 adolescents raised by same-sex couples and 44 by heterosexual couples, all drawn from a national representative sample); Wainright & Patterson, *Peer Relations*, *supra* note 32 (same); Potter, *supra* note 23; Rosenfeld, *supra* note 23 (using US Census data).

[46] *See supra* note 2. One *amicus* disparages "nearly all previous studies" because they failed to include "a married biological

Moreover, *amici* do not claim the studies are invalid, only that their implications are limited to "children raised by highly educated and affluent middle to upper class white women."[47] Even in those studies that are so limited, appropriate comparison across sexual orientation groups can test the claim that sexual orientation affects parenting, and the recent research on national probability samples reinforces these studies. *Amici* herein do not claim that all same-sex couples will be equally effective in raising children,[48] but rather that sexual orientation is irrelevant to parenting outcomes.[49]

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family control group." *Amicus Br.* of Social Science Professors, at 25. But many studies have appropriately included such a group, and their findings are largely consistent with the overall patterns described herein. *See, e.g.*, Potter, *supra* note 23; Rosenfeld, *supra* note 23; Wainright & Patterson, *Peer Relations*, *supra* note 32; Wainright & Patterson, *Delinquency*, *supra* note 28; Wainright et al., *supra* note 26. Moreover, the correct comparison group depends on the nature of the study. For example, comparing children of married heterosexual couples to children of single lesbian mothers would conflate parent sexual orientation with number of parents. The appropriate comparison group in such studies is the children of single heterosexual mothers.

[47] *E.g.*, *Amicus Br.* of Social Science Professors, at 20.

[48] *E.g.*, factors such as access to economic resources affect child development outcomes (note 26 above).

[49] Several *amici* criticizing studies cited here rely on L. Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*, 41 Soc. Sci. Res. 735 (2012). Marks opined that studies cited in an APA 2005 pamphlet (not a brief) allow no conclusions regarding lesbian and gay parenting. This wholesale rejection of an entire body of

B. The Regnerus Study Does Not Provide Evidence That Parental Sexual Orientation Affects Child Development Outcomes.

Several *amici* base their challenge on a recent study ("the Regnerus study") that compared child development outcomes across a range of family types, including two types that were characterized as "lesbian mother" and "gay father" families.[50] But the study's design precludes any meaningful conclusions because of its overbroad definition of children raised by gay or lesbian parents and its conflation of family instability with any potential effects of parental sexual orientation.

Regnerus conducted an Internet survey to identify adults who reported believing that at some time in their childhood their mother or father "ever ha[d] a romantic relationship with someone of the same sex."[51] These individuals were placed into the categories of "LM" (Lesbian Mother) or "GF" (Gay Father). These labels are misleading, however, because no data were collected to verify (1) whether the parent actually had a homosexual orientation or self-identified as gay or lesbian, (2) whether the perceived romantic relationship ever in fact occurred,

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research fails to recognize the realities of the nature of scientific knowledge as discussed above. Moreover, *Amici's* conclusions drawn from those earlier studies are borne out by the research subsequent to 2005.

[50] M. Regnerus, *How Different are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 Soc. Sci. Res. 752 (2012).

[51] *Id.* at 756.

(3) whether the assumed relationship was continuous, episodic, or one-time only, or (4) whether the individual reporting the relationship was actually raised by a homosexual parent, much less a parent in a long-term relationship with a same-sex partner. Indeed, most participants in these groups spent very little, if any, time being raised by a "same-sex couple."[52]

Other participants were placed into six categories defined by the family structure in which they grew up—*e.g.*, continuously married biological parents, stepfamily, single parent. By contrast, the "Lesbian Mother" and "Gay Father" categories were not subdivided according to whether the children had experienced the divorce of their parents or other forms of household instability. Regnerus then reported that respondents in the "Lesbian Mother" and "Gay Father" groups displayed considerably more problems, especially when compared to respondents raised by their biological parents with no disruption in their home situation.

As noted earlier, family instability and parental divorce are often associated with poor adjustment and problems that can last into adulthood.[53] When data from the above-cited Early Childhood

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[52] *Id.* at 757. Only 23% of those who said their mother ever had a same-sex romantic relationship reported they had lived in a household with the mother's female partner for at least 3 years. Fewer than 2% of those who reported their father ever had a same-sex romantic relationship said they had lived in a household with the father's male partner for at least 3 years, and more than half had never done so.

[53] *See supra* notes 22-24 and accompanying text.

Longitudinal Study were adjusted to account for the effects of such instability, an apparent deficit in academic achievement by children raised by parents in same-sex couples was reversed.[54] Similarly, in an analysis of US Census data, children in families headed by a same-sex couple were more likely to be progressing normally in school if their home situation had been stable over time.[55] Regnerus did not control for such events in his analysis.[56]

Indeed, the study's design virtually ensured that respondents from "same-sex parent" families had experienced less family stability than respondents from (by definition) stable heterosexual-parent families.[57] Of all participants in the "lesbian mothers" category, only two were actually raised by a lesbian couple from age 0 to 18.[58] Regnerus did not report the corresponding number with respect to the 73 participants in the "gay fathers"" category. Given that only 23% lived with the father and father's partner for even four months of their first 18 years (and fewer than 2% for at least 3 years),[59] presumably the number who spent all 18 years in such a family is extremely small, if not zero.

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[54] *See supra* note 33 and accompanying text.

[55] M.J. Rosenfeld, *Reply to Allen et al.*, Demography (Nov. 18, 2012) (published online, DOI 10.1007/s13524-012-0170-4). *See also* D.W. Allen et al., *Nontraditional Families and Childhood Progress Through School: A Comment on Rosenfeld*, Demography (Nov. 18, 2012) (published online, DOI 10.1007/s13524-012-0169-x).

[56] Regnerus (joined by some *amici*) defends the compounding of sexual orientation and instability as either too difficult to avoid or justified by the possibility that same-sex relationships might be inherently less stable than heterosexual relationships. *See, e.g.*, *Amicus Br.* of Social Science Professors, at 25-26; *Amicus Br.* of the Beverly Lahaye Institute and the National Legal Foundation, at 29-30. The first rationale has no basis—not only *could* Regnerus have asked participants whether they were raised exclusively by a same-sex couple for their first 18 years, he *did*. *See* M. Regnerus, The New Family Structures Study, Survey Instrument at 11-12, *available at* http://www.prc.utexas.edu/nfss/documents/NFSS-Survey-Instrument.pdf (asking participants to complete "an annual calendar" listing "who exactly you lived with, when, and for approximately how long," from "when you were born until age 18"). The second rationale, even assuming that support for it could be found, implicitly concedes that the moving force behind the effects observed is instability, not sexual orientation.

For these reasons, an independent auditor appointed by the journal that published the articles described it as "a non-scientific study" and concluded it should not have been published.[60] Moreover, over

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[57] The intact biological family group included only participants who were raised by married biological parents who had never divorced, even after the participant's childhood. Regnerus, *supra* note 50, at 757.

[58] M. Regnerus, *Parental Same-Sex Relationships, Family Instability, and Subsequent Life Outcomes for Adult Children: Answering Critics of the New Family Structures Study with Additional Analyses*, 41 Soc. Sci. Res. 1367 (2012).

[59] *Id.*

[60] D.E. Sherkat, *The Editorial Process and Politicized Scholarship: Monday Morning Editorial Quarterbacking and a Call for Scientific Vigilance*, 41 Soc. Sci. Res. 1346 (2012). The suggestion of *amicus curiae* the Beverly Lahaye Institute (at 25-27) that Dr. Sherkat gave the Regnerus Study a clean bill of health is inaccurate, to say the least. He did not fault the journal for approving the publication based on the strength of the reviewers' comments, but he found that the reviewers were "scholars who should have known better [but] failed to recuse themselves from the review process," and did "not simply

200 scientists, clinicians, and academics signed a letter to the journal's editorial board commenting on the study's scientific deficiencies.[61]

In short, the Regnerus study sheds no light on the parenting of stable same-sex couples—as Regnerus (and some *amici* who cite him) acknowledges.[62] Suggestions to the contrary[63] are simply inaccurate.

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ignore[], but lauded" "serious flaws and distortions" in the study. Sherkat at 1347.

[61] G.J. Gates et al., *Letter to the editors and advisory editors of* Social Science Research, 41 Soc. Sci. Res. 1350, 1351 (2012) (noting that the study "could not actually directly examine the impact of having a gay or lesbian parent" because of the "unusual method" of defining those groups, and that it "fails to distinguish family structure and family instability," and concluding that "[t]he methodologies used in this paper and the interpretation of the findings are inappropriate").

[62] Regnerus, *supra* note 50, at 765 ("Child outcomes in stable, 'planned' GLB families and those that are the product of previous heterosexual unions are quite likely distinctive, as previous studies' conclusions would suggest."); *Amicus Br.* of Social Science Professors, at 24 ("[T]he suboptimal outcomes may not be due to the sexual orientation or sexual behavior of the parent.").

[63] *See Amicus Br.* of Liberty Counsel, at 39 (suggesting Regnerus evaluated children "raised in same-sex households" in a study that "controlled for external variables"); *Amicus Br.* of Manhattan Declaration, at 9 n.13 (same); *Amicus Br.* of Helen M. Alvaré, at 20 (same); *Amicus Br.* of National Association of Evangelicals et al., at 12-13 & n.5 (same).

VI. Denying Federal Recognition to Legally Married Same-Sex Couples Stigmatizes Them.

The foregoing shows that the beliefs about lesbians and gay men relied on by Congress in enacting DOMA—about their capacity for committed, long lasting relationships, and their ability to raise healthy well-adjusted children—are contradicted by the scientific evidence and instead reflect an unreasoned antipathy towards an identifiable minority. In institutionalizing greater access by heterosexuals than gay men and lesbians to the many federal resources and benefits accorded married couples and their children, the Act conveys the federal government's judgment that committed intimate relationships between people of the same sex—even when recognized as legal marriages by the couple's state—are inferior to heterosexual relationships.[64] This is the essence of stigma.

A stigmatized condition or status is negatively valued by society, defines a person's social identity, and thus disadvantages that person.[65] A classic work in this area characterized stigma as "an undesired differentness."[66] It can be manifested both in social institutions, such as the law, and in individual behaviors. Laws that accord majority and minority groups differing status highlight the perceived "differentness" of the minority and thereby tend to legitimize prejudicial attitudes and individual acts against the disfavored group, including ostracism, harassment, discrimination, and violence. Large numbers of lesbian, gay, and bisexual people experience such acts of prejudice because of their sexual orientation.[67]

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[64] By not recognizing same-sex marriages, DOMA makes children more vulnerable. For example, in a family where a working parent dies, the surviving parent is not considered a surviving "spouse" eligible for "mother's" or "father's" benefits, depriving the family and child of significant economic protection. 42 U.S.C. § 402(g). *See also supra* note 25.

[65] *See* E. Goffman, Stigma: Notes on the Management of Spoiled Identity (1963); B.G. Link & J.C. Phelan, *Conceptualizing Stigma*, 27 Ann. Rev. Soc. 363 (2001); J. Crocker et al., *Social Stigma*, *in* 2 The Handbook of Social Psychology 504 (D.T. Gilbert et al. eds., 4th ed. 1998); Am. Med. Ass'n, Policy H-65.973, *Health Care Disparities in Same-Sex Partner Households*, *available at* http://www.ama-assn.org/ama/pub/

DOMA is an instance of institutional stigma. It conveys the government's judgment that, in the

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about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding-sexual-orientation.page (recognizing that "exclusion from civil marriage contributes to health care disparities affecting same-sex households").

[66] Goffman, *supra* note 65, at 5.

[67] A national survey of a representative sample of gay, lesbian, and bisexual adults found that 21% of them had been the target of a physical assault or property crime since age 18 because of their sexual orientation. Thirty-eight percent of gay men had been the target of assault or property crime because of their sexual orientation. Eighteen percent of gay men and 16% of lesbians reported they had experienced discrimination in housing or employment. G.M. Herek, *Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States: Prevalence Estimates from a National Probability Sample*, 24 J. Interpersonal Violence 54 (2009); *see also* G.M. Herek et al., *Psychological Sequelae of Hate-Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 67 J. Consulting & Clinical Psychol. 945, 948 (1999); M.V.L. Badgett, Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men (2001).

realm of intimate relationships, a legally married same-sex couple is inherently less deserving of society's full recognition through the provision of federal marriage-linked benefits than are heterosexual couples. By devaluing and delegitimizing the relationships that constitute the very core of a homosexual orientation, the Act compounds and perpetuates the stigma historically attached to homosexuality. Indeed, this effect of the statute condemns it quite apart from its denial of tangible financial benefits to married same-sex couples, for the Supreme Court has repeatedly recognized the unconstitutional nature of stigmatizing legislation based on stereotypic classifications. *See Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) ("[A]s we have repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community * * * can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.") (footnote and citations omitted).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,
Petitioners,
v.

KRISTIN M. PERRY, ET AL.,
Respondents.

UNITED STATES,
Petitioner,
v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *AND* BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Second Circuits

BRIEF OF *AMICUS CURIAE* AMERICAN SOCIOLOGICAL ASSOCIATION IN SUPPORT OF RESPONDENT KRISTIN M. PERRY AND RESPONDENT EDITH SCHLAIN WINDSOR

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. SCHOLARLY CONSENSUS IS CLEAR: CHILDREN OF SAME-SEX PARENTS FARE JUST AS WELL AS CHILDREN OF OPPOSITE-SEX PARENTS 6

II. THE RESEARCH CLAIMED TO UNDERMINE THE CONSENSUS EITHER DOES NOT ADDRESS SAME-SEX PARENTS AND THEIR CHILDREN OR IS MISCHARACTERIZED . . 15

  A. THE REGNERUS STUDY DOES NOT SUPPORT CONCLUSIONS REGARDING THE IMPACT OF BEING RAISED BY SAME-SEX PARENTS 16

  B. THE STUDIES CITED BY BLAG, THE PROPOSITION 8 PROPONENTS, AND THEIR *AMICI* DO NOT ADDRESS SAME-SEX PARENTS AND THEREFORE DO NOT UNDERMINE THE CONSENSUS 22

CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

Cases

Atkins v. Virginia,
536 U.S. 304 (2002) 5

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429 U.S. 190 (1976) 29

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490 U.S. 228 (1989) 5, 29

Romer v. Evans,
517 U.S. 620 (1996) 2

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INTEREST OF *AMICUS CURIAE*[1]

The American Sociological Association ("ASA") is the national professional and scholarly association of sociologists in the United States. Founded in 1905, the ASA has more than 14,000 members, including most sociologists holding doctoral degrees from accredited universities. The ASA publishes nine leading peer-reviewed journals. The ASA is committed to and bound by the highest standards of research methodology and objectivity and is dedicated to advancing sociology as a scientific discipline and profession that serves the public good.

The ASA has a long history of presenting the consensus research findings of social scientists to American courts for their use in evaluating evidence and legal issues, and its conclusions are regularly relied on by courts. As part of that mission, the ASA submits this brief to present to the Court the consensus view of social scientists on certain issues raised in these cases—namely, the effects of same-sex parenting on the wellbeing of children.

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[1] Counsel for each party has consented to the filing of this Brief, as indicated by letters filed with the Clerk of the Court. Pursuant to Rule 37.6, *amicus curiae* state that no counsel for a party authored any part of this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In their briefs to the Court, the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG"), the Hollingsworth Petitioners (the "Proposition 8 Proponents"), and their respective *amici* assert that children fare better with opposite-sex parents[2] than with same-sex parents. They contend that this alleged fact justifies both the Defense of Marriage Act ("DOMA"), which denies federal recognition to legally married same-sex couples, and Proposition 8's revocation of marriage rights for same-sex couples in California. For instance, BLAG argues that "biological differentiation in the roles of mothers and fathers makes it rational[3] to encourage situations in which children have one of each." Brief for Respondent BLAG at 48, *United States v. Windsor*, No. 12-307 (U.S. Jan. 22, 2013). BLAG further contends that "[b]iological parents have a genetic stake in the success of their children" that others, such as adoptive parents and same-sex parents, do not have. *Id.* at 47. The Proposition 8 Proponents advance similar arguments. *See* Brief for Petitioner Hollingsworth at

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[2] In order to be consistent with prior court decisions and the terms utilized by the parties in the courts below, we refer to male-female parents as "opposite-sex" parents throughout this brief.

[3] The parties dispute the appropriate level of scrutiny. However, even assuming that the lowest level of scrutiny applies, the asserted interest in children's wellbeing cannot be accepted as a rationale for DOMA or Proposition 8. When legislative classifications bear no rational relationship to legitimate government interests, those classifications violate the equal protection clause of both the Fifth and Fourteenth Amendments. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

52-53, *Hollingsworth v. Perry*, No. 12-144 (U.S. Jan. 22, 2013).

However, the claim that same-sex parents produce less positive child outcomes than opposite-sex parents—either because such families lack both a male and female parent or because both parents are not the biological parents of their children—contradicts abundant social science research. Decades of methodologically sound social science research, especially multiple nationally representative studies and the expert evidence introduced in the district courts below, confirm that positive child wellbeing is the product of stability in the relationship between the two parents, stability in the relationship between the parents and child, and greater parental socioeconomic resources. Whether a child is raised by same-sex or opposite-sex parents has no bearing on a child's wellbeing.

The clear and consistent consensus in the social science profession is that across a wide range of indicators, children fare just as well when they are raised by same-sex parents when compared to children raised by opposite-sex parents. The social science studies cited by BLAG, Proposition 8 Proponents, and their *amici* to support their arguments fail to address same-sex parents at all. Accordingly, as a matter of science, these studies cannot serve as the basis for conclusions about same-sex parents and related child outcomes and do not undermine the social science consensus that children fare just as well with same-sex parents. To the extent some of the studies cited by BLAG and the Proposition 8 Proponents show that stability improves child outcomes, they confirm that marriage rights for same-sex couples and the federal recognition of such marriages are likely to improve the wellbeing of children of same-sex parents by providing enhanced family stability. The research presented in this brief articulates these points in greater detail, and demonstrates that the government's interest in promoting the wellbeing of children is neither substantially nor rationally connected to DOMA or Proposition 8, because the overwhelming scientific evidence shows clearly that same-sex couples are equally capable of generating positive child outcomes.[4]

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[4] As explained by Respondent Edith Schlain Windsor and acknowledged by the district court in the *Windsor* case, DOMA in no way affects whether children will be raised by same-sex or opposite-sex parents. It does not encourage gay and lesbian individuals to enter into opposite-sex marriages or deter such individuals from having children within same-sex relationships. Additionally, DOMA in no way impacts heterosexual couples' decisions regarding marriage: "We agree that promotion of procreation can be an important government objective. But we do not see how DOMA is substantially related to it." *Windsor v. United States*, 699 F.3d 169, 188 (2d Cir. 2012), *cert. granted*, 81 U.S.L.W. 3072 (U.S. Dec. 7, 2012). *See also Windsor v. United States*, 833 F. Supp. 2d 394, 404 (S.D.N.Y. 2012), *aff'd*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 81 U.S.L.W. 3072 (U.S. Dec. 7, 2012) ("DOMA has no direct impact on heterosexual couples at all; therefore, its ability to deter those couples from having children outside of marriage, or to incentivize couples that are pregnant to get married, is remote, at best."). Similarly, as the United States Court of Appeals for the Ninth Circuit noted in *Perry*, taking away the right to marry from same-sex couples has "no effect on the rights of same-sex couples to raise children or on the procreative practices of other couples." *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 786 (U.S. 2012).

This Court has long relied on social science research to inform its decisions. For example, in *Roper v. Simmons*, the Court relied on social science research showing that "juveniles have less control, or less experience with control, over their own environment" and that "[t]he personality traits of juveniles are more transitory, less fixed" to support its conclusion that capital punishment for crimes committed while a minor is unconstitutional. 543 U.S 551, 569-70 (2005); *see also Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (noting that "[t]here is no evidence that [mentally retarded individuals] are more likely to engage in criminal conduct than others" and holding, in part based on the social science evidence and "germane expertise" of *amicus curiae*, that executing mentally retarded individuals violates the Eighth Amendment); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 255-56 (1989) (relying in part on the testimony of a social psychologist to conclude that the employer of a female worker engaged in sex stereotyping). BLAG and the Proposition 8 Proponents offer no facts to support the contention that Congress and the State of California possessed an important or rational basis for DOMA and Proposition 8. In this instance, when the social science evidence is exhaustively examined—which the ASA has done—the facts demonstrate that children fare just as well when raised by same-sex parents. Unsubstantiated fears regarding same-sex child rearing do not overcome these facts and do not justify upholding DOMA and Proposition 8.

ARGUMENT

I. SCHOLARLY CONSENSUS IS CLEAR: CHILDREN OF SAME-SEX PARENTS FARE JUST AS WELL AS CHILDREN OF OPPOSITE-SEX PARENTS

Contrary to the assertions of BLAG, the Proposition 8 Proponents, and their *amici*, the social science consensus is clear: children raised by same-sex parents fare just as well as children raised by opposite-sex parents. Numerous nationally representative, credible, and methodologically sound social science studies form the basis of this consensus. These studies reveal that children raised by same-sex parents fare just as well as children raised by opposite-sex couples across a wide spectrum of child-wellbeing measures: academic performance, cognitive development, social development, psychological health, early sexual activity, and substance abuse. Moreover, these studies are supported by and consistent with the evidence introduced into the records below and accepted by the district court in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). This evidence includes the research of Dr. Michael Lamb, an expert in child social and psychological development who has conducted extensive reviews of twenty-five years worth of research on the wellbeing of children of same-sex parents. *See, e.g.*, Michael Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting*

Children's Adjustment, 16 Applied Developmental Science 98, 104 (2012).[5]

Academic Performance and Cognitive Development

Social science research confirms that the academic performance of children raised by same-sex parents is indistinguishable from that of children raised by opposite-sex parents. A leading study by Daniel Potter based on nationally representative, longitudinal data found no significant difference in academic achievement between children of same-sex parents and children of opposite-sex parents. *See* Daniel Potter, *Same-Sex Parent Families and Children's Academic Achievement,* 74 Journal of Marriage & Family 556 (2012). Similarly, another leading 2009 study by sociologists Alicia Fedewa and Teresa Clark employing nationally representative data that examined the academic achievement of first-grade children reported no significant differences in academic achievement between children raised by same-sex and opposite-sex parents. *See* Alicia L. Fedewa & Teresa P. Clark, *Parent Practices and Home-School Partnerships: A Differential Effect for Children with Same-Sex Coupled Parents?*, 5 Journal of GLBT Family Studies 312 (2009); *see also* Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, 47 Demography 755 (2010) (demonstrating that children of residentially stable same-sex parents are as likely to make normal progress through school as children from stable opposite-sex married parents); Douglas W. Allen et al., *Nontraditional Families and Childhood Progress Through School: A Comment on Rosenfeld*, Demography (Nov. 2012), http://link.springer.com/article/10.1007/s13524-012-0169-x/fulltext.html (confirming similar results of academic performance when comparing children of residentially stable same-sex parents with children of stable opposite-sex married parents).[6] The same pattern holds true among older children. For example, in another nationally representative study, social scientists found similar GPA levels among adolescents living with same-sex and opposite-sex parents. *See* Jennifer L. Wainright et al., *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents*, 75 Child Development 1886 (2004).

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[5] During the *Perry v. Schwarzenegger* trial, the Proposition 8 Proponents "eschew[ed] all but a rather limited factual presentation," and "presented only one witness, David Blankenhorn"—who is not a social scientist—"to address the government interest in marriage." 704 F. Supp. 2d at 931. The district court concluded that this sole witness "provided no credible evidence to support any of the claimed adverse effects proponents promised to demonstrate." *Id.* Since the trial, Blankenhorn has abandoned his former position regarding marriage rights for same-sex couples. *See* David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. Times, June 22, 2012. As Blankenhorn recently explained, it is time to "build new coalitions bringing together gays who want to strengthen marriage with straight people who want to do the same." Mark Oppenheimer, *In Shift, an Activist Enlists Same-Sex Couples in a Pro-Marriage Coalition*, N.Y. Times, Jan. 29, 2013.

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[6] The *amici* of BLAG and the Proposition 8 Proponents rely upon this study by Douglas Allen. Allen re-works data used by Rosenfeld, but ignores stability as a control factor, and as a result finds a difference in academic achievement. However, as Rosenfeld himself responds, and as demonstrated by the social science consensus, stability is the principal factor influencing child outcomes. By removing the control element for stability, Allen cannot discern children's family history. Allen's work thereby conceals that many children in same-sex parent families come from orphanages, foster families, or heterosexual parents who break up, influencing the results but not reflecting on the quality of same-sex parents. When stability is included as a control element, Allen's study confirms that same-sex parents have no negative impact on

Research also reveals similar cognitive development between children raised by same-sex parents and opposite-sex parents. *See* Justin A. Lavner et al., *Can Gay and Lesbian Parents Promote Healthy Development in High-Risk Children Adopted from Foster Care?*, 82 American Journal of Orthopsychiatry 465 (2012). In fact, another study of children with same-sex parents reveals that they score at least as well—and sometimes better than—children of opposite-sex parents on numerous indicators of educational achievement and involvement. *See* Joseph G. Kosciw & Elizabeth M. Diaz, *Involved, Invisible, Ignored: The Experiences of Lesbian, Gay, Bisexual, and Transgender Parents and Their Children in Our Nation's K-12 Schools*, Gay, Lesbian and Straight Education Network (2008).

Social Development

The social development of children raised by same-sex parents is equivalent to that of children raised by opposite-sex parents. Analysis of nationally

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academic outcomes of children. *See* Michael J. Rosenfeld, ***Reply to Allen et al.***, Demography (Nov. 2012), http://link.springer.com/article/10.1007%2Fs13524-012-0170-4.

representative data reveals no differences in social adjustment depending on whether children were raised by same-sex or opposite-sex parents. *See* Fedewa & Clark at 312. Nationally representative studies of adolescents find that the number, support, and quality of peer relationships and friendships are similar for teens raised by female same-sex couples and those raised by opposite-sex parents. *See* Jennifer L. Wainright & Charlotte J. Patterson, *Peer Relations Among Adolescents with Female Same-Sex Parents*, 44 Developmental Psychology 117 (2008); *see also* Fiona Tasker, *Lesbian Mothers, Gay Fathers and Their Children: A Review*, 26 Developmental and Behavioral Pediatrics 224 (2005) (finding children of same-sex parents exhibited the same typical adjustments related to peer relations as children of opposite-sex parents and therefore could not be said to fare worse based on their parents' sexuality).

Mental Health

Social science studies also confirm that children of same-sex parents are just as psychologically healthy as children of opposite-sex parents. According to a nationally representative study, adolescents raised by same-sex and opposite-sex parents report similar levels of self-esteem and depression. *See* Wainright et al. at 1886. Other reliable studies corroborate these results. *See* Loes van Gelderen et al., *Quality of Life of Adolescents Raised from Birth by Lesbian Mothers: The US National Longitudinal Family Study*, 33 Journal of Developmental & Behavioral Pediatrics 1, 1 (2012) (concluding that "[a]dolescent offspring in planned lesbian families do not show differences in [quality of life] when compared with a matched group of adolescents reared in heterosexual families"). As Dr. Lamb outlined in his comprehensive literature review of the social science evidence, "numerous studies of children and adolescents raised by same-sex parents conducted over the past 25 years by respected researchers and published in peer-reviewed academic journals conclude that they are as successful psychologically, emotionally, and socially as children and adolescents raised by heterosexual parents." Lamb at 104. Similarly, surveys reveal no greater levels of anxiety or Attention Deficit Disorder (A.D.D.) among teenagers raised by same-sex parents than among those raised by opposite-sex parents. *See* Nanette Gartrell & Henny W. Bos, *US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, 126 Pediatrics 28 (2010).[7]

This social science evidence confirms the evidence presented at the trial and accepted by the district court in *Perry*. For example, based in part on the testimony of Dr. Lamb that social science studies demonstrate "very conclusively that children who are raised by gay and lesbian parents are just as likely to be well-adjusted as children raised by heterosexual parents," the district court found as a matter of fact that:

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[7] *See also* Rachel H. Farr et al., *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14 Applied Developmental Science 164 (2010); Scott Ryan, *Parent-Child Interaction Styles between Gay and Lesbian Parents and Their Adopted Children*, 3 Journal of GLBT Family Studies 105 (2007); Stephen Erich et al., *A Comparative Analysis of Adoptive Family Functioning with Gay, Lesbian, and Heterosexual Parents and Their Children*, 1 Journal of GLBT Family Studies 43 (2005) (all reporting similar findings).

> [t]he gender of a child's parent is not a factor in a child's adjustment. The sexual orientation of an individual does not determine whether that individual can be a good parent. Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology.

Perry v. Schwarzenegger, 704 F. Supp. 2d at 980.

Early Sexual Activity

The social science studies also demonstrate that teenagers raised by same-sex parents and those raised by opposite-sex parents engage in similar levels of teenage sexual activity. For instance, nationally representative studies show that similar proportions of teenagers raised by same-sex parents and by opposite-sex parents have had sexual intercourse or a romantic relationship. *See* Charlotte J. Patterson & Jennifer L. Wainright, *Adolescents with Same-Sex Parents: Findings from the National Longitudinal Study of Adolescent Health*, in Adoption by Lesbians and Gay Men: A New Dimension in Family Diversity (David M. Brodzinsky & Adam Pertman eds., 2012). In fact, sexual behaviors reported by 17-year-olds raised by same-sex mothers indicated that the age at which they first engage in sexual intercourse was slightly older than those in a gender- and age-matched national sample of children raised by opposite-sex parents. *See* Nanette Gartrell et al., *New Trends in Same-Sex Sexual Contact for American Adolescents*, 41 Archives of Sexual Behavior 5 (2012). Moreover, the odds of having a sexually transmitted disease, becoming pregnant, or impregnating someone were statistically similar. *Id.* And none of the children raised by same-sex parents examined in the National Longitudinal Lesbian Family Study reported any physical or sexual abuse by a parent or caregiver. *See* Nanette Gartrell et al., *Adolescents of the U.S. National Longitudinal Lesbian Family Study: Sexual Orientation, Sexual Behavior, and Sexual Risk Exposure*, 40 Archives of Sexual Behavior 1199 (2011).

Substance Abuse and Behavioral Problems

Finally, social science studies confirm that children of same-sex parents are no more likely to abuse substances than children of opposite-sex parents. A nationally representative sample of adolescents living with female, same-sex parents reveals that the adolescents are similar to their counterparts raised by opposite-sex parents in terms of frequency of substance use (*i.e.*, tobacco, alcohol, and marijuana), problems with substance use, and delinquent behavior. *See* Jennifer L. Wainright & Charlotte J. Patterson, *Delinquency, Victimization, and Substance Use Among Adolescents with Female Same-Sex Parents*, 20 Journal of Family Psychology 526 (2006). Furthermore, children of opposite-sex and same-sex parents report similar levels of problematic, rule-breaking, and inappropriately aggressive behaviors. *See* Gartrell & Bos.

In sum, as the overwhelming body of social science research confirms, whether a child is raised by same-sex or opposite-sex parents has no bearing on a child's wellbeing.[8] Instead, the consensus is that the key factors affecting child wellbeing are stable family environments and greater parental socioeconomic resources, neither of which is related to the sex or sexual orientation of a child's parents. *See* Rand D. Conger et al., *Socioeconomic Status, Family Processes, and Individual Development*, 72 Journal of Marriage & Family 685 (2010). As the district court in *Perry* concluded based on the testimony of Dr. Lamb and other social science evidence presented, "[t]he factors that affect whether a child is well-adjusted are: (1) the quality of a child's relationship with his or her parents; (2) the quality of the relationship between a child's parents or significant adults in the child's life; and (3) the availability of economic and social resources." 704 F. Supp. 2d at 980. These factors indicate that in order to further enhance child outcomes and wellbeing, we should encourage stable and financially secure family units—including same-sex parented families—rather than exclude the hundreds of thousands of children living with same-sex couples from the stability and economic security that marriage provides.

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[8] Notwithstanding certain critics' blanket dismissal of some of the studies underlying the social science research consensus, *see, e.g.*, Brief for Social Science Professors as *Amicus Curiae* Supporting Petitioner–Hollingsworth, No. 12-144, and Respondent–BLAG, No. 12-307 at 13-21 (U.S. Jan. 29, 2013), the ASA's review of the studies confirms that they are methodologically sound and conform to the highest standards of sociological research.

II. THE RESEARCH CLAIMED TO UNDERMINE THE CONSENSUS EITHER DOES NOT ADDRESS SAME-SEX PARENTS AND THEIR CHILDREN OR IS MISCHARACTERIZED

The studies relied on by BLAG, the Proposition 8 Proponents, and their *amici* fail to support their claim that children fare better with opposite-sex parents than same-sex parents, because nearly all of the studies fail to examine same-sex parents or their children. One of the *amici* supporting BLAG and the Proposition 8 Proponents in the circuit courts conceded the importance of apples-to-apples comparisons and dismissed studies that rely on "inappropriate comparisons (i.e., comparing children raised by same-sex couples to children raised by divorced mothers)." Brief for American College of Pediatricians as *Amicus Curiae* Supporting Intervenor–Defendant–Appellant at 4-5, *Windsor v. United States*, 699 F.3d. 169 (2d Cir. 2012). This critique of "inappropriate comparisons" is even truer when the studies do not address same-sex parents at all. Moreover, some of the findings in the studies are mischaracterized by the *amici* supporting BLAG and the Proposition 8 Proponents and, in fact, affirm that family stability and greater parental socioeconomic resources are the principal factors affecting child wellbeing.

In an effort to undermine the social science consensus, several *amici* rely heavily on one study conducted by Mark Regnerus. *See* Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Survey*, 41 Social Science Research 752 (2012) ("Regnerus 2012a"). Critically, for multiple reasons and as Regnerus acknowledges, his study did not examine, and provides no conclusions regarding, the wellbeing of children who lived with and were raised by same-sex parents.

A) THE REGNERUS STUDY DOES NOT SUPPORT CONCLUSIONS REGARDING THE IMPACT OF BEING RAISED BY SAME-SEX PARENTS

The Regnerus study—the principal study relied on by the *amici* of BLAG and the Proposition 8 Proponents—did not specifically examine children raised by same-sex parents, and provides no support for the conclusions that same-sex parents are inferior parents or that the children of same-sex parents experience worse outcomes.

The Regnerus Study Offers No Basis for Conclusions About Same-Sex Parents

First, the Regnerus study does not specifically examine children born or adopted into same-sex parent families, but instead examines children who, from the time they were born until they were 18 or moved out, had a parent who at any time had "a same-sex romantic relationship." Regnerus 2012a at 752. As Regnerus noted, the majority of the individuals characterized by him as children of "lesbian mothers" and "gay fathers" were the offspring of failed opposite-sex unions whose parent subsequently had a same-sex relationship. *Id.* In other words, Regnerus did not study or analyze the children of two same-sex parents.

Second, when the Regnerus study compared the children of parents who at one point had a "same-sex romantic relationship," most of whom had experienced a family dissolution or single motherhood, to children raised by two biological, married opposite-sex parents, the study stripped away all divorced, single, and stepparent families from the opposite-sex group, leaving only stable, married, opposite-sex families as the comparison. *Id.* at 757 (the comparison group consisted of individuals who "[l]ived in intact biological famil[ies] (with mother and father) from 0 to 18, and parents are still married at present"). Thus, it was hardly surprising that the opposite-sex group had better outcomes given that stability is a key predictor of positive child wellbeing. By so doing, the Regnerus study makes inappropriate apples-to-oranges comparisons.

Third, Regnerus's first published analysis of his research data failed to consider whether the children lived with, or were raised by, the parent who was, at some point, apparently involved in "a romantic relationship with someone of the same sex" and that same-sex partner. *Id.* at 756. Instead, Regnerus categorized children as raised by a parent in a same-sex romantic relationship regardless of whether they were in fact raised by the parent and the parent's same-sex romantic partner and regardless of the amount of time that they spent under the parent's care.[9] As a result, so long as an adult child believed that he or she had *had* a parent who had a relationship with someone of the same sex, then he or she was counted by Regnerus as having been "raised by" a parent in a same-sex relationship.[10]

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[9] Although the data used by Regnerus distinguished between children who had lived with their parent while the parent was in a same-sex romantic relationship and children who had not,

Fourth, in contrast to every other study on same-sex parenting, Regnerus identified parents who had purportedly engaged in a same-sex romantic relationship based solely on the child's own retrospective report of the parent's romantic relationships, made once the child was an adult. This unusual measurement strategy ignored the fact that the child may have limited and inaccurate recollections of the parents' distant romantic past. *Id.*

Finally, the study fails to account for the fact that the negative outcomes may have been caused by other childhood events or events later in the individual's

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Regnerus 2012a at 757, Regnerus classified children in his study and defined them as being raised by "Lesbian Mothers" and "Gay Fathers" without regard to those differences. *Id.* at 756-57 (noting that 73 total children responded as having a father in a same-sex relationship and including all 73 in his analysis, notwithstanding that only 42% of the respondents reported living with the father while he was in a same-sex romantic relationship, and only 23% percent reported living with him and his partner for at least 4 months). Regnerus notes that he classified children as being raised by "Lesbian Mothers" and "Gay Fathers" "regardless of any other household transition." *Id.* at 757.

[10] Indeed, the Regnerus study described itself as "a study of young adults rather than children or adolescents, with particular attention paid to reaching ample numbers of respondents who were raised by parents that had a same-sex relationship." *Id.* at 755.

adult life, particularly given that the vast majority (thirty-seven of forty) of the outcomes measured were adult and not childhood outcomes.[11] Factors other than same-sex parenting are likely to explain these negative outcomes in the Regnerus study. Regnerus himself concludes that "I am thus not suggesting that growing up with a lesbian mother or gay father causes suboptimal outcomes *because of* the sexual orientation or sexual behavior of the parent." *Id.* at 766.

In sum, by conflating (1) children raised by same-sex parents with (2) individuals who reportedly had a parent who had "a romantic relationship with someone of the same sex," and referring to such individuals as children of "lesbian mothers" or "gay fathers," the Regnerus study obscures the fact that it did not specifically examine children raised by two same-sex parents. Accordingly, it cannot speak to the impact of same-sex parenting on child outcomes. As discussed above, *amici* in support of BLAG and the Proposition 8 Proponents have themselves rejected such "inappropriate comparisons" between stable and unstable family structures, *see* Brief for American College of Pediatricians at 4-5, as did the district court in *Perry*, *see* 704 F.Supp. 2d at 981 (studies that make apples-to-oranges comparisons are of no moment).

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[11] Regnerus himself recognizes that the survey data he relied upon—the New Family Structures Study (NFSS)—"is poised to address [questions] about the lives of young adults between the ages of 18 and 39, but not about children or adolescents." Regnerus 2012a at 755.

The "Re-Stated" Regnerus Study Offers No Basis for Conclusions About Same-Sex Parents

Regnerus acknowledged the merit of a series of scholarly critiques regarding underlying aspects of his research and subsequently published a second analysis of the data. Among others, a group of over one hundred social scientists signed an article faulting the Regnerus study for failing to take account of family structure and family instability. Gary J. Gates et al., *Letter to the Editor and Advisory Editors of Social Science Research*, 41 Social Science Research 1350 (2012). The article specifically criticized the Regnerus study's failure to "distinguish between the impact of having a parent who has a continuous same-sex relationship from the impact of having same-sex parents who broke-up from the impact of living in a same sex stepfamily from the impact of living with a single parent who may have dated a same-sex partner." *Id.* Regnerus tried to remedy the fact that his initial published research did not analyze whether the children had actually lived with the parent who, according to the adult child, had at some point, been "romantically involved" with someone of the same sex. *See* Mark Regnerus, *Parental Same-Sex Relationships, Family Instability, and Subsequent Life Outcomes for Adult Children: Answering Critics of the New Family Structures Study with Additional Analyses*, 41 Social Science Research 1367, 1369 (2012) ("Regnerus 2012b").

Nevertheless, Regnerus's follow-up analysis does not resolve the problems inherent in his initial analysis and contains many of the same shortcomings. The follow-up analysis maintained the flawed and extremely broad definition of what constitutes "lesbian mothers" and "gay fathers"—a mother or father who ever had a romantic relationship with someone of the same-sex during the period from the birth of the child until the child turned eighteen (or left home to be on their own). *Id.* at 1368. Accordingly, Regnerus's analysis continues to ignore stability as a factor in child outcomes—a factor that explains many of the differences among its subjects. And Regnerus still fails to account for the duration of time spent with a mother who was "romantically involved" with a same-sex partner and that partner. *See id.* at 1372. Only *two* of the eighty-five children who at some point lived with a mother who was "romantically involved" with another woman reported that they did so for the entire duration of their childhood. Finally, Regnerus's follow-up analysis is still not reflective of same-sex parenting because Regnerus could not remedy the fact that he recorded experiences that occurred either during the time the child lived with his or her mothers' same-sex partner *or* during another childhood time period.

If any conclusion can be reached from Regnerus's study, it is that family stability is predictive of child wellbeing. As Regnerus himself notes, family structure (for instance whether the family has a single parent or two parents), matters significantly to child outcomes. Regnerus 2012a at 761. As the social science consensus described in Part I demonstrates, the evidence regarding children raised by same-sex parents overwhelmingly indicates that children raised by such families fare just as well as children raised by opposite-sex parents, and that children raised by same-sex parents are likely to benefit from the enhanced stability the institution of marriage would provide to their parents and families. All told, the Regnerus study, even as revised, does not undermine the consensus that children raised by same-sex parents fare just as well as those raised by opposite-sex parents.

B) THE REMAINING STUDIES CITED BY BLAG, THE PROPOSITION 8 PROPONENTS, AND THEIR *AMICI* DO NOT ADDRESS SAME-SEX PARENTS AND THEREFORE DO NOT UNDERMINE THE CONSENSUS

The other studies cited by BLAG, the Proposition 8 Proponents, and their *amici* in no way undermine the consensus of social science research that children of same-sex couples fare just as well as those of opposite-sex couples. In continued apples-to-oranges fashion, they rely on studies analyzing, *inter alia*, stepparents, single parents, and adoptive parents—none of which address same-sex parents or their children—in order to make speculative statements about the wellbeing of children of same-sex parents. Such inappropriate, methodologically baseless comparisons provide no factual support or justification for DOMA or Proposition 8. Instead, the studies confirm that parental stability and higher parental socioeconomic resources are the key drivers of positive child outcomes.

Studies Regarding the Impact of Stepparents, Divorced Parents, or Single parents

BLAG, the Proposition 8 Proponents, and their *amici* rely on studies examining the impact of stepparents, divorced parents, and single parents on child wellbeing outcomes, and use these studies to argue that two biological parents are necessary to positive child outcomes. *See* Brief for Matthew B. O'Brien as *Amicus Curiae* Supporting Petitioner–Hollingsworth at 17, No. 12-144, and Respondent–BLAG, No. 12-307 (U.S. Jan. 29, 2013); Brief for Social Science Professors as *Amicus Curiae*, Nos. 12-144, 12-307, at 5 (U.S. Jan. 29, 2013). These studies in no way examined same-sex parents or their impact on child wellbeing. *See, e.g.*, Sara McLanahan & Gary Sandefur, *Growing Up with a Single Parent* 38 (1994) (comparing "disrupted" families with "intact" families, but nowhere discussing same-sex parents); Marilyn Coleman et al., *Reinvestigating Remarriage: Another Decade of Progress*, 62 Journal of Marriage & Family 1288 (2000) (comparing stepparents to non-divorced parents, but not addressing same-sex parents); Kristen Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, Child Trends Research Brief 1-2, 6 (2002), http://www.childtrends.org/files/marriagerb602.pdf (comparing the wellbeing of children raised by stepparents and single parents to that of children raised by stable, two parent families); Mark V. Flinn et al., *Growth and Fluctuating Assymetry of Stepchildren*, 20 Evolutionary Human Behavior 465 (1999) (analyzing the wellbeing of children raised by stepfathers, but not addressing same-sex parents); Nicholas H. Wolfinger, *Understanding the Divorce Cycle: The Children of Divorce in Their Own Marriages* (2005) (analyzing the impact of divorce, but not addressing same-sex parents). Accordingly, they cannot be relied upon as scientific evidence regarding the effects of same-sex parenting.

Aside from not specifically addressing same-sex parents, the studies regarding stepparents and divorce indicate that child outcomes are, on average, not as positive because of the disruption caused by divorce or the introduction of a new parent into the family, but do not indicate that the source of the negative outcomes is related to the fact that the stepparent is not biologically related to the child. *See, e.g.*, Moore at 1 ("Divorce is linked to academic and behavior problems among children, including depression, antisocial behavior, impulsive/hyperactive behavior, and school behavior problems. Mental health problems linked to marital disruption have also been identified among young adults."). Therefore, the argument that research regarding stepparents is relevant to same-sex parents because at least one of the same-sex parents is not the biological parent, and is therefore "step" is misplaced. In a planned, same-sex parent family, both parents have brought the child into the family and raised the child from infancy. Moreover, in many states, both parents in same-sex parent families are legal parents to the children.

Accordingly, all of the studies cited by BLAG, the Proposition 8 Proponents, and their *amici* analyzing the effects of single parents and stepparents are mischaracterized by them. The research on children in divorced, single parent, and stepparent families simply says nothing about the wellbeing of children raised by same-sex parents. As the district court determined based on the evidence introduced at trial in the *Perry* case, "[s]tudies comparing outcomes for children raised by married opposite-sex parents to children raised by single or divorced parents do not inform conclusions about outcomes for children raised by same-sex parents in stable, long-term relationships." 704 F. Supp. 2d at 981.

In fact, the authors of one of the principal studies relied on by BLAG—the Child Trends study—have publicly responded that their study focused on children being raised in families headed by single parents, stepparents, and married, opposite-sex parents—not same-sex parents. *See* Moore at Introductory Disclaimer. The Child Trends authors expressly disclaimed BLAG's misuse of their study, explaining that "no conclusions can be drawn from this research about the wellbeing of children raised by same-sex parents or adoptive parents." *Id.* *See also* Chris Johnson, *Anti-Gay Briefs 'Mischaracterized' Study*, Washington Blade (Jan. 25, 2013), http://www.washingtonblade.com/2013/01/25/anti-gay-legal-briefs-mischaracterized-parenting-study.

The Child Trends study concluded something entirely different than what was claimed by BLAG. The study concluded that "when researchers have compared marriage to cohabitation, they have found that marriage is associated with better outcomes for children." Moore at 2. Extending this logic to the context of same-sex couples and their children, recognition of marriage rights of such couples could improve, not impair, the wellbeing of children being raised by currently unmarried same-sex parents. *See also* Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families* 65 Journal of Marriage & Family 876 (2003) (noting that marriage provides enhanced socioeconomic resources to families, improving child wellbeing outcomes); Pamela J. Smock

& Wendy D. Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 Law & Policy 87, 94 (2004) (discussing the role of marriage in contributing to the stability of a family).

Studies Purporting to Examine the Effect of Two Biological Parents

The *amici* in support of DOMA and Proposition 8 cite studies purporting to show the superiority of biological parents over adoptive parents, *see* Brief for Social Science Professors at 14 n.6 (citing Brent Miller et al., *Comparisons of Adopted and Non-Adopted Adolescents in a Large, Nationally Representative Sample*, 71 Child Development 1458 (2000)), and a publication by an advocacy organization purporting to show problems for children conceived by donor sperm, *see* Brief for Coalition for the Protection of Marriage as *Amicus Curiae* Supporting Petitioner–Hollingsworth at 23, No. 12-144, and Respondent–BLAG, No. 12-307 (U.S. Jan. 29, 2013) (citing Institute for American Values (Elizabeth Marquardt, Norval D. Glenn, & Karen Clark, co-investigators), *My Daddy's Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation* (2010)). As with the rest of their studies, these studies do not examine same-sex parents or their children. It is hard to see the relevance of these citations to the issue of marriage rights for same-sex couples given that both adoption and assisted reproduction are widely used by heterosexual couples, as reflected in the very sources cited in support of DOMA and Proposition 8.

In any case, there is no basis for the assertion that adoption or assisted reproduction leads to negative child outcomes. In fact, studies actually indicate that children raised in adoptive families since infancy or in families utilizing assisted reproduction techniques fare just as well as other children. *See also* Gartrell & Bos at 33-34 (showing that "adolescents who have been raised since birth in planned lesbian families demonstrate healthy psychological adjustment" and that they in fact "demonstrated higher levels of social, school/academic, and total competence than gender-matched normative samples of American teenagers"); Brent Miller et al., *Comparisons of Adopted and Non-Adopted Adolescents In A Large, Nationally Representative Sample*, 71 Child Development 1458 (2000) (finding little difference between adoptees and non-adoptees who live in two-parents families,; and finding, to the extent there was any difference, that the difference occurs in children who were adopted later in their childhood). As put succinctly by the district court in *Perry*, "[t]he genetic [or biological] relationship between a parent and a child is not related to a child's adjustment outcomes." 704 F.Supp. 2d at 981.[12]

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[12] The *amici* of BLAG and Proposition 8 Proponents cite to the assertion that children have a "right" to their biological parents because they allegedly fare better with such parents. Margaret Somerville, *Children's Human Rights to Natural Biological Origins and Family Structure*, 1 International Journal of Jurisprudence of the Family 35 (2010). However, when this same opinion was offered to the Iowa Supreme Court in its evaluation of marriage rights for same-sex couples, it was dismissed as being "largely unsupported by reliable scientific studies." *Varnum v. Brien*, 763 N.W.2d 862, 899 (Iowa 2009).

Studies Regarding Gender Roles in Opposite-Sex Family

The *amici* also rely on a number of studies that examine the parental roles of mothers and fathers within the context of opposite-sex parent families and claim that these studies demonstrate that children's wellbeing depends on having both a male and female parent. *See* Brief for Coalition for Protection of Marriage at 33; Brief for Social Science Professors at 7.[13] But these studies do not support this suggestion and reliance on them is misplaced for multiple reasons.

First, like the other studies cited by BLAG, the Proposition 8 Proponents, and their *amici*, these studies do not examine the parenting and disciplinary dynamics of same-sex parents. Without any social science evidence to support their conclusion, the *amici* ask the Court to deduce that a child raised by two gay husbands would not receive the necessary neural development or improvement in emotional and communicative skills. No such conclusion is proper based on these or any studies. Second, BLAG, the Proposition 8 Proponents, and their *amici* ignore the fact that the research regarding different parenting roles and styles indicates that those roles are relative and nothing in the research indicates that same-sex couples are not able to provide such relative parenting dynamics. *See* David Popenoe, *Life Without Father: Compelling New Evidence that Fatherhood & Marriage Are Indispensable for the Good of Children & Society* 147 (1996) (noting that among same-sex parents, one partner commonly fills the "male-instrumental role while the other fills the female-expressive role" in rearing their children). Third, the research also indicates that there is a range of parenting styles, that no couples parent identically, and that children do not need their parents to adopt particular parenting styles to be well adjusted. *See* Paul R. Amato & Frieda Fowler, *Parenting Practices, Child Adjustment, and Family Diversity*, 64 Journal of Marriage & Family 703, 714 (2002) ("When parents spend time with children, help with homework, talk about problems, provide encouragement, and show affection, children do well.").

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[13] *Citing* C.A. Nelson & M. Bosquet, ***Neurobiology of Fetal and Infant Development: Implications for Infant Mental Health***, in Handbook of Infant Mental Health 37-59 (C.H. Zeanah Jr. ed., 2d ed. 2000); Eleanor Maccoby, ***The Two Sexes*** 266-67 (1998); Paul R. Amato & Fernando Rivera, ***Paternal Involvement and Children's Behavior Problems***, 61 Journal of Marriage & Family 375 (1999); Shmuel Shulman & Moshe M. Klein, ***Distinctive Role of the Father in Adolescent Separation-Individuation***, 62 New Directions for Child & Adolescent Development 41, 53 (1993).

Finally, arguments based on rigid gender roles should be rejected as this Court has declined to rely upon "outdated misconceptions" and "loose-fitting characterizations" regarding gender. *See Craig v. Boren*, 429 U.S. 190, 198-99 (1976); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group[.]"). As the district court in *Perry* concluded after examining the social science evidence presented, including the testimony of Dr. Lamb, "[c]hildren do not need to be raised by a male parent and a female parent to be well-adjusted, and having both a male and a female parent does not increase the likelihood that a child will be well-adjusted." 704 F. Supp. 2d at 981.

Nor do the studies relied on by the *amici* that examine the role of absentee fathers, *see, e.g.*, Popenoe at 146, establish that, within the context of same-sex parenting, fathers are necessary to the child's wellbeing. In fact, the research regarding the negative impact of absentee fathers, such as David Popenoe's, has nothing to do with the unique contributions of fathers, but rather with the loss of a parental relationship. *Id.* at 139 ("Much of what fathers contribute to child development, of course, is simply the result of being a second adult in the home. Other things being equal, two adults are far better than one in raising children. As the distinguished developmental psychologist Urie Bronfenbrenner has noted, the quality of interaction between principal caregiver and child depends heavily on the availability and involvement of another adult, a *third party* who assists, encourages, spells off, gives status to, and expresses admiration and affection for the person caring for and engaging in joint activity with the child." (internal quotations omitted)).

In sum, the studies relied on by BLAG, the Proposition 8 Proponents, and their *amici* examine child outcomes within the context of opposite-sex relationships, and do not address the impact of same-sex parents on child wellbeing. These studies do not undermine the social science consensus, supported by the most reliable studies available, that children raised by same-sex parents fare just as well as children raised by opposite-sex parents across a broad spectrum of indicators.[14]

CONCLUSION

The social science consensus is both conclusive and clear: children fare just as well when they are raised by same-sex parents as when they are raised by opposite-sex parents. This consensus holds true across a wide range of child outcome indicators and is supported by numerous nationally representative studies. Accordingly, assuming that either DOMA or Proposition 8 has any effect on whether children are raised by opposite-sex or same-sex parents, there is no basis to prefer opposite-sex parents over same-sex parents and neither DOMA nor Proposition 8 is justified. The research supports the conclusion that extension of marriage rights to same-sex couples has the potential to improve child wellbeing insofar as the institution of marriage may provide social and legal support to families and enhances family stability, key drivers of positive child outcomes. The Regnerus study and other studies relied on by BLAG, the Proposition 8 Proponents, and their *amici* provide no basis for their arguments, because they do not directly examine the wellbeing of children raised by same-sex parents.

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[14] A handful of the studies cited by BLAG, the Proposition 8 Proponents, and their *amici* appear based on their titles to study same-sex parents and their children. They do not. For example, the Brief for Social Science Professors cites to a sociologist who critiques marriage rights for same-sex couples, but that critique is not grounded in scientific evidence, but is simply an opinion essay. Norval D. Glenn, *The Struggle for Same-Sex Marriage*, 41 Society 27 (2004).

These studies therefore do not undermine the consensus from the social science research and do not establish a "common sense" basis for DOMA or Proposition 8.

The decisions of both the United States Courts of Appeals for the Second and Ninth Circuits should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 12-307

In the Supreme Court of the United States

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UNITED STATES OF AMERICA, Petitioner

v.

EDITH SCHLAIN WINDSOR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE ANTI-DEFAMATION LEAGUE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE, CENTRAL CONFERENCE OF AMERICAN RABBIS, CONGREGATION BEIT SIMCHAT TORAH, HADASSAH, HINDU AMERICAN FOUNDATION, INTERFAITH ALLIANCE FOUNDATION, JAPANESE AMERICAN CITIZENS LEAGUE, JEWISH SOCIAL POLICY ACTION NETWORK, KESHET, LUTHERANS CONCERNED/NORTH AMERICA, METROPOLITAN COMMUNITY CHURCH, NATIONAL COUNCIL OF JEWISH WOMEN, NEHIRIM, PEOPLE FOR THE AMERICAN WAY FOUNDATION'S AFRICAN AMERICAN MINISTERS' LEADERSHIP COUNCIL, RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND, T'RUAH: RABBIS FOR HUMAN RIGHTS-NORTH AMERICA, WOMEN OF REFORM JUDAISM, AND WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM AS AMICI CURIAE IN SUPPORT OF RESPONDENT EDITH WINDSOR ON THE MERITS QUESTION

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TABLE OF CONTENTS

Page

Interest of amici 1

Summary of argument 1

Argument 3

I. Religious definitions of marriage vary, including with respect to marriage for gay and lesbian couples 5

II. DOMA violates the Establishment Clause because it was enacted with a religious purpose 11

  A. The Establishment Clause prohibits laws the purpose or primary effect of which is to aid one religious view over others or favor a particular religious viewpoint 12

  B. DOMA was enacted with a religious purpose based on a particular religious understanding of marriage 14

III. DOMA violates equal protection under the Fifth Amendment because it was motivated by moral disapproval of gay and lesbian people without any legitimate government purpose 19

  A. Moral disapproval of a particular group does not constitute a legitimate governmental interest to enact legislation 20

  B. DOMA was enacted to express moral disapproval of gay and lesbian people 22

C. DOMA is not rationally related to the governmental interest of defending religious liberty or any other legitimate governmental interest 24

Conclusion 28

Appendix 1a

TABLE OF AUTHORITIES

Page(s)

Cases:

Bandari v. *INS*, 227 F.3d 1160 (9th Cir. 2000)......... 7

Bob Jones Univ. v. *United States*, 461 U.S. 574 (1983) 8

Boddie v. *Connecticut*, 401 U.S. 371 (1971) 9

Bowers v. *Hardwick*, 478 U.S. 186 (1986) 19

Boy Scouts of America v. *Dale*, 530 U.S. 640 (2000) 27

Cleburne v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985) 21

Comm. for Pub. Educ. & Religious Liberty v. *Nyquist*, 413 U.S. 756 (1973) 11

Edwards v. *Aguillard*, 482 U.S. 578 (1987) 13, 14, 16

Epperson v. *Arkansas*, 393 U.S. 97 (1968) 7

Everson v. *Board of Ed. Of Ewing Tp.*, 330 U.S. 1 (1947).......... 13

Illinois ex rel. McCollum v. *Bd. of Educ.*, 333 U.S. 203 (1948).......... 6

Kerrigan v. *Comm'r of Pub. Health*, 957A.2d 407 (Conn. 2008).......... 9

Larson v. *Valente*, 456 U.S. 228 (1982).............. 12, 13

Lawrence v. *Texas*, 539 U.S. 558 (2003) 2, 19, 20

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 13, 16

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Cases—Continued:

McCreary Cnty. v. *ACLU of Ky.*, 545 U.S. 844 (2005), cert. denied 131 S. Ct. 1474 (2011) 13, 14

McGowan v. *Maryland*, 366 U.S. 420 (1961) 17

Pedersen v. *Office of Personnel Management*, No. 3:10-cv-1750, 2012 WL 3113883 (July 31, 2012) 24, 25

Perry v. *Brown*, 671 F.3d 1052 (9th Cir. 2012) 20

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Romer v. *Evans*, 517 U.S. 620 (1996) 20, 21

Ry. Express Agency, Inc. v. *New York*, 336 U.S. 106 (1949) 22

Turner v. *Safley*, 482 U.S. 78 (1987) 1

United States Dep't of Agric. v. *Moreno*, 413 U.S. 528 (1973) 20, 21

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Statutes:

Ky. Rev. Stat. § 242.185 18

National Minimum Drinking Age Act of 1984, 23 U.S.C. 158 18

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Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559 (1989) 12

David S. Ariel, *What Do Jews Believe?: The Spiritual Foundations of Judaism* (1996) 7

The Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons* (2003) 9

142 Cong. Rec. (daily ed.):

- H10113 (Sept. 10, 1996) 15
- H7442 (July 11, 1996) 15
- H7444 (July 11, 1996) 23
- H7486 (July 12, 1996) 16
- S10,109 (Sept. 10, 1996) 15
- S10,100 (Sept. 10, 1996) 17

Defense of Marriage Act, H.R. Rep. 104-664 , *reprinted in* 1996 U.S.C.C.A.N 2905 (1996) 14, 23

Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong. 33 (1996) 15

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Nan D. Hunter, *Living with Lawrence*, 88 Minn. L. Rev. 1103 (2004) 19

Jewish Reconstructionist Movement, *JRF Homosexuality Report and Inclusion of GLBTQ Persons*, http://archive.jewishrecon.org/node/1742?ref=jrf (last visited Feb. 26, 2013) 10

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1086 7

1124 7

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INTEREST OF AMICI[1]

Amici curiae are a diverse group of religious and cultural organizations that advocate for religious freedom, tolerance, and equality. Amici have a strong interest in this case due to their commitment to religious liberty, civil rights, and equal protection of law. Identity and Interest statements of particular amici curiae can be found in the appendix to this brief.

SUMMARY OF ARGUMENT

Amici support respondent Edith Windsor's challenge to the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"), and contend it violates not only the Fifth Amendment's guarantee of Equal Protection, but also the Establishment Clause of the First Amendment. The court of appeals' decision assures full federal recognition of civil marriages, while allowing religious groups the freedom to choose how to define marriage for themselves. Many religious traditions, including those practiced by many of the undersigned amici, attribute religious significance to the institution. See *Turner* v. *Safley*, 482 U.S. 78, 96 (1987) ("[M]any religions recognize marriage as having spiritual significance."). But religious views differ regarding what marriages qualify to be solemnized. Pursuant to the First Amendment, in order to guard religious liberty for all, those religious understandings cannot define marriage recognition under civil law.

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[1] The United States of America and Bi-Partisan Legal Advisory Group have issued letters consenting to the filing of amicus briefs in this case and have separately consented to the filing of this brief. Respondent Edith Schlain Windsor has consented to the filing of this brief in a letter that has been filed with the Clerk of Court. Pursuant to Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than the amici or their counsel made a monetary contribution to the preparation or submission of this brief.

In the past, Congress and the federal courts have deferred to state-based civil schemes for marriage recognition. Those state laws have, in turn, been subject to the First Amendment's prohibition against denying individuals the right to marry simply because such marriages would offend the tenets of a particular religious group. Cf. *Loving* v. *Virginia*, 388 U.S. 1 (1967) (rejecting religious justification for law restricting right of individuals of different races to marry). In DOMA, Congress departed from this longstanding deference to state law and, for the first time, incorporated into federal law a single religious definition of marriage—a definition inconsistent with the faith beliefs of many religious groups, including many of the undersigned amici, that embrace an inclusive view of marriage. Congress had no legitimate secular purpose in adopting that interpretation. Rather, the legislative history confirms that Members of Congress were specifically motivated to tie the federal definition of marriage to a particular understanding that those Members believed to be the better interpretation of one religious tradition. Section 3 of DOMA is therefore unconstitutional under the Establishment Clause.

Similarly, DOMA's failure to further any legitimate government interest also renders it unconstitutional under the Fifth Amendment guarantee of Equal Protection. Under a line of cases decided by this Court, including most significantly *Lawrence* v. *Texas*, 539 U.S. 558 (2003), moral condemnation of an identifiable group is never a legitimate government interest. While amici recognize the role that religious and moral beliefs have in shaping the public policy views of citizens and legislators, those beliefs, standing alone and directed toward the disparagement of a single identifiable group, cannot survive even the lowest level of constitutional review. This principle, articulated in the due process context by *Lawrence*, similarly applies to cases brought under the Fifth Amendment Equal Protection guarantee like this challenge to DOMA.

Some opposing amici have suggested that protecting religious liberty is a legitimate government interest that could sustain DOMA under the rational basis test. But those amici fail to explain how a ruling invalidating Section 3 of DOMA would interfere with religious liberty in any way. The case at bar concerns whether an individual legally married under state law should receive equal protection under federal tax law. The types of concerns raised by amici are simply not implicated here. While protecting religious liberty may at times be a legitimate government interest, what these amici actually urge is that the government enact a particular religious view of marriage to the exclusion of other views. The government has no legitimate interest in enacting legislation that merely adopts a particular version of Judeo-Christian religious morality. Far from being a legitimate government interest, using the law to promote such an interest would violate both the Establishment Clause and Fifth Amendment Equal Protection guarantee.

ARGUMENT

The Establishment Clause's secular purpose doctrine and the Fifth Amendment Equal Protection guarantee speak with one voice against legislative resort to moral and religious condemnation of identifiable groups. Under both doctrines, the government must be able to set forth a legitimate, secular purpose that falls within its prescribed powers. These doctrines are cut from the same cloth and analysis under one can inform the other.

This Court has long implicitly acknowledged the connection between religious justifications and the Equal Protection guarantee. The Court's decision overturning Virginia's law forbidding marriage between persons of different races is illustrative. In *Loving* v. *Virginia*, the Court dismissed the Virginia trial judge's proffered religious-based rationale, which cited God's hand in creating different races, recognizing instead that "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." 388 U.S. 1, 11 (1967). Ultimately, the Court recognized that the anti-miscegenation law served no secular purpose, and was based on nothing more than racial discrimination—even if disguised as a moral or religious belief.

The District Court's decision in *Perry* v. *Schwarzenegger*, which is currently before this Court on a separate writ of certiorari, further illustrates the overlap between these doctrines. Drawing upon both the First and Fourteenth Amendments, the court observed the distinction in constitutional law between "secular" and "moral or religious" state interests. *Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921, 930-931 (N.D. Cal. 2010) (citing *Lawrence*, 539 U.S. at 571 for the Fourteenth Amendment proposition and *Everson* v. *Board of Ed. Of Ewing Tp.*, 330 U.S. 1, 15 (1947), for the Establishment Clause proposition), aff'd 671 F.3d 1052 (9th Cir.), pet. for cert. granted, 133 S. Ct. 786 (2012). The court recognized that the State had no legitimate "interest in enforcing private moral or religious beliefs without an accompanying secular purpose." *Ibid.* The evidence presented in *Perry* established that "moral and religious views form[ed] the only basis for a belief that same-sex couples are different from opposite-sex couples." *Id.* at 1001. Acknowledging the lack of a secular purpose, the *Perry* court ultimately concluded that the only conceivable basis for Proposition 8 was a "private moral view that same-sex couples are inferior." *Id.* at 1003. Such private moral disapproval of a group is not a legitimate government interest. *Ibid.*

While the substantive issues of Edith Windsor's case were argued below under the Equal Protection guarantee of the Fifth Amendment, the Establishment Clause supports a similar outcome. The Court's moral-justifications doctrine under the Equal Protection Clause reflects similar concerns to those under the Establishment Clause when legislation is motivated by a particular religious doctrine. Thus, DOMA's failings under the Establishment Clause underscore and inform its failings under the rational basis test.

I. RELIGIOUS DEFINITIONS OF MARRIAGE VARY, INCLUDING WITH RESPECT TO MARRIAGE FOR GAY AND LESBIAN COUPLES

Different religious groups have different views on marriage. In most religious communities, there is disagreement among individual congregations—and, within congregations, disagreement among individual parishioners—about how to approach marriage. This diversity of belief is not new. Even within unified religious groups, restrictions on religious marriage have changed over time. Under our constitutional scheme, these groups have a fundamental right to adopt and modify the requirements for marriage within their own religious communities. But they do not have the right to impose their particular religious view onto the institution of civil marriage.

Many religious groups have at times recognized the benefit inherent in ensuring that their own rules on marriage are distinct from those embodied in civil law, because it provides them with autonomy to determine which marriages to solemnize and under what circumstances. See, *e.g.*, Southern Baptist Convention, *Position Statement on the Separation of Church and State*, http://www.sbc.net/aboutus/pschurch.asp (last visited Feb. 10, 2013) ("We stand for a free church in a free state. Neither one should control the affairs of the other."); Joseph F. Smith et al., *Presentation of the First Presidency to the April 1896 Conference of the Church of Jesus Christ of Latter Day Saints*, *reprinted in* U.S. Congress, *Testimony of Important Witnesses as Given in the Proceedings Before the Committee on Privileges and Elections of the United States Senate in the Matter of the Protest Against the Right of Hon. Reed Smoot, A Senator from the State of Utah, to Hold His Seat* 106 (1905) ("[T]here has not been, nor is there, the remotest desire on our part, or on the part of our coreligionists, to do anything looking to a union of church and state."). *Cf. Illinois ex rel. McCollum* v. *Bd. of Educ.*, 333 U.S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."). A review of practices surrounding interfaith, interracial, and post-divorce remarriage demonstrates this important distinction.

Interfaith Marriage: Some churches historically have prohibited (and some continue to prohibit) interfaith marriage, while others accept it. For example, the Roman Catholic Church's *Code of Canon Law* proscribed interfaith marriage for most of the twentieth century. Michael G. Lawler, *Marriage and the Catholic Church: Disputed Questions* 118-119 (2002) ("The church everywhere most severely prohibits the marriage between two baptized persons, one of whom is Catholic, and the other of whom belongs to a heretical or schismatic sect.") (quoting 1917 Code C.1060). Although this restriction was relaxed in 1983, modern Catholic doctrine still requires the Church's "express permission" to marry a Christian who is not Catholic and the Church's "express dispensation" for a Catholic to marry a non-Christian. 1983 Code C.1086, 1124; Roman Catholic Church, *Catechism of the Catholic Church* 1635 (1995 ed.). Similarly, Orthodox and Conservative Jewish traditions both tend to proscribe interfaith marriage, see David S. Ariel, *What Do Jews Believe?: The Spiritual Foundations of Judaism* 129 (1996), as do many interpretations of Islamic law, see, *e.g.*, *Bandari* v. *INS*, 227 F.3d 1160, 1163-1164 (9th Cir. 2000) (Iran's official interpretation of Islamic law forbids interfaith marriage and dating).

Despite these religious traditions prohibiting or limiting interfaith marriage, American civil law has not prohibited or limited marriage to couples of the same faith, or any faith at all, and doing so would be patently unconstitutional. See *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *cf. Bandari*, 227 F.3d at 1168 ("[P]ersecution aimed at stamping out an interfaith marriage is without question persecution on account of religion.") (citation and internal quotation marks omitted).

Interracial Marriage: As with interfaith marriage, religious institutions in the past have differed markedly in their treatment of interracial relationships. For example, some fundamentalist churches previously condemned interracial marriage. See *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 580-581 (1983) (fundamentalist Christian university believed that "the Bible forbids interracial dating and marriage").

In the past, the Church of Jesus Christ of Latter-day Saints ("LDS Church") discouraged interracial marriage. See *Interracial Marriage Discouraged*, Church News, June 17, 1978, at 2 ("Now, the brethren feel that it is not the wisest thing to cross racial lines in dating and marrying.") (quoting President Spencer W. Kimball in a 1965 address to students at Brigham Young University). Additionally, in the context of its policy on excluding African-Americans from the priesthood, the LDS Church expressly recognized that its position on treatment of African-Americans was "wholly within the category of religion," applying only to those who joined the church, with "no bearing upon matters of civil rights." The First Presidency, *Statement on the Status of Blacks*, Dec. 15, *1969*, *reproduced in* Appendix, *Neither White Nor Black: Mormon Scholars Confront the Race Issue in a Universal Church* (Lester E. Bush, Jr. & Armand L. Mauss eds., 1984). In other words, such religious views regarding interracial marriage may not dictate the terms of civil marriage.

Marriage Following Divorce: Finally, the Catholic Church does not recognize marriages of those who have divorced and remarried, viewing those marriages as "objectively contraven[ing] God's law." *Catechism of the Catholic Church* 1650, 2384. However, civil law has not reflected this position, and passing such a law would interfere with the fundamental right to marry. See *Boddie* v. *Connecticut*, 401 U.S. 371, 376 (1971).

* * *

In all three instances discussed above, individual religious groups have adopted particular rules relating to marriage, yet those rules have not been allowed to dictate the confines of civil marriage law.

Further, there is disagreement among religious groups and religious people in their approaches to same-sex marriage. Many faith groups, such as the Catholic and Mormon churches, oppose equal marriage as part of their official doctrine. See, *e.g.*, The Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons* (2003); First Presidency an Council of the Twelve Apostles of the Church of Jesus Christ of Latter-Day Saints, *The Family: A Proclamation to the World* (1995). But other faiths openly welcome same-sex couples into marriage, including many of the undersigned amici.[2] The United

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[2] The fact that some religious groups welcome marriage between same-sex couples does not demonstrate that gay and lesbian individuals have "political power" as that term is used in the context of heightened scrutiny. See *Kerrigan* v. *Comm'r of Pub. Health*, 957A.2d 407, 439-454 (Conn. 2008), for full treatment of this issue. In any case, many religious groups historically have been—and apparently continue to be—strong opponents of equal marriage rights for same-sex couples.

Church of Christ officially supports same-sex marriage, as do the Unitarian Universalist Association, Conservative Judaism, Reconstructionist Judaism, and Reform Judaism. Shaila Dewan, *United Church of Christ Backs Same-Sex Marriage*, N.Y. Times, July 5, 2005; Unitarian Universalist Association, *Freedom to Marry, For All People*, http://archive.uua.org/news/2004/freedomtomarry/index.html (2004) (last visited Feb. 26, 2013); Rabbi Elliot Dorff et al., *Rituals and Documents of Marriage and Divorce for Same-Sex Couples* (Spring 2012); Jewish Reconstructionist Movement, *JRF Homosexuality Report and Inclusion of GLBTQ Persons*, http://archive.jewishrecon.org/node/1742?ref=jrf (last visited Feb. 26, 2013); General Assembly Union of American Hebrew Congregations, *Civil Marriage for Gay and Lesbian Jewish Couples* (Nov. 2, 1997), http://urj.org//about/union/governance/reso//?syspage=article&item_id=2000 (last visited Feb. 26, 2013). In other faiths, individual congregations have been allowed to decide for themselves whether to bless marriages between same-sex couples. Last year, the National Cathedral in Washington, D.C., an Episcopal cathedral, endorsed such marriages. Laurie Goodstein, *Washington National Cathedral Announced It Will Hold Same-Sex Weddings*, N.Y. Times, Jan. 9, 2013, at A-12 (also noting that the Episcopalian National Convention had authorized an official liturgy for blessing same-sex unions). Further, even in faiths where there is no official recognition of marriage between same-sex couples, many members are able to maintain their faith while supporting equal marriage. *See* Robert P. Jones, Public Religion Research Institute, *Religious Americans' Perspectives on Same-Sex Marriage* (June 30, 2012) (finding that 63 percent of religious non-

Christians, 56 percent of white Catholics, 53 percent of Hispanic Catholics, and 52 percent of white mainline Protestants favored allowing gay and lesbian couples to marry).

While some religious institutions may have a history of defining marriage as between a man and a woman, that tradition is separate from, and cannot be allowed to dictate, civil law. The legal definition of civil marriage is not tied to particular religious traditions, but instead reflects changes in contemporary understandings of marriage. A religious group cannot be forced to open its doors or its sacraments to those who disagree with its traditions, but neither can the government restrict access to civil marriage to align with any particular religious beliefs.

II. DOMA VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT WAS ENACTED WITH A RELIGIOUS PURPOSE

Religious belief can play an important role in the formation of some people's public policy preferences. But that role must be tempered by principles of religious liberty, as "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Comm. for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 796 (1973) (quoting *Lemon* v. *Kurtzman*, 403 U.S. 602, 622 (1971)). DOMA runs afoul of these longstanding Establishment Clause principles because it has a religious purpose—to write one particular religious understanding of marriage into federal law—without a primary secular purpose, and this understanding is directly at odds with the position taken by other religious traditions.

A. The Establishment Clause Prohibits Laws The Purpose Or Primary Effect Of Which Is To Aid One Religious View Over Others Or Favor A Particular Religious Viewpoint

Since this country's founding, the concept of religious liberty has, at a minimum, included the equal treatment of all faiths without discrimination or preference. See *Larson* v. *Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). As this Court explained in *Larson*:

> Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference. Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations.

Id. at 245; see also Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1636 (1989) ("The * * * proposition, that government may not prefer one religion over any other, receives overwhelming support in the American tradition of church and state.").

"[I]n * * * light of its history and the evils it was designed forever to suppress," the Court has consistently given the Establishment Clause "broad meaning."

Everson v. *Board of Ed. Of Ewing Tp.*, 330 U.S. 1, 14-15 (1947). The Court has invalidated laws that aid one religion. *Id.* at 15-16 ("Neither a state nor the Federal Government can * * * pass laws which aid one religion, aid all religions, or prefer one religion over another."). It has also rejected any law that has the purpose or primary effect of advancing certain religious denominations over others. See *Edwards* v. *Aguillard*, 482 U.S. 578 (1987) (holding that law requiring teaching of creationism was unconstitutional because it lacked a secular purpose); *Larson*, 456 U.S. at 244. In *Lemon* v. *Kurtzman*, the Court distilled these principles into a test that remains instructive: a law must have a secular purpose; its primary effect cannot be to advance or inhibit religion; and it must not result in excessive government entanglement in religion. 403 U.S. 602, 622 (1971).

This Court has discussed at length the requirement that a statute have a secular purpose, noting that "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cnty.* v. *ACLU of Ky.*, 545 U.S. 844, 864 (2005), cert. denied 131 S. Ct. 1474 (2011). Furthermore, under the Establishment Clause, the relevant question is whether Congress *at the time legislation was passed* was acting with a proper purpose. See *Edwards*, 482 U.S. at 594-595. In *McCreary*, the Court emphasized that this test has "bite," such that legislation will not survive scrutiny under the Establishment Clause simply because "some secular purpose" is constructed after the fact. 545 U.S. at 865 & n.13. In examining congressional purpose, courts look to a variety of sources, including legislative history, statements on the record, and testimony given by supporters. *Edwards*, 482 U.S. at 587, 591-592.

B. DOMA Was Enacted With A Religious Purpose Based On A Particular Religious Understanding Of Marriage

With DOMA, Congress made no secret of its intentions: DOMA's legislative history is replete with religious sentiments. As this Court explained in *McCreary*, examination of the purpose of a statute "is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country." 545 U.S. at 861. The Court further explained that employing traditional tools of statutory interpretation such as legislative history allows a court to determine legislative purpose without resort to any "judicial psychoanalysis of a drafter's heart of hearts." *Id.* at 862.

The House Judiciary Committee Report on DOMA underscores the statute's religious underpinnings. The Report stated that "[c]ivil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." Defense of Marriage Act, H.R. Rep. 104-664, at 15-16, *reprinted in* 1996 U.S.C.C.A.N 2905 (1996) (footnote omitted).

In addition, numerous members of Congress noted that an express purpose of DOMA was to incorporate their interpretation of Judeo-Christian religious beliefs about marriage into civil law. See 142 Cong. Rec. S10,109 (daily ed. Sept. 10, 1996) ("One only has to turn to the Old Testament and read the word of God to understand how eternal is the true definition of marriage.") (statement of Sen. Byrd); *Defense of Marriage*

Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong. 33 (1996) ("House Hearing") ("Traditional heterosexual marriage * * * has been the preferred alternative by every religious tradition in recorded history.") (statement of Rep. Sensenbrenner); 142 Cong. Rec. H7442 (daily ed. July 11, 1996) ("[M]arriage is a covenant established by God.") (statement of Rep. Hutchinson); *id.* at H7446 (daily ed. July 11, 1996) ("[T]he institution of marriage is not a creation of the State. * * * [Rather] [i]t has been sanctified by all the great monotheistic religions and, in particular, by the Judeo-Christian religion which is the underpinning of our culture.") (statement of Rep. Talent); 142 Cong. Rec. H10113 (daily ed. Sept. 10, 1996) ("The definition of marriage is not created by politicians and judges * * *. It is rooted in our history, in our laws and our deepest moral and religious convictions, and in our nature as human beings.") (statement of Sen. Coats).

One DOMA sponsor admitted that DOMA was enacted based on "God's principles" and a rejection of "humanistic principles":

> We as legislators and leaders for the country are in the midst of a chaos, an attack upon God's principles. God laid down that one man and one woman is a legal union. That is marriage, known for thousands of years. That God-given principle is under attack. It is under attack. There are those in our society that try to shift us away from a society based on religious principles to humanistic principles; that the human being can do whatever they want, as long as it feels good and does not hurt others.

> When one State wants to move towards the recognition of same-sex marriages, it is wrong. * * * We as a Federal Government have a responsibility to act, and we will act.

142 Cong. Rec. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer). Religious witnesses also testified before Congress on both sides of the debate. House Hearing, *supra*, at 211 (testimony of Rabbi Saperstein); *id.* at 216-217 (testimony of Jay Alan Sekulow); see also *Edwards*, 482 U.S. at 591-592 (use of religious experts in support of legislation indicated that purpose was religious). Indeed, the comments of these witnesses and their Congressional supporters reflect the very sort of "political division along religious lines [that] was one of the principal evils against which the First Amendment was intended to protect." *Lemon*, 403 U.S. at 622.

Measured at the time of enactment, DOMA also had no effect *except* to express the religious preference of the members of Congress who proffered these religious justifications for the law. Indeed, at the time of enactment, no state permitted marriages between same-sex couples. DOMA's only effect was to put the federal government on record supporting a particular religious understanding of marriage. In the religious sphere, even among adherents of Christianity, there was at the time (and continues to be) considerable debate about how religion should treat marriage between same-sex couples. With DOMA, Congress's primary purpose was to take sides in this religious debate. See 142 Cong. Rec. S10,100-10,102 (daily ed. Sept. 10, 1996) ("[T]he Unitarian Universalist Association now affirms the growing practice of some of its ministers of conducting services of union of gay and lesbian couples and urges member societies to support their ministers in this practice. The Society of Friends leaves all issues to congregational decision and thousands of same-sex marriages have been sanctified in Quaker ceremonies since the 1970's. Other denominations are still studying the issue. The validity of same-sex marriage has been debated at the national level by the Presbyterian, Episcopal, Lutheran and Methodist churches. So why not debate it here * * *[?]) (statement of Sen. Byrd). DOMA was thus the quintessential government "endorsement" of religion—a misuse of government power solely to promote a religious view. But even after states began to recognize marriage equality, DOMA's principle purpose was to put the federal government's imprimatur on a particular religious understanding of marriage.

Amici note that many laws that have support in particular religious traditions could nonetheless be constitutional, even if some lawmakers were to cite their religion as a motivation for passing the law, if they have a primarily secular purpose. See *McGowan* v. *Maryland*, 366 U.S. 420, 444-45 (1961) (upholding a mandatory Sunday closing law for most businesses despite substantial religious connections because the "purpose and motivation" of the law was primarily secular—"to provide a uniform day of rest for all citizens"). But two characteristics of DOMA distinguish it from other laws where religion is a factor. For one, most such laws do not have a comparable volume of religious- and morality-based rhetoric in the legislative record. Second, in most cases, a secular purpose also exists for a law such that the primary effect of the law is not to advance a particular religious viewpoint. For example, the beliefs of many religious adherents, including many Muslims, Mormons, and Methodists, require that they abstain from alcohol. And various laws restricting the sale and consumption of alcohol exist throughout the United States. See, *e.g.*, Ky. Rev. Stat. § 242.185 (Kentucky law permitting dry counties); 23 U.S.C. 158 (National Minimum Drinking Age Act of 1984). In some cases, religious and moral understanding may have played a part in the decisions of some lawmakers to pass such laws. But unlike DOMA, most alcohol laws have legitimate, secular purposes—preventing driving deaths, for example, or protecting children from addiction—and their primary effect is to advance these government interests, not advance religion. Conversely, as discussed in greater detail below, DOMA advances no legitimate government interest and thus also lacks a secular purpose. See Section III, *infra*.

Until the enactment of DOMA, the federal government had never sought to define civil marriage, leaving the matter to the states. But with DOMA, in a stark departure from past practice, Congress for the first time imposed its own definition onto marriage. The impetus for this unprecedented move was Congress' desire to establish as law a particular religious understanding of marriage. Members of Congress freely invoked Judeo-Christian values and tradition to justify their support of the law. Further, the law lacked any separate, rational, secular purpose. Under such circumstances, DOMA is unconstitutional under the Establishment Clause.

III. DOMA Violates Equal Protection Under The Fifth Amendment Because It Was Motivated By Moral Disapproval of Gay and Lesbian People Without Any Legitimate Government Purpose

Religion plays an important role in the lives of many Americans, and many lawmakers are undoubtedly guided in their legislative decision-making by personal religious and moral beliefs. But under a line of cases including this Court's decision in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), a law must be rationally related to a legitimate government interest beyond the desire to disadvantage a group on the basis of moral disapproval.[3] DOMA lacks such other interest. The law is therefore unconstitutional under the Equal Protection guarantee of the Fifth Amendment.[4]

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[3] The majority opinion in *Lawrence* acknowledged the Equal Protection Clause theory as "a tenable argument," but grounded its decision in principles of due process in order to eliminate any question as to the continuing validity of *Bowers* v. *Hardwick*, 478 U.S. 186 (1986). See *Lawrence*, 539 U.S. at 574-575. In its due process analysis, the Court spoke not only of a protected liberty interest in the conduct prohibited by the Texas law—consensual sexual relations—but also of the Court's concern with laws that "demean[]" gay people and "stigma[tize]" a group that deserves "respect." *Id.* at 571-575; see also Nan D. Hunter, *Living with Lawrence*, 88 Minn. L. Rev. 1103, 1124 (2004).

[4] Amici support the Solicitor General's position, with which the Respondent agrees, that DOMA should be scrutinized under a heightened level of review. *See* Br. for the United States on the Merits Question 18-36. However, this brief analyzes the issue under rational basis review to show that DOMA cannot withstand even the lowest level of constitutional review, much less heightened scrutiny.

A. Moral Disapproval Of A Particular Group Does Not Constitute A Legitimate Governmental Interest To Enact Legislation

The Court has held that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Lawrence*, 539 U.S. at 577 (quoting *Bowers* v. *Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) (internal quotation marks omitted). As Justice O'Connor observed in her *Lawrence* concurrence, "[m]oral disapproval of [a particular group], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Id.* at 582. Justice O'Connor further observed that the Court had "never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Ibid.*

Lawrence is consistent with a series of cases in which the Court invalidated laws reflecting a "bare * * * desire to harm a politically unpopular group." See *Romer* v. *Evans*, 517 U.S. 620, 634-635 (1996) (alteration in original) (citation omitted); *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973); see also *Perry* v. *Brown*, 671 F.3d 1052, 1094 (9th Cir. 2012) ("Enacting a rule into law based solely on the disapproval of a group, however, 'is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit'" (quoting *Romer*, 517 U.S. at 635)). In these cases, the Court properly stripped away the rationales proffered in support of such laws to uncover the fact that "animus," "negative attitudes," "unease," "fear," "bias," or "unpopular[ity]" actually motivated the legislative action at issue. *E.g.*, *Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (holding that "irrational prejudice" against mentally disabled is not a legitimate interest); *Moreno*, 413 U.S. at 534 (invalidating restriction on households receiving food stamps based on unpopularity of "hippies"); *Romer*, 517 U.S. at 634 (finding that law targeting gay and lesbian individuals "raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected").

In *Moreno*, the Court struck down a federal law excluding from the food stamp program "any household containing an individual who is unrelated to any other member of the household." 413 U.S. at 529. The Court first determined that the stated purpose of the law—"to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households," *id.* at 533 (citation omitted)—was not furthered by the challenged provision. Looking for other possible rationales, the Court found, based primarily on statements in the congressional record suggesting that the law was animated by dislike of "hippies" and "hippie communes," that the law's true purpose was to harm these groups. *Id.* at 534. The Court found this purpose unconstitutional, holding that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Ibid.* (citation omitted).

Underlying the decisions in *Moreno* and its progeny is an awareness by this Court that allowing condemnation of a politically unpopular group to constitute a legitimate government interest would effectively eviscerate the Fourteenth Amendment Equal Protection Clause and Fifth Amendment Equal Protection guarantee:

> [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Ry. Express Agency, Inc. v. *New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). This risk is hardly theoretical: Some of the most notable violations of equal protection were justified by moral condemnation of a group. See *Loving* v. *Virginia*, 388 U.S. 1, 3 (1967) (trial judge justified 25-year sentence of married mixed race couple by invoking God's separation of the races). In such circumstances, this Court has consistently rejected moral condemnation as a government interest.

B. DOMA Was Enacted To Express Moral Disapproval Of Gay And Lesbian People

In a recent letter to Congress expressing the Executive Branch's belief that DOMA is unconstitutional, Attorney General Eric Holder wrote, "[t]he [Congressional Record underlying DOMA] contains numerous expressions reflecting moral disapproval of gay and lesbian people and their intimate and family relationships—precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against." Letter from Eric Holder, Attorney General, to John Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011). Amici agree with Attorney General Holder.

As discussed above, the Congressional Record for DOMA is filled with references to religion. Other statements sound remarkably similar, but use the language of moral condemnation. See H.R. Rep. No. 104-664, at 15-16; 142 Cong. Rec. H7444 (daily ed. July 11, 1996) ("[N]o society * * * has lived through the transition to homosexuality and the perversion which it lives and what it brought forth.") (statement of Rep. Coburn); *id.* at S10068 (daily ed. Sept. 9, 1996) ("[DOMA] will safeguard the sacred institutions of marriage and the family from those who seek to destroy them and who are willing to tear apart America's moral fabric in the process.") (statement of Sen. Helms); *id.* at H7444 (daily ed. July 11, 1996) ("The real debate is about homosexuality and whether or not we sanction homosexuality in this country. * * * What [constituents] believe * * * is that homosexuality is immoral, that it is based on perversion, that it is based on lust.") (statement of Rep. Coburn).

If these statements were not sufficient to demonstrate that moral disapprobation of gay and lesbian people was the motivating force for DOMA, the House Report provides further proof. It states expressly that DOMA was enacted to "[u]phold[] traditional notions of morality." H.R. Rep. No. 104-664, at 15. Tellingly, Defendant-Intervenor Bipartisan Legal Advisory Group ("BLAG") never once mentions Congress' moral disapproval rationale in 76 pages of briefing. This rationale—recorded in the House Report—was the true purpose of the law and the only one that makes sense once other purported government interests are shown to bear no rational relationship to DOMA. The Congressional Record is rife with references to religion and moral condemnation, statements that make clear that the "traditional notions of morality" they were trying to protect were those of a particular form of Judeo-Christian religious interpretation. The after-the-fact purported rationales for DOMA offered by BLAG cannot hide this truth.

C. DOMA Is Not Rationally Related To The Governmental Interest Of Defending Religious Liberty Or Any Other Legitimate Governmental Interest

There is no legitimate governmental interest that would justify the federal government's refusal to recognize the marriages of same-sex couples under applicable state law. See *Windsor* v. *United States*, 833 F. Supp. 2d 394, 402 (S.D.N.Y. 2012) (finding Section 3 of DOMA unconstitutional "under the rational basis test"). Numerous governmental interests have been proposed for DOMA, in this case and others, and amici will not review all of them here.[5] But what remains once they are rejected is clear: a bare desire by Congress to express its moral condemnation of gay and lesbian people.

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[5] The recent decision of the United States District Court for the District of Connecticut in *Pedersen* v. *Office of Personnel Management*, No. 3:10-cv-1750, 2012 WL 3113883 (July 31, 2012), is illustrative: it dispenses with many of the purported interests set forth for DOMA and state-level bans on marriage between same-sex couples. See *id.* at *37-*48. The *Pederson* court examined five purported rationales for DOMA: "(1) To employ caution in the face of a proposed redefinition of the centuries-old definition of marriage; (2) To protect the public fisc; (3) To maintain consistency and uniformity with regard to eligibility for federal benefits; (4) To avoid creating a social understanding of bearing, begetting, and rearing children separate from marriage; and (5) To recognize an

Amicus curiae Becket Fund has asserted that DOMA is rationally related to a legitimate government interest in protecting religious liberty. Br. of Amicus Curiae Becket Fund for Religious Liberty 28-30 ("Becket Fund"). While protecting religious liberty could in some circumstances be a legitimate government interest, DOMA is not rationally related to furthering that interest. Indeed, it is telling that the Becket Fund ignores the fact that millions of people of faith and numerous faith groups actually *support* equal marriage rights for same-sex couples. *See* Section I, *supra*. Like Congress, the Becket Fund does not seek religious *liberty*, which would mean equal liberty for all religious viewpoints, but governmental adoption of Becket Fund's own religious perspective. In DOMA, Congress did not attempt to make space for religious liberty, nor could DOMA be justified in hindsight as being rationally related to such an interest. Rather, Congress simply enshrined into law one religious view of marriage, to the exclusion of all others. As a result, the government interest Becket Fund calls "religious liberty" is, in reality, just another way of describing Congress' unconstitutional use of DOMA to endorse a particular understanding of Judeo-Christian morality. *See* Section II, *supra*.

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institution designed to ensure that children have parents of both sexes." *Id.* at *37. The court found that "such objectives bear no rational relationship to Section 3 of DOMA as a legislative scheme, [and] no conceivable rational basis exists for the provision." *Id.* at *48.

Becket Fund and several other amici in support of Petitioner also argue that a ruling overturning DOMA would have a "catastrophic" effect on religious liberty, causing "wide-ranging church-state conflict" that "threatens to upset [the country's] history of [religious liberty] accommodation" and designate religious people as "enemies of equality." See Br. of Amici Curiae Chaplain Alliance for Religious Liberty et al. ("Chaplain Alliance"); Becket Fund; Br. of Amici Curiae Liberty, Life and Law Foundation et al.; Br. of Amici Curiae Robert P. George et al. But Congress does not *avoid* religious conflict by adopting one religious view of marriage as defining the right of secular, civil marriage. Individual religions remain free to define marriage as they see fit, but those religions cannot ask Congress to enshrine their religious preferences as binding law in order to free them from the discomfort of acknowledging the discriminatory character of those religious views.

These amici also claim that if DOMA is overturned, those who wish to discriminate against gay and lesbian people "will immediately be vulnerable to lawsuits under anti-discrimination laws." Becket Fund at 9. This argument is nonsensical. As Becket Fund acknowledges, discrimination against gay and lesbian people is already illegal in many states, and it will continue to be illegal in those states if this Court overturns DOMA. Neither DOMA's enactment nor overturning DOMA alters the marital status of individuals under state law. Becket Fund provides no explanation as to how nondiscrimination laws would be affected by DOMA, and it cannot do so.

The First Amendment's Free Exercise Clause and freedom of association guarantees already ensure that religious groups will retain their religious liberty. According to well-established precedent, people of religious conscience may worship as they please and adopt eligibility criteria for membership in their private and religious associations. See, *e.g.*, *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000). Certain amici warn against the "power of this Court's perceived approval or disapproval" to "marginalize and stigmatize" those who hold discriminatory religious views against gay and lesbian people. Becket Fund 10 n. 11; Br. of Amici Curiae Robert P. George et al. 31. But this Court's job is to interpret the Constitution, not sway public opinion.

Edith Windsor comes before the Court because she has been deprived of $363,000 in estate taxes because certain Members of Congress believed that the better interpretation of Judeo-Christian religious tradition called for moral and religious condemnation of Edith Windsor's marriage. If there is any interest in religious liberty at stake in this case it is not that of the Becket Fund, but the liberty of Edith Windsor to love and to marry another person consistent with the dictates of her own moral and religious compass.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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March 2013

APPENDIX

APPENDIX

AMICI CURIAE STATEMENTS OF INTEREST

Anti-Defamation League

ADL was founded in 1913 to combat anti-Semitism and other forms of discrimination, to advance goodwill and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all. Today, ADL is one of the world's leading civil and human rights organizations combating anti-Semitism and all types of prejudice, discriminatory treatment and hate. As part of its commitment to protecting the civil rights of all persons, ADL has filed amicus briefs in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws.[*]

ADL has a substantial interest in this case. At issue are core questions about equality and constitutional rights. And the justifications offered by Petitioners and their *amici* to support DOMA—if embraced by this Court—would invite state-sanctioned prejudice of the strain that ADL has long fought.

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[*] See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church and School* v. *E.E.O.C.*, 132 S. Ct. 694 (2012); *Christian Legal Soc.* v. *Martinez*, 130 S. Ct. 2971 (2010); *Lawrence* v. *Texas*, 539 U.S. 558 (2003); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002); *Alexander* v. *Sandoval*, 532 U.S. 275 (2001); *Boy Scouts of America* v. *Dale*, 530 US 640 (2000): *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Romer* v. *Evans*, 517 U.S. 620 (1996).

Americans United for Separation of Church and State

Amicus curiae Americans United for Separation of Church and State is a national, nonsectarian public-interest organization based in Washington, D.C. Its mission is twofold: (1) to advance the free-exercise rights of individuals and religious communities to worship as they see fit, and (2) to preserve the separation of church and state as a vital component of democratic government. Americans United was founded in 1947 and has more than 120,000 members and supporters across the country.

Americans United has long supported laws that reasonably accommodate religious practice.[1] Consistent with its support for the separation of church and state, however, Americans United opposes measures that exceed the bounds of permissible accommodation by imposing substantial harms on innocent third ties. That concern is especially salient when the purported accommodation results in government-sanctioned discrimination against a class of people that historically has been the target of religious and moral disapproval.

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[1] See, *e.g.*, Brief for Americans United for Separation of Church and State et al., as Amici Curiae Supporting Respondents, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (No. 04-1084), 2005 WL 2237539 (supporting exemption from federal drug laws for Native American religious practitioners); Brief for Americans United for Separation of Church and State and American Civil Liberties Union as Amici Curiae Supporting Petitioners, *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005) (No. 03-9877), 2004 WL 2945402 (supporting religious accommodations for prisoners).

Bend the Arc – A Jewish Partnership for Justice

Amicus curiae Bend the Arc: A Jewish Partnership for Justice (Bend the Arc) is the nation's leading progressive Jewish voice empowering Jewish Americans to be advocates for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

The Central Conference of American Rabbis and the Women of Reform Judaism

Amicus curiae The Central Conference of American Rabbis (CCAR), whose membership includes more than 1,800 Reform rabbis, and the Women of Reform Judaism which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, are committed to ensuring equality for all of God's children, regardless of sexual orientation.

As Jews, we are taught in the very beginning of the Torah that God created humans B'tselem Elohim, in the Divine Image, and therefore the diversity of creation represents the vastness of the Eternal (Genesis 1:27). We oppose discrimination against all individuals, including gays and lesbians, for the stamp of the Divine is present in each and every human being. Thus, we unequivocally support equal rights for all people, including the right to a civil marriage license. Furthermore, we whole-heartedly reject the notion that the state should discriminate against gays and lesbians with regard to civil marriage equality out of deference to religious tradition, as Reform Judaism celebrates the unions of loving same-sex couples and considers such partnerships worthy of blessing through Jewish ritual.

Congregation Beit Simchat Torah (CBST)

Amicus curiae Congregation Beit Simchat Torah (CBST) was founded in 1973 is a vibrant spiritual community and a progressive voice within Judaism. CBST is the world's largest LGBT synagogue and attracts and welcomes gay men, lesbians, bisexuals, transgender, queer and straight individuals and families who share common values. Passionate, provocative, and deeply Jewish, CBST champions a Judaism that rejoices in diversity, denounces social injustice wherever it exists, and strives for human rights for all people locally, nationally and internationally. This case is of the upmost importance to Congregation Beit Simchat Torah which has fought fervently for Marriage Equality.

Hadassah – The Women's Zionist Organization of America

Amicus curiae Hadassah, The Women's Zionist Organization of America, founded in 1912, has over 330,000 Members, Associates and supporters nationwide. In addition to Hadassah's mission of initiating and supporting pace-setting health care, education and youth institutions in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah vigorously condemns discrimination of any kind and, as a pillar of the Jewish community, understands the dangers of bigotry. Hadassah strongly supports the constitutional guarantees of religious liberty and equal protection, and rejects discrimination on the basis of sexual orientation. Hadassah supports government action that provides civil status to committed same-sex couples and their families equal to the civil status provided to the committed relationships of men and women and their families, with all associated legal rights and obligations, both federal and state.

The Hindu American Foundation

Amicus curiae The Hindu American Foundation ("HAF") is an advocacy group providing a progressive voice for over two million Hindu Americans. The Foundation interacts with and educates leaders in public policy, academia, and the media about Hinduism and issues concerning Hindus both domestically and internationally, including religious liberty; the portrayal of Hinduism; hate speech; hate crimes, and human rights. HAF has both litigated and participated as amicus curiae in numerous cases involving issues of separation of church and state as well as the right to free exercise and subscribes to the view that all religions and adherents thereof should be treated equally and with dignity by the state.

The Interfaith Alliance Foundation

Amicus curiae Interfaith Alliance Foundation celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance's members across the country belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy and advocating for the proper boundaries between religion and government. Interfaith Alliance also seeks to shift the perspective on LGBT equality from that of problem to solution, from a scriptural argument to a religious freedom agreement, and to address the issue of equality as informed by our Constitution. Same-Gender Marriage and Religious Freedom: A Call to Quiet Conversations and Public Debates a paper by Interfaith Alliance President, Rev. Dr. C. Welton Gaddy, offers a diversity of ideas based on Interfaith Alliance's unique advocacy for religious freedom and interfaith exchange.

The Japanese American Citizens League

Amicus curiae The Japanese American Citizens League, founded in 1929, is the nation's largest and oldest Asian-American non-profit, non-partisan organization committed to upholding the civil rights of Americans of Japanese ancestry and others. It vigilantly strives to uphold the human and civil rights of all persons. Since its inception, JACL has opposed the denial of equal protection of the laws to minority groups. In 1967, JACL filed an amicus brief in Loving v. Virginia, urging the Supreme Court to strike down Virginia's anti-miscegenation laws, and contending that marriage is a basic civil right of all persons. In 1994, JACL became the first API non-gay national civil rights organization, after the American Civil Liberties Union, to support marriage equality for same-sex couples, affirming marriage as a fundamental human right that should not be barred to same-sex couples. JACL continues to work actively to safeguard the civil rights of all Americans.

Jewish Social Policy Action Network (JSPAN)

Amicus curiae The Jewish Social Policy Action Network ("JSPAN") is a membership organization of American Jews dedicated to protecting the Constitutional liberties and civil rights of Jews, other minorities, and the weak in our society. It has filed numerous briefs in this Court and the lower federal courts seeking to uphold those liberties.

JSPAN is vitally interested in this case because the issue is at the heart of the Jewish experience in America. For most of the last two thousand years, Jews lived primarily in countries in which the government was at one with the ruling Christian or Muslim class, and therefore treated Jews as less than equal citizens. In America, Jews were freed from this linkage and were able fully to be both Jews and Americans. As a consequence, American Jews have always shared a great concern when any groups are subjected to a civil disability because they do not read scripture with the same understanding as those who write the civil laws.

Keshet

Amicus curiae Keshet is a national grassroots organization that works for the full equality and inclusion of lesbian, gay, bisexual, and transgender (LGBT) Jews in Jewish life. Led and supported by LGBT Jews and straight allies, Keshet strives to cultivate the spirit and practice of inclusion in all parts of the Jewish community. Keshet is the only organization in the U.S. that works for LGBT inclusion in all facets of Jewish life – synagogues, Hebrew schools, day schools, youth groups, summer camps, social service organizations, and other communal agencies. Through training, community organizing, and resource development, we partner with clergy, educators, and volunteers to equip them with the tools and knowledge they need to be effective agents of change.

Lutherans Concerned/North America

Amicus curiae Lutherans Concerned/North America (d/b/a Reconciling Works: Lutherans for Full Participation), Founded in 1974, works at the intersection of oppressions to embody, inspire, advocate and organize for the acceptance and full participation of people of all sexual orientations and gender identities within the Lutheran communion and in society. Our ministry is compelled by the call of God in our lives to witness to the reconciling love of Jesus and to work for justice.

Metropolitan Community Church

Amicus curiae Metropolitan Community Church ("MCC") was founded in 1968 to combat the rejection of and discrimination against persons within religious life based upon their sexual orientation or gender identity. MCC has been at the vanguard of civil and human rights movements and addresses the important issues of racism, sexism, homophobia, ageism, and other forms of oppression. MCC is a movement that faithfully proclaims God's inclusive love for all people and proudly bears witness to the holy integration of spirituality and sexuality.

The National Council of Jewish Women

Amicus curiae The National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Laws and policies that provide equal rights for same-sex couples." Our principles state that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society" and "discrimination on the basis of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation, or gender identity must be eliminated." Consistent with our Principles and Resolutions, NCJW joins this brief.

Nehirim

Amicus curiae Nehirim is a national community of lesbian, gay, bisexual, and transgender (LGBT) Jews, partners, and allies. Nehirim's advocacy work centers on building a more just and inclusive world based on the teachings in the Jewish tradition.

People for the American Way Foundation's African American Ministers Leadership Council

Amicus curiae People for the American Way Foundation (PFAWF) on behalf of the African American Ministers Leadership Council, a nonpartisan citizens' organization established to promote and protect civil and constitutional rights, joins this brief on behalf of its program, the African American Ministers Leadership Council—a network comprised of 1100 African American ministers—and its Equal Justice Task Force. Founded in 1981 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF has been actively involved in litigation and other efforts nationwide to combat discrimination and promote equal rights, including efforts to protect and advance the civil rights of LGBT individuals. PFAWF regularly participates in civil rights litigation, and has supported litigation to secure the right of same-sex couples to marry. PFAWF joins this brief in order to vindicate the constitutional right of same-sex couples to equal protection of the law.

The Religious Coalition for Reproductive Choice

Amicus curiae the Religious Coalition for Reproductive Choice (RCRC), Founded in 1973, is dedicated to mobilizing the moral power of the faith community for reproductive justice through direct service, education, organizing and advocacy. For RCRC, reproductive justice means that all people and communities should have the social, spiritual, economic, and political means to experience the sacred gift of sexuality with health and wholeness.

The Sikh American Legal Defense and Education Fund

Amicus curiae the Sikh American Legal Defense and Education Fund (SALDEF) was founded in 1996 and is the oldest Sikh American civil rights and educational organization. We empower Sikh Americans through advocacy, education and media relations. SALDEF's mission is to protect the civil rights of Sikh Americans and ensure a fostering environment in the United States for future generations.

T'ruah: Rabbis for Human Rights-North America

Amicus curiae T'ruah: The Rabbinic Call for Human Rights is an organization led by rabbis from all denominations of Judaism that acts on the Jewish imperative to respect and protect the human rights of all people. Our commitment to human rights begins with the Torah's declaration that all people are created in the image of God (Genesis 1:26). Within the Jewish canon, this core belief leads to teachings that equate harming a human being with diminishing the image of God. (See, for example, B'reishit Rabbah 34:14 and Mishnah Sanhedrin 6:5.)

People of faith are not of one mind opposing civil marriage equality, and many interpretations of religion, including ours, support equal marriage rights. Judaism insists on the equality of every person before the law. The Torah instructs judges, "You shall not judge unfairly; you shall show no partiality" (Deuteronomy 16:19). Jewish law has developed strict guidelines to ensure that courts function according to this principle.

The rights and protections afforded by civil marriage are legal and not religious in nature. The case at hand addresses tax obligations that may be incumbent on some couples married according to the laws of their state, but not on others. Jewish law accepts that "the law of the land is the law," and upholds the right of the government to impose taxes on its citizens. However, major Jewish legal authorities classify as "theft" a tax levied on one subgroup and not on another (Maimonides, Mishneh Torah, Laws of Theft 5:14; Shulchan Aruch, Hoshen Mishpat 369:8). We thus believe it is important to state that people of faith are not of one mind opposing civil marriage equality, and that many interpretations of religion actually support such equality.

The Universal Declaration of Human Rights similarly guarantees to every person equal rights, without "distinction of any kind," and specifies that "Men and women of full age * * * are entitled to equal rights as to marriage, during marriage and at its dissolution."

While each rabbi or religious community must retain the right to determine acceptable guidelines for religious marriage, the state has an obligation to guarantee to same-sex couples the legal rights and protections that accompany civil marriage. Doing otherwise constitutes a violation of human rights, as well as the Jewish and American legal imperatives for equal protection under the law.

Women's League for Conservative Judaism

Amicus curiae Women's League for Conservative Judaism (WLCJ) is the largest synagogue-based women's organization in the world. As an active arm of the Conservative/Masorti movement, we provide service to hundreds of affiliated women's groups in synagogues across North America and to thousands of women worldwide. WLCJ strongly supports full civil equality for gays and lesbians with all associated legal rights and obligations, both federal and state and rejects discrimination on the basis of sexual orientation.

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In the Supreme Court of the United States

DENNIS HOLLINGSWORTH, *ET AL.*, *Petitioners*,

v.

KRISTIN M. PERRY, *ET AL.*, *Respondents*.

UNITED STATES, *Petitioner*,

v.

EDITH SCHLAIN WINDSOR AND
BIPARTISAN LEGAL ADVISORY GROUP, *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Second Circuits

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF HOLLINGSWORTH AND THE BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS

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QUESTIONS PRESENTED

1. Given the predictable conflict between same-sex marriage and religious liberty, was maintaining religious liberty a rational basis for People of the State of California and the United States Congress to define marriage as the union of a man and a woman?

2. Should the people have the opportunity in the first instance to work out solutions to the conflict between same-sex marriage and religious liberty?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

I. According legal recognition to same-sex marriage without robust protections for religious liberty will result in wide-ranging church-state conflict. 6

  A. Leading legal scholars on both sides of the marriage debate recognize the conflict between same-sex marriage and religious liberty and support legislative exemptions. 11

  B. Religious people and institutions that object to same-sex marriage will face a wave of private civil litigation under anti-discrimination laws never intended for that purpose 15

  C. Religious people and institutions that object to same-sex marriage will be penalized by state and local governments. 21

    1. Exclusion from government facilities and fora. 22

    2. Loss of licenses or accreditation. 23

        3. Disqualification from government grants and contracts. 24
        4. Loss of state or local tax exemptions. 26
        5. Loss of educational and employment opportunities. 27
    II. Given the threat to religious liberty, DOMA and Proposition 8 are rational responses to the threat to religious liberty posed by court decisions to adopt same-sex marriage without conscience protections. 28
    III. American citizens and their legislatures are competent to decide on the legal definition of marriage through political processes. 30
        A. Because many of the conflicts between same-sex marriage and religious liberty can be avoided—at least in part—by legislative exemptions, the judiciary should allow the legislatures to go first. 31
        B. Allowing the people to decide avoids a frozen conflict and facilitates their acceptance of whatever may be the ultimate result of their public debate. 33
CONCLUSION 38

APPENDIX

TABLE OF AUTHORITIES

Cases

Attorney Gen. v. *Desilets*,
636 N.E.2d 233 (Mass. 1994) 19

Baehr v. *Lewin*,
852 P.2d 44 (Haw. 1993) 3, 4, 11, 15, 18, 28

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910 P.2d 112, 115 (Haw. 1996) 3

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Num. DCR PN34XB-03008
(N.J. Off. of Att'y Gen., Div. on Civil Rts.,
Oct. 23, 2012) 17

Bob Jones Univ. v. *United States*,
461 U.S. 574 (1983) 26

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335 F.3d 80 (2d Cir. 2003) 22

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530 U.S. 640 (2000) 17, 22

Boy Scouts of America v. *Till*,
136 F. Supp. 2d 1295 (S.D. Fla. 2001) 22

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790 A.2d 428 (Vt. 2001) 27

Butler v. *Adoption Media, LLC*,
486 F. Supp. 2d 1022 (N.D. Cal. 2007) 15, 17

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304 F. Supp. 2d 77 (D. Me. 2004) 26

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No. 2011-MR-254, 2011 WL 3655016
(Ill. Cir. Ct. Aug. 18, 2011) 25

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130 S.Ct. 2971 (2010) 10

Collins v. *City of Harker Heights, Tex.*,
503 U.S. 115 (1992) 31

Cradle of Liberty Council, Inc. v. *City of Philadelphia*,
851 F. Supp. 2d 936 (E.D. Pa. 2012) 22

Dale v. *Boy Scouts of America*,
160 N.J. 562 (N.J. 1999) 17

Dist. Attorney's Office for the Third Judicial Dist. v. *Osborne*,
557 U.S. 52 (2009) 31

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284 P.3d 428 (N.M. Ct. App. 2012) 18

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494 U.S. 872 (1990) 29

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129 P.3d 394 (Cal. 2006) 22

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798 N.E.2d 941 (Mass. 2003) 8, 31

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465 U.S. 555 (1984) 25

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132 S. Ct. 694 (2012) 20

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No. 11-cv-734, 2012 WL 3255201
(D. Haw. Aug. 8, 2012) 30-31

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957 A.2d 407 (Conn. 2008) 32

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96 N.Y. 2d 484 (N.Y. 2001) 19-20

Martinez v. *County of Monroe*,
850 N.Y.S.2d 740 (N.Y. App. Div. 2008) 15

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682 F.3d 1 (1st Cir. 2012) 3

Parker v. *Hurley*,
514 F.3d 87 (1st Cir. 2008) 30

Perry v. *Brown*,
671 F.3d 1052 (9th Cir. 2012) .... passim

Roe v. *Wade*,
410 U.S. 113 (1973) 34

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No. 12-cv-4788-PKC (S.D.N.Y.) 21

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51 Cal. Rptr. 2d 700 (Cal. 1996) 19

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633 F.3d 723 (9th Cir. 2011) 20

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460 N.W.2d 2 (Minn. 1990) 19

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874 P.2d 274 (Alaska 1994) 19

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102 P.3d 937 (Alaska 2004) 19

Varnum v. *Brien*,
763 N.W.2d 862 (Iowa 2009) 31-32

Walz v. *Tax Commission*,
397 U.S. 664 (1970) 36

Ward v. *Polite*,
667 F.3d 727 (6th Cir. 2012) 24, 28, 29, 34

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521 U.S. 702 (1997) 31

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Preamble, *Declaration of Independence* 37

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Employment Discrimination Lawsuits*,
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Amy Guttman & Dennis Frank Thompson,
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Definitions and FAQs Under Proposed Sexual Orientation and Gender Identity Protections 16

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Campus Challenges 10

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(Douglas Laycock, Anthony R. Picarello Jr. & Robin Fretwell Wilson eds., 2008) .... passim

Adam Liptak,
Gay Vows, Repeated From State To State,
N.Y. Times, Apr. 12, 2009 34

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5 Nw. J. L. & Soc. Pol'y 274 (2010) 13

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CNN.com, Nov. 4, 2009 36

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D. Smith,
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33 Monitor on Psychology (Jan. 2002),.................. 23

Melissa Walker,
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Des Moines Register, Aug. 6, 2007......................... 17

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Wash. Post, March 2, 2010 21

Patricia Wen,
"They Cared for the Children": Amid Shifting Social Winds, Catholic Charities Prepares to End Its 103 Years of Finding Homes for Foster Children and Evolving Families,
Boston Globe, June 25, 2006................................. 23

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A Matter of Conviction: Moral Clashes Over Same-Sex Adoption,
22 BYU J. Pub. L. 475 (2008) 28

INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions.[1] It has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. It is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the freedom of all religious people to pursue their beliefs without excessive government interference.

The Becket Fund has also represented religious people and institutions with a wide variety of views about same-sex marriage and homosexuality, including religious people and institutions on all sides of the same-sex marriage debate, and including both non-LGBT and LGBT clients. As a religious liberty law firm, the Becket Fund does not take a position on same-sex marriage as such, but focuses instead on same-sex marriage only as it relates to religious liberty.

The Becket Fund has long sought to facilitate academic discussion of the impact that according legal recognition to same-sex marriage could have on religious liberty. In December 2005, it hosted a conference of noted First Amendment scholars—representing the full spectrum of views on same-sex marriage—to assess the religious freedom implications of legally-recognized same-sex marriage. The conference resulted in the book *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Douglas Laycock, Anthony R. Picarello Jr. & Robin Fretwell Wilson eds., 2008) ("*Emerging Conflicts*"). To date, *Emerging Conflicts* remains the touchstone of scholarly discourse about the intersection of same-sex marriage and religious liberty.

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[1] Parties to both cases have consented to the filing of this brief and letters indicating their consent are on file with the Clerk. *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Based on its expertise in the field of religious liberty generally, and the intersection of same-sex marriage and religious liberty specifically, the Becket Fund submits this brief to demonstrate that concerns about the potential conflict between same-sex marriage and religious liberty are both rational and well-founded in fact. In its view, this conflict is best resolved not by judicial decree, but by the legislative process, which is more adept at balancing competing societal interests, including religious liberty.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Religious liberty intersects with same-sex marriage in two important ways relevant to the cases before the Court.

The first intersection goes to the motivations behind DOMA and Proposition 8. DOMA and Proposition 8 were rational responses to court decisions that gave legal recognition to same-sex marriage without addressing the significant church-state conflicts that would result.

The second intersection concerns the effects of this Court's decision in these cases. Were the judicial branch to take the question of how to deal with conflicts between religious liberty and same-sex marriage away from the political process, it would likely result in perpetual struggle without prospect of a political resolution. The commitments are simply too great on both sides to impose a judicial resolution. And setting church and state permanently at odds would be bad for both.

Rational response. DOMA was passed largely in reaction to *Baehr* v. *Lewin*, which held—without mentioning religious liberty—that Hawaii's existing marriage laws were likely unconstitutional. 852 P.2d 44 (Haw. 1993) (plurality op.); see *Massachusetts* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 6 (1st Cir. 2012). Proposition 8 was passed in response to *In re Marriage Cases*, in which the California Supreme Court asserted that religious freedom is unaffected by same-sex marriage because "no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs."[2] *In re Marriage Cases*, 183 P.3d 384, 451-52 (Cal. 2008)

By limiting religious freedom concerns to "forced solemnization," the California Supreme Court allowed itself to be distracted by a red herring—albeit one that parties on opposing sides of the marriage debate have been all too happy to indulge. Among scholars, "[n]o one seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to them." Marc D. Stern, *Same-Sex Marriage and the Churches, in Emerging Conflicts* 1; see also Marriage and Religious Freedom, An Open Letter From Religious Leaders in the United States to All Americans (Jan. 12, 2012) ("the First Amendment creates a very high bar" for forced solemnizations).

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[2] The Hawaii Supreme Court later repeated the California court's error by stating that no clergy would be required to solemnize same-sex marriage and rejecting concerns about anti-discrimination lawsuits as "groundless." *Baehr* v. *Miike*, 910 P.2d 112, 115 (Haw. 1996).

But there are many other reasonably foreseeable—and potentially legislatively avoidable—conflicts between same-sex marriage and religious liberty that made it rational for Congress and the people of California to object to the judicial redefinition of marriage reflected in *Baehr* and *In re Marriage Cases*.

These conflicts fall into two broad categories. *First*, objecting religious institutions and individuals will face an increased risk of lawsuits under federal, state, and local anti-discrimination laws, subjecting religious organizations to substantial civil liability if they choose to continue practicing their religious beliefs. *Second*, religious institutions and individuals will face a range of penalties from federal, state and local governments, such as denial of access to public facilities, loss of accreditation and licensing, and the targeted withdrawal of government contracts and benefits.

These foreseeable conflicts implicate the fundamental First Amendment rights of religious institutions, including the rights to freedom of religion and freedom of association. *Amicus* cannot predict how these First Amendment issues will play out in every instance. But while *Windsor* ignored these concerns and *Perry* dismissed them, the scholarly consensus is that the threat to religious liberty is real. This threat unquestionably provided a rational basis for Congress to proceed cautiously by enacting DOMA and for the people of California to return to the traditional definition of marriage by voting for Proposition 8.

The judicial role. This conclusion is reinforced by the fact that every state legislature to adopt same-sex marriage has included stronger conscience protections than the state and federal court decisions that invalidated DOMA and Proposition 8. In the sixteen years since DOMA was enacted, six states and the District of Columbia have adopted same-sex marriage laws through the democratic process. All of these laws have included conscience protections. If religious liberty concerns were, as *Perry* held, irrational, then these legislatures were acting irrationally. Even worse than this oblique judicial condemnation of religious accommodations is the effect of the decisions below; uncorrected they would cut off the debate over same-sex marriage and religious liberty just as it is starting in earnest.

As the most recent state-level votes on the issue demonstrate, that debate is vigorous, and it is safe to say that a public consensus is still in the process of forming. But if this Court were to invalidate DOMA and Proposition 8 on Equal Protection grounds, the debate would be short-circuited. Worse, the country would face a perpetual church-state conflict that might take decades to resolve, if ever. The better path is to allow the democratic process time to work.

ARGUMENT

I. According legal recognition to same-sex marriage without robust protections for religious liberty will result in wide-ranging church-state conflict.

Recognizing a constitutional right to same-sex marriage without simultaneously protecting conscience rights threatens the religious liberty of people and organizations who cannot, as a matter of conscience, treat same-sex unions as the moral equivalent of opposite-sex marriage. Without conscience protections, widespread and intractable church-state conflicts will result.

Why is this so?

Several factors are at work. First, there is the scope of the underlying theological dispute: an estimated 160 million Americans—97.6% of all religious adherents in the United States and more than half of the entire population—belong to religious bodies that affirm the traditional definition of marriage.[3] This number has not changed significantly in the past ten years.[4] For example, just this past summer, the Presbyterian Church (U.S.A.), which allows non-celibate gay clergy, rejected a redefinition of marriage.[5]

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[3] Marriage Law Project, World Religions and Same-Sex Marriage 4-5 & n.8 (2002).

[4] See Pew Forum on Religion & Public Life, Religious Groups' Official Positions on Same-Sex Marriage (Dec. 7, 2012), http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Religious-Groups-Official-Positions-on-Same-Sex-Marriage.aspx (several mainline Protestant denominations now allow the blessing of same-sex unions while maintaining a distinction between same-sex unions and traditional marriage).

Until the 1990s, no larger religious group in the United States officially endorsed same-sex marriage, and only a handful do today.[6] While of course not all individual believers agree with their religion's official position on marriage, many do, and religious organizations themselves are generally bound by official teaching.

Second, the religious commitments are deep ones. For the largest world religions present in the United States, the institution of opposite-sex marriage is central to their moral teaching about sexual relationships.[7] For these groups, opposite-sex marriage holds special theological significance. As a result, programs and teaching are frequently organized around the distinction between married couples and couples who are not married: benefits such as marriage retreats, marriage counseling, and the use of religious property for private ceremonies are all offered to couples who are married and denied to those who are not.

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[5] See G. Jeffrey MacDonald, *Presbyterian church rejects same-sex marriage*, Christian Science Monitor, July 7, 2012.

[6] See Pew Forum (noting that "Reform and Reconstructionist Jewish movements have supported gay and lesbian rights, including same-sex marriage, since the mid-1990s," and that "Unitarian Universalist Association of Congregations passed a resolution in support of same-sex marriage" in 1996). Some United Church of Christ congregations also conduct same-sex marriage ceremonies.

[7] See, *e.g.*, *Sex, Marriage, and Family in World Religions* xxii-xxvii (Don S. Browning, M. Christian Green, & John Witte, Jr. eds., 2009) (describing opposite-sex limitation on marriage in Buddhism, Christianity, Confucianism, Hinduism, Islam, and Judaism and the central role of sexual complementarity within marriage for world religions).

Third, the relatively short history of same-sex marriage thus far indicates that there will be a great deal of litigation in the future. The first state to give civil recognition to same-sex marriage was Massachusetts, in 2003, and every other state to recognize same-sex marriage has done so within the last five years.[8] Even so, litigation has already begun. Because litigation under anti-discrimination laws increases exponentially over time, a few lawsuits now are a strong indicator of many more lawsuits to come.[9] Indeed, once this Court rules in the cases before it, perhaps the greatest disincentive to suing religious people and organizations over their objections same-sex marriage will disappear: namely, worries about what this Court might think of those lawsuits.

Fourth, the stakes are especially high in this Court. A ruling from this Court that objecting to same-sex marriage is always irrational, or that making distinctions regarding same-sex marriage constitutes discrimination against a quasi-suspect class, will have two major negative effects on religious objectors. One is that they will immediately be vulnerable to lawsuits under anti-discrimination laws never designed for that purpose. In the Appendix, we have set forth a non-exhaustive list of the many state laws prohibiting gender, marital status, and sexual orientation discrimination and identifying the religious exemptions, if any for each such law. These laws could be triggered by recognition of same-sex marriage. See Appendix 1a-101a.

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[8] *Goodridge* v. *Dep't of Publ. Health*, 798 N.E.2d 941 (Mass. 2003); Connecticut (2008); Iowa (2009); Vermont (2009); New Hampshire (2010); Washington, D.C. (2010); New York (2011); Washington (2012); Maine (2013); Maryland (2013).

[9] See, *e.g.*, Vivian Berger *et al.*, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 Hofstra Lab. & Emp. L.J. 45, 45 (2005) ("The number of employment discrimination lawsuits rose continuously throughout the last three decades of the twentieth century. In the federal courts, such filings grew 2000% * * * .").

The other negative effect is that this Court's disapprobation would cast suspicion on religious objectors in a way that existing laws against sexual orientation discrimination do not. Were this Court to hold, as *Perry* did, that maintaining a distinction between opposite-sex marriage and other legal relationships "dishonor[s]" gays and lesbians—or concludes, as the Department of Justice has argued in DOMA litigation, that "defending traditional notions of morality * * * evidences * * * animus" towards gays and lesbians[10]—then these longstanding practices will suddenly become *prima facie* evidence of anti-gay discrimination, instead of what they are: expressions of longstanding moral worldviews that put opposite-sex marriage at the center of human sexuality.[11]

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[10] United States' Superseding Br. 48, *Massachusetts* v. *U.S. Dep't of Health and Human Servs.*, No. 10-2204 (1st Cir. Sept. 22, 2011), ECF 5582082; *cf.* United States' Br. 37-38, *Windsor*, Nos. 12-2335 & 12-2435 (2d Cir. Aug. 10, 2012), ECF 120 (making the same argument but substituting "disapproval" for "animus"); but see United States' Br. 22-23, *Windsor*, No. 1:10-cv-08435 (S.D.N.Y. Aug. 19, 2011), ECF 71 (making the same argument using "animus").

Perry was therefore wrong to dismiss—in response to *amicus*'s brief—religious liberty concerns as a rational basis for Proposition 8.[12] Redefining marriage affects many religious groups in ways that allowing same-sex domestic partnerships does not. By contrast, no legislation adopting same-sex marriage has ever branded the opposing view as irrational or animus-based; it has simply changed the law. Indeed, it is very likely that many Americans have voted in favor of legal recognition for same-sex marriage even though the practice runs contrary to their own religious beliefs—and they don't view those beliefs as irrational.

Given these factors, it is not surprising that a scholarly consensus has emerged that giving legal recognition to same-sex marriage will result in widespread, foreseeable, and to some extent legislatively avoidable church-state conflict. Some scholars argue that the rights of religious believers should nearly always give way to the right of gays and lesbians to be free from discrimination.[13] Others support strong exemptions for objecting religious believers.[14] But there is widespread scholarly agreement that the conflict is coming.

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[11] The post-decision history of *Christian Legal Society* v. *Martinez*, 130 S.Ct. 2971 (2010) demonstrates the power of this Court's perceived approval or disapproval. Although that case turned on a wayward stipulation and concerned public universities, it has subsequently been used as a justification for excluding Christian organizations from both public and private university campuses. See, *e.g.*, Bob Smietana, *Anti-bias policies drive some religious groups off campuses*, USA Today, Apr. 2, 2012 (describing disputes around country and noting that the private Vanderbilt University cited *Martinez* in defense of its all-comers policy that applies to all groups except fraternities and sororities); Intervarsity Christian Fellowship/USA, *Campus Challenges*, http://www.intervarsity.org/page/campus-challenges (claiming 41 separate efforts to exclude Christian group since *Martinez* was decided).

[12] *Perry* v. *Brown*, 671 F.3d 1052, 1091 (9th Cir. 2012).

Since neither *Baehr* nor *In re Marriage Cases* even recognized these conflicts—let alone resolved them—it was entirely rational for Congress and the people of California to respond as they did. And given the certainty of those conflicts, it would be prudent for this Court to stay its hand and allow the political process an opportunity to mitigate those conflicts.

A. Leading legal scholars on both sides of the marriage debate recognize the conflict between same-sex marriage and religious liberty and support legislative exemptions.

As noted above, there is a clear consensus among leading legal scholars that conflicts between same-sex marriage and religious liberty are real and should be legislatively addressed. This scholarly consensus confirms that concerns over potential church-state conflict as a result of court decisions that found a constitutional right to same-sex marriage without discussing corresponding protections for religious believers provided a rational basis for both DOMA and Proposition 8.

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[13] Chai R. Feldblum, *Moral Conflict and Conflicting Liberties, in Emerging Conflicts* 123, 154.

[14] Douglas Laycock, *Afterword, in Emerging Conflicts* 189, 197-201.

In the *Emerging Conflicts* book, seven prominent scholars of First Amendment law agreed that legal recognition of same-sex marriage, without more, would create widespread conflicts with religious liberty. See, *e.g.*, Marc D. Stern, *Same-Sex Marriage and the Churches, in Emerging Conflicts* 1 (describing scope of anticipated conflicts). Professor Chai Feldblum of Georgetown University wrote from her own experience as a lesbian who had been raised in an Orthodox Jewish family, arguing that conscientious objections to same-sex marriage are legitimate:

> I believe those who advocate for LGBT equality have downplayed the impact of such [anti-discrimination] laws on some people's religious beliefs and, equally, I believe those who have sought religious exemptions from such civil rights laws have downplayed the impact that such exemptions would have on LGBT people.

Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in Emerging Conflicts* 123, 124-25. Feldblum went on to confirm the real threat to religious liberty that legal recognition of same-sex marriage presents, and treated the position of religious objectors as rational, though she ultimately concluded that religious claims should fail. See *id.* at 155-56.

Others, such as leading religious liberty scholar Douglas Laycock—who likewise supports giving legal recognition to same-sex marriage—argue that some conflicts between same-sex marriage and religious liberty are unavoidable, but some could be mitigated by providing conscience protections. See, *e.g.*, Douglas Laycock, *Afterword, in Emerging Conflicts* 189, 197-

201. There is a consensus, however, that serious conflicts between same-sex marriage and religious liberty exist.

In addition to the scholarly consensus that there is a conflict, there is also a scholarly consensus that the conflict should be addressed by enacting legislative exemptions for conscientious objectors. Legal scholars have written a series of detailed open letters to legislators in states considering same-sex marriage legislation arguing that threats to religious liberty should be legislatively addressed. See Appendix at 102a (Letter from Prof. Robin Fretwell Wilson and others to the Governor of Illinois (Dec. 18, 2012); *id.* at 137a (Letter from Prof. Douglas Laycock and others to Members of the Illinois Senate (Dec. 24, 2012) (supporting both same-sex marriage and strong religious exemptions)).

In response, two other prominent First Amendment scholars—Professors Ira Lupu and Robert Tuttle of George Washington University—published a law review article disagreeing with some of the specific religious liberty accommodations recommended in the open letters, but agreeing that many conscience protections are indeed necessary and advisable if the threat to religious liberty is to be mitigated.[15]

Leading scholars within the gay rights movement also advocate legislative protections for religious objectors. Professor William Eskridge of Yale has written that "Gay rights advocates put [the religious exemption] provision in ENDA, and it should be retained."[16] Professor Andrew Koppelman of Northwestern and Jonathan Rauch of the Brookings Institution have both advocated legislative accommodations as a solution to the conflict between same-sex marriage and religious liberty.[17]

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[15] See Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 Nw. J. L. & Soc. Pol'y 274 (2010).

There is thus a scholarly consensus that the conflicts between same-sex marriage and religious liberty are real, deeply rooted, and far-reaching. And, although they disagree about the details, scholars have reached a separate consensus that these conflicts can be significantly mitigated by carefully-crafted legislative exemptions.

These two consensuses reinforce the commonsense conclusion that members of Congress and the people of California acted rationally when they rejected giving legal recognition to same-sex marriage without conscience protections. And they counsel judicial restraint in the cases before the Court.

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[16] William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Law*, 106 Yale L.J. 2411, 2456 (1997) (referring to proposed Employment Non-Discrimination Act).

[17] See, *e.g.*, Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 Brook. L. Rev. 125 (2006); David Blankenhorn & Jonathan Rauch, *A Reconciliation on Gay Marriage*, N.Y. Times, Feb. 21, 2009.

B. Religious people and institutions that object to same-sex marriage will face a wave of private civil litigation under anti-discrimination laws never intended for that purpose.

As the scholarly consensus indicates, religious institutions face significant new sources of civil liability if same-sex marriage is given legal recognition without concurrent protections for individuals and institutions with conscientious objections. Without strong conscience protections, giving legal recognition to same-sex marriage will enable same-sex spouses to bring suit against religious institutions under gender, marital status, and sexual orientation anti-discrimination laws, most of which were never designed to reach claims by members of same-sex marriages. See, *e.g.*, *Martinez* v. *County of Monroe*, 850 N.Y.S.2d 740, 743 (N.Y. App. Div. 2008) (refusal to provide benefits based on same-sex marriage contracted in Ontario violated New York's prohibition on marital status discrimination); *Baehr*, 852 P.2d at 64 (limitation of marriage to opposite-sex couples was form of sex-based discrimination); *Butler* v. *Adoption Media, LLC*, 486 F.Supp.2d 1022, 1056 (N.D. Cal. 2007) (allowing marital status claim to go forward in dispute over adoption by same-sex couple).

To be sure, in some states—like California—existing laws regarding equal treatment of domestic partners result in similar conflicts. But granting legal recognition to same-sex marriage nationwide will automatically trigger a host of federal, state, and local statutes nationwide. See *e.g.*, Appendix at 1a-101a (listing state laws). And while some of these laws, especially those concerning sexual orientation discrimination, include religious exemptions, in most cases they do not, and the accommodations are also simply not designed to respond to judicial redefinition of civil marriage.

What follows is a non-exhaustive description of these potential conflicts.

Public accommodation laws. Religious institutions often provide a broad array of programs and facilities to their members and to the general public, such as hospitals, schools, adoption services, and marital counseling. Religious institutions have historically enjoyed wide latitude in choosing what religiously-motivated services and facilities they will provide, and to whom they will provide them. But giving legal recognition to same-sex marriage without robust conscience exemptions will restrict that freedom in at least two ways.

First, most states include gender, marital status, or sexual orientation as protected categories under public accommodations laws. See Appendix at 1a-101a (listing state laws). Second, religious institutions and their related ministries are facing increased risk of being declared places of public accommodation, and thus being subject to legal regimes designed to regulate secular businesses. For example, some laws require church halls be treated as public accommodations if they are rented to non-members. See, *e.g.*, Hutchinson, Kan. Human Relations Commission, *Definitions and FAQs Under Proposed Sexual Orientation and Gender Identity Protections* 4 (2012).[18] When coupled with legally-recognized same-sex marriage, these two facts create significant liability risk for religious objectors. Indeed, expansion of the definition of "public accommodation" is what precipitated the divisive *Boy Scouts* v. *Dale* litigation: unlike other states, New Jersey's Supreme Court held that the Boy Scouts were a "place of public accommodation."[19]

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[18] http://www.hutchgov.com/egov/docs/1332537777_170654.pdf.

This risk is greatest for those religious organizations that serve people with different beliefs. Unfortunately, the more a religious organization seeks to minister to the general public (as opposed to just co-religionists), the greater the risk that the service will be regarded as a public accommodation giving rise to liability.

Some of the many religiously-motivated services that could be "public accommodations" are: healthcare services, marriage counseling, family counseling, job training programs, child care, gyms and day camps,[20] life coaching, schooling,[21] adoption services,[22] and the use of wedding ceremony facilities.[23]

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[19] *Dale* v. *Boy Scouts of America*, 160 N.J. 562, 602 (N.J. 1999), *reversed*, *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000).

[20] See Melissa Walker, *YMCA rewrites rules for lesbian couples*, Des Moines Register, Aug. 6, 2007 (city forced YMCA to change its definition of "family" or lose grant).

[21] See *Gay Rights Coalition of Georgetown Univ. Law Ctr.* v. *Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (en banc) (public accommodations statute required equivalent access to all university facilities.).

[22] See *Butler*, 486 F.Supp.2d 1022 (Arizona adoption facilitation website was public accommodation under California law).

And religious business owners face the same risks: when New Mexico photographer Elaine Huguenin declined for religious reasons to photograph a same-sex commitment ceremony, she was sued under the New Mexico Human Rights Act and required to pay nearly $7,000 on the basis that her business constituted a public accommodation. *Elane Photography, LLC* v. *Willock*, 284 P.3d 428, 433 (N.M. Ct. App. 2012), *cert. granted*, 2012-NMCERT-008 (N.M. Aug. 16, 2012).

Of the thousands of American religious organizations that minister to the public in one or more of the ways mentioned above, many simply want to avoid the appearance—and reality—of condoning or subsidizing same-sex marriage through their "family-based" services. Yet after *Baehr* and *In re Marriage Cases*, the law threatened to forbid these institutions from expressing and acting on their religious objections to same-sex marriage precisely because they seek to serve the broader public. DOMA and Proposition 8 were rational responses to that concern.

Housing discrimination laws. Religious colleges and universities frequently provide student housing and often give special treatment to married couples. Legally married same-sex couples could reasonably be expected to seek these benefits, but many religious educational institutions would conscientiously object to providing similar support for same-sex unions. Housing discrimination lawsuits would result.

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[23] See *Bernstein* v. *Ocean Grove Camp Meeting Ass'n*, Num. DCR PN34XB-03008 (N.J. Off. of Att'y Gen., Div. on Civil Rts., Oct. 23, 2012) (Methodist organization violated public accommodations law by denying same-sex couples use of wedding pavilion because it opened pavilion for other weddings).

For example, under Federal law, gender discrimination in housing is prohibited. See 42 U.S.C. § 3604. There are some limited exemptions for religious institutions, see 42 U.S.C. § 3607, but they would not automatically cover all conflicts triggered by legal recognition of same-sex marriage—and determining their scope would require costly litigation. Similarly, state and local housing laws ban discrimination on the basis of gender, marital status, and sexual orientation—and the religious exemptions are also limited. See, *e.g.*, Cal. Gov't Code §§ 12955.4, 12995 (recognizing limited exemptions for certain religious organizations); 775 Ill. Comp. Stat. § 5/3-106 (recognizing limited exemptions for certain religious organizations); see Appendix at 1a-101a (collecting state housing discrimination laws).

In several states, courts have required landlords to facilitate the unmarried cohabitation of their tenants, over strong religious objections.[24] If unmarried couples cannot be discriminated against in housing due to marital status protections, legally married same-sex couples would have comparatively stronger protection, as public policy tends to favor and subsidize marriage as an institution. *Levin* v. *Yeshiva Univ.*, 96 N.Y.2d 484 (N.Y. 2001) is an example. In *Levin*, the court held that two lesbian students had stated a valid disparate impact claim of sexual orientation discrimination after the university refused to provide married student housing benefits to unmarried couples. If same-sex marriage is adopted without religious protections, plaintiffs would not have to rely on sexual orientation discrimination claims—the much more common laws against marital status discrimination would suffice.

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[24] See *Smith* v. *Fair Employment & Hous. Comm'n.*, 51 Cal. Rptr. 2d 700 (Cal. 1996) (no substantial burden on religion where landlord required to rent to unmarried couples despite sincere religious objections because landlord could avoid the burden by exiting the rental business). See also *Thomas* v. *Anchorage Equal Rights Comm'n*, 102 P.3d 937, 939 (Alaska 2004); *Swanner* v. *Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); *Attorney General* v. *Desilets*, 636 N.E.2d 233, 235 (Mass. 1994). But see *State by Cooper* v. *French*, 460 N.W.2d 2 (Minn. 1990) (state constitutional protection of religious conscience exempted landlord from ban against marital status discrimination in housing).

Employment discrimination laws. Religious organizations that object to same-sex marriage may also face private lawsuits when one of their employees enters into a civilly-recognized same-sex marriage. For many religious institutions, an employee's entering a same-sex marriage would constitute a public repudiation of the institution's core religious beliefs in a way that less public relationships do not. Some employers will respond by changing the terms of employment for those employees. These employees may then sue under laws prohibiting gender, sexual orientation, or marital status discrimination in employment. See Appendix 1a-101a (listing state antidiscrimination laws). If the employee is a "minister," or the relevant statute includes an exemption, then the defendant religious employer could raise an affirmative defense. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church and Sch.* v. *EEOC*, 132 S. Ct. 694, 707 (2012); *Spencer* v. *World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) *cert. denied*, 132 S. Ct. 96 (2011) (applying Title VII's religious exemption). But where the employee does not qualify as a minister and no legislative exemption is in place, the employer will be exposed to liability for any alleged adverse employment action. See, *e.g.*, *Roe* v. *Empire Blue Cross Blue Shield*, No. 12-cv-4788-PKC (S.D.N.Y. filed June 19, 2012) (class action lawsuit filed after adoption of same-sex marriage in New York against Catholic medical center and its insurer seeking same-sex spousal benefits).

Moreover, if same-sex marriage is adopted without protections, religious employers may be automatically required to provide insurance to all legal spouses—both opposite-sex and same-sex—to comply with anti-discrimination laws. For example, after the District of Columbia passed a same-sex marriage law without strong conscience protections, the Catholic Archdiocese of Washington was forced to stop offering spousal benefits to any of its new employees.[25]

C. Religious people and institutions that object to same-sex marriage will be penalized by state and local governments.

Adopting same-sex marriage also subjects religious organizations to the denial of generally available government benefits. Where same-sex marriage is adopted without religious protections, those who conscientiously object to such marriages can be labeled unlawful "discriminators" and thus denied access to otherwise generally available state and local government benefits.

The government benefits which are placed at risk in a judicial imposition of same-sex marriage fall into five categories: (1) access to government facilities and fora, (2) government licenses and accreditation, (3) government grants and contracts, (4) tax-exempt status, and (5) educational opportunities.

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[25] William Wan, *Same-Sex Marriage Leads Catholic Charities to Adjust Benefits*, Wash. Post, March 2, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/03/01/AR2010030103345.html.

1. Exclusion from government facilities and fora.

Religious institutions that object to same-sex marriage will face challenges to their ability to access a diverse array of government facilities and fora. This is borne out in the reaction to the Boy Scouts' requirement that members believe in God and not advocate for, or engage in, homosexual conduct. Because of this belief, the Boy Scouts have had to fight to gain equal access to public after-school facilities.[26] They have lost leases to city campgrounds and parks,[27] a lease to a government building that served as their headquarters for 79 years,[28] and the right to participate in a state-facilitated charitable payroll deduction program.[29] All of this has happened despite this Court's decision in *Dale*. If same-sex marriage is adopted without robust protections for conscientious objectors, religious organizations that object to same-sex marriage would expect to face similar penalties under these more-restrictive laws, notwithstanding any constitutional rights that they may have.

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[26] *Boy Scouts of America* v. *Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (challenge to Boy Scouts' use of school facilities).

[27] *Evans* v. *City of Berkeley*, 129 P.3d 394 (Cal. 2006) (equal access to boat berths denied to Scouts).

[28] *Cradle of Liberty Council, Inc.* v. *City of Philadelphia*, 851 F. Supp. 2d 936, 939 (E.D. Pa. 2012).

[29] *Boy Scouts of Am.* v. *Wyman*, 335 F.3d 80 (2d Cir. 2003) (Boy Scouts could be excluded from state's workplace charitable contributions campaign).

2. Loss of licenses or accreditation.

A related concern exists with respect to licensing and accreditation decisions. In Massachusetts, for example, the state threatened to revoke the adoption license of Boston Catholic Charities, a large and longstanding religious social-service organization, because it refused on religious grounds to place foster children with same-sex couples. Rather than violate its religious beliefs, Catholic Charities shut down its adoption services.[30] This sort of licensing conflict would only increase after judicial recognition of same-sex marriage, since many governments would require all civil marriages to be treated identically.

Similarly, religious colleges and universities have been threatened with the loss of accreditation because they object to sexual conduct outside of opposite-sex marriage. In 2001, for example, the American Psychological Association, the accrediting body for professional psychology programs, threatened to revoke the accreditation of religious colleges that prefer coreligionists, in large part because of concerns about "codes of conduct that prohibit sex outside of marriage and homosexual behavior."[31] Where same-sex marriage is adopted without strong religious protections, religious colleges and universities that oppose same-sex marriage will likely face similar threats.[32] And the same issue will also affect licensed professionals.[33]

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[30] Patricia Wen, *"They Cared for the Children": Amid Shifting Social Winds, Catholic Charities Prepares to End Its 103 Years of Finding Homes for Foster Children and Evolving Families*, Boston Globe, June 25, 2006 (Catholic Charities had to choose between following Church beliefs and continuing to offer social services); *cf.* 102 Mass. Code Regs. §§ 1.03(1), 5.04(1)(c); 110 Mass. Code Regs. § 1.09(2) (regulations requiring non-discrimination based upon marital status and sexual orientation).

3. Disqualification from government grants and contracts.

Religious universities, charities, hospitals, and social service organizations often serve secular government purposes through contracts and grants. For instance, religious colleges participate in state-funded financial aid programs, religious counseling services provide marital counseling and substance abuse treatment, and religious homeless shelters care for those in need.

Many contracts and grants require recipients to be organized "for the public good" and forbid recipients to act "contrary to public policy." If same-sex marriage is recognized without specific accommodations for religious organizations, those organizations that refuse to approve, subsidize, or perform same-sex marriages could be found to violate such standards, thus disqualifying them from participation in government contracts and grants.

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[31] D. Smith, *Accreditation committee decides to keep religious exemption*, 33 Monitor on Psychology 1 (Jan. 2002) (describing why APA ultimately abandoned proposal).

[32] Religious law schools may be particularly vulnerable. The Association of American Law Schools' (AALS) current guidance allows schools to regulate "conduct" that is "directly incompatible with their "essential religious tenets," but warns that if their beliefs include a "prohibition of all nonmarital sexual conduct, the school must, nevertheless, comply with" AALS bylaws on sexual orientation discrimination. AALS Handbook, Interpretive Principles to Guide Religiously Affiliated Member Schools (1993), http://www.aals.org/about_handbook_sgp_rel.php.

[33] See discussion of *Ward* v. *Polite*, *infra*.

For example, in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), a religious college was denied *all* federal student financial aid for failing to comply, for religious reasons, with Title IX's anti-discrimination affirmation requirements; this even though there was no evidence of actual gender discrimination. In the marriage context, religious universities that oppose same-sex marriage could be denied access to government programs (such as scholarships, grants, or tax-exempt bonds) by governmental agencies that adopt an aggressive view of applicable anti-discrimination standards.

Religious organizations opposed to same-sex marriage also face the loss of government social service contracts. After the District of Columbia adopted same-sex marriage, Catholic Charities stopped providing foster care services for the city because it had to choose between continuing its program and violating its religious beliefs regarding the recognition of same-sex marriages.[34] And in Illinois, a state court held that Catholic Charities was required to place children for adoption with couples in civil unions or forgo its annual contracts with the state.

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[34] Michelle Boorstein, *Citing same-sex marriage bill, Washington Archdiocese ends foster-care program*, Wash. Post, Feb. 17, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/02/16/AR2010021604899.html.

Catholic Charities of the Diocese of Springfield v. *Illinois et al.*, No. 2011-MR-254, 2011 WL 3655016 (Ill. Cir. Ct. Aug. 18, 2011). If same-sex marriage is given legal recognition without accommodation for religious objectors, many religious organizations will be forced either to extend benefits to same-sex spouses or to stop providing social services in partnership with government.[35]

4. Loss of state or local tax exemptions.

Most religious institutions have charitable tax-exempt status under federal, state and local laws. But without conscience protections, that status could be stripped by state agencies and local governments based solely on that religious institution's conscientious objection to same-sex marriage.[36] Whether the First Amendment could provide an effective defense to this kind of penalty is an open question.[37]

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[35] See, *e.g.*, *Catholic Charities of Maine, Inc.* v. *City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004) (upholding ordinance forcing religious charity to either extend employee spousal benefit programs to registered same-sex couples, or lose access to all city housing and community development funds).

[36] "[P]rivate churches losing their tax exemptions for their opposition to homosexual marriages * * * are among the very dangers from the left against which I warned." Prof. Richard A. Epstein, *Same-Sex Union Dispute: Right Now Mirrors Left*, Wall St. J., July 28, 2004, at A13.

[37] See *Bob Jones Univ.* v. *United States*, 461 U.S. 574 (1983) (rejecting Free Exercise Clause defense to IRS withdrawal of 501(c)(3) status based on religious belief against interracial dating and marriage). See also Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious*

5. Loss of educational and employment opportunities.

The conflict between same-sex marriage and religious liberty affects individual religious believers, too. Vermont has held that individual town clerks are may be fired if they seek to avoid issuing civil union licenses to same-sex couples for religious reasons, and at least twelve Massachusetts Justices of the Peace had to resign because they could not facilitate same-sex marriages.[38] The situation is particularly acute for state-employed professionals like social workers who face a difficult choice between their conscience and their livelihood.[39]

Students at public universities face similarly stark choices. When Julea Ward, a Master's in Counseling student in her final semester at Eastern Michigan University, told her professors that she had no problem counseling individual gay and lesbian clients

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Groups with Unpopular Practices, *in Emerging Conflicts* 59, 64-65 (supporting same-sex marriage but arguing that objectors' tax exemptions should not be stripped); Douglas Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, *in Emerging Conflicts* 103, 108-11 (arguing that *Bob Jones* should not apply to conscientious objectors to same-sex marriage).

[38] *Brady* v. *Dean*, 790 A.2d 428 (Vt. 2001) (Vermont clerks); Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. Times, May 17, 2004 (Massachusetts Justices of the Peace) .

[39] Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 BYU J. Pub. L. 475 (2008) (describing dismissals and resignations of social service workers where conscience protections were not provided).

but could not in good conscience help them with their same-sex relationships, she was expelled for violating the school's anti-discrimination policy. *Ward* v. *Polite*, 667 F.3d 727, 738 (6th Cir. 2012). If the Ninth Circuit's declaration that refusing to endorse same-sex marriage demonstrates "animosity" and "dislike" towards gays and lesbians is adopted by this Court, conflicts like these will be even more widespread as religious believers' long-held views on marriage suddenly become *prima facie* evidence of discriminatory animus under anti-discrimination laws.

II. Given the threat to religious liberty, DOMA and Proposition 8 are rational responses to the threat to religious liberty posed by court decisions to adopt same-sex marriage without conscience protections.

The foregoing examples are hardly exhaustive. They suffice to show, however, that the California Supreme Court's failure to provide any conscience protections in *In re Marriage Cases*—and the Hawaii Supreme Court's similar failure in *Baehr*— created a significant threat to the ability of religious people and institutions to live in accordance with their beliefs. Democratic action designed to eliminate that threat is not irrational.

Neither of the decisions under review grappled with the religious liberty concerns raised by court-ordered adoption of same-sex marriage. *Windsor* did not even acknowledge that they existed. Judge Reinhardt's opinion in *Perry* acknowledged the religious liberty concerns raised by *amicus*, 671 F.3d at 1091, but first mischaracterized them as concerns that "religious organizations would be penalized * * * for refusing to provide services to *families headed by same-*

sex spouses" and then dismissed them on the ostensible ground that "Proposition 8 did nothing to affect" California's existing anti-discrimination laws. *Ibid.* (emphasis added).

But because so many major religious groups center their teachings regarding sexual morality around opposite-sex marriage, changing the definition of marriage itself—which is precisely what Proposition 8 was designed to address—triggers a distinct set of religious liberty concerns. See *supra* Section I. Moreover, being forced to call a same-sex relationship a "marriage" creates a conflict of conscience for many religious organizations where "civil union" or "domestic partnership" would not. *Perry* only aggravated this sort of church-state conflict by concluding that denying the title of marriage to same-sex couples shows "animosity" or "dislike" towards gays and lesbians, even if they are treated equally in every other respect.

Some have argued that these conflicts should be discounted because they supposedly arise from neutral and generally applicable laws. See Plf's Resp. to *amicus* at 4-5, *Perry* v. *Schwarzenegger*, No. 3:09-cv-02292 (N.D. Cal. Feb. 26, 2010), Dkt. No. 607. Even if that were true—and it is not—that would neither eliminate the conflicts, nor make it irrational for voters to be concerned about them. To the contrary, the lack of Free Exercise protection would only increase voters' rational concerns, since they would then have no way to avoid burdens imposed by these supposedly neutral, generally applicable laws. Since this Court has specifically invited states to consider protections for religious activity that go beyond what the Free Exercise Clause protects, it can hardly be irrational for California voters to take them up on the offer. See

Employment Div. v. *Smith*, 494 U.S. 872, 890 (1990) (because First Amendment rights are not "banished from the political process" legislative religious protections are to be expected).[40]

III. American citizens and their legislatures are competent to decide on the legal definition of marriage through political processes.

This Court should hesitate to strike down DOMA and Proposition 8 for another reason as well: doing so

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[40] With respect to Proposition 8, it was also rational for voters to be concerned about the religious liberty of public school students and their parents. Voters could rationally be concerned about advancing restrictions on student speech objecting to same-sex marriage. See, *e.g.*, *Harper* v. *Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007)) (student's religious speech objecting to homosexuality could be banned under *Tinker* because it would "destroy the self-esteem" of LGBT students). Similarly, voters could rationally be concerned that adoption of same-sex marriage would reduce parents' ability to find out what their children were taught about same-sex marriage. See *Parker* v. *Hurley*, 514 F.3d 87 (1st Cir.), *cert. denied*, 555 U.S. 815 (2008) (Massachusetts parents could not obtain notice of when their young children would be taught curriculum designed to celebrate same-sex marriage).

The Ninth Circuit responded to these concerns by stating that California schools have long "been prohibited from giving any instruction that discriminates on the basis of sexual orientation," *Perry*, 671 F.3d at 1091, but this is beside the point. Adopting same-sex marriage without conscience protections necessarily weakens religious objectors' claims. See, *e.g.*, *Parker*, 514 F.3d at 95 (Massachusetts' recognition of same-sex marriage weakened parents' Free Exercise claim under *Smith*).

"'would short-circuit'" the work that state legislatures are already doing in this area. *Jackson* v. *Abercrombie*, No. 11-cv-734, 2012 WL 3255201 (D. Haw. Aug. 8, 2012) (quoting *Dist. Attorney's Office for the Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 72-73 (2009)). "By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997). As a result, "[t]he doctrine of judicial self-restraint requires [this Court] to exercise the utmost care whenever we are asked to break new ground in this field." *Collins* v. *City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). Six states have already enacted same-sex marriage laws, all of which provide greater protection for conscience rights than the court decisions which gave rise to DOMA and Proposition 8. See *infra* at 32-33 n.42. Striking down DOMA and Proposition 8 as Plaintiffs request risks turning a very active political debate into a dead end. It would also communicate a profound and, *amicus* believes, unjustified mistrust in the ability of Americans to debate and decide important political issues for themselves.

A. Because many of the conflicts between same-sex marriage and religious liberty can be avoided—at least in part—by legislative exemptions, the judiciary should allow the legislatures to go first.

Six states—Maine, Maryland, New Hampshire, New York, Washington, and Vermont—and the District of Columbia have adopted same-sex marriage by legislative action.[41] Although their laws vary, and no state has provided complete protection to conscientious objectors, each of the six states and the District of Columbia has attempted to address the conflicts between same-sex marriage and religious liberty by providing accommodations for conscientious objectors.[42]

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[41] Massachusetts and Iowa have same-sex marriage by

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judicial rulings. See *Goodridge* v. *Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003); *Varnum* v. *Brien*, 763 N.W.2d 862 (Iowa 2009). Connecticut's legislature adopted same-sex marriage legislation—with several religious exemptions—after its previous marriage/civil union system was struck down. *Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *see* Conn. Gen. Stat. §§ 46b-35a, 46b-35b, 38a-624a (providing religious exemptions).

[42] 2012 Me. Legis. Serv. § 1 (I.B. 3) (exempting clergy and religious organizations from "host[ing] any marriage in violation of" their religious beliefs and protecting them from lawsuits or loss of tax-exempt status for their failure to do so) (to be codified at Me. Rev. Stat. Ann. tit. 19-A, § 655); 2012 Md. Laws ch. 2 § 2-2, -3, -4 (exempting religious organizations from solemnizing or providing services or accommodations related to the solemnization and protecting their ability to offer religious programs consistent with their definition of marriage; permitting religious fraternal organizations to limit insurance coverage to spouses in opposite-sex marriages; and permitting religious adoption and foster care agencies which do not receive government funding to limit their placements to opposite-sex married couples) (to be codified at Md. Code Ann., Fam. Law §§ 2-201, 2-202, 2-406); N.H. Rev. Stat. § 457:37 (exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges * * * related to" the "solemnization," "celebration," or "promotion" of a marriage); N.Y. Dom. Rel. Law § 11(1) (exempting religious organizations from solemnizing or providing services or accommodations related to the solemnization of

The fact that every state legislature to address same-sex marriage has recognized the conflict with religious liberty is strong evidence that this concern is rational: if protecting religious liberty is irrational, then all of these legislatures have been acting irrationally. The truth, of course, is that the state legislatures and voters who have adopted these laws attempt to balance competing legitimate societal interests. And that is something that the political branches can do far more easily than the judicial branch.

B. Allowing the people to decide avoids a frozen conflict and facilitates their acceptance of whatever may be the ultimate result of their public debate.

If the history of the same-sex marriage debate in this country teaches anything, it is that the public discussion will continue long after this Court has issued its opinion. The only question is whether that discussion will become a frozen conflict—a political

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marriages that they do not recognize; protecting religious organizations' ability to limit certain kinds of housing to opposite-sex spouses); Vt. Stat. Ann. 9 § 4502(l) (2009) (exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges * * * related to" the "solemnization" or "celebration" of a marriage); Wash. Rev. Code § 26.04.010 (2012) (exempting religious organizations from solemnizing or providing services or accommodations related to the solemnization of marriages that they do not recognize); D.C. Code § 46-406(e) (exempting religious organizations from providing "services, accommodations, facilities, or goods * * * related to" the "celebration," "solemnization," or "promotion" of a marriage).

debate without hope of political remedy—or whether it will be allowed to evolve as society changes.

Using the judicial power to end debate now will perpetuate the conflict, not end it. This Court's role in reshaping American abortion laws provides an example of this dynamic in action: as Justice Ginsburg has observed, when *Roe* v. *Wade* was decided in 1973, "legislatures all over the United States were moving on [abortion]," and "[t]he law was in a state of flux." Adam Liptak, *Gay Vows, Repeated From State To State*, N.Y. Times, Apr. 12, 2009. This Court's decision to strike down nearly all existing abortion laws on a single day created "a perfect rallying point" for the pro-life cause, *ibid.*, and 40 years later *Roe* remains at the epicenter of the public conflict over abortion.

Striking down DOMA and Proposition 8 would result in the same kind of self-perpetuating conflict that emerged after *Roe*. Nearly any rationale for striking down these two laws will throw the marriage laws of all fifty states into doubt. As with the abortion conflict, judicial preemption of the deliberative process would reduce the political discussion to two sides shouting at each other endlessly with no constructive result—the political equivalent of trench warfare.

That conflict would be exacerbated by the inevitable perception that overturning DOMA and Proposition 8 was anti-democratic. It would be seen, rightly or wrongly, as the Court overruling both Congress and the voters. And it would also send the message that Americans and their representatives are not competent to decide thorny issues.

John Hart Ely famously said that "constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can." *Democracy and Distrust* 183 (1980). This is a situation where representative government *can* be trusted. That many people disagree strongly is simply a sign that the debate is not over. Indeed, democracy without disagreement is not worthy of the name. See, *e.g.*, Isaiah Berlin, *Two Concepts of Liberty*, *in Four Essays on Liberty* 118 (Oxford 1969); Robert Huckfeldt, Paul E. Johnson & John Sprague, *Political Disagreement* (2004) ("* * * a democracy without conflict and disagreement is not a democracy. Democratic institutions are not designed to eliminate conflict and disagreement, but only to manage disagreement in a productive manner."). And citizens reasoning through those disagreements—the very process of deliberation—ensures the vitality of our democratic system by accepting, rather than suppressing, disagreement and dissent:

> If citizens do not try to deliberate about issues such as sexual harassment, homosexual rights, or racial justice, they may never learn how to do so responsibly. Sexist, homophobic, and racist messages will not thereby disappear from American politics; they will retreat between the lines.

Amy Guttman & Dennis Frank Thompson, *Democracy and Disagreement* 109 (1996).

Moreover, using the judicial power to strike DOMA and Proposition 8 down will also prevent legislatures from arriving at workable compromises regarding religious liberty. Although many have argued in the press or elsewhere that the debate over same-sex marriage is a winner-take-all battle, there is potential middle ground. Professor Laycock has explained that:

> unavoidable conflict [between the interests of same-sex couples and the interests of conscientious objectors] does not necessarily mean unmanageable conflict. For the most part, ***these conflicts are not zero-sum games***, in which every gain for one side produces an equal and opposite loss for the other side. If legislators and judges will treat both sides with respect, harm to each side can be minimized. Of course that is a huge "if."

Douglas Laycock, *Afterword*, *in Emerging Conflicts* 196 (emphasis added). Managing these conflicts will require detailed exploration and balancing of all of the societal interests at stake. That is a job that legislatures can undertake far more easily than the judiciary. In Justice Brennan's view, "government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities"—but those exemptions can only be granted, and pluralism protected, through political, not judicial processes.[43]

Finally, if this Court declines to freeze the debate, voters are free to revisit their decisions. That is what happened in Maine: in 2009, voters rejected a same-sex marriage law in a statewide referendum, but in 2012, they adopted a same-sex marriage law—including religious exemptions—in a second statewide referendum. *Maine Rejects Same-Sex Mar-*

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[43] *Walz* v. *Tax Commission*, 397 U.S. 664, 692 (1970) (Brennan, J., concurring).

riage Law, CNN.com, Nov. 4, 2009[44]; *A Festive Mood in Maine as Same-Sex Marriage Becomes Legal*, N.Y. Times, Dec. 30, 2012, at A20.[45] By contrast, were the question removed from ordinary political processes, such reconsideration and fine-tuning would be all but impossible.

* * *

At this juncture in our Nation's political life, same-sex marriage and religious liberty stand in conflict. Given that conflict—acknowledged by scholars and legislatures alike—it is not irrational for voters, or Congress, or the courts to act to protect the rights of conscience. Indeed, it is the political philosophy of the United States that governments are formed solely to protect a set of pre-existing rights that includes religious freedom. *Declaration of Independence*, preamble. Since court decisions left Americans with an all-or-nothing choice between same-sex marriage and full protection for the rights of conscience, DOMA and Proposition 8 were entirely rational responses to the threat to religious liberty.

The wide-ranging nature of the conflict also implicates the judicial role. DOMA and Proposition 8 both present multi-dimensional social issues. Yet because courts are limited to resolving cases and controversies, they are forced to address these complex issues in a binary way. That structural limitation, taken together with the prospect of legislative solutions and the high value our country puts on religious freedom, counsels judicial restraint in the cases before the Court.

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[44] http://articles.cnn.com/2009-11-04/politics/maine.same.sex_1_marriage-maine-john-baldacci-same-sex?_s=PM:POLITICS.

[45] http://www.nytimes.com/2012/12/30/us/same-sex-marriage-becomes-legal-in-maine.html.

CONCLUSION

For the foregoing reasons, the Court should reverse the lower courts and uphold the constitutionality of both DOMA and Proposition 8.

Respectfully submitted.

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APPENDIX

TABLE OF CONTENTS

Selected Anti-Discrimination Statutory Provisions and Marriage-Relevant Exceptions by State 1a

Letter from Prof. Robin Fretwell Wilson and others to Hon. Pat Quinn, Governor of Illinois (Dec. 18, 2012) 102a

Letter from Prof. Douglas Laycock and others to Members of the Illinois Senate (Dec. 24, 2012) 137a

Selected Anti-Discrimination Statutory Provisions and Marriage-Relevant Exceptions by State

Protected Category	**Provisions and Exceptions**
ALABAMA	
Gender	Housing: ALA. CODE 1975 § 24-8-4
ALASKA	
Gender	Employment: ALASKA STAT. § 18.80.220
Gender	Public Accommodations: ALASKA STAT. § 18.80.230
Gender	Housing: ALASKA STAT. § 18.80.240 Exception: "The activities of a nonprofit and noncommercial organization on a nonremunerative basis in aiding minority group members to obtain housing opportunities so as to further the purpose of this chapter are not considered a violation...." ALASKA STAT. § 18.80.215
Marital Status	Employment: ALASKA STAT. § 18.80.220
Marital Status	Public Accommodations: ALASKA STAT. § 18.80.230
Marital Status	Housing: ALASKA STAT. § 18.80.240

Protected Category	Provisions and Exceptions
	Exception: "The activities of a nonprofit and noncommercial organization on a nonremunerative basis in aiding minority group members to obtain housing opportunities so as to further the purpose of this chapter are not considered a violation...." ALASKA STAT. § 18.80.215
ARIZONA	
Gender	Employment: ARIZ. REV. STAT. § 41-1463, 1464 Exception for religious institutions: "This article does not apply to . . . a religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities." ARIZ. REV. STAT. § 41- 1462.
Gender	Public Accommodations: ARIZ. REV. STAT. § 41-1442
Gender	Housing: ARIZ. REV. STAT. § 41-1491.14, 41-1491.20
Gender	Government Contracts: ARIZ. REV.

Protected Category	Provisions and Exceptions
	Stat. § 41-3751 (religious institutions contracting with government may not discriminate on basis of gender against individuals receiving contracted services)
ARKANSAS	
Gender	Housing: Ark. Code Ann. § 16-123-107; Ark. Code Ann. § 16-123-204; Ark. Code Ann. § 16-123-206
Gender	Employment: Ark. Code Ann. § 16-123-107
Gender	Public accommodations: Ark. Code Ann. § 16-123-107
Gender	Mental health services: Ark. Code Ann. § 20-47-220
CALIFORNIA	
Sexual Orientation	Public Accommodations/Commerce: Cal. Civ. Code § 51; Cal. Civ. Code § 51.5
Sexual Orientation	Education: Cal. Educ. Code § 200, 220 Exception: "This article shall not apply to an educational institution that is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization." Cal. Educ. Code

Protected Category	Provisions and Exceptions
	§ 221
Sexual Orientation	Education: CAL. EDUC. CODE § 66270 (postsecondary education) Exception: "This chapter shall not apply to an educational institution that is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization." CAL. EDUC. CODE § 66271
Sexual Orientation	Employment: CAL. GOV. CODE § 12940 Exception: "Notwithstanding any other provision of this part, an employer that is a religious corporation may restrict eligibility for employment in any position involving the performance of religious duties to adherents of the religion for which the corporation is organized." CAL GOV. CODE § 12922 Exception: "'Employer' does not include a religious association or corporation not organized for private profit." CAL. GOV. CODE § 12926(d). Exception: "(c) Notwithstanding subdivision (d) of Section 12926

Protected Category	**Provisions and Exceptions**
	and except as otherwise provided in subdivision (d) of this section, 'employer' includes a religious corporation or association with respect to persons employed by the religious association or corporation to perform duties, other than religious duties, at a health care facility operated by the religious association or corporation for the provision of health care that is not restricted to adherents of the religion that established the association or corporation. 'Employer' does not include a religious corporation with respect to either the employment, including promotion, of an individual of a particular religion, or the application of the employer's religious doctrines, tenets, or teachings, in any work connected with the provision of health care. (e) Notwithstanding subdivision (d) of Section 12926, "employer" does not include a nonprofit public benefit corporation incorporated to provide health care on behalf of a religious organization under Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the

Protected Category	**Provisions and Exceptions**
	Corporations Code, with respect to employment, including promotion, of an individual of a particular religion in an executive or pastoral-care position connected with the provision of health care. "(f)(1) Notwithstanding any other provision of law, a nonprofit public benefit corporation formed by, or affiliated with, a particular religion and that operates an educational institution as its sole or primary activity, may restrict employment, including promotion, in any or all employment categories to individuals of a particular religion." CAL. GOV. CODE § 12926.2.
Sexual Orientation	Housing/Real Estate: CAL. GOV. CODE § 12955; CAL. CIV. CODE § 53; CAL. CIV. CODE § 782.5 Exception: This section does not "[p]rohibit any postsecondary educational institution, whether private or public, from providing housing accommodations reserved for either male or female students so long as no individual person is denied equal access to housing accommodations, or from providing separate housing

Protected Category	**Provisions and Exceptions**
	accommodations reserved primarily for married students or for students with minor dependents who reside with them." CAL. GOV. CODE § 12995.
Sexual Orientation	Commerce: CAL. CIV. CODE § 51.5
Sexual Orientation	Programs receiving state funding: CAL. GOV. CODE § 11135; CAL. PUB. CON. CODE § 6108(g)(9) (government contracts)
Gender & gender identity	Public Accommodations: CAL. CIV. CODE § 51; CAL. CIV. CODE § 51.5 (commerce-based law)
Gender & gender identity	Education: CAL. EDUC. CODE §§ 200, 220, 230 Exception: "This article shall not apply to an educational institution that is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization." CAL. EDUC. CODE § 221 Exception: "This chapter shall not apply to the membership practices of the Young Men's Christian Association, Young Women's Christian Association, girl scouts, boy scouts, Camp Fire, or voluntary

Protected Category	**Provisions and Exceptions**
	youth service organizations which are exempt from taxation under subdivision (a) of Section 501 of the federal Internal Revenue Code of 1954, whose membership has traditionally been limited to persons of one sex, and principally to persons of less than 19 years of age." CAL. EDUC. CODE § 223.
Gender & gender identity	Education: CAL. EDUC. CODE § 66270 (postsecondary education) Exception: "This chapter shall not apply to an educational institution that is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization." CAL. EDUC. CODE § 66271.
Gender & gender identity	Employment: CAL. GOV. CODE § 12940 Exception: "Notwithstanding any other provision of this part, an employer that is a religious corporation may restrict eligibility for employment in any position involving the performance of religious duties to adherents of the religion for which the corporation is organized." CAL.

Protected Category	Provisions and Exceptions
	GOV. CODE § 12922 Exception: "'Employer' does not include a religious association or corporation not organized for private profit." CAL. GOV. CODE § 12926(d). Exception: "(c) Notwithstanding subdivision (d) of Section 12926 and except as otherwise provided in subdivision (d) of this section, 'employer' includes a religious corporation or association with respect to persons employed by the religious association or corporation to perform duties, other than religious duties, at a health care facility operated by the religious association or corporation for the provision of health care that is not restricted to adherents of the religion that established the association or corporation. "(d) 'Employer' does not include a religious corporation with respect to either the employment, including promotion, of an individual of a particular religion, or the application of the employer's religious doctrines, tenets, or teachings, in any work

Protected Category	Provisions and Exceptions
	connected with the provision of health care. "(e) Notwithstanding subdivision (d) of Section 12926, 'employer' does not include a nonprofit public benefit corporation incorporated to provide health care on behalf of a religious organization under Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code, with respect to employment, including promotion, of an individual of a particular religion in an executive or pastoral-care position connected with the provision of health care. "(f)(1) Notwithstanding any other provision of law, a nonprofit public benefit corporation formed by, or affiliated with, a particular religion and that operates an educational institution as its sole or primary activity, may restrict employment, including promotion, in any or all employment categories to individuals of a particular religion." CAL. GOV. CODE § 12926.2.
Gender & gender	Housing/Real Estate: CAL. GOV. CODE § 12955; CAL. CIV. CODE § 53;

Protected Category	Provisions and Exceptions
identity	CAL. CIV. CODE § 782.5 Exception: This section does not "[p]rohibit any postsecondary educational institution, whether private or public, from providing housing accommodations reserved for either male or female students so long as no individual person is denied equal access to housing accommodations, or from providing separate housing accommodations reserved primarily for married students or for students with minor dependents who reside with them." CAL. GOV. CODE § 12995(a)(2).
	Programs receiving state funding: CAL. GOV. CODE § 11135; CAL. PUB. CON. CODE § 6108(g)(9) (government contracts)
Gender & gender identity	Commerce: CAL. BUS. & PROF. CODE § 16721; CAL. CIV. CODE § 51.5; CAL. REV. & TAX CODE §§ 6361, 6361.1 (tax exemption for certain fundraising sales)
Marital Status	Public Accommodations: CAL. CIV. CODE § 51; CAL. CIV. CODE § 51.5 (commerce-based law)
Marital Status	Employment: CAL. GOV. CODE § 12940

Protected Category	Provisions and Exceptions
	Exception: "Notwithstanding any other provision of this part, an employer that is a religious corporation may restrict eligibility for employment in any position involving the performance of religious duties to adherents of the religion for which the corporation is organized." CAL. GOV. CODE § 12922. Exception: "Employer" does not include a religious association or corporation not organized for private profit." CAL. GOV. CODE § 12926(d). Exception: "(c) Notwithstanding subdivision (d) of Section 12926 and except as otherwise provided in subdivision (d) of this section, "employer" includes a religious corporation or association with respect to persons employed by the religious association or corporation to perform duties, other than religious duties, at a health care facility operated by the religious association or corporation for the provision of health care that is not restricted to adherents of the religion that

Protected Category	**Provisions and Exceptions**
	established the association or corporation. "(d) 'Employer' does not include a religious corporation with respect to either the employment, including promotion, of an individual of a particular religion, or the application of the employer's religious doctrines, tenets, or teachings, in any work connected with the provision of health care. "(e) Notwithstanding subdivision (d) of Section 12926, 'employer' does not include a nonprofit public benefit corporation incorporated to provide health care on behalf of a religious organization under Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code, with respect to employment, including promotion, of an individual of a particular religion in an executive or pastoral-care position connected with the provision of health care. "(f)(1) Notwithstanding any other provision of law, a nonprofit public benefit corporation formed by, or affiliated with, a particular religion and that operates an

Protected Category	**Provisions and Exceptions**
	educational institution as its sole or primary activity, may restrict employment, including promotion, in any or all employment categories to individuals of a particular religion." CAL. GOV. CODE § 12926.2
Marital Status	Housing/Real Estate: CAL. GOV. CODE § 12955; CAL. CIV. CODE § 53; CAL. CIV. CODE § 782.5. Exception: This section does not "[p]rohibit any postsecondary educational institution, whether private or public, from providing housing accommodations reserved for either male or female students so long as no individual person is denied equal access to housing accommodations, or from providing separate housing accommodations reserved primarily for married students or for students with minor dependents who reside with them." CAL GOV. CODE 12995(a)(2).
Marital Status	Commerce: CAL.CIV.CODE § 51.5
Marital Status	Government contracts: CAL. PUB. CONT. CODE § 6108(g)(9)

Protected Category	**Provisions and Exceptions**
	COLORADO
Sexual Orientation	Employment: COLO. REV. STAT. § 24-34-402 Exception: "'Employer'... does not mean religious organizations or associations, except such organizations or associations supported in whole or in part by money raised by taxation or public borrowing." COLO. REV. STAT. § 24-34-401
Sexual Orientation	Public Accommodation: COLO. REV. STAT. ANN § 24-34-601 Exception: "Place of public accommodation" shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes.." COLO. REV. STAT. § 24-34-601
Sexual Orientation	Housing: COLO. REV. STAT. § 24-34-502
Sexual Orientation	Housing/tax exemption: COLO. REV. STAT. ANN. § 39-3-112 (some residential charitable housing not tax exempt if it discriminates) Exception: "[H]owever, if the owner or sponsoring organization is a religious denomination, said owners or operators may give

Protected Category	**Provisions and Exceptions**
	preference to members of that denomination." *Id.*
Gender	Employment: COLO. REV. STAT. § 24-34-402 Exception: "'Employer'... does not mean religious organizations or associations, except such organizations or associations supported in whole or in part by money raised by taxation or public borrowing." COLO. REV. STAT. § 24-34-401
Gender	Housing: COLO. REV. STAT. § 24-34-502
Gender	Public Accommodation: COLO. REV. STAT. ANN. § 24-34-601 Exception: "Place of public accommodation" shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes." COLO. REV. STAT. § 24-34-601
Gender	Housing/tax exemption: COLO. REV. STAT. ANN. § 39-3-112 (some residential charitable housing not tax exempt if it discriminates) Exception: "[H]owever, if the owner or sponsoring organization is a religious denomination, said

Protected Category	**Provisions and Exceptions**
	owners or operators may give preference to members of that denomination." *Id.*
Marital Status	Housing: COLO. REV. STAT. § 24-34-502
Marital Status	Public Accommodation: COLO. REV. STAT. ANN. § 24-34-601 Exception: "Place of public accommodation" shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes." COLO. REV. STAT. § 24-34-601.
Marital Status	Housing/tax exemption: COLO. REV. STAT. ANN. § 39-3-112 (some residential charitable housing not tax exempt if it discriminates) Exception: "[H]owever, if the owner or sponsoring organization is a religious denomination, said owners or operators may give preference to members of that denomination." *Id.*
CONNECTICUT	
Sexual Orientation	Employment: CONN. GEN. STAT. § 46a-81c*
Sexual Orientation	Public Accommodations: CONN. GEN. STAT. § 46a-81d*
Sexual	Housing: CONN. GEN. STAT.

Protected Category	**Provisions and Exceptions**
Orientation	§ 46a-81e*
Sexual Orientation	Government contractors: CONN. GEN. STAT. ANN. § 4a-60a;* CONN. GEN. STAT. ANN. § 46a-81i Exception: "The state, foster and adoption agencies are not required to place children with homosexual or bisexual parents." CONN. GEN. STAT. ANN. § 45a-726a.
Sexual Orientation	Professional organizations: CONN. GEN. STAT. ANN. § 46a-59, 81b*
Gender & gender identity	Employment: CONN. GEN. STAT. § 46a-60a
Gender & gender identity	Housing: CONN. GEN. STAT. § 46a-64c
Gender & gender identity	Public accommodations: CONN. GEN. STAT. ANN. § 46a-64
Gender & gender identity	Government contractors: CONN. GEN. STAT. ANN. § 4a-60
Gender & gender identity	Professional organizations: CONN. GEN. STAT. ANN. § 46a-59
Gender & gender identity	State facilities/contracts: CONN. GEN. STAT. ANN. § 46a-71

Protected Category	Provisions and Exceptions
Marital Status	Employment: CONN. GEN. STAT. § 46a-60a
Marital Status	Housing: CONN. GEN. STAT. § 46a-64c Exception: "The provisions of this section with respect to the prohibition of discrimination on the basis of marital status shall not be construed to prohibit the denial of a dwelling to a man or a woman who are both unrelated by blood and not married to each other."
	* General Exception: "The provisions of sections 4a-60a and 46a-81a to 46a-81o, inclusive, shall not apply to a religious corporation, entity, association, educational institution or society with respect to the employment of individuals to perform work connected with the carrying on by such corporation, entity, association, educational institution or society of its activities, or with respect to matters of discipline, faith, internal organization or ecclesiastical rule, custom or law which are established

Protected Category	Provisions and Exceptions
	by such corporation, entity, association, educational institution or society." CONN. GEN. STAT. § 46a-81p.
DELAWARE	
Sexual Orientation	Housing: DEL. CODE ANN. tit. vi, §§ 4601-06, 4619
Sexual Orientation	Public Accommodations: DEL. CODE ANN. tit. vi, §§ 4501-04
Sexual Orientation	Employment: DEL CODE ANN. tit. xix, § 711 Exception: "It shall not be an unlawful employment practice for a school, college, university or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled or managed by a particular religion or by a particular religious corporation, association or society or if the curriculum of such school, college, university or other educational institution or institution of learning is directed toward the propagation of a

Protected Category	**Provisions and Exceptions**
	particular religion." *Id.*
Gender	Housing: DEL CODE ANN. tit. vi, §§ 4601-06, 4619
Gender	Public Accommodations: DEL CODE ANN. tit. vi, §§ 4501-04
Gender	Employment: DEL CODE ANN. tit. xix, § 711 Exception: "It shall not be an unlawful employment practice for a school, college, university or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled or managed by a particular religion or by a particular religious corporation, association or society or if the curriculum of such school, college, university or other educational institution or institution of learning is directed toward the propagation of a particular religion." *Id.*
Gender	Government contractors: DEL. CODE ANN. tit. xxix, § 6519A
Marital	Public Accommodations: DEL.

Protected Category	Provisions and Exceptions
Status	CODE ANN. tit. vi, §§ 4501-04
Marital Status	Housing: DEL. CODE ANN. tit. vi, §§ 4601-06, 4619
Marital Status	Employment: DEL. CODE ANN. tit. xix, § 711 Exception: "It shall not be an unlawful employment practice for a school, college, university or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled or managed by a particular religion or by a particular religious corporation, association or society or if the curriculum of such school, college, university or other educational institution or institution of learning is directed toward the propagation of a particular religion." *Id.*
FLORIDA	
Gender	General: FLA. STAT. ANN. § 760.01
Gender	Employment: FLA. STAT. ANN. § 760.10

Protected Category	**Provisions and Exceptions**
	Exception: "This section shall not apply to any religious corporation, association, educational institution, or society which conditions opportunities in the area of employment or public accommodation to members of that religious corporation, association, educational institution, or society or to persons who subscribe to its tenets or beliefs. This section shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporations, associations, educational institutions, or societies of its various activities." *Id.*
Gender	Public Accommodation: FLA. STAT. ANN. § 760.08; § 760.60 (large private clubs) Exception: "This section shall not apply to any religious corporation, association, educational institution, or society which conditions opportunities in the area of employment or public

Protected Category	**Provisions and Exceptions**
	accommodation to members of that religious corporation, association, educational institution, or society *or* to persons who subscribe to its tenets or beliefs. This section shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporations, associations, educational institutions, or societies of its various activities." FLA. STAT. ANN. § 760.10(d)(9).
Gender	State employees' charitable campaign: FLA. STAT. ANN. § 110.181
Gender	Housing: FLA. STAT. ANN. § 760.23
Marital Status	General: FLA. STAT. ANN. § 760.01
Marital Status	Employment: FLA. STAT. ANN. § 760.10
Marital Status	Public accommodations: FLA. STAT. ANN. § 760.08, § 760.60 (large private clubs) Exception: "This section shall not

Protected Category	**Provisions and Exceptions**
	apply to any religious corporation, association, educational institution, or society which conditions opportunities in the area of employment or public accommodation to members of that religious corporation, association, educational institution, or society *or* to persons who subscribe to its tenets or beliefs. This section shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporations, associations, educational institutions, or societies of its various activities." FLA. STAT. ANN. § 760.10(d)(9)
GEORGIA	
Gender	Housing: GA. CODE ANN. § 8-3-202
HAWAII	
Sexual Orientation	Public accommodation: HAW. REV. STAT. § 489-3
Sexual	Housing: HAW. REV. STAT. § 515-

Protected Category	Provisions and Exceptions
Orientation	3 Exception: "Nothing in section 515-3 shall be deemed to prohibit refusal, because of sex, including gender identity or expression, sexual orientation, or marital status, to rent or lease housing accommodations: (1) Owned or operated by a religious institution and used for church purposes as that term is used in applying exemptions for real property taxes; or (2) Which are part of a religiously affiliated institution of higher education housing program which is operated on property that the institution owns or controls, or which is operated for its students pursuant to Title IX of the Higher Education Act of 1972." HAW. REV. STAT. § 515-4
Gender & gender identity	Public accommodation: HAW. REV. STAT. § 489-3
Gender & gender identity	Housing: HAW. REV. STAT. § 515-3 Exception: "Nothing in section 515-3 shall be deemed to prohibit refusal, because of sex, including gender identity or expression,

Protected Category	**Provisions and Exceptions**
	sexual orientation, or marital status, to rent or lease housing accommodations: (1) Owned or operated by a religious institution and used for church purposes as that term is used in applying exemptions for real property taxes; or (2) Which are part of a religiously affiliated institution of higher education housing program which is operated on property that the institution owns or controls, or which is operated for its students pursuant to Title IX of the Higher Education Act of 1972." HAW. REV. STAT. § 515-4
Gender	Users of public lands: HAW. REV. STAT. § 171-64
Gender	Education: HAW. REV. STAT. § 302A-1001 (education and recreation using state facilities or funds)
Marital Status	Housing: HAW. REV. STAT. § 515-3 Exception: "Nothing in section 515-3 shall be deemed to prohibit refusal, because of sex, including gender identity or expression, sexual orientation, or marital status, to rent or lease housing

Protected Category	Provisions and Exceptions
	accommodations: (1) Owned or operated by a religious institution and used for church purposes as that term is used in applying exemptions for real property taxes; or (2) Which are part of a religiously affiliated institution of higher education housing program which is operated on property that the institution owns or controls, or which is operated for its students pursuant to Title IX of the Higher Education Act of 1972." HAW. REV. STAT. § 515-4
IDAHO	
Gender	Public Accommodation: IDAHO CODE ANN. § 18-7301(2), IDAHO CODE ANN. § 18-7303 (criminal penalty)
Gender	Employment: IDAHO CODE ANN. § 18-7301(1); IDAHO CODE ANN. § 18-7303 (criminal penalty)
Gender	Employment: IDAHO CODE ANN. § 67-5909
Gender	Public Accommodation: IDAHO CODE ANN. § 67-5909 Exception: "[U]nless such criteria can be shown to be necessary for the provision of the goods, services,

Protected Category	**Provisions and Exceptions**
	facilities, privileges, advantages or accommodations being offered." *Id.*
Gender	Education: IDAHO CODE ANN. § 67-5909
Gender	Housing: IDAHO CODE ANN. § 67-5909
Gender	Employment and Health Services: IDAHO CODE ANN. § 16-2402(5)(i)
	ILLINOIS
Sexual Orientation	Employment: 775 ILL. COMP. STAT. 5/2-102 Exception: "'Employer' does not include any religious corporation, association, educational institution, society, or non-profit nursing institution conducted by and for those who rely upon treatment by prayer through spiritual means in accordance with the tenets of a recognized church or religious denomination with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, society or non-profit nursing institution of its activities." 775 ILL. COMP. STAT.

Protected Category	**Provisions and Exceptions**
	5/2-101
Sexual Orientation	Public accommodations: 775 ILL. COMP. STAT. 5/5-102 Exception: "sectarian" schools are not a "public accommodation." 775 ILL. COMP. STAT. 5/5-101(a)(11)
Sexual Orientation	Housing: 775 ILL. COMP. STAT. 5/3-102 Exception: The act does not prohibit "[a] religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of a dwelling which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin." 775 ILL. COMP. STAT. 5/3-106(E)
Sexual Orientation	Government contracts: 775 ILL. COMP. STAT. 5/2-105; 775 ILL. COMP. STAT. 10/1

Protected Category	**Provisions and Exceptions**
Gender	Employment: 775 ILL. COMP. STAT. 5/2-102 Exception: "'Employer' does not include any religious corporation, association, educational institution, society, or non-profit nursing institution conducted by and for those who rely upon treatment by prayer through spiritual means in accordance with the tenets of a recognized church or religious denomination with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, society or non-profit nursing institution of its activities." 775 ILL. COMP. STAT. 5/2-101
Gender	Public accommodations: 775 ILL. COMP. STAT. 5/5-102 Exception: "sectarian" schools are not a "public accommodation." 775 ILL. COMP. STAT. 5/5-101(a)(11)
Gender	Housing: 775 ILL. COMP. STAT. 5/3-102 Exception: The act does not prohibit "[a] religious organization, association, or society, or any nonprofit

Protected Category	**Provisions and Exceptions**
	institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of a dwelling which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin." 775 ILL. COMP. STAT. 5/3-106(E)
Gender	Government contracts: 775 ILL. COMP. STAT. 5/2-105; 775 ILL. COMP. STAT. 10/1
Marital Status	Employment: 775 ILL. COMP. STAT. 5/2-102 Exception: "'Employer' does not include any religious corporation, association, educational institution, society, or non-profit nursing institution conducted by and for those who rely upon treatment by prayer through spiritual means in accordance with the tenets of a recognized church or religious denomination with respect to the employment of individuals of a

Protected Category	**Provisions and Exceptions**
	particular religion to perform work connected with the carrying on by such corporation, association, educational institution, society or non-profit nursing institution of its activities." 775 ILL. COMP. STAT. 5/2-101
Marital Status	Public accommodations: 775 ILL. COMP. STAT. 5/5-102 Exception: "sectarian" schools are not a "public accommodation." 775 ILL. COMP. STAT. 5/5-101(a)(11)
Marital Status	Housing: 775 ILL. COMP. STAT. 5/3-102 Exception: The act does not prohibit "[a] religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of a dwelling which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account

Protected Category	Provisions and Exceptions
	of race, color, or national origin." 775 ILL. COMP. STAT. 5/3-106(E)
Marital Status	Government contracts: 775 ILL. COMP. STAT. 5/2-105; 775 ILL. COMP. STAT. 10/1
INDIANA	
Gender	Housing: IND. CODE ANN. §§ 22-9.5-5-1 to 22-9.5-5-4, §§ 22-9.5-5-6 to 22-9.5-5-8
Gender	Housing: IND. CODE ANN. § 22-9-1-2 (implementation through commissions)
Gender	Education: IND. CODE ANN. § 22-9-1-2 (implementation through commissions) Exception: "[I]t shall not be a discriminatory practice for a private or religious educational institution to continue to maintain and enforce a policy of admitting students of one (1) sex only." IND. CODE ANN. § 22-9-1-3(q)(3).
Gender	Employment: IND. CODE ANN. § 22-9-1-2 (implementation through commissions)
Gender	Public Accommodation: IND. CODE ANN. § 22-9-1-2 (implementation through commissions)

Protected Category	**Provisions and Exceptions**
Gender	Government contractors: IND. CODE ANN. § 22-9-1-10
	IOWA
Sexual Orientation	Employment: IOWA CODE § 216.6 Exception: "Any bona fide religious institution or its educational facility, association, corporation, or society with respect to any qualifications for employment based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose. A religious qualification for instructional personnel or an administrative officer, serving in a supervisory capacity of a bona fide religious educational facility or religious institution, shall be presumed to be a bona fide occupational qualification." IOWA CODE § 216.6(6)(d).
Sexual orientation	Public accommodations: IOWA CODE § 216.7 Exception: "Any bona fide religious institution with respect to any qualifications the institution may impose based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious

Protected Category	**Provisions and Exceptions**
	purpose." IOWA CODE § 216.7(2)(a)
Sexual orientation	Housing: IOWA CODE §§ 216.8, 216.8A Exception: "Any bona fide religious institution with respect to any qualifications it may impose based on religion, sexual orientation, or gender identity, when the qualifications are related to a bona fide religious purpose unless the religious institution owns or operates property for a commercial purpose or membership in the religion is restricted on account of race, color, or national origin." IOWA CODE § 216.12 (1)(a)
Sexual orientation	Education: IOWA CODE § 216.9 Exception: "Nothing in this section shall be construed as prohibiting any bona fide religious institution from imposing qualifications based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose or any institution from admitting students of only one sex." IOWA CODE § 216.9(d)(2)
Gender	Employment: IOWA CODE § 216.6; IOWA CODE ANN § 729.4 (criminal

Protected Category	**Provisions and Exceptions**
	penalty)
Gender	Public accommodations: IOWA CODE § 216.7
Gender	Housing: IOWA CODE §§ 216.8, 216.8A
Gender	Education: IOWA CODE § 216.9
Gender identity	Employment: IOWA CODE § 216.6 Exception: "Any bona fide religious institution or its educational facility, association, corporation, or society with respect to any qualifications for employment based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose. A religious qualification for instructional personnel or an administrative officer, serving in a supervisory capacity of a bona fide religious educational facility or religious institution, shall be presumed to be a bona fide occupational qualification." IOWA CODE § 216.6(6)(d).
Gender identity	Public accommodations: IOWA CODE § 216.7 Exception: "Any bona fide religious institution with respect to any qualifications the institution may

Protected Category	**Provisions and Exceptions**
	impose based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose." IOWA CODE § 216.7(2)(a)
Gender identity	Housing: IOWA CODE §§ 216.8, 216.8A Exception: "Any bona fide religious institution with respect to any qualifications it may impose based on religion, sexual orientation, or gender identity, when the qualifications are related to a bona fide religious purpose unless the religious institution owns or operates property for a commercial purpose or membership in the religion is restricted on account of race, color, or national origin."IOWA CODE § 216.12 (1)(a)
Gender identity	Education: IOWA CODE § 216.9 Exception: "Nothing in this section shall be construed as prohibiting any bona fide religious institution from imposing qualifications based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose or any institution from admitting

Protected Category	**Provisions and Exceptions**
	students of only one sex." IOWA CODE § 216.9(d)(2)
KANSAS	
Gender	Employment: KAN. STAT. ANN. § 44-1009 Exception: "'Employer' includes any person in this state employing four or more persons and any person acting directly or indirectly for an employer, labor organizations, nonsectarian corporations, organizations engaged in social service work and the state of Kansas and all political and municipal subdivisions thereof, but shall not include a nonprofit fraternal or social association or corporation." KAN. STAT. ANN. § 44-1002
Gender	Housing/Sale of Property: KAN. STAT. ANN. §§ 44-1016, 44-1017
Gender	Public accommodations: KAN. STAT. ANN. §§ 44-1001, 44-1009(c) Exceptions: "Public accommodations do not include a religious or nonprofit fraternal or social association or corporation." "This term ["unlawful discriminatory practice"] shall not apply to a religious or private

Protected Category	Provisions and Exceptions
	fraternal and benevolent association or corporation." KAN. STAT. ANN. § 44-1002.
KENTUCKY	
Gender	Government contractors: KY. REV. STAT. ANN. § 45.570
Gender	Education: KY. REV. STAT. ANN. § 344.555 Exception: "This section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of the organization." *Id.*
Gender	Employment: KY. REV. STAT. ANN. § 344.040
Gender	Housing: KY. REV. STAT. ANN. § 344.360 Exception: The provision does not apply to "The YMCA, YWCA, and similar type single sex dormitory rental properties, including, but not limited to, those dormitories operated by institutions of higher education; (2) A landlord who refused to rent to an unmarried couple of opposite sex[.]" KY. REV.

Protected Category	**Provisions and Exceptions**
	STAT. ANN. § 344.362.
LOUISIANA	
Gender	Public accommodations: LA. REV. STAT. ANN. § 49:146; LA. REV. STAT. ANN. § 51:2247
Gender	Employment: LA. REV. STAT. ANN. § 23:332 Exception: "(2) A school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of the school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion." LA. REV. STAT. ANN. § 23:332 (H)(2). (b) "Employment of an individual by a private educational or religious institution or any nonprofit corporation, or the

Protected Category	**Provisions and Exceptions**
	employment by a school, college, university, or other educational institution or institution of learning of persons having a particular religion if the school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of the school, college, university, other educational institution, or institution of learning is directed toward the propagation of a particular religion." LA. REV. STAT. ANN. § 23:302
Gender	Housing: LA. REV. STAT. ANN. §§ 51:2602; 51:2606; 51:2607
MAINE	
Sexual orientation	Employment: ME. REV. STAT. ANN. tit v, §§ 4571, 4572 Exception: "Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of that organization." ME. REV.

Protected Category	Provisions and Exceptions
	STAT. ANN. tit v, § 4573-A
Sexual orientation	Housing: ME. REV. STAT. ANN. tit v, §§ 4581, 4581-A Exception: "[A] religious corporation, association or organization that does not receive public funds is exempt from this provision ... ." ME. REV. STAT. ANN. tit v, § 4553
Sexual orientation	Public Accommodations: ME. REV. STAT. ANN. tit v, §§ 4591, 4592
Sexual orientation	Education: ME. REV. STAT. ANN. tit v, §§ 4601, 4602 Exception: "The provisions in this subsection relating to sexual orientation do not apply to any education facility owned, controlled or operated by a bona fide religious corporation, association or society." ME. REV. STAT. ANN. tit v, § 4602(4).
Gender	Public contractors: ME. REV. STAT. Ann. tit. v § 784
Gender	Employment: ME. REV. STAT. ANN. tit v, §§ 4571, 4572
Gender	Housing: ME. REV. STAT. ANN tit. v, §§ 4581, 4581-A
Gender	Public Accommodations: ME.

Protected Category	**Provisions and Exceptions**
	REV. STAT. ANN tit. v, §§ 4591, 4592
Gender	Education: ME. REV. STAT. ANN. tit. v, §§ 4601, 4602
Marital status	Education: ME. REV. STAT. ANN. tit. v, § 4602
	MARYLAND
Sexual orientation	Employment: MD. CODE ANN. §§ 20-602, -604, -606 Exception: this title does not apply to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion or sexual orientation to perform work connected with the activities of the religious entity." MD. CODE ANN. § 20-604. Exception: "[T]his subtitle does not prohibit . . . a school, college, university, or other educational institution from hiring and employing employees of a particular religion, if: (i) the institution is wholly or substantially owned, supported, controlled, or managed by a particular religion or by a

Protected Category	**Provisions and Exceptions**
	particular religious corporation, association, or society; or (ii) the curriculum of the institution is directed toward the propagation of a particular religion[.]" MD. CODE ANN. § 20-605.
Sexual orientation	Housing: MD. CODE ANN. §§ 20-702, -705
Sexual orientation	Public Accommodations: MD. CODE ANN.§ 20-304
Sexual orientation	Government contractors: MD. CODE ANN., STATE FIN. & PROC. § 19-114
Sexual orientation	Commerce: MD. CODE ANN., Art. § 20-402 (licensed businesses)
Sexual orientation	Licensed social workers: MD. CODE ANN., HEALTH OCC. § 19-311
Gender	Employment: MD. CODE ANN. §§ 20-602, -604, -606 Exception: this title does not apply to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion or sexual orientation to perform work connected with the activities of the religious entity." MD. CODE

Protected Category	**Provisions and Exceptions**
	ANN. § 20-604. Exception: "[T]his subtitle does not prohibit . . . a school, college, university, or other educational institution from hiring and employing employees of a particular religion, if: (i) the institution is wholly or substantially owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society; or (ii) the curriculum of the institution is directed toward the propagation of a particular religion[.]" MD. CODE ANN. § 20-605.
Gender	Housing: MD. CODE ANN. §§ 20-702, -705
Gender	Public Accommodations: MD. CODE ANN.§ 20-304
Gender	Government contractors: MD. CODE ANN., STATE FIN. & PROC. § 19-114
Gender	Commerce: MD. CODE ANN., Art. § 20-402 (licensed businesses)
Gender	Licensed social workers: MD. CODE ANN., HEALTH OCC. § 19-311
Marital status	Employment: MD. CODE ANN.

Protected Category	Provisions and Exceptions
	§§ 20-602, -604, -606 Exception: this title does not apply to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion or sexual orientation to perform work connected with the activities of the religious entity." MD. CODE ANN. § 20-604. Exception: "[T]his subtitle does not prohibit . . . a school, college, university, or other educational institution from hiring and employing employees of a particular religion, if: (i) the institution is wholly or substantially owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society; or (ii) the curriculum of the institution is directed toward the propagation of a particular religion[.]" MD. CODE ANN. § 20-605.
Marital status	Housing: MD. CODE ANN. §§ 20-702, -705
Marital	Public Accommodations: MD.

Protected Category	Provisions and Exceptions
status	CODE ANN.§ 20-304
Marital status	Government contractors: MD. CODE ANN., STATE FIN. & PROC. § 19-114
Marital status	Commerce: MD. CODE ANN., Art. § 20-402 (licensed businesses)
MASSACHUSETTS	
Sexual orientation	Public Accommodations: MASS. ANN. LAWS ch. 272, § 92A; MASS. ANN. LAWS ch. 272, § 98 (criminal penalties)
Sexual orientation	MASS. ANN. LAWS ch. 151B, § 4 Exception: "Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule,

Protected Category	Provisions and Exceptions
	custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained." *Id.*
Sexual orientation	Employment: MASS. ANN. LAWS ch. 151B, § 4 Exception: "Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained." *Id.*
Gender	Housing: MASS. ANN. LAWS ch.

Protected Category	Provisions and Exceptions
	151B, § 4 Exception: "Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained." *Id.*
	Employment: MASS. ANN. LAWS ch. 151B, § 4 Exception: "Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization

Protected Category	**Provisions and Exceptions**
	operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained." *Id.*
Gender	Public Accommodations: MASS. ANN. LAWS ch. 272, § 92A; MASS. ANN. LAWS ch. 272, § 98 (criminal penalties)
Marital status	Housing: MASS. ANN. LAWS ch. 151B, § 4 Exception: "Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is

Protected Category	**Provisions and Exceptions**
	operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained." *Id.*
MICHIGAN	
Gender	Employment: MICH. COMP. LAWS ANN. 37.2202
Gender	Government Contractors: MICH. COMP. LAWS ANN. 37.2209
Gender	Housing: MICH. COMP. LAWS ANN. 37.2502
Gender	Education: MICH. COMP. LAWS ANN. 37.2402; MICH. COMP. LAWS ANN. 390.933 (colleges receiving state loans)
Marital status	Employment: MICH. COMP. LAWS ANN. 37.2202
Marital	Government Contractors: MICH.

Protected Category	**Provisions and Exceptions**
status	COMP. LAWS ANN. 37.2209
Marital status	Housing: MICH. COMP. LAWS ANN. 37.2502
Marital status	Education: MICH. COMP. LAWS ANN. 37.2402
	MINNESOTA
Sexual orientation	Employment: MINN. STAT. § 363A.02(1)(a)(1); MINN. STAT. § 363A.08 Exceptions: "The provisions of section 363A.08 shall not apply to a religious or fraternal corporation, association, or society, with respect to qualifications based on religion or sexual orientation, when religion or sexual orientation shall be a bona fide occupational qualification for employment." MINN. STAT. § 363A.20(2) "Nothing in this chapter prohibits any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for educational purposes that is operated, supervised, or controlled by a religious association, religious corporation,

Protected Category	**Provisions and Exceptions**
	or religious society that is not organized for private profit, from: (1) limiting admission to or giving preference to persons of the same religion or denomination; or (2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities. This clause shall not apply to secular business activities engaged in by the religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized." MINN. STAT. § 363A.26.
Sexual orientation	Housing: MINN. STAT. § 363A.02(1)(a)(2); MINN. STAT. § 363A.09 Exception: "Nothing in this chapter prohibits any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for educational purposes that is operated, supervised, or

Protected Category	Provisions and Exceptions
	controlled by a religious association, religious corporation, or religious society that is not organized for private profit, from: (1) limiting admission to or giving preference to persons of the same religion or denomination; or (2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities. This clause shall not apply to secular business activities engaged in by the religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized." MINN. STAT. § 363A.26.
Sexual orientation	Public Accommodations: MINN. STAT. § 363A.02(1)(a)(3); MINN. STAT. § 363A.11 Exception: "Nothing in this chapter prohibits any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for educational purposes that is

Protected Category	Provisions and Exceptions
	operated, supervised, or controlled by a religious association, religious corporation, or religious society that is not organized for private profit, from: (1) limiting admission to or giving preference to persons of the same religion or denomination; or (2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities. This clause shall not apply to secular business activities engaged in by the religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized." MINN. STAT. § 363A.26.
Sexual orientation	Education: MINN. STAT. § 363A.02(1)(a)(5); MINN. STAT. § 363A.13. Exception: "Nothing in this chapter prohibits any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for

Protected Category	Provisions and Exceptions
	educational purposes that is operated, supervised, or controlled by a religious association, religious corporation, or religious society that is not organized for private profit, from: (1) limiting admission to or giving preference to persons of the same religion or denomination; or (2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities. This clause shall not apply to secular business activities engaged in by the religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized." MINN. STAT. § 363A.26.
Sexual orientation	Business relations: MINN. STAT. § 363A.17 Exception: "Nothing in this chapter prohibits any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for

Protected Category	Provisions and Exceptions
	educational purposes that is operated, supervised, or controlled by a religious association, religious corporation, or religious society that is not organized for private profit, from: (1) limiting admission to or giving preference to persons of the same religion or denomination; or (2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities. This clause shall not apply to secular business activities engaged in by the religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized." MINN. STAT. § 363A.26.
Gender	Employment: MINN. STAT. § 363A.02(1)(a)(1); MINN. STAT. § 363A.08
Gender	Housing: MINN. STAT. § 363A.02(1)(a)(2); MINN. STAT. § 363A.09 Exception: "The provisions of section 363A.09 shall not apply to...

Protected Category	Provisions and Exceptions
	rooms in a temporary or permanent residence home run by a nonprofit organization, if the discrimination is by sex." MINN. STAT. ANN. § 363A.21
Gender	Public Accommodations: MINN. STAT. § 363A.02(1)(a)(3); MINN. STAT. § 363A.11
Gender	Education: MINN. STAT. § 363A.02(1)(a)(5); MINN. STAT. § 363A.13.
Gender	Business relations: MINN. STAT. § 363A.17
Marital status	Employment: MINN. STAT. § 363A.02(1)(a)(1); MINN. STAT. § 363A.08
Marital status	Housing: MINN. STAT. §§ 363A.02(1)(a)(2); 363A.09
Marital status	Public Accommodations: MINN. STAT. § 363A.11
Marital status	Education: MINN. STAT. § 363A.02(1)(a)(5); MINN. STAT. § 363A.13
Marital status	Business relations: MINN. STAT. § 363A.17
MISSISSIPPI	
Gender	Social services: MISS. CODE ANN. § 41-99-5 (hospitals receiving

Protected Category	**Provisions and Exceptions**
	public grants)
Gender	Business: MISS. CODE ANN. § 57-10-519; MISS. CODE ANN. § 57-71-19; MISS. CODE ANN. § 57-77-27
MISSOURI	
Gender	Housing: MO. REV. STAT. § 213.040
Gender	Employment: MO. REV. STAT. § 213.055 Exception: "[E]mployer . . . " does not include does not include corporations and associations owned and operated by religious or sectarian groups." MO. REV. STAT. § 213.010(7)
Gender	Education: MO. REV. STAT. 173.1102
Gender	Public Accommodations: MO. REV. STAT. § 213.065. Exception: "The provisions of this section shall not apply to a private club, a place of accommodation owned by or operated on behalf of a religious corporation, association or society, or other establishment which is not in fact open to the public, unless the facilities of such establishments are made available to the customers or

Protected Category	Provisions and Exceptions
	patrons of a place of public accommodation as defined in section 213.010 and this section." MO. REV. STAT. § 213.065(3).
MONTANA	
Gender	Employment: MONT. CODE ANN. § 49-2-303, MONT. CODE ANN. § 49-1-102
Gender	Public accommodation: MONT. CODE ANN. § 49-2-304; MONT. CODE ANN. § 49- 1-102 Exception (social services): "Consideration of religious factors by a licensed child-placing agency that is affiliated with a particular religious faith is not arbitrary consideration of religion within the meaning of this section." *Id.*
Gender	Housing: MONT. CODE ANN. § 49-2-305
Gender	Education: MONT. CODE ANN. § 49-2-307
Marital status	Education: MONT. CODE ANN. § 49-2-307
Marital status	Employment: MONT. CODE ANN. § 49-2-303
Marital status	Public accommodation: MONT. CODE ANN. § 49-2-304

Protected Category	Provisions and Exceptions
Marital status	Housing: MONT. CODE ANN. § 49-2-305
	NEBRASKA
Gender	Public accommodations: NEB. REV. ST. § 20-132, § 20-134; NEB. REV. ST. § 20- 124 (criminal penalty)
Gender	Housing: NEB. REV. ST. § 20-318
Gender	Employment: NEB. REV. STAT. § 48-1104
Gender	Government contractors: NEB. REV. ST. § 48-1122
Marital status	Employment: NEB. REV. STAT. ANN. § 48-1104
	NEVADA
Sexual orientation	Employment: NEV. REV. STAT. ANN. § 613.330
Gender & gender identity	Employment: NEV. REV. STAT. ANN. § 613.330
	NEW HAMPSHIRE
Sexual orientation	Employment: N.H. Rev. Stat. Ann. § 354-A:6-7 Exceptions: "'Employer' does not include ... a fraternal or religious association or corporation, if such club, association, or corporation is not organized for private

Protected Category	Provisions and Exceptions
	profit … ." N.H. Rev. Stat. Ann. § 354-A:2. "Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained." N.H. Rev. Stat. Ann. § 354-A: 18
Sexual orientation	Housing: N.H. Rev. Stat. Ann. § 354-A:8-10 Exception:"Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious

Protected Category	**Provisions and Exceptions**
	organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained." N.H. Rev. Stat. Ann. § 354-A: 18
Sexual orientation	Public Accommodation: N.H. Rev. Stat. Ann. § 354-A:16-17 Exception: "Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained." N.H. Rev. Stat. Ann. § 354-A: 18
Gender	Employment: N.H. Rev. Stat.

Protected Category	Provisions and Exceptions
	Ann. § 354-A:6-7 Exceptions: "'Employer' does not include ... a fraternal or religious association or corporation, if such club, association, or corporation is not organized for private profit ... ." N.H. Rev. Stat. Ann. § 354-A:2. "Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained." N.H. Rev. Stat. Ann. § 354-A: 18
Gender	Housing: N.H. Rev. Stat. Ann. § 354-A:8-10 Exception: "Nothing contained in this chapter shall be construed to bar any religious or

Protected Category	**Provisions and Exceptions**
	denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained." N.H. Rev. Stat. Ann. § 354-A: 18
Gender	Public Accommodation: N.H. Rev. Stat. Ann. § 354-A:16-17 Exception: "Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making

Protected Category	**Provisions and Exceptions**
	such selection as is calculated by such organization to promote the religious principles for which it is established or maintained." N.H. Rev. Stat. Ann. § 354-A: 18
Marital status	Employment: N.H. Rev. Stat. Ann. § 354-A:6-7 Exceptions: "'Employer' does not include … a fraternal or religious association or corporation, if such club, association, or corporation is not organized for private profit … ." N.H. Rev. Stat. Ann. § 354-A:2. "Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained." N.H.

Protected Category	Provisions and Exceptions
	Rev. Stat. Ann. § 354-A: 18
Marital status	Housing: N.H. Rev. Stat. Ann. § 354-A:8-10 Exception: "Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained." N.H. Rev. Stat. Ann. § 354-A: 18
Marital status	Public Accommodation: N.H. Rev. Stat. Ann. § 354-A:16-17 Exception: "Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational

Protected Category	Provisions and Exceptions
	purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained." N.H. Rev. Stat. Ann. § 354-A: 18
NEW JERSEY	
Sexual orientation	Employment: N.J. REV. STAT. § 10:5-12 Exception: "[I]t shall not be an unlawful employment practice . . . for a religious association or organization to utilize religious affiliation as a uniform qualification in the employment of clergy, religious teachers or other employees engaged in the religious activities of the association or organization, or in following the tenets of its religion in establishing and utilizing criteria for employment of an employee;" *Id.*
Sexual orientation	Public Accommodations: N.J. REV. STAT. § 10:5-12 Exception: "... nor shall anything

Protected Category	**Provisions and Exceptions**
	herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution … ." N.J. REV. STAT. § 10:5-5(l).
Sexual orientation	Housing: N.J. REV. STAT. § 10:5-12 Exception: "Nothing herein contained shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, in the sale, lease or rental of real property, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained." N.J. REV. STAT. § 10-5-5(n).
Sexual orientation	Government contracts: N.J. STAT. ANN. 10:2-1
Gender	Social services: N.J. STAT. ANN. 9:3-40 (adoption agencies)

Protected Category	Provisions and Exceptions
Gender	Government contractors: N.J. STAT. ANN. 10:2-1
Gender	Employment: N.J. REV. STAT. § 10:5-12 Exception: "[I]t shall not be an unlawful employment practice . . . for a religious association or organization to utilize religious affiliation as a uniform qualification in the employment of clergy, religious teachers or other employees engaged in the religious activities of the association or organization, or in following the tenets of its religion in establishing and utilizing criteria for employment of an employee" *Id.*
Gender	Public Accommodations: N.J. REV. STAT. § 10:5-12; N.J. STAT. ANN. 10:1-2, 1-3 Exception: "... nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution ... ." N.J. REV. STAT. § 10:5-5(l).
Gender	Housing: N.J. REV. STAT. § 10:5-12 Exception: "Nothing herein contained shall be construed to

Protected Category	Provisions and Exceptions
	bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, in the sale, lease or rental of real property, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained." N.J. REV. STAT. § 10-5-5(n).
Marital status	Social services: N.J. STAT. ANN. 9:3-40 (adoption agencies)
Marital status	Public accommodations: N.J. STAT. ANN. 10:1-2, 1-3
Marital status	Government contractors: N.J. STAT. ANN. 10:2-1
Marital status	Employment: N.J. REV. STAT. § 10:5-12 Exception: "[I]t shall not be an unlawful employment practice . . . for a religious association or organization to utilize religious affiliation as a uniform

Protected Category	**Provisions and Exceptions**
	qualification in the employment of clergy, religious teachers or other employees engaged in the religious activities of the association or organization, or in following the tenets of its religion in establishing and utilizing criteria for employment of an employee;" *Id.*
Marital status	Public Accommodations: N.J. REV. STAT. § 10:5-12 Exception: "... nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution ... ." N.J. REV. STAT. § 10:5-5(l).
Marital status	Housing: N.J. REV. STAT. § 10:5-12 Exception: "Nothing herein contained shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, in the sale, lease or rental of real property, from limiting admission to or giving preference to persons of the same religion or denomination or from

Protected Category	Provisions and Exceptions
	making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained." N.J. REV. STAT. § 10-5-5(n).
NEW MEXICO*	
Sexual orientation	Employment: N.M. STAT. ANN. § 28-1-7
Sexual orientation	Housing: N.M. STAT. ANN. § 28-1-7
Sexual orientation	Public Accommodation: N.M. STAT. ANN. § 28-1-7
Gender & gender identity	Employment: N.M. STAT. ANN. § 28-1-7
Gender & gender identity	Housing: N.M. STAT. ANN. § 28-1-7
Gender & gender identity	Public Accommodation: N.M. STAT. ANN. § 28-1-7
Marital status	Employment: N.M. STAT. ANN. § 28-1-7
Marital status	Housing: N.M. STAT. ANN. § 28-1-7
Marital	Public Accommodation: N.M.

Protected Category	Provisions and Exceptions
status	STAT. ANN. § 28-1-7
	* Exception applicable to each of the foregoing provisions: These provisions do not "bar any religious or denominational institution or organization that is operated, supervised or controlled by or that is operated in connection with a religious or denominational organization from limiting admission to or giving preference to persons of the same religion or denomination or from making selections of buyers, lessees or tenants as are calculated by the organization or denomination to promote the religious or denominational principles for which it is established or maintained, unless membership in the religious or denominational organization is restricted on account of race, color, national origin or ancestry; [or] bar any religious or denominational institution or organization that is operated, supervised or controlled by or that is operated in connection with a religious or denominational organization from imposing discriminatory

Protected Category	**Provisions and Exceptions**
	employment or renting practices that are based upon sexual orientation or gender identity; provided, that the provisions of the Human Rights Act [28-1-1 NMSA 1978] with respect to sexual orientation and gender identity shall apply to any other: (1) for-profit activities of a religious or denominational institution or religious organization subject to the provisions of Section 511(a) of the Internal Revenue Code of 1986, as amended; or (2) nonprofit activities of a religious or denominational institution or religious organization subject to the provisions of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended." N.M. STAT. ANN. § 28-1-9(B)-(C).
NEW YORK	
Sexual Orientation	Employment: NY Exec. Law § 296*
Sexual Orientation	Housing: NY Exec. Law § 296*
Sexual Orientation	Public Accommodation: NY Exec. Law § 296*

Protected Category	**Provisions and Exceptions**
Sexual Orientation	Education: NY EDUC. LAW § 313**
Gender	Employment: NY Exec. Law § 296*
Gender	Housing: NY Exec. Law § 296*
Gender	Public Accommodation: NY Exec. Law § 296*
Gender	Government contractors: NY EXEC. LAW § 312
Gender	Education: NY EDUC. LAW § 313**
Marital Status	Employment: NY Exec. Law § 296*
Marital Status	Housing: NY Exec. Law § 296*
Marital Status	Public Accommodation: NY Exec. Law § 296*
Marital Status	Government contractors: NY EXEC. LAW § 312
Marital Status	Education: NY EDUC. LAW § 313**
	*Exception: "Nothing contained in [NY Exec. Law § 296] shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or

Protected Category	**Provisions and Exceptions**
	educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained." NY Exec. Law § 296.
	**Exception: Exception: "except that nothing in [NY EDUC. LAW § 313] shall be deemed to affect, in any way, the right of a religious or denominational educational institution to select its students exclusively or primarily from members of such religion or denomination or from giving preference in such selection to such members or to make such selection of its students as is calculated by such institution to promote the religious principles for which it is established or maintained." NY EDUC. LAW § 313

Protected Category	Provisions and Exceptions
NORTH CAROLINA	
Gender	Housing: N.C. GEN. STAT. § 41A-4
Gender	Government contractors: N.C. GEN. STAT. ANN. § 143-135.5
NORTH DAKOTA	
Gender	Employment: N.D. CENT. CODE §§ 14-02.4-03 to 14-02.4-09
Gender	Public accommodations: N.D. CENT. CODE §§ 14-02.4-14 to 14-02.4-16
Gender	Housing: N.D. CENT. CODE §§ 14-02.5-02 to 14-02.5-08
Gender	Licensing: N.D. CENT. CODE §§ 23-17.3-05
Marital Status	Employment: N.D. CENT. CODE §§ 14-02.4-03 to 14-02.4-09
Marital Status	Public accommodations: N.D. CENT. CODE §§ 14-02.4-14 to 14-02.4-16
Marital Status	Housing: N.D. CENT. CODE §§ 14-02.5-02 to 14-02.5-08
OHIO	
Gender	Housing: OHIO REV. CODE ANN. § 4112.02(H)
Gender	Public accommodation: OHIO

Protected Category	Provisions and Exceptions
	REV. CODE ANN. § 4112.02(G)
Gender	Employment: OHIO REV. CODE ANN. § 4112.02(A); OHIO REV. CODE ANN. § 3301.53(A)(3) (employment of preschool teachers)
Gender	Social services/Government Contractors: OHIO REV. CODE ANN. § 340.12 (contractor providing mental health or addiction services for the state); OHIO REV. CODE ANN. § 1751.18(A)(2) (health insurance or provider contracting with insurer); OHIO REV. CODE ANN. § 3701.046(A) (grant recipients for women's health care)
Marital Status	Social services: OHIO REV. CODE ANN. § 3701.046(A) (grant recipients for women's health care)
OKLAHOMA	
Gender	Employment: OKLA. STAT. tit. xxv, §§ 1302 to 1306
Gender	Housing: OKLA. STAT. tit xxv, §§ 1452, 1506.9
Gender	Social services: OKLA. STAT. tit iiiA § 301(E)(2) and (F) (amateur sports leagues); OKLA. STAT. ANN. tit. xlvii, § 1104.6(C)(2) (crisis pregnancy centers receiving state

Protected Category	**Provisions and Exceptions**
	funds)
Gender	Public accommodations: OKLA. STAT. ANN. tit. xxv, § 1402 (includes all recipients of government funds)
Marital status	Social services: OKLA. STAT. ANN. tit. xlvii, § 1104.6 (crisis pregnancy centers receiving state funds)
	OREGON
Sexual Orientation	Social services: OR. REV. STAT. § 418.648(10) (foster parents); OR. REV. STAT. § 443.739(19) (adult foster home residents); OR. REV. STAT. § 458.505(4)(h) (organizations receiving certain anti-poverty funds)
Sexual Orientation	Education: OR. REV. STAT. § 659.850(1)
Sexual Orientation	Public accommodations: OR. REV. STAT. § 659A.006; OR. REV. STAT. § 659A.403(1)
Sexual Orientation	Housing: OR. REV. STAT. § 659A.006; OR. REV. STAT. § 659A.421 Exception: "(3) It is not an unlawful practice for a bona fide church or other religious institution to take any action with respect to housing

Protected Category	**Provisions and Exceptions**
	or the use of facilities based on a bona fide religious belief about sexual orientation as long as the housing or the use of facilities is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity that has no necessary relationship to the church or institution." OR. REV. STAT. § 659A.006.
Sexual Orientation	Employment: OR. REV. STAT. § 659A.006; OR. REV. STAT. § 659A.030 Exception: "(5) It is not an unlawful employment practice for a bona fide church or other religious institution to take any employment action based on a bona fide religious belief about sexual orientation: (a) In employment positions directly related to the operation of a church or other place of worship, such as clergy, religious instructors and support staff; (b) In employment positions in a nonprofit religious school, nonprofit religious camp, nonprofit religious day care center, nonprofit religious thrift

Protected Category	Provisions and Exceptions
	store, nonprofit religious bookstore, nonprofit religious radio station or nonprofit religious shelter; or (c) In other employment positions that involve religious activities, as long as the employment involved is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity that has no necessary relationship to the church or institution." OR. REV. STAT. § 659A.006.
Gender	Education: OR. REV. STAT. § 659.850(1)
Gender	Housing: OR. REV. STAT. § 659A.006; OR. REV. STAT. § 659A.421
Gender	Employment: OR. REV. STAT. § 659A.006; OR. REV. STAT. § 659A.030
Gender	Public Accommodations: OR. REV. STAT. § 659A.403; OR. REV. STAT. § 659A.006
Marital Status	Social services: OR. REV. STAT. § 418.648 (foster parents); OR. REV. STAT. § 443.739 (adult foster home residents); OR. REV. STAT. §

Protected Category	**Provisions and Exceptions**
	458.505(4)(h) (organizations receiving certain anti-poverty funds)
Marital Status	Education: OR. REV. STAT. § 659.850(1)
Marital Status	Housing: OR. REV. STAT. § 659A.006; OR. REV. STAT. § 659A.421
Marital Status	Employment: OR. REV. STAT. § 659A.006; OR. REV. STAT. § 659A.030
Marital Status	Public Accommodations: OR. REV. STAT. § 659A.403; OR. REV. STAT. § 659A.006
PENNSYLVANIA	
Gender	Employment: 43 PA. CONST. STAT. § 955 Exception: "The term 'employer' … does not include religious, fraternal, charitable or sectarian corporations or associations, except such corporations or associations supported, in whole or in part, by governmental appropriations. The term 'employer' with respect to discriminatory practices based on race, color, age, sex, national origin or non- job related handicap or disability, includes religious,

Protected Category	Provisions and Exceptions
	fraternal, charitable and sectarian corporations and associations employing four or more persons within the Commonwealth." 43 PA. CONST. STAT. § 954(b).
Gender	Housing: 43 PA. CONST. STAT. § 955 Exception: "Nothing in this clause shall bar any religious or denominational institution or organization or any charitable or educational organization which is operated, supervised or controlled by or in connection with a religious organization or any bona fide private or fraternal organization from giving preference to persons of the same religion or denomination or to members of such private or fraternal organization or from making such selection as is calculated by such organization to promote the religious principles or the aims, purposes or fraternal principles for which it is established or maintained." 43 PA. CONST. STAT. § 953(h)(10)
Gender	Public Accommodation: 43 PA. CONST. STAT. § 955(h)

Protected Category	Provisions and Exceptions
Gender	Education: 24 PA. CONST. STAT. §§ 5002, 5004
Gender	Social services: 35 PA. CONST. STAT. § 448.804(a) (licensed health care facility)
Gender	Insurance: 40 PA. CONST. STAT. § 1171.5(a)(7)(iii)
Marital status	Insurance: 40 PA. CONST. STAT. § 1171.5(a)(7)(iii)
RHODE ISLAND	
Sexual orientation	Public Accommodations: R.I. GEN. LAWS § 11-24-2
Sexual orientation	Employment: R.I. GEN. LAWS § 28-5-7; R.I. GEN. LAWS § 28-5-2 Exception: "Nothing in this subdivision shall be construed to apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of its religion to perform work connected with the carrying on of its activities." R.I. GEN. LAWS § 28-5-6(7)(ii)
Sexual orientation	Commerce: R.I. GEN. LAWS § 28-5.1-14 (state-licensed corporations)
Gender & gender identity	Public Accommodations: R.I. GEN. LAWS § 11-24-2

Protected Category	**Provisions and Exceptions**
Gender & gender identity	Employment: R.I. GEN. LAWS § 28-5-7; R.I. GEN. LAWS § 28-5-2 Exception: "Nothing in this subdivision shall be construed to apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of its religion to perform work connected with the carrying on of its activities." R.I. GEN. LAWS § 28-5-6(7)(ii)
Gender	Housing: R.I. GEN. LAWS §§ 34-37-1—34-37-4
Gender & gender identity	Commerce: R.I. GEN. LAWS § 28-5.1-14 (state-licensed corporations)
Marital status	Housing: R.I. GEN. LAWS §§ 34-37-1 to 34-37-4
Marital status	Commerce: R.I. GEN. LAWS § 28-5.1-14 (state-licensed corporations)
SOUTH CAROLINA	
Gender	Employment: S.C. CODE ANN. § 1-13-80
Gender	Housing: S.C. CODE ANN. § 31-21-40
SOUTH DAKOTA	
Gender	Employment: S.D. CODIFIED

Protected Category	Provisions and Exceptions
	LAWS § 20-13-10 Exception: "Sections 20-13-10 to 20-13-13, inclusive, shall not apply to any bona fide religious institution with respect to any qualifications for employment based on religion when such qualifications are related to a bona fide religious purpose." S.D. CODIFIED LAWS § 20-13-18.
Gender	Housing: S.D. CODIFIED LAWS § 20-13-20
Gender	Education: S.D. CODIFIED LAWS § 20-13-22 Exception: "This section does not apply to any bona fide religious institution which has a qualification based on religion if such qualification is related to a bona fide religious purpose." *Id.*
Gender	Public accommodations: S.D. CODIFIED LAWS § 20-13-23
Gender	Insurance: S.D. CODIFIED LAWS § 58-33-13.1 Exception: "This section shall not affect the right of fraternal benefit societies to determine eligibility requirements for membership." *Id.*
Marital	Insurance: S.D. CODIFIED LAWS §

Protected Category	Provisions and Exceptions
Status	58-33-13.1 Exception: "This section shall not affect the right of fraternal benefit societies to determine eligibility requirements for membership." *Id.*
TENNESSEE	
Gender	Employment: TENN. CODE ANN. § 4-21-401
Gender	Public Accommodation: TENN. CODE ANN. § 4-21-501
Gender	Housing: TENN. CODE ANN. § 4-21-601
Gender	Government contractors: TENN. CODE ANN. § 4-3-1412
Gender	Social services: TENN. CODE ANN. § 12-4-122(f) (religious organizations providing social services funded by the state)
TEXAS	
Gender	Housing: TEX. PROP. CODE ANN. § 301.021
Gender	Employment: TEX. LAB. CODE ANN. § 21.051
UTAH	
Gender	Public Accommodation: UTAH CODE ANN. §§ 13-7-1, 13-7-3 Exceptions: "but the term [public

Protected Category	**Provisions and Exceptions**
	accommodation] shall not apply to any institution, church, any apartment house, club, or place of accommodation which is in its nature distinctly private except to the extent that it is open to the public." UTAH CODE ANN. § 13-7-2. Provision does not "deny any religious organization the right to regulate the operation and procedures of its establishments." UTAH CODE ANN. § 13-7-3.
Gender	Employment: UTAH CODE ANN. § 34A-5-106 Exception: "(ii) 'Employer' does not include: (A) a religious organization or association; (B) a religious corporation sole; or (C) any corporation or association constituting a wholly owned subsidiary or agency of any religious organization or association or religious corporation sole." UTAH CODE ANN. § 34A-5-102(1)(h)(2)
Gender	Housing: UTAH CODE ANN. § 57-21-5 Exceptions: "This chapter does not apply to a temporary or permanent residence facility

Protected Category	Provisions and Exceptions
	operated by a nonprofit or charitable organization, including any dormitory operated by a public or private educational institution, if the discrimination is by sex or familial status for reasons of personal modesty or privacy or in the furtherance of a religious institution's free exercise of religious rights under the First Amendment of the United States Constitution." UTAH CODE ANN. § 57-21-3(2) "This chapter does not prohibit any nonprofit educational institution from: (a) requiring its single students to live in housing approved, operated, or owned by the institution; (b) segregating housing that the institution approves, operates, or owns on the basis of sex or familial status or both for reasons of personal modesty or privacy, or in the furtherance of a religious institution's free exercise of religious rights under the First Amendment of the United States Constitution; or (c) otherwise assisting others in making sex-segregated housing available to students as may be permitted by

Protected Category	Provisions and Exceptions
	regulations implementing the federal Fair Housing Amendments Act of 1988 and Title IX of the Education Amendments of 1972." UTAH CODE ANN. § 57-21-3(7)
VERMONT	
Sexual orientation	Employment: VT. STAT. ANN. tit. xxi, § 495; VT. STAT. ANN. tit. xxi, § 1621 Exception: "The provisions of this section prohibiting discrimination on the basis of sexual orientation and gender identity shall not be construed to prohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised, or controlled by or in connection with a religious organization, from giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment which is calculated by the organization to promote the religious principles for which it is established or maintained." VT. STAT. ANN. tit. xxi, § 495 (e)
Sexual	Housing: VT. STAT. ANN. tit. ix, §

Protected Category	**Provisions and Exceptions**
orientation	4503
Sexual orientation	Public Accommodation: VT. STAT. ANN. tit. ix, § 4502 Exception: "(l) Notwithstanding any other provision of law, a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods, or privileges is related to the solemnization of a marriage or celebration of a marriage. Any refusal to provide services, accommodations, advantages, facilities, goods, or privileges in accordance with this subsection shall not create any civil claim or cause of action. This subsection shall not be construed to limit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction

Protected Category	**Provisions and Exceptions**
	with a religious organization from selectively providing services, accommodations, advantages, facilities, goods, or privileges to some individuals with respect to the solemnization or celebration of a marriage but not to others." VT. STAT. ANN. tit. ix, § 4502(l)
Gender & gender identity	Employment: VT. STAT. ANN. tit. xxi, § 495; VT. STAT. ANN. tit. xxi, § 1621 Exception: "The provisions of this section prohibiting discrimination on the basis of sexual orientation and gender identity shall not be construed to prohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised, or controlled by or in connection with a religious organization, from giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment which is calculated by the organization to promote the religious principles for which it is established or maintained." VT. STAT. ANN. tit. xxi, § 495 (e).

Protected Category	**Provisions and Exceptions**
Gender & gender identity	Housing: VT. STAT. ANN. tit. ix, § 4503
Gender & gender identity	Public Accommodation: VT. STAT. ANN. tit. ix, § 4502 Exception: "(l) Notwithstanding any other provision of law, a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods, or privileges is related to the solemnization of a marriage or celebration of a marriage. Any refusal to provide services, accommodations, advantages, facilities, goods, or privileges in accordance with this subsection shall not create any civil claim or cause of action. This subsection shall not be construed to limit a religious organization, association, or society, or any nonprofit institution or

Protected Category	**Provisions and Exceptions**
	organization operated, supervised, or controlled by or in conjunction with a religious organization from selectively providing services, accommodations, advantages, facilities, goods, or privileges to some individuals with respect to the solemnization or celebration of a marriage but not to others." VT. STAT. ANN. tit. ix, § 4502(l)
Marital status	Housing: VT. STAT. ANN. tit. ix, § 4503
Marital status	Public Accommodation: VT. STAT. ANN. tit. ix, § 4502 Exception: "(l) Notwithstanding any other provision of law, a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods, or privileges is related to the solemnization of a marriage or celebration of a

Protected Category	Provisions and Exceptions
	marriage. Any refusal to provide services, accommodations, advantages, facilities, goods, or privileges in accordance with this subsection shall not create any civil claim or cause of action. This subsection shall not be construed to limit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization from selectively providing services, accommodations, advantages, facilities, goods, or privileges to some individuals with respect to the solemnization or celebration of a marriage but not to others." VT. STAT. ANN. tit. ix, § 4502(l)
VIRGINIA	
Gender	Government Contracts: VA. CODE ANN. § 2.2-4201; VA. CODE ANN. § 2.2-4311
Gender	Employment: VA. CODE ANN. § 2.2-3903
Gender	Housing: VA. CODE ANN. § 36-96.3
WASHINGTON	
Sexual orientation	Housing: WASH. REV. CODE ANN. § 49.60. 222

Protected Category	**Provisions and Exceptions**
Sexual orientation	Employment: WASH. REV. CODE ANN. 49.60.180 Exception: "'Employer' includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit" WASH. REV. CODE ANN. § 49.60.040(11)
Sexual orientation	Public Accommodation: WASH. REV. CODE ANN. 49.60.215 Exception: "[P]ublic accommodation" does not "apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution." WASH. REV. CODE ANN. § 49.60.040(3)
Gender	Housing: WASH. REV. CODE ANN. § 49.60.222 Exception: "Notwithstanding any other provision of this chapter, it shall not be an unfair practice or a denial of civil rights for any public or private educational institution to separate the sexes or give preference to or limit use of dormitories, residence halls, or

Protected Category	**Provisions and Exceptions**
	other student housing to persons of one sex or to make distinctions on the basis of marital or families with children status." WASH. REV. CODE ANN. § 49.60.222(3)
Gender	Employment: WASH. REV. CODE ANN. 49.60.180 Exception: "'Employer' includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit." WASH. REV. CODE ANN. § 49.60.040(11)
Gender	Public Accommodation: WASH. REV. CODE ANN. 49.60.215 Exception: "[P]ublic accommodation" does not "apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution." WASH. REV. CODE ANN. § 49.60.040(3).
Marital status	Housing: WASH. REV. CODE ANN. § 49.60. 222 Exception: "Notwithstanding any other provision of this chapter, it

Protected Category	Provisions and Exceptions
	shall not be an unfair practice or a denial of civil rights for any public or private educational institution to separate the sexes or give preference to or limit use of dormitories, residence halls, or other student housing to persons of one sex or to make distinctions on the basis of marital or families with children status." WASH. REV. CODE ANN. § 49.60.222(3)
Marital status	Employment: WASH. REV. CODE ANN. § 49.60.180 Exception: "'Employer' includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit" WASH. REV. CODE ANN. § 49.60.040(11)
WEST VIRGINIA	
Gender	Employment: W. VA. CODE § 5-11-9
Gender	Public Accommodations: W. VA. CODE § 5-11-9
Gender	Housing: W. VA. CODE § 5-11A-5
WISCONSIN	
Sexual	Employment: WIS. STAT. § 111.321; WIS. STAT. § 111.36

Protected Category	**Provisions and Exceptions**
Orientation	
Sexual Orientation	Government Contractors: WIS. STAT. § 16.765
Sexual Orientation	Housing: WIS. STAT. § 106.50
Sexual Orientation	Public Accommodation: WIS. STAT. § 106.52
Gender	Employment: WIS. STAT. § 111.321; WIS. STAT. § 111.36
Gender	Government Contractors: WIS. STAT. § 16.765
Gender	Government Contractors: WIS. STAT. § 16.765
Gender	Government Contractors: WIS. STAT. § 16.765
Marital Status	Employment: WIS. STAT. § 111.321
Marital Status	Housing: WIS. STAT. § 106.50
WYOMING	
Gender	Employment: WYO. STAT. ANN. § 27-9-105 Exception: The definition of an "employer" subject to non-discrimination requirements excludes "religious organizations or associations." WYO. STAT. ANN. § 27-9-105
Gender	Public Accommodations: WYO. STAT. ANN. § 6-9-101

December 18, 2012

BY EMAIL

The Honorable Pat Quinn, Governor of Illinois
207 State Capitol Bldg.
Springfield, IL 62706

Re: Religious Liberty Implications of Legalizing Same-Sex Marriage

Dear Governor Quinn:

We write to urge the Illinois General Assembly to ensure that any bill legalizing same-sex marriage does not infringe the religious liberty of organizations and individuals who, for religious reasons, conscientiously object to facilitating same-sex marriages. Providing religious protections in any same-sex marriage bill honors America's long and rich tradition of religious freedom and tolerance.

If the Legislature legalizes same-sex marriage, it is possible to do so without infringing on religious liberty. The contentious debate in New York, Washington, Maryland and elsewhere surrounding same-sex marriage proves the wisdom of constructive, good-faith attempts both to grant legal recognition to same-sex marriage *and* to protect religious liberty for conscientious objectors.[1]

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[1] An Appendix is attached summarizing the core religious liberty protections afforded by jurisdictions that currently recognize or recently considered enacting same-sex marriage.

This letter analyzes the potential effects of same-sex marriage on religious conscience in Illinois and proposes a solution to address the conflicts: a specific religious liberty protection that should be an integral part of any proposed legislation. This proposal clarifies that individuals and organizations may refuse to provide services for a wedding if doing so would violate deeply held beliefs, while ensuring that the refusal creates no substantial hardship for the couple seeking the service. We write not to support or oppose same-sex marriage in Illinois. Rather, our aim is to define a "middle way" to address the needs of same-sex couples while honoring and respecting religious liberty.[2]

As this letter details, the conflicts between same-sex marriage and religious conscience will be both certain and considerable if adequate protections are not provided. Without adequate safeguards, many religious individuals will be forced to engage in conduct that violates their deepest religious beliefs, and religious organizations will be constrained in crucial aspects of their religious exercise. We urge the Illinois General Assembly to take the time and care to ensure that the legalization of same-sex marriage does not restrict the inalienable right of religious liberty. Doing so is entirely consistent with the text of the Illinois State Constitution that each member of the General Assembly has sworn to uphold and protect. Since its adoption in 1818 to the present text, the Illinois

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[2] While we have a range of views on the underlying issue of same-sex marriage, we wholeheartedly share the belief that when same-sex marriage is recognized it should be accompanied by corresponding protections for religious liberty.

Constitution protects religious freedom in the strongest of terms.[3]

Part A of this letter proposes a specific religious conscience protection that will defuse the vast majority of conflicts between same-sex marriage and religious liberty. Part B provides examples of precedent for the protection we propose. Part C details the sorts of legal conflicts that will arise if same-sex marriage is legalized without reasonable protections for religious liberty.

A. Proposed Religious Conscience Protection

The many potential conflicts between same-sex marriage and religious liberty are avoidable.[4] But they are avoidable only if the Illinois General Assembly takes the time and effort to craft the "robust religious-conscience exceptions" to same-sex marriage that leading voices on both sides of the public debate over same-sex marriage call for.[5] The juncture for balancing religious liberty and legal recognition of same-sex unions is now.[6]

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[3] *See* ILL. CONST., art. 1, sec. 3 ("The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed[.]").

[4] *See, e.g.*, Douglas Laycock, University of Virginia School of Law, *Afterword* in SAME-SEX MARRIAGE AND RELIGIOUS LIGERTY: EMERGING CONFLICTS, Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson, eds. 191-97 (Rowman & Littlefield 2008) [hereinafter Laycock] (detailing the scope of "avoidable" and "unavoidable" conflicts).

[5] *See* David Blankenhorn & Jonathan Rauch, *A Reconciliation on Gay Marriage*, N.Y. TIMES, Feb. 22, 2009, at WK11, *available at* http://www.nytimes.com/2009/02/22/opinion/ 22rauch.html?_r =1 (arguing for recognition of same-sex unions together with religious conscience protections).

Any proposed marriage bill can provide reasonable, carefully tailored protections for religious conscience by including a simple "marriage conscience protection" modeled, in part, on existing conscience protections in Illinois' nondiscrimination laws, which provide religious protections in the strongest of terms.[7] The "marriage conscience protection" would provide as follows:

Section ___

(a) Religious organizations protected.

No religious or denominational organization, no organization operated for charitable or educational purposes which is supervised or controlled by or in connection with a religious organization, and no individual employed by any of the foregoing organizations, while acting in the scope of that employment, shall be required to

(1) provide services, accommodations, advantages, facilities, goods, or privileges for a purpose re-

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[6] Though conscience protections should also extend to existing civil unions, we do not address civil unions here.

[7] *See, e.g.*, 775 ILL. COMP. STAT. 5/5-102.(1)(b) (2012) ("With respect to a place of public accommodation defined in paragraph (11) of Section 5-101, the exercise of free speech, free expression, free exercise of religion or expression of religiously based views by any individual or group of individuals that is protected under the First Amendment to the United States Constitution or under Section 3 of Article I, or Section 4 of Article I, of the Illinois Constitution, shall not be a civil rights violation.")

lated to the solemnization or celebration of any marriage; or

(2) solemnize any marriage; or

(3) treat as valid any marriage

if such providing, solemnizing, or treating as valid would cause such organizations or individuals to violate their sincerely held religious beliefs.

(b) Individuals and small businesses protected.

(1) Except as provided in paragraph (b)(2), no individual, sole proprietor, or small business shall be required to

(A) provide goods or services that assist or promote the solemnization or celebration of any marriage, or provide counseling or other services that directly facilitate the perpetuation of any marriage; or

(B) provide benefits to any spouse of an employee; or

(C) provide housing to any married couple

if providing such goods, services, benefits, or housing would cause such individuals or sole proprietors, or owners of such small businesses, to violate their sincerely held religious beliefs.

(2) Paragraph (b)(1) shall not apply if

(A) a party to the marriage is unable to obtain any similar good or services, employment benefits, or housing elsewhere without substantial hardship; or

(B) in the case of an individual who is a government employee or official, if another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay; *provided that* no judicial officer authorized to solemnize marriages shall be required to solemnize any marriage if to do so would violate the judicial officer's sincerely held religious beliefs.

(3) A "small business" within the meaning of paragraph (b)(1) is a legal entity other than a natural person

(A) that provides services which are primarily performed by an owner of the business; or

(B) that has five or fewer employees; or

(C) in the case of a legal entity that offers housing for rent, that owns five or fewer units of housing.

(c) No civil cause of action or other penalties.

No refusal to provide services, accommodations, advantages, facilities, goods, or privileges protected by this section shall

(1) result in a civil claim or cause of action challenging such refusal; or

(2) result in any action by the State or any of its subdivisions to penalize or withhold benefits from any protected entity or individual, under any laws of this State or its subdivisions, including but not limited to laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status.[8]

This proposed legislation has several important features. First, the language parallels existing protections in Illinois nondiscrimination law which articulates that "the exercise of free speech, free expression, free exercise of religion or expression of religiously based views by any individual or group of individuals that is protected under the First Amendment to the United States Constitution or under Section 3 of Article I, or Section 4 of Article I, of the Illinois Constitution, shall not be a civil rights violation."[9] The language also significantly mirrors, in part, the express protections provided in the Connecticut, District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington same-sex marriage laws for religious organizations. Many of these laws protect, among other things, the conscientious refusal “to provide services, accommodations, advantages, facilities, goods, or privileges . . . related to the solemnization of a marriage.”[10]

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[8] Some have expressed concern that the proposed text would permit objections to interracial marriage. Although such objections are likely to be rare, if not non-existent, this concern is readily addressed by a simple proviso that would read: "Notwithstanding any of the foregoing provisions, this section does not change any provision of law with respect to discrimination on the basis of race."

[9] 775 ILL. COMP. STAT. 5/5-102.1(b) (2012) ("With respect to a place of public accommodation defined in paragraph (11) of Section 5-101, the exercise of free speech, free expression, free exercise of religion or expression of religiously based views by any individual or group of individuals that is protected under the

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First Amendment to the United States Constitution or under Section 3 of Article I, or Section 4 of Article I, of the Illinois Constitution, shall not be a civil rights violation.); 775 ILL. COMP. STAT. 5/5-103 (2012) (Excluding any “private club, or other establishment not in fact open to the public, except to the extent that the goods, services, facilities, privileges, advantages, or accommodations of the establishment are made available to the customers or patrons of another establishment that is a place of public accommodation” from the definition of a public accom[m]odation).

[10] *See* COMM. PUBLIC ACT NO. 09-13 (2009) §§ 17-19, *available at* http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm (exempting religious organizations from “provid[ing] services, accommodations, advantages, facilities, goods, or privileges . . . related to” the “solemnization” or “celebration” of a marriage, and providing separate exemptions for religious adoption agencies and fraternal benefit societies); Religious Freedom and Civil Marriage Equality Amendment Act of 2009, D.C. Law No. L18-0110 (enacted Dec. 18, 2009, effective Mar. 3, 2010,), *available at* http://www.dccouncil.washington.dc.us/ lims/legisation.aspx?LegNo=B18-0482 (exempting religious societies and religiously affiliated non-profits from providing “accommodations, facilities, or goods for a purpose related to the solemnization or celebration of a same-sex marriage, or the promotion of same-sex marriage through religious programs, counseling, courses, or retreats...”); 2012 Md. Laws ch. 2 § 3 (to be codified at Md. Code Ann., Fam. Law §§ 2-201–2-202) (exempting religious organizations from the “solemnization of a marriage or celebration of a marriage that is in violation of the entity's religious beliefs” or “the promotion of marriage through any social or religious programs or services, in violation of the entity's religious beliefs”) (N.H. REV. STAT. §

Second, this proposed legislation lists the primary areas of Illinois law where the refusal to treat a marriage as valid is likely to result in liability, penalty, or denial of government benefits ("laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status").

Third, this proposed legislation provides protection only when providing services related to a marriage, solemnizing a marriage, or being forced to treat a marriage as valid would "violate . . . sincerely held religious beliefs." This phrase is drawn from numerous court cases discussing the First Amendment to the U.S. Constitution and ensures that the religious conscience protections will apply only to a "violation" of "sincere" beliefs that are "religious"—not to situations that merely make religious people uncomfortable, not to insincere beliefs asserted as a pretext for discrimination, and not to non-religious moral beliefs.

457:37 (exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges . . . related to" the "solemnization," "celebration," or "promotion" of a marriage); N.Y. DOM. REL. § 10-b (1) (2011) ("a religious entity . . . benevolent [order] . . . or a not-for-profit corporation operated, supervised, or controlled by a religious corporation . . . shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage"); 9 VT. STAT. ANN. § 4502(l) (2009) (exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges . . . related to" the "solemnization" or "celebration" of a marriage); Wash. Rev. Code § 26.04.010(2)(5) (providing that religious organizations need not "provide accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage").

Fourth, this proposed legislation provides vital protections in subsection (b) for individuals of religiously informed conscience who own sole proprietorships and small businesses. We explain the need for such protection in Parts C and F below.

Finally, this proposed legislation recognizes that religious accommodations might not be without cost for same-sex couples, such as the need to find a different wedding photographer or caterer if their original choice must decline for reasons of conscience. In order to address this issue, subsection (b)(2) ensures that a same-sex couple can obtain the service, even from conscientious objectors, when the inability to find a similar service elsewhere would impose a substantial hardship on the couple. But because this hardship exception could force organizations or individuals to violate their religious beliefs, it should be available only in cases of substantial hardship, not mere inconvenience or symbolic harm. The language in subsection (b)(2)(B) also ensures that no government employee or official (such as a county clerk) may act as a choke point on the path to marriage. So, for example, no government employee can refuse on grounds of conscience to issue a marriage license unless another government employee is promptly available and willing to do so. These sorts of override protections are common in other laws protecting the right of conscientious objection, especially in the health care context.[11]

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[11] *See, e.g.*, IOWA CODE § 146.1 (2005) ("An individual who may lawfully perform, assist, or participate in medical procedures which will result in an abortion shall not be required against that individual's religious beliefs or moral convictions to perform, assist, or participate in such procedures. . . . Abortion does not include medical care which has as its primary purpose the

B. Precedent for Religious Conscience Protections

There is ample precedent for the type of conscience protection we have proposed. As noted above, Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington have already enacted religious exemptions as part of their legislation implementing same-sex marriage.[12] Similarly, Illinois' existing nondiscrimination laws on employment provide a categorical exemption for religious organizations.[13] And federal nondiscrimination statutes provide protection for religious and conscientious objectors in many different contexts.[14]

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treatment of a serious physical condition requiring emergency medical treatment necessary to save the life of a mother."); S.C. CODE ANN. §§ 44-41-40, (2002) ("No private or non-governmental hospital or clinic shall be required . . . to permit their facilities to be utilized for the performance of abortions; *provided*, that no hospital or clinic shall refuse an emergency admittance."); TEX. OCC. CODE ANN. § 103.004 (Vernon 2004) ("A private hospital or private health care facility is not required to make its facilities available for the performance of abortion *unless* a physician determines that the life of the mother is immediately endangered."(emphasis added)).

[12] *See* note 10 above and pages 14-15 below.

[13] *See* 775 ILL. COMP. STAT. 5/2-101 (exempting "any religious corporation, association, educational institution, society, or non-profit nursing institution conducted by and for those who rely upon treatment by prayer through spiritual means in accordance with the tenets of a recognized church or religious denomination with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, society or non-profit nursing institution of its activities.").

[14] *See, e.g.*, 32 C.F.R. § 1630.11 (accommodating conscientious objectors to military service); 42 U.S.C. § 300a-7 (accommodat-

In short, protecting religious conscience is very much a tradition of both America and Illinois. We urge the Illinois General Assembly to continue that "middle way" accommodation of interests.

The religious conscience protection that we have proposed would alleviate the vast majority of the conflicts between same-sex marriage and religious liberty, while still allowing for full equality of treatment and respect for same-sex marriages. It has ample precedent in both Illinois and U.S. law. And it represents the best in the American and Illinois constitutional tradition of protecting the inalienable right of conscience.

C. Conflicts Between Same-Sex Marriage and Religious Liberty

In the only book-length comprehensive scholarly work on same-sex marriage and religious liberty,[15] legal scholars on both sides of the same-sex marriage

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ing health care professionals who conscientiously object to participating in medical procedures such as abortion or sterilization); 42 U.S.C. § 2000bb *et seq.* (Religious Freedom Restoration Act lifts federal-created burdens on religious exercise).

[15] SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson, eds. (Rowman & Littlefield 2008) (including contributions from both supporters and opponents of same-sex marriage). *See also* Thomas Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206 (2010); Marc D. Stern, *Liberty v. Equality; Equality v. Liberty*, 5 NW. J.L. & SOC. POL'Y 307 (2010); Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL'Y 318 (2010).

debate agreed that codifying same-sex marriage ***without*** providing robust religious accommodations will create widespread and unnecessary legal conflicts—conflicts that will work a "sea change in American law" and will "reverberate across the legal and religious landscape."[16] The conflicts between religious conscience and same-sex marriage generally take one of two forms. First, if same-sex marriage is legalized without appropriate statutory accommodations, religious organizations and individuals that object to same-sex marriage will face new lawsuits under the state nondiscrimination act and other similar laws. So will many small businesses, which are owned by individual conscientious objectors. Likely lawsuits include claims where:

- Individuals of conscience, who run a small business, such as wedding photographers, florists, banquet halls, or making wedding cakes in one's home, can be sued under public accommodations laws for refusing to offer their services in connection with a same-sex marriage ceremony.[17]

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[16] *Id.* Marc Stern, *Same-Sex Marriage and the Churches* at 1 [hereinafter "Stern"]. *See also* Laycock at 191-7 (detailing the scope of "avoidable" and "unavoidable" conflicts); Robin Fretwell Wilson, Washington and Lee University School of Law, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes between Religion and the State*, 53 B.C. L. REV. 1417 (2012) *available at* http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1130&context=wlufac.

[17] *See* 775 ILL. COMP. STAT. 5/2-101 (exempting "any religious corporation, association, educational institution, society, or non-profit nursing institution conducted by and for those who rely upon treatment by prayer through spiritual means in accordance with the tenets of a recognized church or religious denomination with respect to the employment of individuals of a par-

- Religious summer camps, day care centers, retreat centers, counseling centers, meeting halls, or adoption agencies can be sued under public accommodations laws for refusing to offer their facilities or services to members of a same-sex marriage.[18]

- A church or other religious nonprofit that dismisses an employee, such as an organist or secretary, for entering into a same-sex marriage can be sued under employment discrimination laws that prohibit discrimination on the basis of marital status.[19]

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ticular religion to perform work connected with the carrying on by such corporation, association, educational institution, society or non-profit nursing institution of its activities."); *Elane Photography v. Willock*, 284 P.3d 428, N.M.App., May 31 , 2012 cert. granted, 2012-NMCERT-008 Aug. 16, 2012. (New Mexico photographer fined for refusing on religious grounds to photograph a same-sex commitment ceremony); Stern at 37-39; *see also Issues Brief: Same-Sex Marriage and State Anti-Discrimination Laws* at 3-5, *available at* http://www.becketfund.org/files /34a97.pdf [hereinafter "Issues Brief"].

[18] *Bernstein v. Ocean Grove Camp Meeting Ass'n*, Num.. CRT 6145-09 (Off. of Admin. Law decision issued January 12, 2012. Available at http://www.adfmedia.org/files/OGCMA-Bernstein Ruling.pdf) (finding that a Methodist organization likely violated public accommodations law by denying same-sex couples use of its wedding pavilion); *Butler v. Adoption Media*, 486 F. Supp.2d 1022 (N.D. Cal. 2007) (administrators of Arizona adoption facilitation website found subject to California's public accommodations statute because they refused to post profiles of same-sex couples as potential adoptive parents); *see also* Stern at 37-39; Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 BYU J. PUB. L. 475 (2008) (describing clashes over adoptions by same-sex couples).

[19] Stern at 48-52; Issues Brief at 3-5.

The second form of conflict involving religious organizations and individuals (or the small businesses that they own) that conscientiously object to same-sex marriage is that they will be labeled unlawful "discriminators" under state or municipal laws and thus face a range of penalties at the hand of state agencies and local governments, such as the withdrawal of government contracts or exclusion from government facilities. For example:

- A religious college, hospital, or social service organization that refuses to provide its employees with same-sex spousal benefits can be denied access to government contracts or grants on the ground that it is engaging in discrimination that contravenes public policy.[20]

- A religious charity or fraternal organization that opposes same-sex marriage can be denied access to government facilities, such as a lease on government property or participation in a government-sponsored employee charitable campaign.[21]

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[20] *See Catholic Charities of Maine v. City of Portland*, 304 F. Supp.2d 77 (D. Me. 2004) (upholding ordinance forcing religious charity either to extend employee spousal benefit programs to registered same-sex couples, or to lose access to all city housing and community development funds); Don Lattin, *Charities Balk at Domestic Partner, Open Meeting Laws*, S.F. CHRON., July 10, 1998, at A-1 (describing how the Salvation Army lost $3.5 million in social service contracts with the City of San Francisco because it refused, on religious grounds, to provide benefits to the same-sex partners of its employees).

[21] *See Evans v. City of Berkeley*, 38 Cal.4th 1 (Cal. 2006) (affirming revocation of a boat berth subsidy at public marina due to

- Doctors, psychologists, social workers, counselors, and other professionals who conscientiously object to same-sex marriage can have their licenses revoked.[22]

- Religious fraternal organizations or other nonprofits that object to same-sex marriage can be denied food service licenses, adoption agency licenses, child care licenses, or liquor licenses on the ground that they are engaged in unlawful discrimination.[23]

Boy Scouts' exclusion of atheist and openly gay members); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (holding that the Boy Scouts may be excluded from the state's employee charitable contributions campaign for denying membership to openly gay individuals).

[22] *See* Stern at 22-24 (noting that a refusal to provide counseling services to same-sex couples could be "considered a breach of professional standards and therefore grounds for the loss of a professional license"); *see also* Patricia Wen, *"They Cared for the Children": Amid Shifting Social Winds, Catholic Charities Prepares to End Its 103 Years of Finding Homes for Foster Children and Evolving Families*, BOSTON GLOBE, June 25, 2006, at A1 (explaining how Massachusetts threatened to revoke the adoption license of Catholic Charities for refusing on religious grounds to place foster children with same-sex couples); Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 BYU J. PUB. L. 475 (2008) (describing dismissals and resignations of social services workers where conscience protections were not available).

[23] *See, e.g.*, Stern at 19-22 (noting that many state regulators condition licenses on compliance with nondiscrimination requirements).

- Religious colleges or professional schools can have their accreditation revoked for refusing to recognize the validity of same-sex marriages.[24]

- Church-affiliated organizations can have their tax exempt status stripped because of their conscientious objection to same-sex marriage.[25]

All of these conflicts either did not exist before, or will significantly intensify after, the legalization of same-sex marriage. Thus, legalizing same-sex marriage without adequate protections for religious liberty will have at least two unintended consequences: It will harm religious organizations and individuals of conscience, *and it will spawn costly, unnecessary conflicts, many of which will lead to litigation.*[28]

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[24] Stern at 23 (describing how religiously affiliated law schools have unsuccessfully challenged diversity standards imposed by the American Bar Association as a condition of accreditation); D. Smith, *Accreditation Committee Decides to Keep Religious Exemption*, 33 MONITOR ON PSYCHOLOGY 1 (Jan. 2002) (describing a proposal of the American Psychology Association to revoke the accreditation of religious colleges and universities that have codes of conduct forbidding homosexual behavior), *available at* http://www.apa.org/monitor/jan02/exemption.html.

[25] Jill P. Capuzzo, *Group Loses Tax Break Over Gay Union Issue*, N.Y. TIMES, Sept. 18, 2007 (describing the case of *Bernstein v. Ocean Grove Camp Meeting Ass'n*, in which New Jersey revoked the property tax exemption of a beach-side pavilion controlled by an historic Methodist organization, because it refused on religious grounds to host a same-sex civil union ceremony); Douglas W. Kmiec, Pepperdine University School of Law, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion* in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 107-21 (describing attacks on tax exemptions for religious organizations with objections to same-sex marriage); Jonathan Turley, George Washington University Law School, *An Unholy Union* in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 59-76 (arguing for same-sex marriage but against withdrawal of tax exemptions for religious organizations with conscientious objections).

D. The Need for Robust Religious Liberty Protection

In 2012, House Bill 5170 was introduced in the Illinois General Assembly to enact same-sex marriage. This bill failed to provide sufficient protections for religious conscience. Section 209(a) of the bills states "[n]othing in this Act shall be construed to require any religious denomination...or any officiant acting as a representative of a religious denomination...to solemnize any marriage."[27] This bill offers *no protection* to those with conscientious religious objections to same-sex marriage.

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[28] Filed lawsuits are often just the tip of the iceberg with respect to conflicts over a given law and a claimed right. Most conflicts get resolved before a suit is filed and comes to the attention of the public. Some employers will back down when suit is threatened. Others will pay a settlement and walk away. Some employers will be quietly "chilled" even though they would prefer another course of action. What matters is the number of conflicts rather than the number of lawsuits. This data is not available, however, and so cannot be empirically studied. Nonetheless, there need only be a few conflicts for there to be a crisis of conscience. Each conflict is a profound violation of religious liberty. Moreover, even assuming that there are a small number of actual conflicts (as some critics claim), then there will be a correspondingly few number of same-sex couples affected by the religious exemptions we recommend. Finally, discrimination lawsuits often increase dramatically over time, so an important question is how many lawsuits against conscientious objectors will be filed 20 years from now. *See, e.g.*, Vivian Berger *et al.*, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 45 (2005) ("The number of employment discrimination lawsuits rose continuously throughout the last three decades of the twentieth century. In the federal courts, such filings grew 2000% . . . .").

As explained below, *this provision would have provided less protection for religious liberty than every other state that has successfully enacted same-sex marriage legislation.* The bills conferred on religious organizations only that protection already guaranteed by the U.S. Constitution and Illinois Constitution. Individual clergy or religious organizations that refuse to perform same-sex marriage receive ersatz protection, for they are already protected by the U.S. Constitution. Indeed, with or without this language, "[n]o one seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to them."[28] Focusing on the issue of "forced officiating" is a straw-man argument calculated to distract the uninformed from real situations where religious conscience is at risk.

What the proposed legislation left out was considerable:

- It provides no protection from the loss of government benefits for refusing to recognize a same-sex marriage.
- It provides no protection for individual objectors.

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[27] House Bill 5170 (2012).

[28] Stern at 1.

- It provides no protection to religious organizations from private lawsuits brought under Illinois' nondiscrimination laws.

This proposed legislation was grossly lacking as the following Parts explain in more detail.

a. No Protection from Government Penalty

A good deal of misunderstanding surrounds religious liberty exemptions. Exemptions serve the important function of protecting conscientious objectors from private lawsuits. But exemptions also serve the purpose of insulating conscientious objectors from penalties at the hand of the government.[29] How might this occur?

An objector may be penalized by losing access to government grant programs or other state or local benefits. Thus, in *Catholic Charities of Maine v. City of Portland*, the district court upheld a Portland ordinance that forced a religious charity either to extend employee spousal benefits to registered same-sex couples, or to lose eligibility to all city housing and community development funds.[30] Similarly, the Salvation Army lost $3.5 million in social service contracts with the City of San Francisco because it refused, on religious grounds, to provide benefits to the same-sex partners of its employees.[31] The Boy Scouts of America have litigated, *and lost*, numerous suits over a state's authority to deny them access to benefits that others receive, when the law was otherwise silent.[32] Closer to home, Catholic adoption agencies in Illinois recently lost contracts with the state because they refused to place children in the homes of unmarried cohabitating couples.[33] The state claimed that the Catholic adoption agencies had violated the state's newly enacted civil union law.[34] That law contains no exemption for religious civil service agencies and thus provides no protection against government penalties for conscientious objectors. Although this case implicated a civil union law, the consequences for a religious organization in Illinois would be indistinguishable under the proposed same-sex marriage legislation without these important exemptions that we recommend.

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[29] Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS at 81.

[30] 304 F. Supp. 2d 77 (D. Me. 2004); *see also* footnote 19 above.

[31] *See* Don Lattin, *Charities Balk at Domestic Partner, Open Meeting Laws*, S.F. CHRON., July 10, 1998, at A-1.

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[32] *See Evans v. City of Berkeley*, 38 Cal.4th 1 (Cal. 2006) (affirming revocation of a boat berth subsidy at public marina due to Boy Scouts' exclusion of atheist and openly gay members); *Cradle of Liberty Council v. City of Philadelphia*, 2008 WL 4399025 (E.D. Pa. Sept. 25, 2008) (dismissing breach of contract complaints arising from city's termination of a lease with the Boy Scouts based on the Boy Scouts' policies regarding homosexual conduct); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (holding that the Boy Scouts may be excluded from the state's workplace charitable contributions campaign for denying membership to openly gay individuals).

These results are possible because of the United States Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990) (concluding that neutral and generally applicable laws do not violate the First Amendment no matter how much they burden an individual's or organization's exercise of religion). These outcomes demonstrate our point: legislative relief is needed to protect religious conscience.

[33] *Catholic Charities of the Diocese of Springfield v. State*, 2011 WL 3655016 (2011). In deciding a motion for summary judgment, the state trial judge held that Catholic Charities had no property right in their contracts from the state, and thus were not entitled to due process when the state decided not to extend the contract to the charities. *Id.* The judge expressly declined to address Catholic Charities' arguments that the state violated its rights under the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.*, the Illinois Religious Freedom Protection & Civil Union Act, 750 ILCS 75/1 *et seq.*, and the Illinois Religious Freedom Restoration Act, 775 ILCS 35/1 *et seq. Id.* at n. 1.

Church-affiliated organizations have lost their exemption from taxes as well. In New Jersey, the Ocean Grove Camp Meeting Association, a group owned and operated by an historic Methodist organization, refused on religious grounds to host the same-sex civil union ceremonies of two lesbian couples in its beachside pavilion.[35] Local authorities stripped the group of their exemption from local property taxes on the pavilion, and billed them for $20,000.[36]

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[34] Illinois Religious Freedom Protection & Civil Union Act, 750 ILCS 75/1 *et seq.*

[35] *See* Jill P. Capuzzo, Group Loses Tax Break Over Gay Union Issue, N.Y. TIMES, Sept. 18, 2007 (describing the case of *Bernstein v. Ocean Grove Camp Meeting Ass'n*).

[36] *See* Bill Bowman, *$20G Due in Tax on Boardwalk Pavilion: Exemption Lifted in Rights Dispute*, ASBURY PARK PRESS, Feb. 23, 2008.

Some exemption opponents argue that *Ocean Grove* is irrelevant to the same-sex marriage debate because the tax exemption at issue was conditioned upon the Camp Meeting Association's willingness to open the property for the entire public. That argument, however, overlooks two points. First, while the tax exemption in *Ocean Grove* was based on an open-space requirement, nothing stops governments from conditioning tax exemptions on other things, such as compliance with state and local nondiscrimination laws or, more generally, being organized for

The Camp Meeting Association did not just lose its tax exemption from taxes on the pavilion. It was also investigated by the New Jersey Department of Civil Rights for an alleged violation of the New Jersey Law Against Discrimination. In fact, the Department of Civil Rights has determined that probable cause exists to find a violation. Thus, the case is not only about losing tax-exempt status, but also about being penalized for allegedly violating state nondiscrimination laws.[37]

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the "public interest." *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983). Thus, just as governments can strip a tax exemption because an organization cannot in good conscience open its property to the entire public, so also governments can strip a tax exemption because it concludes that an organization's conscientious objection to same-sex marriage violates nondiscrimination laws or "public policy" more generally. Second, when the Camp Meeting Association agreed to open its property to the entire public, it likely never contemplated the legalization of civil unions or same-sex marriage, much less that it would be asked to facilitate such a marriage in violation of its religious beliefs. *Ocean Grove* thus illustrates the fact that legalizing same-sex marriage will create significant conflicts of conscience that were never contemplated before.

[37] As the Third Circuit explained, "The federal complaint arose out of the [New Jersey Department of Civil Right's] investigation into whether the Association's refusal to permit couples to use the Boardwalk Pavilion for civil unions violates the [New Jersey Law Against Discrimination]. Clearly, therefore, New Jersey's interest in eliminating unlawful discrimination is at the center of this dispute." *Ocean Grove Camp Meeting Ass'n of United Methodist Church v. Vespa-Papaleo*, 339 Fed.Appx. 232, 238 (3d Cir. 2009); *See also Catholic Charities of the Diocese of Springfield v. State*, 2011 WL 3655016 (2011).

These impacts on church-affiliated organizations, predicted by scholars,[38] did not result from statutory revocations of tax-exempt status in civil union legislation. Instead, these actions occurred because state law offered no explicit exemption providing otherwise. These experiences drive home the need for explicit protection from penalties by the government.

b. Needed Protection for Individual Objectors

Legal recognition of same-sex marriage can also place a real burden on *individuals* whose objection arises not from anti-gay animus, but from a sincere religious belief in traditional marriage.

Without exemptions for individuals who, for religious reasons, prefer to step aside from same-sex marriage ceremonies, a religious individual who runs a small business, e.g., a baker who makes wedding cakes; a wedding photographer; a caterer; a florist; a reception hall owner; or a seamstress or a tailor, receives no protection at all.[39] The failure to protect such individuals puts the individual to a cruel choice: their conscience or their livelihood.[40] Enacting protections for individual objectors ***is not only necessary but also consistent with the existing public policy*** in Illinois' antidiscrimination statutory scheme.[41]

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[38] Douglas W. Kmiec, Pepperdine University School of Law, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion* in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 107-21 (describing attacks on tax exemptions for religious organizations with objections to same-sex marriage); Jonathan Turley, George Washington University Law School, *An Unholy Union* in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 59-76 (arguing for same-sex marriage but against withdrawal of tax exemptions for religious organizations with conscientious objections).

[39] *See Elane Photography v. Willock*, 284 P.3d 428, N.M.App., May 31 , 2012 cert. granted, 2012-NMCERT-008 Aug. 16, 2012. (New Mexico photographer fined for refusing on religious grounds to photograph a same-sex commitment ceremony); *see*

Some assume that any religious objection to same-sex marriage must be an objection to providing goods or services to gays as such: in other words, that a refusal represents animus towards gay couples. Yet many people of good will view marriage as a religious institution and the wedding ceremony as a religious sacrament. ***For them, assisting with a marriage ceremony has religious significance that commercial ser-***

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also Gay Couple Sues Illinois Bed and Breakfast For Refusing to Host Civil Union Ceremony, HUFFINGTON POST, FEB. 23, 2011.

[40] Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 BYU J. PUB. L. 475 (2008) (describing dismissals and resignations of social service workers where conscience protections were not provided).

[41] Illinois' Human Rights Act contains an exemption in its laws regarding antidiscrimination in real estate transactions for individuals and owner-occupied rental housing accommodations. *See* 775 ILL. COMP. STAT. ANN. 5/3-106(A) (2011) (exempting the owner of a single family home from selling to a member of a protected class if: (a) The owner does not own or have a beneficial interest in more than three single family homes at the time of the sale; (b) The owner or a member of his or her family was the last current resident of the home; (c) The home is sold without the use...of the sales or rental facilities or services of any real estate broker or salesman...; (d) The home is sold without the publication, posting or mailing, after notice, of any advertisement or written notice"); *see also id.* at 5/106(H-1) (allowing "[t]he owner of an owner-occupied residential building with four or fewer units (including the unit in which the owner resides) [to make] decisions regarding whether to rent to a person based upon that person's sexual orientation" without fear of penalty).

vices, like serving food or driving taxis, simply do not. They have no objection generally to providing services, but they object to directly facilitating a marriage.

In short, nondiscrimination statutes enacted years ago now take on a whole new level of significance, with a much greater need for religious exemptions. A Marriage Bill that provides no protection to individual objectors (other than authorized celebrants, who are already protected by the Constitution) would effectively leave any individual who refuses to assist with same-sex wedding ceremonies open to suit, whether framed as sexual orientation discrimination, sex discrimination, or, where applicable, marital-status discrimination.[42]

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[42] Refusals to provide benefits to same-sex partners have been invalidated in other jurisdictions as a form of gender or sex discrimination. For instance, in *In re Levenson*, 560 F.3d 1145 (9th Cir. 2009) (Order of Reinhardt, J.), the court found an employer's denial of coverage for an employee's same-sex partner under the company's employment benefits plan to be sex discrimination. As Judge Reinhardt explained:

> There is no doubt that the denial of Levenson's request that Sears be made a beneficiary of his federal benefits violated the EDR Plan's prohibition on discrimination based on sex or sexual orientation. Levenson was unable to make his spouse a beneficiary of his federal benefits due solely to his spouse's sex. If Sears were female, or if Levenson himself were female, Levenson would be able to add Sears as a beneficiary. Thus, the denial of benefits at issue here was sex-based and can be understood as a violation of the EDR Plan's prohibition of sex discrimination.

See also In re Golinski, 2009 WL 2222884 at *3 (9th Cir. Jan. 13, 2009) (Order of Kozinski, C.J.) (construing Ninth Circuit benefits policy to include same-sex spouses because denial of benefits to same-sex marriage was form of sex-based discrimination);

Of course, exempting individual objectors might not be without cost for same-sex couples. Thus, we argue only for "hardship exemptions"—exemptions that are available only when there is no substantial hardship on same-sex couples.[43]

c. *No Robust and Uniform Protection for Religious Organizations*

Illinois' existing laws provide additional precedent for religious conscience protection. For example, Illinois' Human Rights Act contains important exemptions for certain religious organizations.[44] Similarly,

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Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (plurality op.) (discrimination by state against same-sex spouses raised difficult constitutional questions regarding sex discrimination and sexual orientation discrimination); *In re Marriage Cases*, 183 P.3d 384, 436-40 (Cal. 2008) (same-sex marriage proponents pursued gender discrimination claims ultimately rejected by court); *cf.* WIS. STAT. § 111.36(1)(d) (defining sexual orientation discrimination as a form of gender discrimination).

[43] *See* Part A above.

[44] 775 IL[L]. COMP. STAT. ANN. 5/2-101(B)(2) (in employment nondiscrimination provisions, definition of "employer" "does not include any religious corporation, association, educational institution, society, or non-profit nursing institution conducted by and for those who rely upon treatment by prayer through spiritual means in accordance with the tenets of a recognized church or religious denomination with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, society or non-profit nursing institution of its activities."); 775 IL[L]. COMP. STAT. ANN. 5/3-106(b) (Illinois' fair housing law allows religious organizations to give preference to individuals of the same religion in the "sale, rental or occupancy of a dwelling which it owns or operates for other than a commercial purpose," unless membership in the religion is discriminatory on the basis of another protected category).

federal laws provide protections for religious and conscientious objectors in many different contexts.[45] In short, protecting conscience is very much part of the American and Illinois State tradition. The Legislature should make the effort to continue that tradition.

As explained in Part C above, these nondiscrimination laws can prompt lawsuits against religious organizations that, for religious reasons, cannot recognize or facilitate a same-sex marriage. For example, a nonprofit social service organization, like a Catholic hospital, could be sued for refusing to provide its employees with same-sex spousal benefits in violation of its religious beliefs; religious day care centers, retreat centers, counseling centers, or adoption agencies could be punished under public accommodations laws for refusing to offer their facilities or services to members of a same-sex marriage; or a religious organization that dismisses an employee, such as a youth counselor, for entering into a same-sex marriage can be sued under employment discrimination laws that prohibit discrimination on the basis of marital status.[46]

The proposed bill in Illinois to legalize same-sex marriage provides *considerably less* protection than *every other jurisdiction* where the legislature has considered the issue.[47] Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington have all enacted same-sex marriage laws, and all provide much more protection for religious liberty than the current Illinois bill.[48]

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[45] 32 C.F.R. § 1630.11 (accommodating conscientious objectors to military service); 42 U.S.C. § 300a-7 (accommodating health care professionals who conscientiously object to participating in medical procedures such as abortion or sterilization); 42 U.S.C. § 2000bb *et seq.* (Religious Freedom Restoration Act lifts government-created burdens on religious exercise).

[46] *See, e.g.*, footnotes 15-26 above.

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[47] *See* footnote 10 above and footnote 48 below.

[48] CONN. PUB. ACT. NO. 09-13 (2009) §§ 17-19, *available at* http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm (exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges ... related to" the "solemnization" or "celebration" of a marriage, and providing separate exemptions for religious adoption agencies and fraternal benefit societies); D.C. Law No. L18-0110 (enacted Dec. 18, 2009, effective Mar. 3, 2010,), *available at* http://www.dccouncil.washington.dc.us/lims/legisation.aspx?LegNo=B18-0482 (exempting religious societies and religiously affiliated non-profits from providing "accommodations, facilities, or goods for a purpose related to the solemnization or celebration of a same-sex marriage, or the promotion of same-sex marriage through religious programs, counseling, courses, or retreats..."); MD. H.B. 438 § 4(a) (2011) (enacted Mar. 1, 2012) (allowing religiously affiliated fraternal organizations, like the Knights of Columbus, expressly to limit insurance coverage to spouses in heterosexual marriages); N.H. REV. STAT. § 457:37 (exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges ... related to" the "solemnization," "celebration," or "promotion" of a marriage); N.Y. DOM. REL. § 10-b (1) (2011) ("a religious entity . . . benevolent [order] . . . or a not-for-profit corporation operated, supervised, or controlled by a religious corporation . . . shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage"); 9 VT. STAT. ANN. § 4502(l) (2009) (exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges ... related to" the "solemnization" or "celebration" of a marriage); WASH. REV. CODE § 26.04.010(5)-(6) (exempting religious organizations from "provid[ing] accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage," and protect-

Each of those states protects religious organizations from being forced to offer "services, accommodations, advantages, facilities, goods, or privileges" related to a marriage when doing so would violate their religious beliefs.[49] Although the protections in Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington also fall short in key areas,[50] they still provide far more protection than Illinois' proposed same-sex marriage legislation.

Conclusion

Without adequate safeguards for religious liberty of the sort proposed in this letter, the recognition of same-sex marriage will lead to socially divisive and entirely unnecessary conflicts between the exercise of rights pursuant to the same-sex marriage law and religious liberty. That is a needless and destructive path where both sides lose. There is a balanced "middle way." The Illinois General Assembly should avoid either extreme and be the peacemaker. On that note, we would welcome any opportunity to provide further information, analysis, or testimony to the Illinois General Assembly.

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ing religious organizations from penalty based on their refusal of any of the above accommodations)[.]

[49] *See* footnote 47.

[50] *See* Letter to Iowa Legislators, *available at* http://mirrorofjustice.blogs.com/files/2009-07-12-iowa-letter-final.doc, at 6-7 (letter from the undersigned describing shortcomings of Connecticut, Vermont, and New Hampshire conscience protections).

Respectfully yours,[51]

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[redacted]
All jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington) **expressly** exempt clergy from requirements to solemnize or celebrate marriages inconsistent with their religious faith. *See* Conn. Gen. Stat. §§ 46b-21, 46b-150d (2009); D.C. Code § 46-406(c) (2010); 2012 Md. Laws ch. 2 § 2 (to be codified at Md. Code Ann., Fam. Law §§ 2-201–2-202, 2-406); N.H. REV. STAT. ANN. § 457:37 (2011); N.Y. Dom. Rel. Law § 11(1) (McKinney 2011); Vt. Stat. Ann. tit. 18, § 5144(b) (2010); Wash. Rev. Code § 26.04.010(2)(4) (2012).
All jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington) **expressly** allow a religiously-affiliated group to refuse to "provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage." *See* Conn. Gen. Stat. § 46b-150d; D.C. Code § 46-406(e); 2012 Md. Laws ch. 2 § 3 (to be codified at Md. Code Ann., Fam. Law §§ 2-201–2-202); N.H. REV. STAT. ANN. § 457:37(III); N.Y. Dom. Rel. Law § 10-b(1); Vt. Stat. Ann. tit. 8, § 4502(1); Wash. Rev. Code § 26.04.010(2)(5).

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[52] Table reprinted from Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes between Religion and the State*, 53 B.C. L. REV. 1417 (2012) *available at* http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1130&context=wlufac.

All jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington) **expressly** protect covered religious objectors from **private suit.** *See* Conn. Gen. Stat. § 46b-150d; D.C. Code § 46-406(e); 2012 Md. Laws ch. 2 § 3 (to be codified at Md. Code Ann., Fam. Law §§ 2-201–2-202); N.H. REV. STAT. ANN. § 457:37(III); N.Y. Dom. Rel. Law § 10-b(1); Vt. Stat. Ann. tit. 8, § 4502(1); Wash. Rev. Code § 26.04.010(2)(6).
Six jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, and Washington) **expressly** protect religious objectors, including religiously affiliated **nonprofit organizations**, from being **"penalize[d]"** by the government for such refusals through, e.g., the loss of government grants. *See* Conn. Gen. Stat. § 46b-150d; D.C. Code § 46-406(e)(2); 2012 Md. Laws ch. 2 § 4 (to be codified at Md. Code Ann., Fam. Law §§ 2-201–2-202); N.H. REV. STAT. ANN. § 457:37(III); N.Y. Dom. Rel. Law § 10-b(1); Wash. Rev. Code § 26.04.010(2)(4).
Three jurisdictions (Maryland, the District of Columbia and New Hampshire) **expressly** protect religious organizations from "the promotion of same-sex marriage through religious programs, counseling, courses, or retreats, that is in violation of the religious society's beliefs." *See* D.C. Code § 46-406(e) (2011)). *See also* N.H. Rev. Stat. Ann § 457:37(3) (exempting "the promotion of marriage through **religious counseling**, programs, courses, retreats, or housing designated for married individuals"); MD. CODE ANN., FAM. LAW § 202-3(a)(2) (provided **so long as the program receives no government funding). New York** may protect this. *See* N.Y. Dom. Rel. § 10-b (2) ("... nothing in this article shall limit or diminish the right, ... of any religious or denominational institution or organization, or any organization operated for charitable or educa-

tional purposes, which is operated, supervised or controlled by or in connection with a religious organization ... from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained").

Two jurisdictions (New Hampshire and New York) **expressly** protect religious organizations from "the promotion of marriage through ... **housing** designated for married individuals." *See* N.H. Rev. Stat. Ann § 457:37(3). *See also* N.Y. Dom. Rel. § 10-b (2) ("... [N]othing in this article shall limit or diminish the right, ... of any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization to limit employment or sales or **rental of housing accommodations** or admission to or give preference to persons of the same religion or denomination...").

Three states (Vermont, New Hampshire and Maryland) expressly allow religiously-affiliated fraternal organizations, like the Knights of Columbus, expressly to **limit insurance coverage** to spouses in heterosexual marriages. *See* VT. STAT. ANN. TIT. 8 § 4501(b); N.H. REV. STAT. ANN. § 457:37(IV) (2009); MD. CODE ANN., FAM. LAW § 202-4.

Two states (Connecticut and Maryland) **expressly** allow a religiously-affiliated **adoption or foster care agency** to place children only with heterosexual married couples so long as they don't receive any government funding. (Conn. Pub. Acts No. 09-13 § 19); *See* MD. CODE ANN., FAM. LAW § 202-3(a)(2).

Three states (Maryland, New Hampshire and New York) **expressly** exempt **individual employees** "being managed, directed, or supervised by or in conjunction with" a covered entity from celebrating same-sex marriages if doing so would violate "religious beliefs and faith." *See* N.Y. Dom. Rel. § 10-b (1). *See also* N.H. Rev. Stat. Ann. § 457:37(III); MD. CODE ANN., FAM. LAW § 202-3(b).
Two states (Maryland and New York) include **non-severability clauses** in their legislation. *See* 2011 Sess. Law News of N.Y. Ch. 96 (A. 8520 §5-a) ("This act is to be construed as a whole, and all parts of it are to be read and construed together. If any part of this act shall be adjudged by any court of competent jurisdiction to be invalid, the remainder of this act shall be invalidated.").

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December 24, 2012

Re: Religious liberty implications of same-sex marriage

Members of the Illinois Senate
Capitol Building
Springfield, IL 62706

Dear Senator:

We urge you to insist that any bill providing for same-sex marriage include robust and specific protections for religious liberty — and then that you pass the bill.

All the signers of this letter have studied and written about the law of religious liberty for many years. One of us edited and contributed to the leading book on protecting both religious liberty and equality in marriage, *Same-Sex Marriage and Religious Liberty* (2008).

Any bill on same-sex marriage should include religious liberty protections on the lines proposed in the separate letter that you recently received from a group of scholars led by Professor Robin Fretwell Wilson. We come to these issues from a rather different perspective from Professor Wilson's group, but their analysis of potential legal conflicts is accurate, and their proposed statutory language is necessary to legislation that is fair and just to all sides.

We support same-sex marriage. We think equality in marriage can be a great advance for human liberty. But careless or overly aggressive drafting could create a whole new set of problems for the religious liberty of those religious believers who cannot conscientiously participate in implementing the new regime. The net effect for human liberty will be no better than a wash if same-sex couples now oppress religious dissenters in the same way that those dissenters, when they had the power to do so, used to oppress same-sex couples.

We realize that you may not share our view of equality in marriage. But we are confident you share our view of religious liberty. And we think it is critical to enact religious liberty protections with respect to same-sex marriage now, before it is too late. Same-sex marriage is coming sooner or later; all the polling data show that the supporters of same-sex marriage are much younger than the opponents. Right now, the issue is close; supporters of same-sex marriage may have to bargain to get their bill. But as their support increases, they will have less need to bargain, they will be freer to respond to the most aggressive members of their movement, and they will have the votes to enact same-sex marriage with no protection whatever for religious liberty. That is very close to what they are trying to do; the protections for religious liberty in last year's House Bill 5170 actually protected very little. But at least from our distant observation point, it is not yet clear that they have the votes. Someday they will, probably sooner rather than later. The time to get legislation to protect religious conscience is now.

It is not enough to protect the right of clergy not to perform same-sex weddings. It is also necessary to protect the churches and synagogues in their other functions, and to protect religious counseling services and religious adoption agencies. It is important to protect religious individuals who assist with weddings or provide professional services to help sustain marriages. The Wilson group's letter has specific statutory language that would accomplish these goals.

I. Religious Organizations

The Illinois Religious Freedom Protection and Civil Union Act addresses the issue in sweeping terms: "Nothing in this Act shall interfere with or regulate the religious practice of any religious body." 750 Ill. Comp. Stat. §75/15. This is a sound statement of principle. And if this is as much as the Assembly can agree on, then this is the provision that should be included in a marriage bill.

But the bare statement of principle leaves it to litigation to determine what is a "religious practice," what is a "religious body," what is interference or regulation, and whether the Assembly intended the full sweep of its language. Section 75/15 goes on to say that "Any religious body, Indian Nation or Tribe or Native Group is free to choose whether or not to solemnize or officiate a civil union." Some lawyers may argue that this more specific provision somehow limits the scope of the more general provision.

House Bill 5170, considered in the 2012 regular session, addressed only the solemnization issue, and omitted the broad statement of principle in the Civil Union Act. The solemnization issue is important, but it is only the most obvious part of the issue for religious organizations. A bill that addresses only solemnization would do less to protect religious liberty than any other state that has enacted same-sex marriage.

A religious organization, in the course of carrying out its religious functions, cannot in good conscience treat as married two persons whose relationship fundamentally violates the religious organization's understanding of marriage. Must the pastor provide pastoral counseling for a same-sex married couple? Must a religious college provide married-student housing for same-sex couples? A religious-liberty provision addressed only to solemnization neglects these and many similar issues.

We think the best solution is the more elaborate language proposed by Professor Wilson's group. It anticipates the range of issues likely to arise and addresses them with care. But at the very least, any bill on same-sex marriage should include the broad statement of principle from the Civil Union Act.

II. Individuals

Neither the Civil Union Act nor House Bill 5170 protected individuals who provide services to help celebrate weddings or professional services to help sustain marriages. This omission threatens serious harm to a religious minority while conferring no real benefits on same-sex couples. Same-sex couples will rarely if ever actually want such personalized services from providers who fundamentally disapprove of their relationship, and they will nearly always be able to readily obtain such services from others who are happy to serve them.

The Wilson group's letter offers carefully crafted language that would address this problem in a way that is fair to both sides. It would protect only individuals and very small businesses, and only when some other business is reasonably available to provide the same service. But it would help ensure that people committed to a traditional view of marriage are not driven from the field.

III. Conclusion

Enacting the right to same-sex marriage with generous exemptions for religious dissenters is the right thing to do. It respects the right of conscience for all sides. It protects the liberty of same-sex couples and the liberty of religious dissenters. Adding religious liberty protections is obviously better for the traditional religious believers; on a few moments' reflection, it is also better for the same-sex couples. Because it is better for both sides, it is better for Illinois. The language proposed in the Wilson group's letter would protect the liberty of both sides. We urge you to add it to any bill on same-sex marriage.

At the very least, the bills should incorporate the language of § 75/15 in the Religious Freedom Protection and Civil Union Act.

Each of us signs this letter in our individual capacities; none of our employers takes a position on the issues we address.

We are available to discuss these issues further if that would be of any benefit. There are rumors of a bill modeled on the New York statute; that statute has gaps and ambiguities that we would be happy to discuss. Professor Laycock will be traveling in early January, but can be reached at his e-mail, or by cell phone at [XXX-XXX-XXXX].

Very truly yours,

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AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
FILED
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No. 12-307

In the Supreme Court of the United States

THE UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR,
and
BIPARTISAN LEGAL ADVISORY GROUP
OF THE UNITED STATES HOUSE OF
REPRESENTATIVES,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF *AMICI CURIAE* OF THE BEVERLY LAHAYE INSTITUTE AND THE NATIONAL LEGAL FOUNDATION,

in support of the Respondent, Bipartisan Legal Advisory Group of the United States House of Representatives, Addressing the Merits and Supporting Reversal.

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE*.............................. 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT... 3

I. CONGRESS'S INTEREST IN ENCOURAGING RESPONSIBLE CHILDREARING PROVIDES AT LEAST A RATIONAL BASIS FOR DOMA'S ENACTMENT BECAUSE COMMON SENSE AND SOCIAL SCIENCE TEACH THAT OPPOSITE-SEX FAMILIES PROVIDE THE OPTIMAL ENVIRONMENT IN WHICH TO RAISE CHILDREN.. 3

  A. Important New Research Demonstrates that Children of Lesbian and Gay Parents Fare Significantly Worse on Numerous Social, Emotional, and Relational Outcome Variables. 9

    1. *The new study overcomes serious problems with prior studies.* 9

2. *The study's specific findings show dramatic differences between children raised by lesbian and gay parents and children raised in opposite-sex households.* 13

B. Politically and non-politically driven criticisms of the study have been well-answered and do not serve to discount the study's groundbreaking importance. **20**

CONCLUSION 33

TABLE OF AUTHORITIES

Cases: **Page(s):**

Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. Ct. App. 2006) (plurality) 5-6

Windsor v. United States, 699 F.3d. 169, (2d Cir. 2012) 3-6

Other Sources:

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Brief for American College of Pediatricians as *Amicus Curiae* Supporting Intervenor–Defendant–Appellant, *Windsor v. United States*, 699 F.3d. 169 (2d Cir. 2012) (Nos. 12–2335 & 12–2435) 6-7, 21

Brief for American Psychological Association, *et al.* as *Amicus Curiae* Supporting Plaintiff-Appellee 23, n.42, *Windsor v. United States*, 699 F.3d. 169 (2d Cir. 2012) (Nos. 12–2335 & 12–2435) 21

Byron Johnson, *et al.*, *A Social Science Response to the Regnerus Controversy*, http://www.baylorisr.org/2012/06/a-social-scientific-response-to-the-regnerus-controversy 24

Darren E. Sherkat, *The Editorial Process and Politicized Scholarship: Monday Morning*

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Loren D. Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*, 41 Social Science Research 735 (2012) ...7-8, 26-27

Mark Regnerus, *How Different are the Adult Children of Parents who have Same-sex Relationships? Findings from the New Family Structures Study*, 41 Soc. Sci. Research 752 (2012) .... 8 *et passim*

Mark Regnerus, *Parental Same-sex Relationships, Family Instability, and Subsequent Life Outcomes for Adult Children: Answering Critics of the New Family Structures Study with Additional Analyses*, 41 Soc. Sci. Research 1367 (2012)............24, 29-32

University of Texas at Austin Completes Inquiry into Allegations of Scientific Misconduct, Aug. 29, 2012, available at http://www.utexas.edu/news/2012/08/29/regnerus_scientific_misconduct_inquiry_completed/ 22

TABLE OF AUTHORITIES (Continued)

Page(s):

Walter R. Schumm, *Methodological Decisions and the Evaluation of Possible Effects of Different Family Structures on Children: The New Family Structures Survey (NFSS)*, 41 Soc. Sci. Research 1357 (2012) 27-28

INTEREST OF *AMICI CURIAE*[1]

The Beverly LaHaye Institute (BLI) is the think tank and research arm of Concerned Women for America. BLI provides accurate academic and scientific data with sound analysis to inform and substantiate policy positions on contemporary issues from a traditional pro-family, feminine perspective. Through professional research and writings, BLI stands strong in defense of marriage, children, and families. BLI sponsors policy forums, provides legislative testimony, compiles and analyzes social science behavioral data. Additionally, BLI publishes literature reviews, opinion editorials, reports, and monographs in an effort to advance women's well-being through sound public policy.

The issues in this case will have a significant impact on women, children and families, the focus of BLI's work.

The National Legal Foundation (NLF) is a public interest law firm that litigates in the areas of religious freedom and in defense of the traditional family. Its supporters are dedicated to preserving the traditional framework of marriage and believe that the work of Congress in enacting DOMA was entirely constitutional. The NLF and its supporters have been involved in the defense of DOMA in courts throughout the United States.

---

[1] All parties have consented to the filing of this Brief through individual letters accompanying this Brief or through blanket letters of consent lodged with the Court. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amici Curiae*, and their counsel.

SUMMARY OF THE ARGUMENT

When Congress passed DOMA, it believed, and rationally so, that heterosexual marriage was the best institution in which to raise children, and that DOMA promoted this optimal environment. As Judge Straub of the United States Court of Appeals for the Second Circuit noted in dissent, this proposition is supported by common sense and has been accepted by numerous court.

In addition, this proposition is supported by social science research. The purpose of this Brief is to demonstrate why the *amici* who supported the Respondent, Ms. Windsor, below (and very likely those who will support her before this Court) are wrong to claim this is not so. In particular, recent "conventional wisdom" accepted by many social scientists claims that there is no difference between children raised in opposite-sex households and children of gay and lesbian parents. This Brief will examine a 2012 study that demonstrates that this is not the case. In fact, the study documents statistically significant differences between the adult children of opposite-sex households and adult children of gay and lesbian parents for thirty-one different variables.

ARGUMENT

I. CONGRESS'S INTEREST IN ENCOURAGING RESPONSIBLE CHILDREARING PROVIDES AT LEAST A RATIONAL BASIS FOR DOMA'S ENACTMENT BECAUSE COMMON SENSE AND SOCIAL SCIENCE TEACH THAT OPPOSITE-SEX FAMILIES PROVIDE THE OPTIMAL ENVIRONMENT IN WHICH TO RAISE CHILDREN.

As the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) has repeatedly noted, when Congress passed DOMA, it believed, and rationally so, that heterosexual marriage was the best institution in which to raise children, and that DOMA promoted this optimal environment. (BLAG's Br. 11, 21, 41-42, 48). Yet the Second Circuit, when presented with the same argument below, dismissed it out of hand:

> BLAG presents three related reasons why DOMA advances the goals of "responsible childrearing" . . . [one of which is that] DOMA facilitates the optimal parenting arrangement of a mother and a father. We agree that promotion of procreation can be an important government objective. But we do not see how DOMA is substantially related to it.
>
> All three proffered rationales have the same defect: they are cast as incentives for heterosexual couples, incentives that DOMA does not affect in any way. DOMA does not

> provide any incremental reason for opposite-sex couples to engage in "responsible procreation." Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before.

Windsor v. United States, 699 F.3d. 169, 187-88 (2d Cir. 2012) (footnote omitted).

This line of reasoning misses the point. True, the incentives for opposite-sex couples remain the same. However, those incentives are now *limited to* opposite-sex couples. In other words, Congress could have rationally decided—with the possibility of same-sex marriage on the horizon in various states—that it was important to make plain that its marriage incentives would be available only to those couples who are capable of natural procreation.

The conferring and withholding of benefits has a direct impact on the federal fisc, and Congress rationally decided to limit certain benefits to those whose ability to procreate warranted, in its judgment, the concomitant impact on the fisc.

Indeed this is the very point made by Judge Straub in his dissent in the court below. First, Judge Straub—echoing black letter law—noted that:

> [u]nlike under heightened scrutiny, in a rational basis equal protection analysis courts look to any "conceivable basis" for the challenged law, not limited to those articulated by or even consistent with the rationales offered by the legislature. Those

> attacking the rationality of a legislative classification have the burden "to negative every conceivable basis which might support it."

Id. at 199 (Straub, J., concurring in part & dissenting in part) (citations and footnote omitted).

Judge Straub then demonstrated just how easy it is to understand how DOMA advances the goals of responsible childrearing. *Id.* at 199-202. Judge Straub explained that "[t]he interest in recognizing the connections between marriage and childrearing by biological parents can be broken down into several components." *Id.* at 199. Judge Straub then explained these several components (and sub-components), noting for each the numerous courts that, unlike, his Second Circuit colleagues had no trouble seeing these as rationale bases for marriage and marriage-benefits regulations. *Id.* at 199-202.

One of the "component[s] of the procreation and childrearing rationale for restricting federal rights to opposite-sex marriage" that Judge Straub explicated "is the Congressional desire to have children raised in families with only biological mothers and fathers, which same-sex couples cannot provide." *Id.* at 201. In support of the validity of this congressional desire as a rational basis for DOMA, Judge Straub quoted from *Hernandez v. Robles*, 855 N.E.2d 1,7 (N.Y. Ct. App. 2006) (plurality):

> Plaintiffs seem to assume that they have demonstrated the irrationality of the view that opposite-sex marriages offer advantages to children by showing there is no scientific

> evidence to support it. Even assuming no such evidence exists, this reasoning is flawed. In the absence of conclusive scientific evidence, the Legislature could rationally proceed on the commonsense premise that children will do best with a mother and father in the home.

Furthermore, Judge Straub agreed with the argument of BLAG, made before his court, that "the evidence offered by Windsor and the professional organizations and child welfare *amici* . . . does not make Congress's 'common sense' regarding the needs of children a forbidden governmental interest under rational basis review." *Windsor*, 699 F.3d at 201.

In fact, the Second Circuit was presented with a battle of social science briefs—as this Court likely will be as well. On one side of the battle was the brief cited by Judge Straub, filed by several professional organizations and a child welfare organization. On the other side was a brief filed by the American College of Pediatricians. Brief for American College of Pediatricians as *Amicus Curiae* Supporting Intervenor–Defendant–Appellant, *Windsor v. United States*, 699 F.3d. 169 (2d Cir. 2012) (Nos. 12–2335 & 12–2435) (hereinafter, "Br. of American College of Pediatricians").

As Judge Straub noted, the former brief claimed that "no credible evidence exists" that "opposite-sex marriages offer advantages to children." *Windsor*, 699 F.3d. at 201 & n.6. Your *Amici* agree completely with Judge Straub that were this assertion true, it would still not render Congress's assessment "forbidden." However, your *Amici* write to point out another problem with this assertion by Windsor's *amici* below—and perhaps soon that of *amici* before this Court.

The problem with this assertion is that before Windsor's *amici* made it, the American College of Pediatricians' Brief had already presented just such evidence (since that brief, in support of BLAG, an Appellant below, had been filed first). In addition to remaining completely silent with regard to studies cited by American College of Pediatricians demonstrating that children "benefit from the unique parenting contributions of both men and women," (Br. of American College of Pediatricians 10-14), Windsor's *amici* very selectively attempted to refute the studies cited by American College of Pediatricians demonstrating that "[e]xisting research on child outcomes for children raised by same-sex couples as compared to married husband-wife couples . . . suggests differences that do not bode well for children." (Br. of American College of Pediatricians 4-10).

In the just named section of their brief, the American College of Pediatricians cited six studies documenting flaws in research that claims that there are no differences between same-sex couples and husband-wife couples, *and* nine studies demonstrating negative consequences to children raised in same-sex households. Windsor's *amici* ignored thirteen of these studies, and used a footnote to address another.[2] However, they could not ignore nor so lightly treat the last study.

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[2] Windsor's *amici* criticized Loren D. Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's*

Windsor's *amici* were forced to interact at greater length with a July 2012 study by Dr. Mark Regnerus, Associate Professor of Sociology and Faculty Research Associate for the Population Research Center, University of Texas at Austin, that shows significant negative differences in thirty-one of forty studied outcome variables for children of lesbian mothers, gay fathers, or both.[3] And there is no wonder that Windsor's *amici* chose to take that study more seriously: it greatly bolsters Congress's commonsense assessment and greatly undercuts their own contrary assertions. The remainder of this

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Brief on Lesbian and Gay Parenting, 41 Social Science Research 735 (2012). In so doing, however, they acknowledge that Marks has identified a study that shows that children of same-sex couples *are* disadvantaged, Brief for American Psychological Association, *et al.* as *Amicus Curiae* Supporting Plaintiff-Appellee 23, n.42, *Windsor v. United States*, 699 F.3d. 169 (2d Cir. 2012) (Nos. 12–2335 & 12–2435), and that he has identified limitations of fifty-nine studies relied upon by the American Psychological Association, *see id., together with* Br. of American College of Pediatricians 4-5.

Although Windsor's *amici* limited their criticism of this article to a footnote, this article has come under greater fire in the media and literature. This will be reflected, at one point, in the discussion that follows of the remaining article.

[3] Mark Regnerus, *How Different are the Adult Children of Parents who have Same-sex Relationships? Findings from the New Family Structures Study*, 41 Soc. Sci. Research 752 (2012) (hereinafter, "*Adult Children Findings*.") This study appeared in the same issue of the journal *Social Science Research* as the study mentioned in footnote 2.

Brief will examine the results of this study, criticism of this study, and responses to that criticism.

A. Important New Research Demonstrates that Children of Lesbian and Gay Parents Fare Significantly Worse on Numerous Social, Emotional, and Relational Outcome Variables.

Dr. Mark Regnerus's study, *Adult Children Findings*, deserves careful attention for multiple reasons. Your *Amici* address those reasons briefly, before turning to the study's results.

1. The new study overcomes serious problems with prior studies.

Regnerus published his *Adult Children Findings* as the initial introduction of a new social science data set. This data set, the New Family Structures Study (NFSS), "is a social-science data-collection project that fielded a survey to a large, random sample of American young adults (ages 18–39) who were raised in different types of family arrangements." *Adult Children Findings*, supra, at 752. The NFSS was created to address a paradox in social science results and problems with social science study designs.

In the *Introduction* to *Adult Children Findings*, Regnerus notes the following paradox. On the one hand, "[s]ocial scientists of family transitions have until recently commonly noted the elevated stability and social benefits of the two-parent (heterosexual) married household, when contrasted to single mothers, cohabiting couples, adoptive parents, and ex-spouses sharing custody." *Id.* (citations omitted). On the other hand, "[s]ince [2001] the conventional wisdom emerging from comparative studies of same-sex parenting is that there are very few differences of note in the child outcomes of gay and lesbian parents." *Id.* at 753 (citations omitted). Perhaps explaining this paradox,

> [c]oncern has arisen . . . about the methodological quality of many studies focusing on same-sex parents. In particular, most are based on non-random, non-representative data often employing small samples that do not allow for generalization to the larger population of gay and lesbian families. For instance, many published studies on the children of same-sex parents collect data from "snowball" or convenience samples, [including] the National Longitudinal Lesbian Family Study . . . .

Id.[4] Further problems exist because many studies are based on parental self-reporting. *Id.* at 754. Furthermore, studies provide much more information about lesbian mothers than about gay fathers and about children still living in lesbian and gay households than about adult children who grew up in such households. *Id.* at 755.

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[4] Snowball sampling is a technique wherein existing study subjects recruit additional subjects from people known to them and convenience sampling occurs when subjects are chosen on the basis of ease of recruitment rather than on being representative of the population.

Although the NFSS is not a longitudinal study, it avoids all the problems identified above: It is a study of adult children, it includes nearly 3,000 respondents, and is "a weighted probability sample, from which meaningful statistical inferences and interpretations can be drawn." *Id.*

Further, the NFSS's design, data collection techniques, and analytical approach give it inherent credibility. Its designers included "leading family researchers in sociology, demography, and human development—from Penn State University, Brigham Young University, San Diego State University, the University of Virginia, and several from the University of Texas at Austin . . . ." *Id.* The team crossed, not only disciplinary, but also ideological lines. *Id.*[5] Additionally, "[s]everal additional external consultants also gave close scrutiny to the survey instrument, and advised on how best to measure diverse topics. Both the study protocol and the questionnaire were approved by the University of Texas at Austin's Institutional Review Board."

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[5] Despite the team crossing ideological lines, Regnerus was careful to reveal funding sources that might attract attention and to explain why funders could not influence results: "The NFSS was supported in part by grants from the Witherspoon Institute and the Bradley Foundation. While both of these are commonly known for their support of conservative causes—just as other private foundations are known for supporting more liberal causes—the funding sources played no role at all in the design or conduct of the study, the analyses, the interpretations of the data, or in the preparation of this manuscript." *Id.*

Of special significance is the process by which the data was collected. The NFSS employed a research firm (Knowledge Networks) with a proven record of data collection for academic studies. *Id.* at 756.[6] The participants are randomly recruited by telephone and mail. They include those with "both listed and unlisted numbers, those without a landline telephone and is not limited to current Internet users or computer owners, and does not accept self-selected volunteers." *Id.* Regnerus also describes the process whereby Knowledge Networks screened participants to insure that the NFSS would contain sufficient numbers (*i.e.*, numbers matching national population percentages) of lesbian mothers, gay fathers, and adoptive parents to allow the generation of meaningful statistics while still keeping the sample random. Finally, by using these techniques, the NFSS avoided another problem that has been identified in other studies: the under representation of racial minorities:

> existing studies of lesbian and gay couples and their families have largely included "white, middle-class persons who are relatively 'out' in the gay community and who are living in urban areas," while "working-class sexual minorities, racial or ethnic sexual minorities, sexual minorities who live in rural or isolated

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[6] Ironically, Regnerus has been criticized for using Knowledge Networks, despite it having been used by "over 350 working papers, conference presentations, published articles, and books . . . including the 2009 National Survey of Sexual Health and Behavior, whose extensive results were featured in an entire volume of the *Journal of Sexual Medicine . . . .*" *Id.*

> geographical areas" have been overlooked, understudied, and difficult to reach.

Id. at 757 (quoting Abbie E. Goldberg, *Lesbian and Gay parents and Their Children: Research on the Family Life Cycle* 12-13. (2010: APA Books). By contrast, the NFSS racial percentages closely approach those of the 2010 Census data. *Id.*

2. *The study's specific findings show dramatic differences between children raised by lesbian and gay parents and children raised in opposite-sex households.*

In this initial study from the NFSS data, Regnerus compared various "outcomes" across "eight different types of family-of-origin structure and/or experience." *Id.* Three of those structures are of interest to this Brief, since they are germane to Congress's rational belief that opposite-sex households provide the optimal environment for raising children: Intact biological families, household with lesbian mothers, and households with gay fathers.[7]

Adult Children Findings used three types of variables. First, Regnerus used dichotomous variables, *i.e.*, questions that can be answered "yes" or "no". These variables included items such as whether the respondent was married, had voted in the last election, used public assistance, and whether they had been suicidal in the past twelve months. *Id.* at 758.[8] Second, Regnerus used continuous variables, *i.e.*, variables the respondent rates on a scale of 1 to, for example, 5; or variables that are assigned a value on a scale. These included self-reporting on physical health and happiness, and on ranges of income. Third, Regnerus used count variables, *i.e.*, variables for which the Respondent reported a number, for example, the frequency of use of marijuana and alcohol, arrests, and sexual activity.

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[7] Four of Regnerus's other categories are for respondents who were adopted by "strangers" at birth; whose parents divorced after the respondent turned eighteen; who lived in a step family household; and who lived with a single parent. His final category is a catch-all "other."

From these variables, Regnerus evaluated forty outcome variables for each of his eight family categories (which, of course, for statistical analysis were also variables). *Id.* at 761-62 (Tables 2-4). Each was examined in a bivariate and a multivariate manner. *Id.* at 760.

In the bivariate analysis each of the forty outcome variables was compared to each of the family category variables to determine the statistical relationship between them; then the results for each family category was compared to see whether a statistically significant difference existed.[9] For example, 9% of the respondents who were raised in an intact biological family were currently cohabitating, while 24% of those raised by a lesbian mother were currently cohabitating. The difference between 9% and 24 % was statistically significant. On the other hand, 43% of the respondents who were raised in an intact biological family were currently married, whereas 36% of those raised by a lesbian mother were currently cohabitating. However, the difference between 43% and 36% was not statistically significant. *Id.* at 761 (Table 2).

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[8] All variables, both the dichotomous variables just described, and the other types about to be described can be found in Table 1 in *id.* at 758-59.

[9] The concept of statistical significance is a mathematical way of determining whether the numbers being compared are due to a true correlation or to chance. A key component of these calculations is the p-value. Regnerus used a value of $p < 0.05$.

In the mulivariate analysis, variables are compared to each other after mathematically removing the influence of (*i.e.*, "controlling for") other variables. In *Adult Children Findings*, Regnerus controlled for "respondent's age, gender, race/ethnicity, level of mother's education, perceived family-of-origin's income, experience with having been bullied as a youth, and the 'gay friendliness" of the respondent's current state of residence." *Id.* Again, the results can be checked for statistical significance.[10]

Regnerus found statistically significant differences between respondents raised in intact biological families and respondents raised by lesbian mothers for the following outcome variables:

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[10] Here the statistical significance is determined by generating a "coefficient" for each category and comparing those, again using a p-value of $p < 0.05$.

Currently cohabiting[11]—LM[12] higher percent (B & M)[13]
Family received welfare growing up—LM higher percent (B & M)
Currently on public assistance—LM higher percent (B & M)
Currently employed full-time—LM lower percent (B & M)
Currently unemployed—LM higher percent (B & M)
Voted in last presidential election—LM lower percent (B)
Recently or currently in therapy—LM higher percent (M)
Identifies as entirely heterosexual—LM lower percent (B & M)
Had affair while married/cohabiting—LM higher percent (B & M)
Ever had a sexually transmitted infection—LM higher percent (M)

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[11] These outcome variables use Regnerus's wording, except that for a few, abbreviations have been spelled out or an auxiliary verb has been deleted. Actual statistics are located in Tables 2-4 in *id.* at 761-62.

[12] For ease of annotating the following list, "LM" (for "lesbian mother"), indicates those respondents who reported same-sex behaviors by their mother. This abbreviation was used by Regnerus in his study for this family category. He has been criticized for this category. Your *Amici* will address this in the next section of this Brief.

[13] The designation "B" indicates that the difference was statistically significant in the bivariable analysis; the designation "M" indicates that the difference was statistically significant in the multivariable analysis.

Ever touched sexually by parent/adult—LM higher percent (B & M)
Ever forced to have sex against will—LM higher percent (B & M)
Educational attainment—LM less (B & M)
Family-of-origin safety/security[14]—LM lower (B & M)
Family-of-origin negative impact—LM higher (B & M)
Self-reported physical health—LM lower (B)
CES-D depression index[15]—LM higher (worse) (B & M)
Attachment scale (dependability)—LM higher (worse) (B & M)
Level of household income—LM lower (B)
Current relationship is in trouble—LM higher (worse) (B)
Frequency of marijuana use—LM higher (B & M)
Frequency of smoking—LM higher (B & M)
Frequency of watching TV—LM higher (B & M)
Frequency of having been arrested—LM higher (B & M)

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[14] Regnerus describes this and the next outcome variables as follows: "a pair of indexes captures (1) the overall safety and security in their family while growing up, and (2) respondents' impressions of negative family-of-origin experiences that continue to affect them. These are part of a multidimensional relationship assessment instrument (dubbed RELATE) designed with the perspective that aspects of family life, such as the quality of the parent's relationship with their children, create a family tone that can be mapped on a continuum from safe/predictable/rewarding to unsafe/chaotic/punishing." *Id.* at 760 (citation omitted).

[15] "CES-D" stands for "Center for Epidemiological Studies-Depression."

Frequency pled guilty to non-minor offense—LM higher (B & M)
Number of female sex partners (among women)—LM higher (B & M)
Number of male sex partners (among women)—LM higher (B & M)
Number of male sex partners (among men)—LM higher (M)

Similar statistically-significant differences are seen when comparing the results for respondents raised in intact biological families and respondents raised by gay fathers:

Family received welfare growing up— GF[16] higher percent (B & M)
Voted in last presidential election—GF higher percent (M)
Recently thought about suicide—GF higher percent (M)
Identifies as entirely heterosexual—GF lower percent (M)
Ever had a sexually transmitted infection—GF higher percent (M)
Ever forced to have sex against will—GF higher percent (M)
Educational attainment—GF less (B & M)
Family-of-origin safety/security—GF lower (B & M)

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[16] For ease of annotating the following list, "GF" (for "gay father"), indicates those respondents who reported same-sex behaviors by their father. As with "LM," this abbreviation was used by Regnerus in his study for this family category, he has been criticized for this category, and your *Amici* will address this below.

Family-of-origin negative impact—GF higher (B & M)
Closeness to biological mother—GF less (B & M)
CES-D depression index—GF higher (worse) (B & M)
Current relationship quality index—GF lower) (B & M)
Current relationship is in trouble—GF higher (worse) (B & M)
Frequency of smoking—GF higher (M)
Frequency of having been arrested—GF higher (B & M)
Frequency pled guilty to non-minor offense—GF higher (M)
Number of female sex partners (among women)—GF higher (B & M)
Number of male sex partners (among women)—GF higher (B & M)
Number of male sex partners (among men)—GF higher (M)

Unless the criticisms against *Adult Children Findings* are so devastating as to render it of no worth at all, it is simply untenable in its wake to claim there is no difference between children raised in intact biological families and those raised by gay and lesbian parents. And of all of these differences, one may assume that Congress only saw one as a positive: the higher voting rate among children raised by gay fathers. All the other differences would cause Congress to rationally believe that intact biological households are the best environment in which to raise children.

Furthermore, it is worth noting that many of the differences are more than merely "statistically significant." Some of the differences are *multiple* *times* different. This is most easily seen with those outcomes that are measured as a bivariable percentage. Just four examples suffice to show the radical difference in the statistics. Compared to respondents raised in intact biological families, respondents raised by lesbian mothers are over four times more likely to have received welfare growing up, between three and four times as likely to currently be on public assistance and to be unemployed, and a staggering eleven-and-a-half times more likely to have been touched sexually by a parent/adult. *Id.* at 761.

This Brief will now examine the criticism leveled against *Adult Children Findings* to see whether it is grounds for discounting all of this data that supports Congress's commonsense, rational basis for believing the opposite-sex families provide the optimal environment for raising children and that DOMA furthers that interest.

B. Politically and non-politically driven criticisms of the study have been well-answered and do not serve to discount the study's groundbreaking importance.

There are several sources of criticism of *Adult Children Findings*. First, as mentioned, Windsor's *amici* below attacked it in their brief and presumably *amici* will attack it in their briefing to this Court. Presumably those attacks will follow the lines taken by *amici* below or those taken in the social science literature and in media outlets. None of these attacks can undercut *Adult Children Findings* in any significant way.

First, the criticism by Windsor's *amici* below, is—at bottom—more a criticism of the *use* of Regnerus's study by the American College of Pediatricians in its brief than of the study itself. Windsor's *amici* criticized the American College of Pediatricians for characterizing the study as being one of children of same-sex couples. Brief for American Psychological Association, *et al., supra,* 22. The *amici* compare this description to that of Regnerus himself who was more careful in describing the family units studied. *See id.*

One may concede—or more properly, "readily acknowledge"—as Regnerus has, *Adult Children Findings* at 756, that respondents were asked whether their parents *ever* had a same-sex romantic relationship without destroying the legitimacy of the study. Indeed this procedure was carried out as part of the screening process implemented by *Knowledge Networks* in its efforts to ensure that enough gay and lesbian households were represented. *Id.*

Furthermore, Windsor's *amici* below claim that the "data do not show whether the [respondent-] perceived romantic relationship ever in fact occurred . . . " Brief for American Psychological Association, *et al., supra,* 22. *This* criticism is easy to reject. The people reporting these relationships were all adults operating with the benefit of hindsight. Ninety-one percent of those who reported that their mothers had a same-sex relationship reported living with her during the relationship and 57% reported living with the mother and the partner for at least 4 months. *Adult Children Findings* at 757. The comparable statistics for gay fathers were 42% and 23%.

Some of the criticisms from other quarters are more serious but none is cause to discount the strong support *Adult Children Findings* lends to Congress's commonsense understanding that intact opposite-sex families are the optimal environment in which to raise children.

The most telling rebuttal to various criticisms of Regnerus's study is that the study and the scholar have survived them all. Because the subject matter of Regnerus's study is so emotionally charged, for reasons including its impact on the instant litigation, many of the criticisms have been ideologically driven.

One criticism came in the form of accusations of scientific misconduct leveled at Regnerus by Scott Rose of the website thenewcivilrightsmovement.com. The University of Texas at Austin conducted an internal inquiry and hired an outside consultant. Both the members of the inquiry panel and the consultant determined that no formal investigation was warranted. *University of Texas at Austin Completes Inquiry into Allegations of Scientific Misconduct*, Aug. 29, 2012, available at http://www.utexas.edu/news/2012/08/29/regnerus_scientific_misconduct_inquiry_completed/ (last visited Jan. 28, 2013). Significantly, the University noted that "good faith differences in interpretations or judgments of data, scholarly or political disagreements, good faith personal or professional opinions, or private moral or ethical behavior or views are not misconduct." *Id.*

Another criticism that was fueled in large part by a just-as-thinly-veiled "difference in . . . private moral . . . views," *id.*, came in the form of a letter written by UCLA scholar Gary Gates and signed by about 200 other scholars. Gary J. Gates, *et al.*, *Letter to the Editor and Advisory Editors of* Social Science Research, 41 Social Science Research 1350 (2012). Gates is the Williams Distinguished Scholar at the Charles R. Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at the UCLA School of Law. The Gates letter contained two main criticisms: first, that the journal *Social Science Research* had not followed it own normal and proper procedures in publishing the study (hinting—or more than hinting—that the study was not worthy of publication) and second that Regnerus failed to distinguish between family structure (his eight categories) and family instability. *Id.*

Ironically, this criticism prompted four responses, the cumulative weight of which, more than prove that *Adult Children Findings* passes social science muster and, thus, lends strong credence to Congress's commonsense understanding that intact biological families are the optimal environment for raising children.[17]

First, the Gates letter prompted a counter-letter from academics who took the opposite view, namely that *Adult Children Findings* "helped inform the ongoing scholarly . . conversation about same-sex families" and that much of the criticism was misplaced for three reasons. Byron Johnson, *et al.*, *A Social Science Response to the Regnerus Controversy*, http://www.baylorisr.org/2012/06/a-social-scientific-response-to-the-regnerus-controversy (last visited Jan. 27, 2012). Specifically, these professors first agreed with Regnerus on the limitations of prior studies and rebuked critics for not "acknowledging the superiority of Regnerus's sample to most previous research." *Id.* Second, the professors addressed the issue of family instability. They noted the difficulty in finding appropriate populations to study (*i.e.*, stable gay and lesbian households), the fact that instability was likely a valid hallmark of the families in the NFSS, and the fact that the findings on instability matched similarly finding of studies conducted in Great Britain, the Netherlands, and Sweden. *Id.* Third the professors noted that the major finding of Regnerus's study—the very real differences in outcome variables—paralleled findings of a study which found differences in academic outcomes. *Id.*

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[17] Your *Amici* do mean to imply that the above represents all of the types of criticism nor that what follows represents all of the types of responses. Rather, they represent significant examples of the more important types (and in the case of the criticisms are limited to non-ad hominem types).

The second, third, and fourth responses to the Gates letter all took place within the pages of *Social Science Research* itself. The second response was a so-called publication audit, which examined events surrounding the publication of *Adult Children Findings*. This audit was conducted by Darren E. Sherkat, a scholar who has "long harbored negative sentiment" towards Regnerus. Mark Regnerus, *Parental Same-sex Relationships, Family Instability, and Subsequent Life Outcomes for Adult Children: Answering Critics of the New Family Structures Study with Additional Analyses*, 41 Soc. Sci. Research 1367, n.1 (2012) (Hereinafter, "Regnerus, *Answering Critics*"). Given this animosity, it is not surprising that the article containing the audit did not limit itself to that task, but added criticism of *Adult Children Findings* similar to that leveled against it by other sources. Darren E. Sherkat, *The Editorial Process and Politicized Scholarship: Monday Morning Editorial Quarterbacking and a Call for Scientific Vigilance*, 41 Soc. Sci. Research 1346 (2012). Furthermore, the audit leveled some criticisms at the peer reviewers of the study. However, these latter criticisms were of two types. First, the reviewers did not see the same "flaws" with the article that Sherkat saw. *E.g.*, *id.* at 1348 ("Reviewers uniformly downplayed or ignored the fact that the study did not examine children of identifiably gay and lesbian parents . . . ."). This "flaw" has been addressed already in the Brief and will be addressed again. Second, Sherkat lamented problems with conflicts held by reviewers, but admitted that these conflicts plague all social science journals.

In light of this last admission, Sherkat's bottom line on the publication was that everything was done within the currently appropriate, if flawed bounds. Specifically, Sherkat noted the following: "As is normal, [*Social Science Research's* editor James D.] Wright turned first to two editorial board members who work on topics related to the papers—and one of these board members reviewed both papers. Wright attempted to get five reviews for the Regnerus paper and he secured three reviewers . . . ." *Id.* at 1347. "[A]ll of the reviews were positive." *Id.* "All of the reviewers provided quick feedback, and all of the reviews were positive. The editor required revisions . . . as a result of the reviews, and the reviews were completed quickly and successfully with the guidance of the reviewers and the editor." *Id.* "Five of the reviewers [of the *Adult Children Findings* and of the Marks study cited in footnote 2 of this Brief] are very regular, reliable, *SSR* reviewers, and all six were notable scholars. Indeed, the three scholars who are not publicly conservative can accurately be described as social science superstars." *Id.* "It can be argued that Wright should have been more aggressive in asking about such conflicts but this is probably unrealistic given the large number of papers *SSR* processes." *Id.*

Sherkat also drew a comparison between Sherkat's own submission of a study to *Social Science Research* and the situation with *Adult Children Findings*:

> last year the top two downloaded papers in *Social Science Research* were on homosexuality and written from a pro-civil rights perspective; and I was a coauthor of one of them. Our paper was accepted by Wright over the objections of two conservative reviewers—out of three reviews, two were certainly voting "reject". The accusation that Wright was somehow part of a conservative conspiracy to undermine civil rights for LGBT persons is ludicrous, and I know this from his prior actions.

Id. at 1348 (citation omitted).

Finally, although reiterating the problems he had earlier identified, Sherkat summarized his audit by declaring, "[m]y review of the editorial processing of the Regnerus and Marks papers revealed that there were no gross violations of editorial procedures—the papers were peer reviewed, and the "peers" for papers on this topic were similar to what you would expect at *Social Science Research*."

The third response to the Gates letter was an after-the-fact, in-depth analysis of *Adult Children Findings* from the point of view of social science standards with an eye towards all the criticisms that had been leveled against the study, written by Walter R. Schumm, Professor in the School of Family Studies and Human Services at Kansas Statute University. Walter R. Schumm, ***Methodological Decisions and the Evaluation of Possible Effects of Different Family Structures on Children: The New Family Structures Survey (NFSS)***, 41 Soc. Sci. Research 1357 (2012).

Schumm examined all of the following items: random vs. non-random samples, sample size, family forms, measurement of sexual orientation, types of statistical analyses, research funding, and consistency of findings with prior studies.

Schumm's overall conclusions are most succinctly stated in his article's abstract:

> Every social science researcher must make a number of methodological decisions when planning and implementing research projects. Each such decision carries with it both advantages and limitations. The decisions faced and made by Regnerus (2012) are discussed here in the wider context of social science literature regarding same-sex

> parenting. Even though the apparent outcomes of Regnerus's study were unpopular, the methodological decisions he made in the design and implementation of the New Family Structures Survey were not uncommon among social scientists, including many progressive, gay and lesbian scholars. These decisions and the research they produced deserve considerable and continued discussion, but criticisms of the underlying ethics and professionalism are misplaced because nearly every methodological decision that was made has ample precedents in research published by many other credible and distinguished scholars.

Id. at 1356.[18] Interacting as it does with 112 other studies and papers on statistical techniques, *see id.* at 1364-65 (References), Schumm's positive evaluation of *Adult Children Findings* would be an adequate stopping place for affirming its strong support for Congress's view of the family. However, a fourth response to the Gates letter is worth mentioning.

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[18] One of Schumm's observations is of particular interest in light of this Brief's mention of the value of Knowledge Networks and the criticism of it. *See, supra,* note 6 and accompanying text. "Some have criticized the use of [Knowledge Networks] but my brief search of the academic literature found KN having been used for data collection in many research studies with GLB persons, social science research, medical research, and psychiatric research." *Id.* at 1359 (citations to twenty-two representative studies omitted).

That fourth response was a reply article by Regnerus that appeared in the same issue as the Sherkat and Schumm articles. Regnerus, *Answering Critics*, *supra*. In his second article, Regnerus addressed six criticisms of his original study, *id*. at 1368-75, and also reported on additional analyses of the NFSS data, *id*. at 1375-77.

The first criticism addressed is the use of the labels LM (lesbian mother) and GF (gay father). Regnerus admits that these labels may conflate (presumably in the mind of the reader) sexual orientation and sexual behavior. *Id*. at 1368. A more significant criticism of the label LM is that it includes both respondents who lived with their mothers and her partner and those who did not. *Id*. Therefore, Regnerus adopts new labels[19] and evaluates the two types of mothers in a new analysis. Thus, this criticism of the original study disappears in the face of the new study, which will be discussed below.

The second criticism addressed is the accusation that *Adult Children Findings* compares "apples to oranges" because of the built-in instability in the LM and GF family categories. Regnerus counters that attempting to control for instability, even were it possible, could easily produce a model that is unhelpful to understanding the very "social reality" the researcher is seeking to understand. This could be so because instability might not be a variable, properly so-called, but may instead be a "pathway" for other variables. *Id*. at 1369. However, Regnerus also addresses the assertion that because the social stigma against gays and lesbians was more pronounced, the NFSS is in effect "dated" because instability has faded or will fade with the reduced stigma. *Id.* However, Regnerus discusses data available for Norwegian and Swedish same-sex marriages and *current* American same-sex couples that demonstrate the opposite. *Id.* Thus, Regnerus need not back away from his original findings based on this criticism.

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[19] To avoid confusion, this Brief will continue to use the terms used in *Adult Children Findings*.

The third criticism addressed is, as Regnerus points out, actually an extension of the second criticism. This criticism is that the NFSS does not contain a representative sample of stable lesbian families. *Id.* at 1370. Regnerus admits that the NFSS *could* contain an undercount for this family category, but that it is by no means certain. *Id.* Off-setting this problem, however, is that other studies which are based on women who can afford artificial reproductive technologies or on U.S. census data, likely skew stability in the opposite direction. *Id.* at 1370-71.

The fourth criticism addressed is that the original study may have largely captured "the challenges facing 'mixed-orientation marriages' wherein a respondent's parent elects 'against their orientation' to marry someone of the opposite sex, only to witness the subsequent dissolution of their union followed by the commencement of a same-sex relationship." *Id.* at 1371. In response to this criticism, Regnerus runs through possible scenarios based on new data, ultimately noting that the answer cannot be definitively ascertained. *Id.* at 1371-75 & Fig. 1 & Tables 1-3. At bottom, however, Regnerus reasserts that his study was addressing sexual behavior, not sexual orientation and that this criticism does not directly impact his conclusions.

The fifth criticism addressed is an extension of the fourth criticism. Some critics have speculated that many of the LMs and GFs may actually be bisexuals. Regnerus concedes this possibility. However, although Regnerus does not raise the point, this criticism is subject to the same behavior/orientation point made above. Furthermore, the possibility that this is true and the additional possibility that this would have some impact on the original statistics certainly does not render the current results useless.

The sixth criticism addressed is that the *Adult Children's Findings* claim that LM respondents were the most likely to have been placed at some point in foster care could be wrong. *Id.* 1375. Regnerus examined additional data to attempt to address this criticism, ultimately concluding the situation is unclear. *Id.* For purposes of this brief it is sufficient to note that foster care placement was not one of the forty outcome variables (and thus was not previously addressed by this Brief). Regnerus addressed it only in portions of *Adult Children's Findings* dealing with non-outcome indications of instability and with possible scenarios of sexual abuse. *See, Adult Children's Findings* at 757, 763.

In addition to addressing these six criticisms, Regnerus reanalyzed the data. Based on criticism, he shifted some respondents into a different family category, and he expanded the family categories from eight to fifteen. *Answering Critics, supra,* at 1375-76.

By doing this, he was able to generate statistics for respondents who never lived with their lesbian mothers' partners and those who did. In addition, more family categories were available to be compared to these new categories and with gay father families (as well as with each other). For purposes of this Brief, it is sufficient to note respondents from both types of lesbian mother families and from gay father families continued to compare poorly. For children of lesbian mothers, all of the same outcomes are still statistically significantly worse (either bivariably, multivariably or both) for one or both categories except for "voted in the last presidential election" "thought recently about suicide." *Id.* at 1372-74 (Tables 2-4). In addition, "current relationship index" is now bivariably worse for respondents who did live with the mother's partner. *Id.* at 1373 (Table 3).[20]

Thus, in total, one sees that *Adult Children Findings* does stand up to its critics. In addition, a refining of its data continues to demonstrate that it strongly supports Congress's commonsense view that opposite-sex marriage provides the optimal environment in which to raise children. And as Judge Straub and many courts and judges before him have recognized, DOMA is rationally related to encouraging this interest.

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[20] Too few respondents from gay father families reported living with their father to allow for that category to be divided. *Id.* at 1375. Twelve respondents reported that both parents had engaged in same-sex behavior. These respondents who were moved to one of the new lesbian mother categories. This change resulted in "thought recently about suicide," "educational attainment," "frequency of smoking," "frequency of having been arrested," and "frequency pled guilty to non-minor offense" no longer being statistically significantly different.

CONCLUSION

For the foregoing reasons and for other reasons stated by BLAG in its Brief, the judgment of the Second Circuit should be reversed.

Respectfully submitted,
this 29th day of January, 2013,

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AMICUS
CURIAE
BRIEF

No. 12-307

In The
Supreme Court of the United States

◆

UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR, et al.,
Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

◆

BRIEF OF *AMICI CURIAE* BISHOPS OF THE EPISCOPAL CHURCH IN THE STATES OF CALIFORNIA, CONNECTICUT, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE, NEW YORK, VERMONT, AND WASHINGTON AND THE DISTRICT OF COLUMBIA; THE JEWISH THEOLOGICAL SEMINARY OF AMERICA; MANHATTAN CONFERENCE OF THE METROPOLITAN NEW YORK SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA; THE RABBINICAL ASSEMBLY; THE RECONSTRUCTIONIST RABBINICAL ASSOCIATION; RECONSTRUCTIONIST RABBINICAL COLLEGE; RABBI AKIVA HERZFELD OF SHAAREY TPHILOH; THE UNION FOR REFORM JUDAISM; UNITARIAN UNIVERSALIST ASSOCIATION; UNITED CHURCH OF CHRIST; THE UNITED SYNAGOGUE OF CONSERVATIVE JUDAISM; AFFIRMATION; COVENANT NETWORK OF PRESBYTERIANS; FRIENDS FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER CONCERNS; METHODIST FEDERATION FOR SOCIAL ACTION; MORE LIGHT PRESBYTERIANS; PRESBYTERIAN WELCOME; RECONCILING MINISTRIES NETWORK; RECONCILINGWORKS: LUTHERANS FOR FULL PARTICIPATION; AND RELIGIOUS INSTITUTE, INC. ON THE MERITS AND IN SUPPORT OF AFFIRMANCE IN FAVOR OF RESPONDENT EDITH SCHLAIN WINDSOR

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

- I. A Wide Cross-Section Of American Religious Traditions Recognizes The Dignity Of Lesbian And Gay People And Their Relationships 8
  - A. The Inherent Dignity Of Lesbian And Gay Individuals Informs The Theology Of Numerous Religious Believers And Bodies 8
  - B. A Vast Spectrum Of American Faith Groups And Religious Observers Affirms Same-Sex Couples' Relationships In A Multitude Of Ways, Including By Celebrating And Solemnizing Their Marriages 15
- II. Recognizing The Necessary Distinction Between Civil And Religious Marriage, A Growing Number Of Faiths Support Civil Marriage Equality 20
- III. Recognizing Civil Marriages Of Same-Sex Couples Will Not Impinge Upon Religious Beliefs, Practices, Or Operations, But Rather Will Prevent One Set Of Religious Beliefs From Being Imposed Through Civil Law 28

TABLE OF CONTENTS – Continued

Page

A. Affirmance Would Not Interfere With The Exercise Of Religious Freedoms, Including The Freedom To Set Parameters For Religiously Sanctioned Marriage That May Differ From Those Established Under Civil Law ... 29

B. Recognizing The Civil Marriages Of Same-Sex Couples Will Not Burden Religious Organizations' Ability To Operate And Govern Their Own Religious Affairs 35

C. While *Amici* Respect All Fellow Faiths, Including Those That Embrace Different Religious Views On Marriage, It Is Constitutionally Impermissible To Impose Religious Views Through Civil Law To Curtail The Right Of Same-Sex Couples To Civilly Marry 37

CONCLUSION.. 40

APPENDIX A: STATEMENTS OF INTEREST OF *AMICI CURIAE* ....App. 1

TABLE OF AUTHORITIES

Page

CASES

Epperson v. Arkansas, 393 U.S. 97 (1968) 29

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012) 29, 32, 36

Larson v. Valente, 456 U.S. 228 (1982) 7, 37

Loving v. Virginia, 388 U.S. 1 (1967) 31

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici curiae ("*Amici*") represent a broad range of religious groups, organizations, and leaders who support equal treatment for same-sex couples affecting state-regulated civil marriage. While *Amici* come from faiths that have approached issues with respect to lesbian and gay people and their families in different ways over the years, they are united in the belief that, in our vastly diverse and pluralistic society, particular religious views or definitions of marriage should not be permitted to influence who the state permits to marry or how legally married couples are treated by the federal government. Such rights must be determined by religiously neutral principles of equal protection under the law.

The individual interests of each of the *Amici* are listed in Appendix A to this brief.

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[1] Pursuant to Rules 37.3 and 37.6 of the Rules of the Supreme Court, all parties have consented to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. In addition, no persons or entities other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over a century and a half ago, Alexis de Tocqueville reflected on the central role of religion in the birth of the English colonies in America and its "peculiar power" in the cultural life of the United States, while simultaneously observing the necessary corollary that lies at the heart of religious freedom: "In America religion has, if one may put it so, defined its own limits. There the structure of religious life has remained entirely distinct from the political organization. It has therefore been easy to change ancient laws without shaking the foundations of ancient beliefs."[2]

Tocqueville's reflection bears directly on the case before this Court. By historical and legal tradition, American pluralism extends to religion and its expression. *Amici* here affirm and embody that pluralism and submit that the judgment below should be affirmed as consistent with fundamental principles of equal protection and religious freedom. In contrast to those *amicus curiae* organizations urging reversal that would presume to declare a universal religious belief with respect to marriage,[3] *Amici* here bear

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[2] Alexis de Tocqueville, *Democracy in America*, Vol. II, Part 1, Ch. 1, at 432 (J.P. Mayer ed. (1969), George Lawrence trans. (1966), First Harper Perennial Modern Classics (2006)) (paragraph break omitted).

[3] *See, e.g.*, Brief for Catholic Answers, *et al.* as *Amici Curiae* Supporting Respondent BLAG at 13, *United States v. Windsor*

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witness to the diversity of religious viewpoints on marriage across various faiths and denominations.

The American religious panorama embraces a multitude of theological perspectives on lesbian and gay people and same-sex relationships. A vast range of religious perspectives affirms the inherent dignity of lesbian and gay people, their relationships, and their families. This affirmation reflects the deeply rooted belief, common to many faiths, in the essential worth of all individuals and, more particularly, the growing respect accorded within theological traditions to same-sex couples. Thus, some faiths celebrate same-sex couples' marriages identically to those of different-sex couples. Others solemnize same-sex relationships in ways other than marriage.

Faiths embracing same-sex couples – both theologically and with respect to the distinct issue of

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(Jan. 28, 2013) (No. 12-307); Brief for Chaplain Alliance for Religious Liberty, *et al.* as *Amici Curiae* Supporting Respondent BLAG at 3-4, *United States v. Windsor* (Jan. 29, 2013) (No. 12-307); Brief for Citizens United, *et al.* as *Amici Curiae* Supporting Respondent BLAG at 30-31, *United States v. Windsor* (Jan. 29, 2013) (No. 12-307); Brief for Liberty, Life and Law Foundation and North Carolina Values Coalition as *Amici Curiae* Supporting Respondent BLAG at 23, *United States v. Windsor* (Jan. 25, 2013) (No. 12-307); Brief for Manhattan Declaration as *Amicus Curiae* Supporting Respondent BLAG at 5, *United States v. Windsor* (Jan. 28, 2013) (No. 12-307); Brief for Westboro Baptist Church as *Amicus Curiae* at 19, *United States v. Windsor* (Jan. 25, 2013) (No. 12-307).

equality under civil law – participate in the mainstream of American religious observance. They include Mainline Protestant denominations such as the United Church of Christ and the Episcopal Church; the Unitarian Universalist Church; portions of the Religious Society of Friends (Quakers); and Judaism's Reform, Reconstructionist, and Conservative movements. Millions of religious individuals from other faiths also embrace and celebrate same-sex couples, including members of many other Protestant denominations, Roman Catholics, Orthodox Jews, and Muslims. These citizens comprise a major part of the American religious landscape.

Eliminating discrimination in civil marriage will not impinge upon religious doctrine or practice. All religions would remain free – as they are today with nine states and the District of Columbia permitting same-sex couples to marry – to define *religious* marriage in any way they choose. Nor would affirmance interfere with religious institutions' constitutionally protected speech or operations. The types of conflicts forecast by certain other *amici* already can and sometimes do arise under public accommodation laws whenever religiously affiliated organizations operate in the commercial or governmental spheres. Courts know how to respond if enforcement of civil rights laws overreaches to infringe First Amendment rights. In any event, the issue largely is irrelevant here, because the couples affected by the Defense of Marriage Act ("DOMA") already are lawfully married under state law. It appears that what those other *amici* want is not protection for their own free speech and free exercise rights, but rather immunity from disapproval they may face by those who affirm the rights and relationships of lesbian and gay people.

Certain *amici* supporting reversal have argued that civil recognition for the marriages of same-sex couples would alter a longstanding "Christian" definition of "marriage."[4] But this and other religiously based arguments for limiting civil recognition of marriage to different-sex couples cannot constitutionally be given weight by this Court. Crediting such arguments would improperly both enshrine a particular religious belief in the law – itself prohibited under the Establishment Clause – and implicitly privilege religious viewpoints that oppose marriage equality over those that favor it.

For these and other reasons, civil recognition of same-sex relationships, including through marriage, is fundamentally consistent with the religious pluralism woven into the fabric of American law, culture, and society. An affirmance here would not amount to "taking sides" with one religious view against another or constitute an attack on religion. Nor would it signal a judicial imprimatur on changing social mores. Rather, an affirmance would recognize the creative tension inherent in religions' interface with our pluralistic, changing society while confirming that all, regardless of faith, are entitled to equal protection under the law.

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[4] *See* Br. for Catholic Answers, *et al.*, *supra* note 3, at 13; Br. for Chaplain Alliance for Religious Liberty, *et al.*, *supra* note 3, at 1-2; Br. for Citizens United, *et al.*, *supra* note 3, at 30-31; Br. for Liberty, Life and Law Foundation and North Carolina Values Coalition, *supra* note 3, at 25; Br. for Manhattan Declaration, *supra* note 3, at 6; Br. for Westboro Baptist Church, *supra* note 3, at 29.

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ARGUMENT

Americans are a religious people, but diversely so.[5] Religious adherents differ on contentious issues,

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[5] According to survey data from the Pew Forum on Religion & Public Life, more than 90% of Americans believe in God or a universal spirit and more than 80% have some formal religious affiliation. U.S. Religious Landscape Survey, Pew Forum on Religion & Public Life, *Religious Beliefs and Practices: Diverse and Politically Relevant* (June 2008), at 5, 8, *available at* http://religions.pewforum.org/pdf/report2-religious-landscape-study-full.pdf. Religious affiliations and viewpoints also are diverse:

i. While over 75% of religiously affiliated Americans are Christian, this group is comprised of: Protestants, including Evangelical (26.3%), Mainline (18.1%), and Historically Black (6.9%) churches; Roman Catholics (23.9%); Mormons (1.7%); Jehovah's Witnesses (0.7%); Orthodox (0.6%); and Others (0.3%).

ii. Other religiously affiliated Americans are diverse as well, comprised of Jews (1.7%), Buddhists (0.7%), Muslims (0.6%), Hindus (0.4%), and other faiths (approximately 1.5%).

iii. Yet other sizeable blocks of the American public are unaffiliated, whether agnostic (2.4%), atheist (1.6%), or nothing in particular, whether secular

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and religious bodies have themselves evolved and disagreed over time – on marriage as well as other civil rights and social issues.[6] In view of that history and the wide range of modern religious thought on same-sex unions, it would be a mistake to elevate any one view on marriage above all others as the "Christian" or "religious" view. Indeed, it would be constitutionally inappropriate, because civil marriage is a secular institution, *see Maynard v. Hill*, 125 U.S. 190, 210 (1888), and the Constitution bars the government from favoring certain religious views over others, *see Larson v. Valente*, 456 U.S. 228, 244 (1982). Religious freedom means that all voices may contribute to our national conversation, but particular religious

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> and unaffiliated (6.3%) or religious and unaffiliated (5.8%).

Id. at 217.

[6] *See* Michael Perry, *Religion in Politics*, 29 U.C. Davis L. Rev. 729, 772 n.94 (1996) (chronicling shifts in religions' views on usury, the dissolubility of marriages, and slavery, and noting that "[i]n each case one can see the displacement of a principle or principles that had been taken as dispositive"). As one example, the American Baptist Church once believed that churches and other institutions should be separated on the basis of race, but later revised that view. *See* Pamela Smoot, *Race Relations: How Do Baptists Treat Their Brothers and Sisters?*, *in* History Speaks To Hard Questions Baptists Ask (2009), *available at* http://www.baptisthistory.org/smootracerelations.pdf. As another example, the Roman Catholic Church once sought to curtail women's suffrage but later championed it. *See* Rosemary Radford Ruether, *Women, Reproductive Rights and the Catholic Church*, 16 Feminist Theology 184, 185 (Jan. 2008).

perspectives on marriage cannot be permitted to control civil recognition of marriage for all.

I. A Wide Cross-Section Of American Religious Traditions Recognizes The Dignity Of Lesbian And Gay People And Their Relationships

With time, and across traditions, religious Americans have affirmed that the dignity of lesbian and gay people logically and theologically follows from the premise that all persons have inherent dignity. In some traditions, this affirmation has affected religious practice – *e.g.*, in the ordination of clergy. In others, it has led to various forms of religious affirmation of same-sex unions. All of this confirms that no one "religious" view of even the rite of marriage predominates in America, putting aside the separate question of whether there is a common religious viewpoint on civil marriage.

A. The Inherent Dignity Of Lesbian And Gay Individuals Informs The Theology Of Numerous Religious Believers And Bodies

Nearly three decades ago, the United Church of Christ, with 1.1 million members today, adopted a policy of membership nondiscrimination with regard to sexual orientation.[7] In 1989, the 45th General Assembly for the Union of Reform Judaism, which represents 1.5 million Reform Jews, resolved to "urge [its] member congregations to welcome gay and lesbian Jews to membership, as singles, couples, and families" and to "embark upon a movement-wide program of heightened awareness and education to achieve the fuller acceptance of gay and lesbian Jews in our midst."[8] These are but two examples – views on this subject abound, and common to them is the foundational theological belief in the dignity of lesbian and gay Americans *as persons*:

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[7] Resolution, General Synod of the United Church of Christ, *Opening and Affirming Resolution* (July 2, 1985), *available at* http://www.ucccoalition.org/programs/ona/background/1985/ (citing Romans 12:4 for proposition that "Christians . . . are many members, but . . . one body in Christ" and encouraging congregations to adopt "a Covenant of Openness and Affirmation" with lesbian and gay members of the faith).

[8] Resolution, Union of Reform Judaism, 60th General Assembly, *Gay And Lesbian Jews* (Nov. 1989), *available at* http://urj.org//about/union/governance/reso//?syspage=article&item_id=2065. *Cf.* Resolution, Union of Reform Judaism, 45th General Assembly, *Human Rights Of Homosexuals* (Nov. 1977), *available at* http://urj.org//about/union/governance/reso//?syspage=article&item_id=2158 (affirming the "belief that private sexual acts between consenting adults are not the proper province of government and law enforcement agencies"); Central Conference of American Rabbis, *Report of the Ad Hoc Committee on Homosexuality and the Rabbinate of the Central Conference of American Rabbis Annual Convention*, at 262 (1990), *available at* http://borngay.procon.org/sourcefiles/CCAR_Homosexuality.pdf ("all Jews are religiously equal regardless of their sexual orientation").

- The Episcopal Church, with more than 2.1 million members, has "reaffirm[ed] that gay and lesbian persons are by Baptism full members of the Body of Christ and of The Episcopal Church as 'children of God who have a full and equal claim with all other persons upon the love, acceptance, and pastoral concern and care of the Church.'"[9]
- The United Methodist Church, with 7.8 million members in the United States,[10] has affirmed that "homosexual persons no less than heterosexual persons are individuals of sacred worth" and that "all persons are equally valuable in the sight of God."[11]
- The Evangelical Lutheran Church in America, composed of nearly 4.8 million

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[9] Resolution 2006-A167, 75th General Convention of The Episcopal Church (2006), *available at* http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2006-A167.

[10] *See* Barbara Dunlap-Berg, *Church membership tops 12 million*, United Methodist News Feed, *available at* http://www.umc.org/site/apps/nlnet/content3.aspx?c=lwL4KnN1LtH&b=2789393&ct=9135453 (last visited Feb. 23, 2013).

[11] 2008 Book of Resolutions: Resolution #2041, United Methodist Church, *Church To Be In Ministry To Persons Of All Sexual Orientations* (amended and readopted 2008), *available at* http://www.umc.org/site/apps/nlnet/content2.aspx?c=lwL4KnN1LtH&b=4951419&content_id=%7BCAF9E91C-06A0-4D90-8AC2-97E9A0102D1B%7D&notoc=1.

members,[12] has articulated its "commit[ment] to welcoming all people, regardless of sexual orientation, and their families into our congregations."[13]

- The Presbyterian Church (U.S.A.), with 1.9 million members, has concluded that it would be "grave error to deny baptism or church membership to gay and lesbian persons or to withhold pastoral care to them and their families."[14]
- The Unitarian Universalist Church, with over 1,000 congregations,[15] likewise has affirmed the "inherent worth and dignity of every human being, including

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[12] *See* Evangelical Lutheran Church in America, *History of the ELCA, A Union of Common Beliefs*, *available at* http://www.elca.org/Who-We-Are/History.aspx (last visited Feb. 23, 2013).

[13] Evangelical Lutheran Church in America, *Frequently Asked Questions about the 2009 Churchwide Assembly actions regarding human sexuality*, *available at* http://www.elca.org/What-We-Believe/Social-Issues/Social-Statements/JTF-Human-Sexuality/cwafaqs.aspx (last visited Feb. 23, 2013).

[14] Theological Task Force on Peace, Unity and Purity of the Church, Final Report as approved by the 217th General Assembly of the Presbyterian Church (U.S.A.), *A Season of Discernment*, at 20 (2006), *available at* http://apps.pcusa.org/peaceunity purity/final-report/final-report-revised-english.pdf.

[15] *See* Unitarian Universalist Association, *UUA Membership Statistics, 1961-2012* (Dec. 6, 2012), *available at* http://www.uua.org/directory/data/demographics/281427.shtml (last visited Feb. 23, 2013).

> lesbian, gay, bisexual, and transgender individuals."[16]
>
> Reconstructionist Judaism, with nearly 100 congregations in the United States,[17] also has enunciated acceptance of gay and lesbian members, avowing that "the inherent dignity, integrity and equality of human beings" has "primacy over historically conditioned attitudes."[18]

Religious individuals, too, have demonstrated an increasingly positive view of lesbian and gay Americans. According to a Public Religion Research Institute study, *the majority of Americans from most major religious groups* have positive moral and theological views of gay and lesbian people, including 62% of Roman Catholics, 63% of white Mainline Protestants, and 69% of non-Christian, religiously affiliated Americans.[19] While individual liberties should not be subject to public opinion polls, these figures put into perspective the statement of *amicus* Becket Fund for Religious Liberty ("Becket Fund") that most religious adherents belong to bodies that oppose marriage equality.[20] Many of the faiths counted in that total (including Roman Catholics and many major Protestant denominations) have a *majority* of adherents who disagree with church leaders on this question.

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[16] Business Resolution, General Assembly of the Unitarian Universalist Association, *Confronting Sexual Orientation and Gender Identity Discrimination* (2010), *available at* http://www.uua.org/statements/statements/169267.shtml.

[17] *See* Reconstructionist Rabbinical College, *Directory of Reconstructionist Congregations and Havurot*, *available at* http://www.jewishrecon.org/directory?ref=jrf (last visited Feb. 23, 2013).

[18] Shawn I. Zevit, *JRF Homosexuality Report and Inclusion of GLBT Persons*, *available at* http://archive.jewishrecon.org/node/1742?ref=jrf (last visited Feb. 23, 2013) (citing Reconstructionist Commission on Homosexuality, *Homosexuality and Judaism: The Reconstructionist Position* (1993)).

Meanwhile, 57% of white Mainline Protestants and 50% of American Roman Catholics support the ordination of gay and lesbian clergy.[21] Unsurprisingly, therefore, some denominations – both Christian and Jewish – long have permitted openly lesbian and gay clergy.[22] Others more recently have amended their

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[19] Public Religion Research Institute, *Generations at Odds: The Millennial Generation and the Future of Gay and Lesbian Rights*, at 18-19 (Aug. 29, 2011), *available at* http://publicreligion.org/site/wp-content/uploads/2011/09/PRRI-Report-on-Millennials-Religion-Gay-and-Lesbian-Issues-Survey.pdf.

[20] *See* Brief for The Becket Fund for Religious Liberty as *Amicus Curiae* Supporting Respondent BLAG at 6, *United States v. Windsor* (Jan. 28, 2013) (No. 12-307).

[21] Public Religion Research Institute, *supra* note 19, at 20.

[22] The Unitarian Universalist Church called its first openly gay minister to serve as leader for a congregation in 1979. *See* Unitarian Universalist Association, *Unitarian Universalist LGBT History Timeline*, *available at* http://www.uua.org/lgbtq/history/20962.shtml (last visited Feb. 23, 2013). The seminary for Reconstructionist Jews began accepting gay and lesbian applicants in 1984. *See* Zevit, *supra* note 18. The Central Conference of American Rabbis endorsed the view in 1990 that

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practices to admit openly lesbian and gay people to various forms of ministry.[23] Such changes have extended to top leadership eligibility as well, as in the election of the first openly gay bishop in the Episcopal Church in 2003.[24]

"all rabbis, regardless of sexual orientation, be accorded the opportunity to fulfill the sacred vocation that they have chosen." Central Conference of American Rabbis, *supra* note 8, at 261. The Episcopal Church ordained its first openly gay priest in 1977. *See* Mireya Navarro, *Openly Gay Priest Ordained in New Jersey*, N.Y. Times, Dec. 17, 1989, at 54.

[23] *See, e.g.*, Presbyterian Church (U.S.A.), *Presbyterian Church (U.S.A.) Approves Change In Ordination Standard* (May 10, 2011), *available at* http://www.pcusa.org/news/2011/5/10/presbyterian-church-us-approves-change-ordination/ (reporting that new language in church's Book of Orders effectively would open ordained ministry to persons in same-gender relationships); Amy Stone, *Out and Ordained, New York's Jewish Theological Seminary Graduates its First Openly Lesbian Rabbi*, Lilith (2011), *available at* http://www.lilith.org/pdfs/LILSu11_FINAL_Outandordained.pdf (indicating that Conservative Jewish movement welcomed gay and lesbian rabbinical and cantorial students to Jewish Theological Seminary in 2007); Bishop Mark S. Hanson, *Message to Rostered Leaders* (Aug. 22, 2009), *available at* http://www.elca.org/What-We-Believe/Social-Issues/Social-Statements/JTF-Human-Sexuality/Message-to-Rostered-Leaders.aspx (last visited Feb. 23, 2013) (citing Resolution 2 of the 2009 Evangelical Lutheran Church in America Churchwide Assembly as resolving to find "a way for people in such publicly accountable, lifelong, monogamous, same-gender relationships to serve as rostered leaders of the church").

[24] *See* Laurie Goodstein, *Openly Gay Man Is Made A Bishop*, N.Y. Times, Nov. 3, 2003, at A1; *see also* Laurie Goodstein, *Episcopal Vote Reopens a Door to Gay Bishops*, N.Y. Times, July 14, 2009, at A11.

Whether it be the ordination of lesbian and gay clergy, the express welcome to lesbian and gay congregants and their families, or the affirmation that lesbian and gay individuals possess the same inherent dignity as any other person, the American religious landscape is one that includes same-sex couples and their families and that affirms their role in the faith community.

B. A Vast Spectrum Of American Faith Groups And Religious Observers Affirms Same-Sex Couples' Relationships In A Multitude Of Ways, Including By Celebrating And Solemnizing Their Marriages

Loving, committed relationships that same-sex couples have elected to enter also have been accorded doctrinal and theological affirmation in many faiths – unsurprisingly, in ways as diverse as America's religious families. For example, having witnessed "[f]or many years . . . the blessings of having same-sex couples and marriages in [their] midst," and ascribing these blessings to "the work of the Spirit," the New England Yearly Meeting of Friends (Quakers) reached a formal consensus in 2009 to rejoice in same-sex couples' marriages.[26] The Evangelical

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[26] *See* New England Yearly Meeting 2009: Minute 53, *Minute of Affirmation for Consideration of Monthly Meetings*, at 32 (2009), *available at* http://www.neym.org/2009Sessions/2009_NEYM-AdultMinutes.pdf:

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Lutheran Church in America has described the manner in which same-sex unions are, and are

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> For many years, many of our monthly meetings have experienced the blessings of having same-sex couples and marriages in our midst. With every marriage taken under its care, the meeting affirms that each relationship is the work of the Spirit, and a blessing to the couple, to their families and to the Friends community. We affirm the good order of same-sex marriages that are and have been conducted in some monthly meetings of [New England Yearly Meeting]. We encourage all of our constituent monthly meetings to discern how they can best offer to all couples the same care, and affirmations of their leadings to walk together in love.

See also, e.g., Philadelphia Yearly Meeting, *Minute of the Philadelphia Yearly Meeting* (July 27, 2006), *available at* http://flgbtqc.quaker.org/minutes.html#philadelphia (last visited Feb. 23, 2013) ("affirm[ing] the marriage of same-gender couples conducted under the care of Monthly Meetings of the Religious Society of Friends"); South Central Yearly Meeting, *Minute of the South Central Yearly Meeting of Friends* (Apr. 1-4, 1999), *available at* http://flgbtqc.quaker.org/minutes.html#southcentral (last visited Feb. 23, 2013) ("endors[ing] the marriages of individuals under the care of Monthly Meetings without regard to gender").

Friends are organized into monthly, quarterly, and yearly meetings. There is no national or international body of Friends that is superior in authority to the separate yearly meetings. *See* New England Yearly Meeting Faith and Practice Online, *General Organization and Structure of Meeting for Business*, *available at* http://www.neym.org/fponline/general.html (last visited Feb. 23, 2013). Nearly all yearly meetings, including New England, are represented on the Friends World Committee for Consultation; and New England Yearly Meeting is associated with other yearly meetings in the Friends United Meeting and in the Friends General Conference.

expected to be, like different-sex unions in several constitutive dimensions: "[T]he neighbor and community are best served when same-gender relationships are lived out with lifelong and monogamous commitments that are held to the same rigorous standards, sexual ethics, and status as heterosexual marriage. [We] surround such couples and their lifelong commitments with prayer to live in ways that glorify God, find strength for the challenges that will be faced, and serve others."[26]

Support for same-sex relationships in religious doctrine and practice likewise has informed a diverse array of formal marriage rituals. The Unitarian Universalist Association began celebrating the unions of same-sex couples as it would any other consenting adult couple's union in 1979 and formally affirmed this practice in 1984.[27] The Conservative, Reform, and Reconstructionist Jewish movements allow their rabbis to perform religious wedding ceremonies for same-sex couples. Indeed, this practice was approved by a unanimous vote of the Rabbinical Assembly's Committee on Jewish Law and Standards.[28] The United Church of Christ promulgated a new Order for Marriage – a template for marriage ceremonies – so that it could be used in any marriage ceremony regardless of gender.[29] The Episcopal Church acknowledged in 2000 that its membership includes same-sex couples living in "lifelong committed relationships . . . characterized by fidelity, monogamy, mutual affection and respect, careful, honest communication and the holy love which enables those in such relationships to see in each other the image of God," and in 2012 approved a provisional liturgy for the blessing of same-sex unions that may be used with the permission of the local bishop.[30] And some faiths that do not celebrate or solemnize marriages of same-sex couples per se accord recognition to them in various other ways.[31]

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[26] *See, e.g.*, 11th Churchwide Assembly, Evangelical Lutheran Church in America, *Human Sexuality: Gift and Trust* (Aug. 19, 2009), *available at* http://www.elca.org/What-We-Believe/Social-Issues/Social-Statements/JTF-Human-Sexuality.aspx.

[27] *See* LGBT Ministries Multicultural Growth and Witness, Unitarian Universalist Association, *LGBT History & Facts for Unitarian Universalists* (2011), *available at* http://www.uua.org/documents/lgbtq/history.pdf; Resolution of Immediate Witness, General Assembly of the Unitarian Universalist Association, *Support of the Right to Marry for Same-Sex Couples* (1996), *available at* http://www.uua.org/statements/statements/14251.shtml; Unitarian Universalist Association, *Unitarian Universalism and LGBTQ Issues: History & Facts* (Aug. 21, 2012), *available at* http://www.uua.org/lgbtq/history/index.shtml (last visited Feb. 23, 2013).

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[28] *See, e.g.*, E. Dorff, D. Nevins & A. Reisner, *Rituals and Documents of Marriage and Divorce for Same-Sex Couples*, Rabbinical Assembly (Spring 2012) (endorsing Conservative rabbis' right to solemnize marriages of same-sex couples and memorializing 13-0 vote by the Rabbinical Assembly's Committee on Jewish Law and Standards to approve endorsement); *id.* at 6 ("The Rabbinical Assembly maintains standards of rabbinic practice regarding marriage, and we shall apply the same standards to same-sex couples."); Resolution, 111th Convention of the Central Conference of American Rabbis, *Resolution On Same Gender Officiation* (Mar. 2000), *available at* http://ccarnet.org/rabbis-speak/resolutions/2000/same-gender-officiation/ (Reform movement); Lisa Tuttle, *Reconstructionist Movement Issues Joint Statement On Same-Sex Marriage Bans* (Nov. 19, 2008), *available at* http://archive.jewishrecon.org/same-sex-marriage-bans?ref=jrf (last visited Feb. 23, 2013) (noting that in series of resolutions beginning in 1993 Reconstructionist movement affirmed holiness of commitments made by same-sex couples).

[29] United Church of Christ, *Order for Marriage, An Inclusive Version*, *available at* http://www.ucc.org/worship/pdfs/323_346i_order-for-marriage-inclusive.pdf.

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[30] *See* Resolution 2000-D039, 73rd General Convention of The Episcopal Church (2000), *available at* http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2000-D039; Resolution 2012-A049, 77th General Convention of The Episcopal Church (2012), *available at* http://www.generalconvention.org/gc/resolutions; *see also* Laurie Goodstein, *Episcopalians Approve Rite to Bless Same-Sex Unions*, N.Y. Times, July 10, 2012, at A15.

[31] For example, although the Presbyterian Church (U.S.A.) does not formally solemnize same-sex couples' marriages, the church through its General Assembly overwhelmingly voted in 2012 (by a vote of 489 to 152) to "move the whole Presbyterian Church (U.S.A.) into a season of serious study and discernment concerning its meaning of Christian marriage." 2012 Assembly In Brief, Presbyterian Church (U.S.A.), *Same-Gender Marriage*, at 3 (2012), *available at* http://www.pcusa.org/media/uploads/oga/publications/assemblyinbrief.pdf. Same-gender domestic partners of members enrolled in the church's benefits plan became eligible for spousal and child benefits beginning in 2013. *See* Board of Pensions of the Presbyterian Church (U.S.A.), *Same-Gender Partner Benefits Approved for Benefits Plan of Presbyterian Church (U.S.A.)* (Mar. 3, 2012), *available at* http://web.pensions.org/Publications/pensions/Home/Forms%20&%20Publications/Booklets%20&%20Brochures/DomesticPartnerpressrelease.pdf.

The Evangelical Lutheran Church in America's 2009 Churchwide Assembly, meanwhile, resolved by a vote of 619 to

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In short, even limited to the sphere of *religious* marriage, organized religion in the United States exhibits a tremendous diversity of views and practices regarding unions of same-sex couples.

II. Recognizing The Necessary Distinction Between Civil And Religious Marriage, A Growing Number Of Faiths Support Civil Marriage Equality

More than a century ago, this Court held that "marriage is often termed . . . a civil contract . . . and does not require any religious ceremony for its solemnization." *Maynard*, 125 U.S. at 210. *Amici* are therefore mindful that their own theological perspectives on marriage are distinct from the civil law on marriage. Recognizing that civil and religious marriage necessarily are two different things, and further undercutting any claim that religion speaks with one voice on marriage, many religions – including *Amici*

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402 to "commit itself to finding ways to allow congregations that choose to do so to recognize, support and hold publicly accountable lifelong, monogamous, same-gender relationships." Hanson, *supra* note 23. Following that action, more than 300 Evangelical Lutheran congregations have performed blessings over same-sex couples' unions, while many more have adopted other policies and practices affirming same-sex couples' relationships. *See* ReconcilingWorks, *RIC Congregations List*, *available at* http://www.reconcilingworks.org/ric/ric-congregations-list#results (last visited Feb. 23, 2013).

here – have distinct positions supporting equal *civil* marriage rights for same-sex couples.[32]

Two Christian denominations that trace their history directly to the Puritans of New England support civil marriage for gay and lesbian couples.[33] Almost seventeen years ago, in 1996, the Unitarian Universalist Association – discussed above regarding its practice of *religiously* solemnizing same-sex unions – formally resolved to support equal civil marriage rights in part because the marriage equality debate "ha[d] focused on the objections of certain religious communities" to equal access to marriage.[34] In 2004, the Association further affirmed that "Civil

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[32] *Amici* do not suggest that their spiritual views on civil marriage equality should be imposed on anyone else. Rather, they present some of their beliefs here to counter the notion that any one segment of the religious community can claim divine or some other universally normative authority as a basis for exclusively reserving civil marriage for heterosexual couples. *See generally* Br. for Catholic Answers, *et al.*, *supra* note 3; Br. for Liberty, Life and Law Foundation and North Carolina Values Coalition, *supra* note 3; Br. for Manhattan Declaration, *supra* note 3; Br. for Westboro Baptist Church, *supra* note 3.

[33] *See generally* Mark W. Harris, *Unitarian Universalist Origins: Our Historic Faith* (Oct. 2002), *available at* http://www.uua.org/info/origins.html (last visited Feb. 23, 2013); United Church of Christ, *Short Course in the History of the United Church of Christ*, *available at* http://www.ucc.org/about-us/short-course/shortcourse.pdf (last visited Feb. 23, 2013).

[34] Resolution of Immediate Witness, General Assembly of the Unitarian Universalist Association, *Support of the Right to Marry for Same-Sex Couples* (1996), *available at* http://www.uua.org/statements/statements/14251.shtml.

Marriage is a Civil Right," and opposed any amendment of the United States Constitution to bar same-sex couples from marrying.[35] The following year, in 2005, the United Church of Christ "affirm[ed] equal marriage rights for couples regardless of gender and declar[ed] that the government should not interfere with couples regardless of gender who choose to marry and share fully and equally in the rights, responsibilities and commitment of legally recognized marriage."[36]

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[35] Action of Immediate Witness, General Assembly of the Unitarian Universalist Association, *Oppose Federal Marriage Amendment* (2004), *available at* http://www.uua.org/statements/statements/13433.shtml.

[36] Resolution, General Synod of the United Church of Christ, *In Support of Equal Marriage Rights for All* (July 4, 2005), *available at* http://www.ucc.org/assets/pdfs/in-support-of-equal-marriage-rights-for-all-with-background.pdf. Echoing the proper distinction between religious and civil marriage, the United Church of Christ General Synod concluded that "theologically and biblically, there is neither justification for denying any couple, regardless of gender, the blessings of the church nor for denying equal protection under the law in the granting of a civil marriage license, recognized and respected by all civil entities." *Id. See also id.* ("[L]egislation to ban recognition of same-gender marriages further undermine[s] the civil liberties of gay and lesbian couples and contributes to a climate of misunderstanding and polarization increasing hostility against gays and lesbians.").

In addition, the Reform,[37] Reconstructionist,[38] and Conservative[39] movements of Judaism all support

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[37] At its 1997 General Assembly, the Union of American Hebrew Congregations (now the Union for Reform Judaism) resolved to "[s]upport secular efforts to promote legislation which would provide through civil marriage equal opportunity for gay men and lesbians." General Assembly Resolution, Union of American Hebrew Congregations, *Civil Marriage for Gay and Lesbian Jewish Couples* (Oct. 29–Nov. 2, 1997), *available at* http://urj.org//about/union/governance/reso//?syspage=article&item_id=2000. As part of the foundation for this resolution, the Union of American Hebrew Congregations recognized that, "[n]o less than heterosexual couples, gay men or lesbians living in monogamous domestic relationships have demonstrated, like their counterparts, love for one another, compassion for the sick, and grief for the dead." *Id.* The 1997 resolution built on a 1996 resolution of the Central Conference of American Rabbis ("CCAR") "support[ing] the right of gay and lesbian couples to share fully and equally in the rights of civil marriage." Resolution, 107th Convention of the Central Conference of American Rabbis, *On Gay and Lesbian Marriage* (Mar. 1996), *available at* http://ccarnet.org/rabbis-speak/resolutions/1996/on-gay-and-lesbian-marriage-1996/. The CCAR resolution specifically recognized that civil marriage is a question of civil law and thus completely distinct from rabbinic officiation at religious marriages. *Id.*

[38] The Jewish Reconstructionist movement adopted a resolution in favor of full civil marriage equality for same-sex couples. *See* Reconstructionist Rabbinical Association, *et al.*, *Reconstructionist Movement Endorses Civil Marriage for Same-Sex Couples* (Apr. 2004), *available* at http://www.rrc.edu/news-media/news/reconstructionist-movement-endorses-civil-marriage-same-sex-couples. *See id.* ("[T]he Reconstructionist movement now endorses and supports the right of same-sex couples to share fully and equally in the rights, responsibilities, and commitments of civil marriage.").

[39] The Rabbinical Assembly – representing Conservative Judaism – resolved in 2011 to "support the extension of civil

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equal civil marriage rights for same-sex couples, as does the American Friends Service Committee of the Religious Society of Friends (Quakers).[40] More than three thousand clergy from numerous faiths have endorsed an open letter by the Religious Institute, Inc. calling for marriage equality.[41] *Amici* also note

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rights and privileges granted to married persons to same sex couples," and as early as 1990, had resolved to "work for full and equal civil rights for gays and lesbians in our national life." Resolution, Rabbinical Assembly, *Resolution In Support Of Equal Rights And Inclusion For Gay, Lesbian, Bisexual, And Transgender (GLBT) Persons* (2011), *available at* http://www.rabbinicalassembly.org/story/resolution-support-equal-rights-and-inclusion-gay-lesbian-bisexual-and-transgender-glbt-person?tp=212.

[40] In 2004, the Executive Committee of the American Friends Service Committee Board of Directors, acting at the direction of the full board, approved a "minute" setting forth its "support for equal civil marriage rights for lesbian, gay, bisexual, and transgender people." *See* American Friends Service Committee, *AFSC Board Statement on Equal Marriage* (2004), *available at* http://afsc.org/sites/afsc.civicactions.net/files/documents/AFSC%20Board%20Minute.pdf. Noting that some advocate civil unions for same-sex couples, while reserving civil marriage for heterosexual couples, the Executive Committee disagreed: "It is our belief that government sanction should be applied equally. All couples should be granted civil union licenses or all should be granted marriage licenses." *Id.* Like *Amici* here, the American Friends Service Committee Executive Committee was "careful to distinguish between civil law, in which no single religious view should predominate, and the right of various faith traditions, denominations, and congregations to decide for themselves whether they will perform, support, or recognize [same-sex] marriages." *Id.*

[41] Religious Institute, Inc., *Religious Declaration on Sexual Morality, Justice, and Healing* (Jan. 2010), *available at*

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that the very church founded by the Pilgrims who sailed on the Mayflower in 1620 – First Parish in Plymouth, now a Unitarian Universalist congregation – has issued a proclamation invoking its historical pursuit of religious freedom, recounting its long history of openness to lesbian and gay congregants, and calling for full civil marriage equality for same-sex couples.[42] Given its historical pedigree, the First Parish proclamation underscores the resonance of today's marriage equality debate with the nation's founding ideal of liberty.

In 2006, the Episcopal Church likewise called on federal, state, and local governments to provide same-sex couples protections equivalent to those "enjoyed by non-gay married couples" and "oppose[d] any state or federal constitutional amendment that prohibits same-sex civil marriage or civil unions," a stance growing out of its "historical support of gay and lesbian persons as children of God and entitled to full civil rights."[43] In 2012, the Episcopal Church called on

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http://religiousinstitute.org/node/293; Religious Institute, Inc., *List of Endorsers* (Jan. 10, 2012), *available at* http://religiousinstitute.org/list-of-endorsers (last visited Feb. 23, 2013).

[42] *See* Resolution, First Parish Church in Plymouth, *Resolution Demanding That All Persons, Regardless Of Sexual Orientation Or Gender Identification, Receive Equal Treatment Under The United States Constitution And The Laws Of The Land* (Feb. 4, 2013), *available at* https://www.dropbox.com/s/3ptdnty9xvx6sta/same%20sex%20marriage%20resolution%2002-02-13.doc (last visited Feb. 23, 2013).

[43] Resolution 2006-A095, 75th General Convention of The Episcopal Church (2006), *available at* http://www.episcopal

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Congress "to repeal federal laws that have a discriminatory effect on same-gender civilly married couples, and to pass legislation to allow the U.S. federal government to provide benefits to those couples."[44]

Even within faiths that do not believe the government should issue marriage licenses to same-sex couples – a position their leaders remain free to express – many adherents (in some cases, a majority) nonetheless have come to support equal access to civil marriage. For example, the Roman Catholic Church hierarchy is strongly opposed to both civil and religious marriage for same-sex couples.[45] Yet Catholic teaching joins other mainstream religions in affirming the fundamental human dignity of lesbian and gay individuals and calling for an end to "any forms

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archives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2006-A095.

[44] Resolution 2012-D018, 77th General Convention of The Episcopal Church (2012), *available at* http://www.generalconvention.org/gc/resolutions.

[45] United States Conference of Catholic Bishops, *Between Man And Woman: Questions And Answers About Marriage And Same-Sex Unions* (2003), *available at* http://www.usccb.org/issues-and-action/marriage-and-family/marriage/promotion-and-defense-of-marriage/questions-and-answers-about-marriage-and-same-sex-unions.cfm (last visited Feb. 23, 2013). *See also* Brief for United States Conference of Catholic Bishops as *Amicus Curiae* Supporting Respondent BLAG, *United States v. Windsor* (Jan. 29, 2013) (No. 12-307).

of injustice, oppression, or violence against them."[46] Consistent with the latter teaching, many individual American Catholics have come to favor marriage equality: polling conducted by the Pew Forum in late 2011 showed that "[a]mong Catholics as a whole, supporters" of marriage for same-sex couples had come to "outnumber opponents (52% vs. 37%)," whereas just one year before, 46% had favored same-sex marriage while 42% expressed opposition.[47] There are American Muslims, too, who believe that their religious faith is not contravened when the government affords marriage rights to same-sex couples.[48]

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[46] *See, e.g.*, Statement, Bishops' Committee on Marriage and Family, *Always Our Children: A Pastoral Message To Parents Of Homosexual Children And Suggestions For Pastoral Ministers* (1997), *available at* http://www.usccb.org/issues-and-action/human-life-and-dignity/homosexuality/always-our-children.cfm (last visited Feb. 23, 2013) (observing that "respect for the God-given dignity of all persons means the recognition of human rights and responsibilities," such that "the fundamental human rights of homosexual persons must be defended and . . . all of us must strive to eliminate any forms of injustice, oppression, or violence against them").

[47] The Pew Forum on Religion & Public Life, *Religion and Attitudes Toward Same-Sex Marriage* (Feb. 7, 2012), *available at* http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Religion-and-Attitudes-Toward-Same-Sex-Marriage.aspx (last visited Feb. 23, 2013) (citing comparative data from Aug.-Sept. 2010 and Oct. 2011).

[48] *See, e.g.*, Press Release, Muslims for Progressive Values, *Muslims for Progressive Values Applauds President Obama's Support of Marriage Equality* (May 9, 2012), *available at* http://www.mpvusa.org/uploads/Obama_Supports_Same_Sex

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The preceding survey belies the claim of certain *amici* favoring reversal that American religions speak uniformly or overwhelmingly in opposition to marriage equality for same-sex couples. To the contrary, American religious thought and practice embrace a rich diversity. No one view speaks for "religion" – even if, contrary to the Establishment Clause, it were appropriate to give weight to religious views in evaluating and applying the Constitution's secular promise of equal protection.

III. Recognizing Civil Marriages Of Same-Sex Couples Will Not Impinge Upon Religious Beliefs, Practices, Or Operations, But Rather Will Prevent One Set Of Religious Beliefs From Being Imposed Through Civil Law

Where lawful civil marriages of same-sex couples are recognized, the First Amendment's guarantees continue to protect the decisions of those faiths that choose not to solemnize such marriages, as well as those that do. Therefore, affirmance here would not alter the freedom of all religious communities to decide which religious unions are consistent with their beliefs. Nor would affirmance burden religious persons and institutions in the pursuit of their religious activities or the exercise of conscience. To the

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Marriage_FINAL.pdf (espousing the belief that same-sex couples should be allowed to marry).

contrary, reversal predicated on certain of the arguments of religious *amici* regarding express or implicit religious definitions of marriage would improperly favor one set of religious views (*e.g.*, rejecting the marriages of same-sex couples) against other religious views (*e.g.*, like those of *Amici* here, favoring equal treatment under law for married same-sex couples).

A. Affirmance Would Not Interfere With The Exercise Of Religious Freedoms, Including The Freedom To Set Parameters For Religiously Sanctioned Marriage That May Differ From Those Established Under Civil Law

However civil authorities define marriage, existing constitutional principles protect the autonomy of various religious entities to define *religious* marriages to comport with their respective tenets. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 (2012) (affirming principle that certain "matter[s are] 'strictly ecclesiastical,'" meaning they are "the church's alone" (citation omitted)); *see also Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."). In this manner, religion and the state reciprocally respect their own proper spheres. *See generally McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.").

This tradition of respect for religious autonomy has, indeed, permitted various religions to maintain rules regarding religious marriage that would be unenforceable under civil law – declining to sanctify or even recognize, for example, marriages between persons of different faiths and races, or successive marriages following divorce. Conservative Judaism, for example, prohibits interfaith marriages: "Rabbis and cantors affiliated with the Conservative Movement may not officiate at the marriage of a Jew to a non-Jew, may not co-officiate with any other clergy, and may not officiate or be present at a purely civil ceremony."[49]

For most of the twentieth century, the Roman Catholic Church's Code of Canon Law also proscribed interfaith marriages.[50] Considerably liberalized in 1983, official Catholic doctrine still restricts interfaith marriage by requiring the Church's "express permission" for a Catholic to enter a "mixed marriage" with a non-Catholic Christian, and "an express dispensation" for a Catholic to enter a "disparity of cult" marriage with a non-Christian – without which any marriage to a non-Christian is deemed invalid.[51]

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[49] Leadership Council on Conservative Judaism, *Statement on Intermarriage* (Mar. 7, 1995), *available at* http://www.mazorguide.com/living/Denominations/conservative-intermarriage.htm.

[50] Michael G. Lawler, *Interchurch Marriages: Theological and Pastoral Reflections, in* Marriage in the Catholic Tradition: Scripture, Tradition, and Experience, Ch. 22, at 222 (Todd A. Salzman, *et al.*, eds., 2004).

Historically, religious institutions also have differed markedly from each other and from the government in their treatment of interracial unions. For example, some fundamentalist groups condemned interracial marriage well after this Court's ruling in *Loving v. Virginia*, 388 U.S. 1 (1967), that the Constitution requires states to allow interracial civil marriages.[52] The Church of Jesus Christ of Latter-day Saints also has had a history of discouraging interracial marriages.[53]

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[51] *Catechism of the Catholic Church* ¶ 1635 (2d ed. 2000).

[52] *See* Gustav Niebuhr, *Interracial Dating Ban to End at Bob Jones University*, N.Y. Times, Mar. 4, 2000, at A11.

[53] *See Interracial Marriage Discouraged*, The Deseret News, June 17, 1978, at 4 ("Now, the brethren feel that it is not the wisest thing to cross racial lines in dating and marrying." (quoting President Spencer W. Kimball in a 1965 address to students at Brigham Young University)). In the different but conceptually related context of its historical policy on excluding African-Americans from the priesthood, the Church of Jesus Christ of Latter-day Saints expressly recognized that its position on treatment of African-Americans was "wholly within the category of religion," applying only to those who joined the church, with "no bearing upon matters of civil rights." The First Presidency, *Statement on the Status of Blacks* (Dec. 15, 1969), *in* Neither White Nor Black: Mormon Scholars Confront the Race Issue in a Universal Church 222 (Lester E. Bush, Jr. & Armand

(Continued on following page)

As for unions following divorce, the Roman Catholic Church teaches that "[t]he remarriage of persons divorced from a living, lawful spouse is not permitted by God's law as taught by Christ."[54] This means that Roman Catholic priests "cannot recognize the union of people who are civilly divorced and remarried,"[55] even though states do.

Conversely, states may sometimes prohibit marriages that are acceptable within a particular faith community. Indeed, even as they advocate here for an end to DOMA, many *Amici* faiths already religiously celebrate marriages of same-sex couples, and still other *Amici* have worked and/or are working within their own faiths to bring official religious approval to these unions. *See* discussion *supra* at Point I(B). The two efforts, however, are and should remain separate, and *Amici* here emphasize the importance of that separation as fully consistent with the Religion Clauses.

L. Mauss eds., 1984). That religions continue to be given wide latitude in determining matters of intrafaith doctrine and discipline – who counts as a minister being a prime example – was quite recently confirmed by this Court in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012). *See* discussion *supra* at 29, and *infra* at 36-37.

[54] United States Conference of Catholic Bishops, *United States Catholic Catechism For Adults* 290 (2006).

[55] United States Conference of Catholic Bishops, *Compendium – Catechism of the Catholic Church* ¶ 349 (2006).

In any event, the existence and persistence of differences such as those discussed above demonstrate that affirmance would not burden religious liberty. Were the federal government to start recognizing the lawful civil marriages of same-sex couples – as it does interfaith marriages, interracial marriages, and re-marriages after divorce – religions that disapprove of such unions would remain free to define *religious* marriage however they wish. They could withhold spiritual blessing of such marriages and indeed bar those entering into them from being congregants at all, just as they are now free to do so on grounds of faith, race, prior marital status, or any other characteristic deemed religiously significant.

Amici urging reversal fail to explain how their religious practice would be burdened by the fact that other people are afforded equal marriage rights by the state. For example, the brief of *amici* Liberty, Life and Law Foundation and North Carolina Values Coalition scarcely even touches on the actual legal consequences of recognizing the marriages of same-sex couples. Instead, it focuses on fears of having to "endorse or facilitate" marriages of same-sex couples,[56] to "affirm" such marriages,[57] or being subject to "[c]ompelled recognition" of objectionable unions.[58] Other than public accommodation law issues

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[56] Br. for Liberty, Life and Law Foundation and North Carolina Values Coalition, *supra* note 3, at 16, 18.

[57] *Id.* at 22.

[58] *Id.* at 23.

(addressed *infra* at Point III(B)), *amici* do not identify any cognizable impact on religious practices such as might constitute a free exercise violation. Rather, they seem to suggest that the deep offense they take at seeing same-sex couples marry – and the public disapprobation they may face for failing to embrace such marriages – is in and of itself an assault on religion. To similar effect is the brief of *amici* Chaplain Alliance for Religious Liberty, *et al.*, filed on behalf of military chaplains with religious objections to marriage equality. They express the fear that, if same-sex couples are permitted to marry and unequal treatment of them under the law becomes, within military culture, the equivalent of racism, those who continue to disapprove of same-sex couples' marriages will be marginalized or forced out of the military.[50]

But the Free Exercise Clause does not protect religious actors from the consequences of their statements and actions, or from the expression of others whom they may offend. There is no protected constitutional right not to be considered – correctly or incorrectly – a "discriminator." It is no accident that the Free Exercise Clause shares an amendment with the Free Speech Clause, because robust and open debate is crucial to both freedoms. *See, e.g.*, William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn. L. Rev. 545, 546-47 (1983) (arguing that free exercise of religion bears directly on freedom of speech, that both have their proper public dimension, and that Religion Clauses, together, offer "a unitary protection for individual liberty").

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[50] Br. for Chaplain Alliance for Religious Liberty, *et al.*, *supra* note 3, at 13-14.

Eliminating DOMA's unconstitutional distinction between lawfully married couples solely based on sexual orientation would not change, mandate, control, or interfere with any other party's religious practices. The religious freedoms embodied in the Constitution guarantee that diverse religious traditions and beliefs, including the sole right to define who can marry religiously, will flourish regardless of changes in civil marriage laws.

B. Recognizing The Civil Marriages Of Same-Sex Couples Will Not Burden Religious Organizations' Ability To Operate And Govern Their Own Religious Affairs

Amici supporting reversal nonetheless suggest that recognizing the civil marriages of same-sex couples will curtail religious organizations' ability to operate their own affairs and serve their communities.[80] For example, *amicus* Becket Fund raises the specter that, if this Court rules that Section 3 of DOMA is unconstitutional, religious institutions that wish not to respect the marriages of same-sex couples as a matter of religious doctrine will be exposed to a "wave of private civil litigation under anti-discrimination laws" relating to public accommodations, housing, and employment.[61]

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[80] *See, e.g.*, Br. for Catholic Answers, *et al.*, *supra* note 3, at 22-32; Br. for Liberty, Life and Law Foundation and North Carolina Values Coalition, *supra* note 3, at 4-21; Br. for Manhattan Declaration, *supra* note 3, at 15-21.

But the types of disputes anticipated by the Becket Fund have more to do with existing civil rights laws barring discrimination based on sexual orientation than with any conflicts that are likely to arise based on marital status if this Court affirms the judgment below. Indeed, because DOMA concerns discrimination against couples *who are already legally married under state law*, the arguments about state anti-discrimination laws largely are irrelevant here.

In any event, the extent to which any religious institution is subject to state regulation as an employer or as a public accommodation is determined by existing statutes and relevant, binding case law. Indeed, just last year this Court unanimously ruled that an employment discrimination claim by the former employee of a religious institution had to give way to the First Amendment right of the employer to determine who qualifies as a minister under its *religious* understanding of that term. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S. Ct. at 707, 709 ("The purpose of the [ministerial] exception [to employment discrimination laws] is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful – a matter 'strictly ecclesiastical' – is the church's alone" (internal citation omitted)). This Court need not predetermine these issues in order to affirm.

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[61] Br. for Becket Fund for Religious Liberty, *supra* note 20, at 15-21.

C. While *Amici* Respect All Fellow Faiths, Including Those That Embrace Different Religious Views On Marriage, It Is Constitutionally Impermissible To Impose Religious Views Through Civil Law To Curtail The Right Of Same-Sex Couples To Civilly Marry

Since this nation's founding, the concept of religious liberty has included the equal treatment of all faiths without discrimination or preference. *See Larson*, 456 U.S. at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). Government action denying recognition on religious or quasi-religious grounds of the civil marriages of same-sex couples violates this principle by putting the force of law behind one set of religious views.

Several *amici* in this case urge reversal on avowedly religious or quasi-theological grounds that would wreak havoc with the Establishment Clause. For example, *amicus* Manhattan Declaration bases its arguments largely on an exposition of what "Christians believe" about marriage and the assertion that the "Christian definition of marriage" is and should be enshrined in secular law.[62] Similarly, *amici* Robert P. George, *et al.* assert that the government's understanding of marriage must be concordant with the definition of marriage as a "conjugal" relationship, defined by the sexually complementary roles of a man and a woman.[63] Although these *amici* largely present their argument through a philosophical lens, it has religious implications.[64]

These assertions improperly seek to enshrine particular religious or quasi-theological views in civil law. The "conjugal" notion of marriage may be one propounded by certain philosophers or by certain religious faiths. But it does not express a universal definition of marriage, religious or otherwise. Judaism, for example, understands marriage more as a contractual than a conjugal union, as evidenced by the process Judaism has established for divorce within the faith, a process akin to exiting a contractual relationship.[65] More fundamentally, that some groups believe that marriage should be viewed primarily as a conjugal union may serve their faiths well, but provides no legitimate basis for action by the government, which must remain neutral, in structuring law and public policy, among particular religious viewpoints. "Courts are not arbiters of scriptural interpretation" and "should not undertake to dissect religious beliefs." *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981). The overtly religious arguments of *amici* who would have the Court adopt and impose specifically religious definitions of marriage must be rejected – among other reasons because that result would disfavor and disadvantage *other religious believers*, like *Amici* here, who do not embrace the arguments or conclusions of *amici* seeking reversal.

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[62] *See* Br. for Manhattan Declaration, *supra* note 3, at 5-6.

[63] *See* Brief for Robert P. George, *et al.* as *Amici Curiae* Supporting Respondent BLAG at 5, *United States v. Windsor* (Jan. 29, 2013) (No. 12-307).

[64] *See, e.g.*, Natural Family Planning Program, United States Conference of Catholic Bishops, *Conjugal Love* 1, *available at* http://www.usccb.org/issues-and-action/marriage-and-family/natural-family-planning/upload/nfp-conjugal-love.pdf (arguing that "[a]uthentic conjugal love will be more highly prized, and wholesome public opinion created about it if Christian couples give outstanding witness to faithfulness and harmony in their love," and that "[m]arriage and conjugal love are by their nature ordained toward the begetting and educating of children").

By affirming the judgment of the court below that Section 3 of DOMA is unconstitutional without reference to religiously based arguments, and affirming the constitutional promise of equal treatment for lawfully married different- and same-sex couples, this Court will ensure that civil law neither favors nor disfavors any particular religious viewpoint, and it will leave individual faith communities free to determine for themselves whether or not to add religious sanction to particular unions.

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[65] *See* Michael J. Broyde, *The Covenant-Contract Dialectic in Jewish Marriage and Divorce Law*, *in* Covenant Marriage in Comparative Perspective 53, 58 (John Witte & Eliza Ellison eds., 2005) ("Talmudic Jewish law treated marriage formation as a private contract requiring the consent of both parties, and divorce as the other side of that marriage contract, albeit with certain limitations.").

◆

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Court should affirm the judgment of the Court of Appeals holding that Section 3 of DOMA is unconstitutional.

Respectfully submitted,

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February 28, 2013

APPENDIX A: STATEMENTS OF INTEREST OF *AMICI CURIAE*

Amici curiae Bishops of The Episcopal Church include the Rt. Rev. Marc Handley Andrus, Bishop of California; the Rt. Rev. Mary Gray-Reeves, Bishop of El Camino Real (Cal.); the Rt. Rev. J. Jon Bruno, Bishop of Los Angeles (Cal.); the Rt. Rev. Diane Jardine Bruce, Bishop Suffragan of Los Angeles (Cal.); the Rt. Rev. Mary D. Glasspool, Bishop Suffragan of Los Angeles (Cal.); the Rt. Rev. Barry L. Beisner, Bishop of Northern California; the Rt. Rev. James R. Mathes, Bishop of San Diego (Cal.); the Rt. Rev. Chester L. Talton, Bishop of San Joaquin (Cal.); the Rt. Rev. Ian T. Douglas, Bishop of Connecticut; the Rt. Rev. Laura J. Ahrens, Bishop Suffragan of Connecticut; the Rt. Rev. James E. Curry, Bishop Suffragan of Connecticut; the Rt. Rev. Alan Scarfe, Bishop of Iowa; the Rt. Rev. Stephen T. Lane, Bishop of Maine; the Rt. Rev. Eugene Taylor Sutton, Bishop of Maryland; the Rt. Rev. Joe Goodwin Burnett, Assistant Bishop of Maryland; the Rt. Rev. James Joseph Shand, Bishop of Easton (Md.); the Rt. Rev. M. Thomas Shaw SSJE, Bishop of Massachusetts; the Rt. Rev. Gayle E. Harris, Bishop Suffragan of Massachusetts; the Rt. Rev. Douglas J. Fisher, Bishop of Western Massachusetts; the Rt. Rev. A. Robert Hirschfeld, Bishop of New Hampshire; the Rt. Rev. Andrew M.L. Dietsche, Bishop of New York; the Rt. Rev. Lawrence C. Provenzano, Bishop of Long Island (N.Y.); the Rt. Rev. Gladstone B. Adams III, Bishop of Central New York; the Rt. Rev. Prince G. Singh, Bishop of Rochester (N.Y.); the Rt. Rev. R. William Franklin, Bishop of Western New York; the Rt. Rev. Thomas C. Ely, Bishop of Vermont; the Rt. Rev. Gregory H. Rickel, Bishop of Olympia (Wash.); the Rt. Rev. James E. Waggoner, Jr., Bishop of Spokane (with respect to the portion of the diocese located in the State of Washington); and the Rt. Rev. Mariann Edgar Budde, Bishop of Washington (D.C.).[1] As Bishops serving in civil jurisdictions where same-sex couples have been granted the right to marry, The Episcopal Church has authorized them to provide a "generous pastoral response" to civilly married couples.[2]

Amicus curiae The Jewish Theological Seminary of America ("JTS") is a preeminent institution of Jewish higher education that integrates rigorous academic scholarship and teaching with a commitment to strengthening Jewish tradition, Jewish lives, and Jewish communities. As the intellectual center of the Conservative Movement, JTS is committed to educating the public on Jewish perspectives regarding important social issues and providing an informed Jewish voice on those issues.

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[1] The territory of each diocese of The Episcopal Church is described at http://www.episcopalchurch.org/browse/diocese.

[2] Resolution 2009-C056, 76th General Convention of The Episcopal Church (2009), *available at* http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2009-C056; Resolution 2012-A049, 77th General Convention of The Episcopal Church (2012), *available at* http://www.generalconvention.org/gc/resolutions.

Amicus curiae Manhattan Conference of the Metropolitan New York Synod of the Evangelical Lutheran Church in America represents the pastors and members of the Evangelical Lutheran Church in America in the Manhattan area. The Evangelical Lutheran Church in America was formed from three separate and well-established North American church bodies: The American Lutheran Church, The Association of Evangelical Lutheran Churches, and The Lutheran Church in America.

Amicus curiae Rabbinical Assembly (the "Assembly") is the international association of Conservative rabbis. Since its founding in 1901, the Assembly has been the creative force shaping the ideology, programs, and practices of the Conservative movement, and is committed to building and strengthening the totality of Jewish life. Rabbis of the Assembly serve congregations throughout the world, and also work as educators, officers of communal service organizations, and college, hospital, and military chaplains.

Amicus curiae Reconstructionist Rabbinical Association ("RRA"), established in 1974, is the professional association of Reconstructionist rabbis. Comprised of nearly 300 rabbis, the RRA represents the rabbinic voice within the Reconstructionist movement.

Amicus curiae Reconstructionist Rabbinical College educates leaders, advances scholarship and develops resources for contemporary Jewish life.

Amicus curiae Rabbi Akiva Herzfeld of Shaarey Tphiloh serves the oldest Mainline Orthodox synagogue north of Boston. The congregation was founded in 1904 on Newberry Street in Portland, Maine and moved to its present location in 1954.

Amicus curiae Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews, is committed to ensuring equality for all of God's children, regardless of sexual orientation.

Amicus curiae Unitarian Universalist Association was founded in 1961 and has nurtured a heritage of providing a strong voice for social justice and liberal religion. Unitarian Universalism is a caring, open-minded faith community that traces its roots in North America back to the Pilgrims and the Puritans.

Amicus curiae United Church of Christ has more than 5,100 churches and 1.1 million members across the United States, and serves God in the co-creation of a just and sustainable world.

Amicus curiae United Synagogue of Conservative Judaism ("USCJ") is the congregational arm of Conservative Judaism in North America. USCJ is committed to a dynamic Judaism that is learned and passionate, authentic and pluralistic, joyful and accessible, egalitarian and traditional, and thereby seeks to create the conditions for a powerful and vibrant Jewish life for the individual members of its sacred communities.

Amicus curiae Affirmation represents lesbian, gay, bisexual, transgender, and queer people and their supporters in the United Methodist Community.

Amicus curiae Covenant Network of Presbyterians, a broad-based, national group of clergy and lay leaders, seeks to support the mission and unity of the Presbyterian Church (U.S.A.), articulate and act on the church's historic, progressive vision, work for a fully inclusive church, and find ways to live out the graciously hospitable gospel by living together with all our fellow members in the Presbyterian Church (U.S.A.).

Amicus curiae Friends for Lesbian, Gay, Bisexual, Transgender, and Queer Concerns ("FLGBTQC") is a faith community within the Religious Society of Friends. FLGBTQC deeply honors, affirms, and upholds that of God in all people.

Amicus curiae Methodist Federation for Social Action mobilizes clergy and laity within The United Methodist Church to take action on issues of peace, poverty and people's rights within the church, the nation, and the world.

Amicus curiae More Light Presbyterians represents lesbian, gay, bisexual, and transgender people in the life, ministry, and witness of the Presbyterian Church (U.S.A.) and in society.

Amicus curiae Presbyterian Welcome is a diverse community of countless individuals representing lesbian, gay, bisexual, and transgender people in the

Presbyterian Church (U.S.A.), through education, advocacy, and relationship building.

Amicus curiae Reconciling Ministries Network serves lesbian, gay, bisexual, and transgender United Methodists and their allies to transform their world into the full expression of Christ's inclusive love. Reconciling Ministries Network envisions a vibrant Wesleyan movement that is biblically and theologically centered in the full inclusion of God's children.

Amicus curiae ReconcilingWorks: Lutherans For Full Participation organizes lesbian, gay, bisexual, and transgender individuals and their allies within the Lutheran communion and its ecumenical and global partners.

Amicus curiae Religious Institute, Inc. is a multifaith organization whose thousands of supporters include clergy and other religious leaders from more than fifty faith traditions. The Religious Institute, Inc. partners with the leading mainstream and progressive religious institutions in the United States.

AMICUS
CURIAE
BRIEF

No. 12-307

In the Supreme Court of the United States

UNITED STATES, PETITIONER
v.
EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ON THE NON-JURISDICTIONAL ISSUES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES....................................iv

STATEMENT OF INTEREST OF AMICUS CURIAE....................................1

SUMMARY OF ARGUMENT....................................2

ARGUMENT....................................4

I. THE TOTAL LACK OF TRADITIONAL UNDERPINNING FOR GAY MARRIAGE.....5

II. "MORAL DECAY IN MODERN AMERICA"....................................8

III. THE LEGAL ACADEMY AND GAY MARRIAGE....................................12

IV. GAY MARRIAGE AND THE PUBLIC FISC....................................13

V. SODOMY AS CANCER, AIDS, OTHER-DISEASE, AND INJURY VECTOR..........15

VI. DIVERSE MARRIAGE: THE GOOD OF HETEROSEXUAL (MAN/WOMAN), DIFFERENT-SEX MARRIAGE PARTNERS....................................19

VII. EQUAL PROTECTION IN OUR LAW, HISTORY, AND CULTURE, RE GAY

MARRIAGE..20

A. Why Affirmative Action Is More Defensible than Gay Marriage; and, Would Martin Luther King Have Been Welcome to Speak at the Presidential Inauguration?..................................20

B. Reparations for Slavery v. Gay Marriage; and, *Brown* v. *Crawford*...................25

C. "*Lawrence* and No Further"; or, Negative Liberty, Positive Liberty, and State-Subsidized Sodomy..........................27

D. The Real Equal Protection Violation in this Case: Voting Rights?.................29

E. "Occupational Qualification" and Gay Marriage...30

VIII. GAY MARRIAGE LEADING TO POLYGAMY: NO JOKE, UNFORTUNATELY...............................31

IX. RATIONAL BASIS SANS ANIMUS IS THE RIGHT LEVEL OF SCRUTINY, THOUGH DOMA (OR PROPOSITION 8) MAY PASS HIGHER LEVELS AS WELL..................34

X. GENEROUS ALTERNATIVES TO COURT-ORDERED LEGAL GAY MARRIAGE.........37

XI. HOW COURT-ORDERED GAY MARRIAGE

MAY HURT THE CAUSE OF GAY MARRIAGE....................................38

CONCLUSION..40

TABLE OF AUTHORITIES

CASES

Brown v. Bd. of Educ., 347 U.S. 483 (1954)...3, 25, 27

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U.S. Const. amend. V (Equal Prot. Cl.)...........*passim*

U.S. Const. amend. XIV (Equal Prot. Cl., explicit or implied)...7, 26

STATUTES

Anti-Obscenity Enforcement Act of 1998, Ala. Code § 13A-12-200.2 (1975; amended 1998)...............11

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Isaiah Berlin (1909-1997) on "positive" and "negative" liberty..28

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Br. on the Merits for Resp't The Bipartisan Legal Advisory Group of the U.S. House of Representatives in 12-307 (Jan. 2013)............36

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Winston Churchill, alleged quip about "Rum, sodomy, and the lash"..............................11

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Respondent, The Bipartisan Legal Advisory Group ("BLAG") of the United States House of Representatives in Case 12-307 ("*United States v. Windsor*"). BLAG opposes overturning Section 3 of the Defense of Marriage Act ("DOMA"),[2] and thus opposes the Court's forcing Congress sometimes to offer benefits for same-sex partners, due to a supposed violation of the Equal Protection Clause of the Fifth Amendment of the Constitution. This brief will cover the substantive aspects of the case, not the jurisdictional aspects such as standing.

Since both this case and the *Hollingsworth v. Perry* ("*Hollingsworth*") case[3] about California's Proposition 8 (2008) are about same-sex marriage ("gay marriage", or "*per se* sterile marriage" ("PSSM")), are being heard in tandem, and there is a heavy overlap of issues, this brief will discuss both cases.

Amicus has multiple interests in this case, and also in *Hollingsworth*. For example, he has a general interest as a lawyer who cares deeply about our Constitution, and who has submitted briefs to this Court concerning constitutional matters, e.g., his *Schuette v. Coalition to Defend Affirmative Action, et al.* (a.k.a. "*BAMN*")[4] amicus brief recommending summary reversal, *see id.*, in that case because the idea that the Equal Protection Clause mandates legalized affirmative action in a State is absurd.

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[1] No party or its counsel wrote or helped write this brief, or gave money to its writing or submission, see S. Ct. R. 37. Blanket permission is on record with the Court for *amicae/i* to write briefs, except in the case of Edith Windsor's counsel, who sent Amicus e-mailed permission.

[2] Pub. L. 104–199, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7.

[3] 671 F.3d 1052 (9th Cir. 2012) (*cert. granted*, 81 U.S.L.W. 3324) (U.S. Dec. 7, 2012) (No. 12-144).

Similarly, in the instant case, the idea that the Equal Protection Clause mandates legalized gay marriage, or similar status, under federal law (or in a State) is unsupportable. Amicus means to explore that parallel, and many other issues, including contextual, moral, and medical ones, so that the Court may make the optimal decision in these controversial cases, *Windsor* and *Hollingsworth*.

Speaking of "controversy", this brief is going to be fairly explicit about various relevant bodily and sexual issues re gay marriage. This is not to cause scandal, but because it would be underinclusive, or even intellectually dishonest, not so to do. Amicus thanks readers for having an open mind.

SUMMARY OF ARGUMENT

Gay marriage has no support in our traditions, and this may be especially worrisome seeing the recent moral decay of America by traditional standards. Thus, the States and Congress are free to decline support and subsidy for gay marriage, despite the false claims of many law professors that governmental bodies are constitutionally shackled from doing so. If some say gay marriage is not a moral issue, there are still many other rational bases to decline governmental support for gay marriage.

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[4] Nos. 08-1387, 08-1534, 08-1389, 09-1111, 2012 U.S. App. LEXIS 23443 (6th Cir. Nov. 15, 2012) (en banc), *pet. for cert. pending* (U.S. Dec. 4, 2012) (12-682).

For example, the public fisc may be affected by gay marriage. Also, sodomy is a vector of injury and disease. Moreover, a claim that "equal protection" demands court-ordered legalization of gay marriage, is an attack not only on common sense but also on separation of powers, and on the sensible idea that rights are different from privileges, so that not everyone can always get what they want all the time, e.g., polygamists claiming they have a "right" to polygamy. And, the compelling interest of diversity is served by traditional marriage, since a man-woman couple is diverse as no same-sex couple can be.

And speaking of diversity: other groups who may have been oppressed more than gays may not be receiving their due from society themselves, so the "priority" of gay marriage over those other, older grievances is questionable.

Thus, equal protection, considering our laws, history, and culture, does not encompass gay marriage, which neither Martin Luther King nor his wife saw as necessary. Even an "unpopular" cause like reparations for slavery may have a better equal-protection claim than gay marriage, and gay marriage would be no "*Brown v. Board of Education*" (347 U.S. 483 (1954)) for gays. Marriage can justifiably have fertility as a basis, to a limited extent and without policing. And to take away the

People's right to vote no on gay marriage, may be an equal-protection violation of sorts re the value of their votes.

Especially considering all these reasons, DOMA (or Proposition 8) not only passes the proper standard of review, i.e., rational basis sans animus, but also passes heightened scrutiny, either intermediate or even strict scrutiny.

Lawrence v. Texas (539 U.S. 558 (2003)), a charter of freedom, offers American gays the "negative liberty" of not being arrested; but this does not imply the "positive liberty" of receiving the State's approbation and financial aid for a marriage based on sodomy. *Lawrence* does in fact allow gay marriage, i.e., gays can marry in a church, although without being officially married in the eyes of the State. If the Court somehow concludes it is inhumane for measures like hospital visitation for gay partners not to be mandatory nationwide, the Court can mandate such measures without mandating gay marriage.

America's democratic conversation about gay marriage is working, e.g., several States have recently approved gay marriage; and the votes of people in all the States deserve equal protection more than gay marriage does. For the Court to interrupt this successful national conversation would be damaging, even to the cause of gay marriage itself, which even some homosexuals oppose, and which might find more long-term public support if the Court did not force it on the Nation.

ARGUMENT

I. THE TOTAL LACK OF TRADITIONAL UNDERPINNING FOR GAY MARRIAGE

"It is a truth universally acknowledged, that a single man in possession of a good fortune must be in want of a husband." One reason Jane Austen did not write that line to begin *Pride and Prejudice* (1813)[5] is that it has been "universally acknowledged" in Anglo-American tradition, until recently, that marriage is between men and women, one of each. If Austen's heroine Elizabeth Bennet had married a "Marcy" instead of Mr. Darcy, this would have seemed a little strange. The Nation's founders seem to have had a similar understanding: if James Madison had married Donny instead of Dolley, this would have caused much consternation.

Historically, the first same-sex relations may have been at Sodom and Gomorrah, *see Genesis* 18-19 (Deity destroys Mideastern cities due to behavior of inhabitants). What back history gay marriage *per se* has, is not entirely salutary. *See, e.g.*, Wikipedia, *Same-sex marriage*,[6] noting, *see id.*, that the first gay marriage in the West was that of the crazed Roman emperor Nero to another man. Wikipedia, *Pythagoras (freedman)*,[7] gives more detail of the tender scene, complete with "blushing bride": in 64 A.D., during the riotousness of Saturnalia, Nero

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[5] She used "wife" instead of "husband", of course, *see id.*

[6] http://en.wikipedia.org/wiki/Same-sex_marriage (as of Jan. 16, 2013, at 22:53 GMT).

[7] http://en.wikipedia.org/wiki/ Pythagoras_(freedman) (as of Dec. 13, 2012, at 23:58 GMT).

> stooped to marry himself to one of that filthy herd, by name Pythagoras, with all the forms of regular wedlock. The bridal veil was put over the emperor; people saw . . . . the couch and the nuptial torches; everything in a word was plainly visible, which, even when a woman weds darkness hides.

Id. (citation omitted) ***Res ipsa loquitur.***

Speaking of Rome, Nero's fiddling around with poor Pythagoras, *supra*, brings to mind *Romans* 1:27, where St. Paul says, "the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet." *Id.* (KJV) "For good or ill", such a view of gay marriage has been more typical of our tradition than Nero's lifestyle is.

A later observation, also from Rome, encapsulating the post-Nero Euro-American marriage tradition, is in Pope Paul VI's 1968 encyclical *Humane Vitae*: "[Marital] love is fecund. It is not confined wholly to the loving interchange of husband and wife . . . . Marriage and conjugal love are by their nature ordained toward the procreation and education of children."[8] *Id.* Husband, wife, and fertility, *see id.*, are deemed marks of real marriage.

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[8] Eng. trans. at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html.

Given the condemnations *supra* of gay marriage or gay sex, it is interesting to note[9] that British Satanist/occultist Aleister Crowley taught anal intercourse techniques as part of the 11th degree of his black-magic system, several degrees above the heterosexual techniques at the mere 9th degree.

See also, e.g., *Leviticus* 18:22: "Thou shalt not lie with mankind, as with womankind: it is abomination." *Id.* (KJV)

This section of the brief is meant to help establish that the question of whether prohibitions of gay marriage (or marital-type benefits) violate the Fifth, or Fourteenth, Amendment, need not even be asked, because the tradition of marriage was clearly never meant to be extended beyond heterosexual couples in the first place.

Seeing the traditions mentioned *supra*: claiming that the illegality of gay marriage discriminates against gays, is like claiming that because a fish can't ride a bicycle, that bicycles discriminate against fish. Bicycles were not meant for fish in the first place. (*See, e.g.*, "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U. S. 141, 147 (1940) (Frankfurter, J.))

If a State or Congress wants to go beyond traditional definitions of marriage and newly create gay marriage, or acquiesce to another sovereign's support of gay marriage, that should be up to them, not the courts.

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[9] *See* Wikipedia, *Sex magic*, http://en.wikipedia.org/wiki/Sex_magic (as of Nov. 18, 2012, at 00:58 GMT).

On that note, we now explore the broader issue of our country's morals in general, and who should decide about them and their public endorsement or condemnation.

II. "MORAL DECAY IN MODERN AMERICA"

To many Americans, the country's morals are going into the "toilet" fast these days, due to people's atrocious behavior. *See, e.g.*, Liz Raftery, *Anna Kendrick Tweets Racy Message About Ryan Gosling*, TV Guide,[10]

> The *Twilight* star [Anna Kendrick] made an . . . admission about the actor via Twitter Monday.
>
> "Ugh - NEVER going to a Ryan Gosling movie in a theater again," she wrote. "Apparently m[ ]sturbating in the back row is still considered 'inappropriate.'"

Id. (brackets not in original) Kendrick's "humor", *see id.*, accessible to impressionable young children on the Internet, is not a hopeful sign about where America is going.

Even among our pundit class's writings, decay rages, at least by traditional standards. *See, e.g.*, an article[11] by writer Amanda Marcotte:[12] "Clearly, what we as a nation need is more f[ ]cking, less praying. A good 30% of our bullsh[ ]t would go away pretty quickly if we just shifted our priorities in the right direction." *Id.* (brackets not in original). There is a sense of "sexual entitlement" abroad in this land, which may be one of this Nation's biggest problems at present.

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[10] Yahoo! TV, Jan. 16, 2013, 6:33 a.m., http://tv.yahoo.com/news/anna-kendrick-tweets-racy-message-ryan-gosling-143300434.html.

[11] *Copay-Free Birth Control and Other Women's Health Care Starting Today*, Pandagon, Raw Story blog, Aug. 1, 2012, 10:19

Young actors or writers aside, elders are not behaving well either, e.g., David Petraeus' sordid affair with his biographer Paula Broadwell, which did not bode well for his career. And all this against a backdrop of other threats to children, as with the horrific slaughter at Sandy Hook School in Newtown, Connecticut. Parents wonder, "How can we protect our families, morally and otherwise?"

Families, family values, and growing up innocent, are, indeed, increasingly endangered. *See, e.g.*, HuffPost Live, *Naomi Wolf, Feminist Author: Internet Porn Causing Risky Sex At Colleges (VIDEO)* ("Wolf Article"),[13]

> Regarding the sexual activities of current college-age men and women that grew up on Internet porn, Wolf relayed some particularly horrifying stories.

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a.m., http://www.rawstory.com/rs/2012/08/01/copay-free-birth-control-and-other-womens-health-care-starting-today/.

[12] Of the *American Prospect* and other publications.

[13] Huffington Post, updated Jan. 16, 2013, 9:33 p.m., http://www.huffingtonpost.com/2013/01/16/naomi-wolf-author-porn-anal-sex_n_2489472.html.

> "I visited a conservative college campus and a liberal one and anal fissures were the number one health problem women were having because everyone was doing anal when they were drunk and had just met, which is not the best way to do anal," Wolf told HuffPost Live. "It's a very delicate thing. So, the scripts are being set by porn."

Id. Amicus has always personally felt that no woman (or man) should have to be sodomized, which, with its injury potential, may border on a constitutional violation. *Cf., e.g., Prude v. Clarke*, 675 F.3d 732 (2012), *available at* http://www.abajournal.com/files/Nutriloaf.pdf: "Deliberate withholding of nutritious food . . . . with the effect of causing . . . . maybe an anal fissure (which is no fun at all[)] . . . . would violate the Eighth Amendment." *Id.* at 5 (Posner, J.).

Sodomy used to be a source of shame, even unmentionable ("the unnamable vice"); but with President William "Bill" Clinton sodomizing his intern Monica Lewinsky on public property (the White House) in the 1990's, it seems the floodgates opened and sodomy became more common. Clinton turned out to be a "role model" of an unexpected kind. Ironically, Clinton signed DOMA. Are Americans obliged to follow up Clinton's *unofficial* endorsement of sodomy (by his actions) by *officially* endorsing a relationship based on sodomy, regardless of what their State or Congress voted for? Some would have the Court make this dictate. The Court should not.

After all, many Americans still regard sodomy with horror. Many people associate it with prison, feces, and AIDS, *cf.* Winston Churchill's famous alleged quip about the British Navy's tradition of "Rum, sodomy, and the lash". While *Lawrence* wisely prevents gays from being arrested—*inter alia*, where would they all be put?—, that is not an endorsement of their lifestyle. Americans, and their elected governments, should be free to decline such endorsement, or subsidy.

While this Court is manifestly not a Board of Moral Review, the States and Congress, by contrast, may have a strong role to play in making legislation with moral aspects: the States with their "police powers", and Congress perhaps even without the States' powers. *See, e.g.*, Alabama's statute, the Anti-Obscenity Enforcement Act of 1998, Ala. Code § 13A-12-200.2 (1975; amended 1998), which bans erotic stimulatory devices (so-called "sex toys"), *see id.*, and has survived court challenges. In fact, this Court refused to hear an appeal of those challenges in 2005, *see* Associated Press, ***High court declines to review Alabama's sex-toys ban***, USA Today:[14] two years after *Lawrence*, which latter case, some claim, might allegedly make morality irrelevant.

However, let us assume for a moment that since *Lawrence*, taboo is taboo, so that neither States nor Congress can make even civil legislation about morals any more. Who could be of help in finding other reasons to allow the banning of gay marriage? The legal academy, say?

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[14] Updated Feb. 22, 2005, 11:53 a.m., http://usatoday30.usatoday.com/news/washington/2005-02-22-toys_x.htm.

III. THE LEGAL ACADEMY AND GAY MARRIAGE

Maybe not much. In fact, the legal academy has a great deal to answer for in its promotion of mandatory gay marriage ("MGM"). Indeed, adding liberal or radical academics to libertarian ones (who are usually "conservative" in economic matters) produces a huge supermajority, one suspects, in favor of MGM. (Amicus shall mention no names here, though there are many.) But academics may be deluding themselves, as has been known to happen.

In fact, much of legal-academic life may resemble sodomy in its infertility: *see, e.g.*, the famous quip, "Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something."[15] Thus, it is not surprising that many law professors, isolated from reality, may act as would-be "Raiders of the Equal Protection Clause" and claim that that clause makes promises that it really doesn't, whether re MGM, or MAA ("mandatory affirmative action", in the *BAMN* case, 12-682). But raiders who arrogantly think they are on the side of the angels, may find their "angels" turn out to have an unpleasant face.

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[15] Said by the current Chief Justice, *see, e.g.*, Walter Olson, *Abolish the Law Reviews!* The Atlantic, July 5, 2012, 12:40 p.m., http://www.theatlantic.com/national/archive/2012/07/abolish-the-law-reviews/259389/ (quoting Roberts, C.J.).

Amicus knew the late gay academic John Boswell, who wrote the controversial book *Same-Sex Unions in Pre-Modern Europe* (Villard Books, 1994). Functioning as a Boswell of Boswell, so to speak, Amicus relates here that at a Christmas party in 1987, at a college where he was taking a history course from Boswell, Amicus heard Boswell relate with glee his research into same-sex marriages in medieval times, supposedly blessed by the Church of that era. However, these days, critical opinion is that Boswell may have been wrong: *see, e.g.*, Wikipedia, *Adelphopoiesis*,[16] detailing how Boswell's idea that the medieval-era Church-allowed fraternal ceremony of *adelphopoiesis* ("brother-making", from the Greek) should be interpreted as "same-sex union", had little evidence, his work suffering from not only misinterpreting ideas but maybe even from mistranslating sources, *see id.* So, while wishful thinking is a temptation, even to famous Ivy League academics, it is a temptation one must resist.

All said, while we respect academics, including the estimable Professor Vicki Jackson who is arguing some jurisdictional aspects of this case, it is important not to succumb to some of their more sterile ideas, including those that would mandate approving marriages that are always sterile.

IV. GAY MARRIAGE AND THE PUBLIC FISC

Indeed, there are many reasons, besides "moral" ones, not to endorse mandatory gay marriage. For example, the fisc may be impacted in numerous ways by gay marriage. If every marriage were a gay marriage, Americans would tend to become extinct, which would hurt the fisc. On a more modest level: if something is honored as a "marriage" but can never produce posterity, that may be spending public goodwill and resources on a non-productive relationship. If the government considers it wasteful, they are not obliged to adopt it.

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[16] http://en.wikipedia.org/wiki/Adelphopoiesis (as of Jan. 5, 2013, at 9:04 GMT).

A more direct impact on the fisc comes from taxation and bankruptcy. If gay couples are allowed to pay less taxes because of gay marriage, that is a very direct hit on the fisc. In fact, Edith "Edie" Windsor, in her eponymous case, is suing precisely because she wants $363,000 of her taxes to be waived, on the argument that her same-sex relationship should be as tax-free as an opposite-sex relationship, *see id. passim*.

Of course, that $363,000 could be used by the government to, e.g., help police examine hundreds of rape kits and put hundreds of rapists behind bars. Or it could be used for AIDS research. If Congress thinks that would be a better use for the $363,000 than giving Windsor a tax break, they can so decide.

There is a curious observation in *Windsor*, when the Second Circuit pronounces, "DOMA impairs . . . federal laws ([e.g.,] bankruptcy . . .) that have nothing to do with the public fisc." 699 F.3d at 187 (Jacobs, J.). But how is bankruptcy irrelevant to the public fisc? If gays are not afforded the special convenience of filing as married people, they may be less prone to file for bankruptcy, and any back taxes that they would have liked to be discharged (waived) in bankruptcy, will not be waived. Thus, the public fisc will fatten. And some of that extra money can be spent on couples who *can* make babies with each other—and spent on those babies themselves.

More will be said on the fisc later, but for now, this brief notes that fiscal impact provides a rational, or even substantial, basis not to extend marriage to gay couples.

V. SODOMY AS CANCER, AIDS, OTHER-DISEASE, AND INJURY VECTOR

Another, more alarming reason to disallow gay marriage is that to subsidize relations based on sodomy may increase their number, or at least show *de facto* government endorsement of sodomy, at the same time that sodomy is often a risk factor for disease, injury, or death.

See, e.g., Wolf Article, *supra*, re the anal fissures sodomy often causes. In fact,

> [A]nal sex is considered a high-risk sexual practice because of the vulnerability of the anus and rectum. The anal and rectal tissues are delicate and do not provide natural lubrication, so they can easily tear and permit disease transmission . . . , and the risk of transmission of HIV is higher for anal sex than for vaginal sex.[17]

Id. (citations, including internal, omitted)

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[17] Wikipedia, *Anal sex*, http://en.wikipedia.org/wiki/Anal_sex (as of Jan. 21, 2013, at 07:01 GMT).

There are other deadly problems with sodomy besides HIV/AIDS, such as cancer. *See, e.g.*, Matt Sloane, CNN, *Fewer teens having oral sex, CDC says*,[18]

> "It's widely accepted that there is an increased number of head and neck cancers today due to changes in sexual practices in the '60s, '70s and '80s," -- specifically, an increase in oral sex, said Dr. Otis Brawley, the chief medical officer of the American Cancer Society.

Id.

It may be a truism, but sodomy, and gay sex practices in particular, can be very different from conventional or traditional heterosexual sex. Hear the words of one gay voice, Mark S. King, *Probing My Anal Phobia*, Huffington Post,[19] revealing part of gay sexual culture:

> Leave it to gay men to popularize the "shower shot," a long hose that . . . ends in a narrow nozzle, just right for sliding up your bum for a thorough internal rinse. . . . [Y]ou've just inserted into your a[ ] a pressure washer that could peel the paint off a building.

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[18] KSBW.com, updated 8:34 a.m., Aug. 17, 2012, http://www.ksbw.com/news/health/Fewer-teens-having-oral-sex-CDC-says/-/2024/16166548/-/38nxasz/-/index.html.

[19] Jan. 10, 2012, 6:19 p.m., http://www.huffingtonpost.com/mark-s-king/probing-my-anal-phobia_b_2444663.html?utm_hp_ref=gay-voices.

> [M]y first-time date invited me to visit the bathroom to "rinse out" while he relaxed in bed and waited. . . . That poor, unfortunate man. He had really pretty designer sheets . . . .

Id. For reasons of taste, Amicus shall not mention what happened next, though readers can always read the article themselves. (However, Amicus will note that the "pressure washer", *id.*, sounds somewhat like a torture from Abu Ghraib.) Suffice it to say that non-traditional sex relations can cause unpleasant problems. And if the public does not want to laud and subsidize this all as "marriage", it is quite understandable.

Lesbians, having a different build from gay men, may have somewhat different issues; but, once again, sodomy is sodomy in whatever form, and for lesbians, can include practices like "fisting", i.e., insertion of a fist—or two of them—, into the birth canal (or elsewhere), since women lack certain anatomy males have that would substitute for a fist. *See, e.g.*, Nat'l Ctr. for Biotech. Info., U.S. Nat'l Libr. of Med., Nat'l Insts. of Health, *Vaginal "fisting" as a cause of death.*, PubMed.gov (undated),[20] (young woman dies from vaginal fisting) (citation omitted).

See also, e.g., an article[21] describing one rather notorious gay sex practice, "felching",

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[20] http://www.ncbi.nlm.nih.gov/pubmed/2929548.

[21] Wikipedia, *Felching*, http://en.wikipedia.org/wiki/Felching (as of Jan. 14, 2013, at 22:26 GMT).

> According to the 2003 draft entry for "felch" in the *Oxford English Dictionary*, the earliest occurrence of the word in print appears to have been in *The Argot of the Homosexual Subculture* by Ronald A. Farrell in 1972. . . .
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> . . . .
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> . . . . It was also used in 1979 by Larry Kramer in his novel *Faggots*, where he defined it as sucking the ejaculate from the anus after intercourse.

Id. (citations, including internal, omitted) This concept, *see id.*, may disgust readers, but sodomy is sodomy, and noted gay activist Larry Kramer describes part of it, *see id.* When one leaves the narrow path of man-woman genital sex that can make babies, anything can happen.

If anyone rejoins that not all gays felch, this may be true: but the *predicate* of felching, the depositing of male fluid into the back passage (to be felched, or not), is practically the standard definition of sodomy. Or if one notes that a man and woman could also felch, that may be true, but that kind of "side dish" is not the "main course" of genital sex which can create babies between that female and male.

By contrast, with same-sex sex, sodomy is all that's on the table, ever. The "main course" that perpetuates the human species is forever absent.

VI. DIVERSE MARRIAGE: THE GOOD OF HETEROSEXUAL (MAN/WOMAN), DIFFERENT-SEX MARRIAGE PARTNERS

Another rational base, or even a compelling one, for denying State endorsement of same-sex marriage is the importance of diversity. This is true politically in that if every State decides about gay marriage separately, then likely some States will approve it, and others disapprove: a diverse array of decisions. Then gay couples can take their pick and move to a State offering gay marriage, if they wish. *See, e.g.*, the ideas of Charles Tiebout on "voting with your feet".

However, another level of diversity exists re gay marriage. —It is curious, but not surprising, that "liberals" or "Democrats" who constantly extol the value of racial and gender diversity and affirmative action, tend to suddenly forget the value of diversity when it comes to having two parents of *different* sex, instead of both of the *same* sex.

(Amicus has seen the term "gender incest" used of the lack of diversity inherent in same-sex relationships; without endorsing that term, he still recognizes that one can learn a great deal from the other gender, instead of spending one's whole life with a partner of the same gender.)

Without bothering to cite the copious literature showing the benefits of having a mother and father: common sense tells us that more diversity exists when a child can learn from a female parent and a male parent, than with two male or two female parents. With two fathers, how can a child be breast-fed by a parent? And with two mothers, a child may have no close male role model from whom to learn.

Landmark affirmative-action case *Grutter v. Bollinger*, 539 U.S. 306 (2003), tells us of the compelling state interest of diversity served by affirmative action at universities, *see id.* at, e.g., 325. But that is only maybe for four years, at a college. By contrast, for the *eighteen* years of pre-adult growing up (including the vital first few years of life), for a child to have diverse, different-sex parenting, could be considered a far more compelling interest. Unless one wishes not to be consistent (here, about the value of diversity); and inconsistency tends to cause problems.

Diversity is also a reason that in adoption, heterosexual couples could be given extra points (just as there are "points" for racial or gender diversity in affirmative action) over gay couples in the adoption process. This would still allow gay couples to adopt (which is an alternative to gay marriage, by the way, if gays really want a family), but would also recognize the crucial value of diversity in children's upbringing.

VII. EQUAL PROTECTION IN OUR LAW, HISTORY, AND CULTURE, RE GAY MARRIAGE

A. Why Affirmative Action Is More Defensible than Gay Marriage; and, Would Martin Luther King Have Been Welcome to Speak at the Presidential Inauguration?

The previous section offers a lead-in on affirmative action vis-à-vis gay marriage, two very hot-button "equal protection" issues. —Amicus has heard scuttlebutt that the Court is likely to end or gut affirmative action, and endorse gay marriage, this Term, on some supposed "equality" theory that no races or sexual orientations should receive any privileges. But such decisions by the Court would be injurious and not based in reality.

It is not "playing the 'Suffering Olympics' game" to note that blacks may often have had it worse than gays in this country. Were gays as a class enslaved, brought over on ships in chains? *See, e.g.*, the current Quentin Tarantino film *Django Unchained*[22] —including, *see id.*, a character called "Dr. King [Schultz]"—, depicting slaves being sold, branded, pitted against each other in fights to the death, torn apart by dogs, threatened with castration, and similarly abused, *see id.*

So, given different quanta of oppression, how should we treat different groups, or group members?

On those notes: President Obama's second inaugural celebration last week was inspirational, but Martin Luther King, on whose holiday the public inaugural was held, might be considered unfit to give a speech there today. That statement is shocking, but it is true, seeing King's opinions about homosexuality. *See, e.g.*, John Blake, *What did MLK think about gay people?* CNN,[23] relating how King, in a 1958 advice column for Ebony magazine, replied to a boy worried about his interest in boys, not girls:

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[22] A Band Apart/The Weinstein Company/Columbia Pictures (2012).

[23] Jan. 16, 2012, http://religion.blogs.cnn.com/2012/01/16/what-did-mlk-think-about-gay-people/.

> The type of feeling that you have toward boys is probably not an innate tendency, but something that has been culturally acquired . . . . You are already on the right road toward a solution, since you honestly recognize the problem and have a desire to solve it.

Id.[24] These days, that reply might be enough to get King labeled (falsely) a "vicious homophobic religious fanatic" who sees same-sex attraction as a "problem", *id.*, instead of a blessing.

Reverend Louie Giglio was scheduled to give a benediction at the inauguration, but withdrew after the media found an old 1990's speech in which he, like Reverend Dr. King, questioned the rightness of gay relations, *see, e.g.*, Kae Am, *Crooked Priorities: Louie Giglio, Lady Gaga, and Obama's Inauguration*, Disciple of Thecla blog, Christian Post.[25] An inaugural-committee spokeswoman said, "Pastor Giglio's past comments . . . don't reflect our desire to celebrate the strength and diversity of our country at this Inaugural." *Id.* Does that mean that the millions of Christians, Jews, Muslims, or others who question the rectitude of sodomy are not "strong" or "diverse", and have now become non-citizens, or second-class citizens? The implications are chilling. What would our Pilgrim, Puritan forebears think?

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[24] One wonders what Dr. Martin L. King would think about the openly-discussed lifestyle of Mark S. King, *see Probing My Anal Phobia*, *supra* at 16.

[25] Jan. 21, 2013, 6:17 a.m., http://blogs.christianpost.com/disciple/louie-giglio-lady-gaga-and-obamas-inauguration-14226/.

What is ironic, horribly so, is that Giglio's projects mirrored King's in another way; Giglio has focused for years on ending human trafficking and sex slavery, *see id.* Giglio wanted people to be "free at last", to quote King. But Giglio was not free to speak at the Inaugural. This embarrasses our Nation.

By the way, King actually had a gay aide, Bayard Rustin, but King never endorsed gay marriage. Thus, King, like Amicus, might be able to live with non-discrimination against gays in employment or other fields, without feeling gay marriage to be a necessary legal option throughout all fifty States.

By contrast, Obama, in his second-inaugural speech,[26] said, "Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law – for if we are truly created equal, then surely the love we commit to one another must be equal as well." *Id.* This sounds lovely, maybe: but what does it mean? Does that mean that the love of polygamous families must be equal, i.e., legalized, as well?

Obama also mentioned, "Seneca Falls, and Selma, and Stonewall", *id.* But it might have surprised Dr. King to hear Stonewall mentioned with Selma (or even Seneca Falls), *see* his opinions *supra* on homosexuality.

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[26] *Available at*, e.g., Rap Genius, *Barack Obama — Second Inaugural Address* (undated), http://rapgenius.com/Barack-obama-second-inaugural-address-lyrics.

The 1969 battle of gays at the Stonewall bar in New York not to be arrested or harassed for their activities can be sympathized with, even if one does not endorse their lifestyle. But Obama may hit a stone wall if he tries to argue that gay *marriage* is some fundamental right, moral or legal.

Even Dr. King's widow didn't go that far, *see, e.g.*, Andy Towle, *Coretta Scott King Is Dead at 78*, Towleroad.com,[27] featuring Mrs. King's words: "Gay and lesbian people have families, and their families should have legal protection, whether by marriage or civil union." *Id.* While this shows Coretta Scott King supporting gay families, *see id.*, it also shows she was open to *alternatives* to gay marriage, such as civil unions. In fact, California's current offering of a domestic partnership to gays is a "legal protection", *id.*, which might satisfy Mrs. King.

Circling back to affirmative action: this effort at diversity, to be phased out in colleges by c. 2028, has been called vital to national security by Colin Powell and other generals, *see, e.g.*, Br. of Lt. Gen Julius W. Becton, Jr., et al. as *Amici Curiae* in Supp. of Resp'ts in *Fisher v. Univ. of Tex. at Austin*.[28] And it advantages some groups, underrepresented minorities, but in a way that integrates them into institutions where they can perform as well as, or better than, anyone else.

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[27] Jan. 31, 2006, http://www.towleroad.com/2006/01/coretta_scott_k.html.

[28] 631 F.3d 213 (5th Cir. 2011) (*cert. granted*, 80 U.S.L.W. 3475) (U.S. Feb. 21, 2012) (No. 11-345).

By contrast, even the happiest gay marriage can never make a baby, since it can never perform that function. One billion gay couples can make fewer babies than one heterosexual couple (or polygamous unit) can. So, offering "equal protection" to a gay relationship as "marriage" is not necessary under our Constitution, until such time as human biology alters in ways Amicus does not expect.

B. Reparations for Slavery v. Gay Marriage; and, *Brown* v. *Crawford*

Going further: even the somewhat unpopular cause of reparations to African Americans for slavery may have a better equal-protection case than gay marriage does. Amicus has been interested in reparations for some while, *see, e.g.*, his article *Unsavory White Omissions? A Review of Uncivil Wars*, 105 W. Va. L. Rev. 665 (2003) (reviewing David Horowitz book attacking reparations for slavery). Since slavery doubtlessly caused horrific losses, and the U.S. has paid reparations to Japanese Americans (under Ronald Reagan) and Native Americans, but not blacks, one could make a putative equal protection claim, in theory, for such reparations to be paid.

However, Amicus, though he thinks reparations are fair—who likes to be robbed for centuries and not paid back?—, would not dare to claim that the Court is *obliged to order national full reparations* under the Equal Protection Clause. Such things are best dealt with by legislatures. Now if you compare the "injury" to gay couples from not marrying (though they may have civil unions or such), with the real injury to American blacks and their descendants from several hundred years of uncompensated labor (and monstrous abuse), you may see how weak the "equal protection" claim for gay marriage really is.

Some activists may claim that Court-mandated legal gay marriage will be the *Brown v. Board of Education* (1954) for gays. But to compare the lack of mandatory gay marriage, on one hand, with segregated schools keeping little black children separate from opportunity and equality, on the other, is not a valid comparison. Rather than *Brown v. Board of Education*, another desegregation case, *Crawford v. Board of Education* (of Los Angeles), 458 U.S. 527 (1982), is a better comparison.

In *Crawford*, *supra*, plaintiffs claimed, *see id.*, that a California constitutional amendment taking away protections going beyond those demanded by the Equal Protection Clause of the Fourteenth Amendment, somehow violated that same Clause. They lost, *see Crawford*, 458 U.S. at 545. Similarly, in *Hollingsworth*, plaintiffs (now Respondents Perry et al.) claim that...a California constitutional amendment taking away gay-marriage protections going beyond those traditionally demanded by the Equal Protection Clause of the Fourteenth Amendment, somehow violates that same Clause. One has seen this before, and where it should go, *see Crawford*, *supra*. (*Windsor* has similar problems.)

Had Amicus submitted pre-certiorari briefs in these instant cases, he might have requested summary reversal, as he is doing in *BAMN*, the "mandatory affirmative action" case. The similarity between *BAMN*, *Windsor*, and *Hollingsworth* is eerie, actually. But the Court is not some Aladdin's lamp to be rubbed, under false claims of "equality", whenever someone feels that he cannot win particular entitlements through democratic means.

C. "*Lawrence* and No Further"; or, Negative Liberty, Positive Liberty, and State-Subsidized Sodomy

Though Court-ordered gay marriage would be no equivalent to *Brown v. Board*, *Lawrence* could be considered an "Emancipation Proclamation" for gays. It was a necessary decision for American freedom, especially seeing that, e.g., the Nazi regime put gays in camps, wearing pink triangles. And today, such problems persist; *see, e.g.*, Associated Press, *Cameroon jails 'gay' man for texting 'I'm in love with you' to male friend*, The Guardian (London),[29]

> In October, two men were convicted of homosexuality because of their "effeminate" appearance and because they were drinking Bailey's Irish Cream, which was viewed as a drink favoured by gay men, according to . . . the U.N. high commissioner for human rights.

Id. The truth-is-stranger-than-fiction air of this absurd, paranoid anti-gay (and anti-Irish?) discrimination, *see id.*, reminds us that *Lawrence* is a good idea, protecting gays from arbitrary abuse and letting them participate in democratic discussion about issues like gay marriage

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[29] Dec. 17, 2012, 3:36 p.m., http://www.guardian.co.uk/world/2012/dec/17/cameroon-antigay-legislation-mbede-text.

Not everyone thinks there should be much discussion, though: *see, e.g.*, Manya A. Brachear, *Cardinal George, bishops issue letter opposing gay marriage*, Chicago Tribune:[30] "'Civil laws that establish "same-sex marriage" create a legal fiction,' George and the bishops wrote in a letter sent to priests Tuesday. 'The state has no power to create something that nature itself tells us is impossible.'" *Id.* While George's statement, *see id.*, may have inspirational value to some, it may not be an accurate statement of how American law works.

In fact, our States, and Congress, are clothed with immense power, delegated by the People, so that those governmental bodies can, even if it is unwise, create the right to gay marriage out of nothing. The Constitution allows this. Likewise, it allows those bodies not to create gay marriage, or to repeal it.

So, while *Lawrence* preserves for gays (or other practicers of sodomy) the "negative" liberty, as British philosopher Isaiah Berlin (1909-1997) might put it, of freedom from arrest and harassment, it is up to the People or their representatives to grant, or not, the "positive liberty" of an entitlement or subsidy for gay marriage. And seeing that gay marriage is a sort of state-subsidized sodomy, to be frank, perhaps all the People aren't really up for that at this point. (The laws of dozens of States against gay marriage help confirm this.) Thus, the Court, and Nation, are obliged to go no further than *Lawrence* and its protections.

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[30] Jan. 2, 2013, http://www.chicagotribune.com/news/local/ct-met-cardinal-george-gay-marriage-0102-20130102,0,1703693.story.

If they did, they might actually infringe on others' rights, even indirectly.

D. The Real Equal Protection Violation in this Case: Voting Rights?

For example, if the right to vote about gay marriage is needlessly removed from voters, that disrespects their right to vote. This disenfranchisement may not be a *per se* equal protection violation, but it may a *de facto* one. *See, e.g.*, *Bush v. Gore* (531 U.S. 98 (2000))—a well-known case with prominent lawyers like Theodore Olson and David Boies—, on the importance of the vote and equal protection thereof.

There may even be racial issues, *see, e.g.*, Patrick J. Egan & Kenneth Sherrill, *California's Proposition 8: What Happened, and What Does the Future Hold?* Nat'l Gay and Lesbian Task Force,[31] tbl.1, showing, *see id.*, African Americans and Latinos voting yes on Proposition 8 at higher percentages than whites. It is fascinating to see some of the "left-of-center" people who complain about voting-rights violations but remain silent when vast swaths of policy, such as gay marriage, risk being removed from voter control—especially the control of minority voters, *see* Egan and Sherrill, *supra*. This dilution of the vote, and minority vote, should be resisted by the Court.

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[31] Jan. 2009, *available at* http://www.thetaskforce.org/downloads/issues/egan_sherrill_prop8_1_6_09.pdf, at 3 (p. 4 of the PDF).

E. "Occupational Qualification" and Gay Marriage

Finally, one can somewhat compare the function of gender, in marriage, to a bona fide occupational qualification (BFOQ) in employment law. Every gay marriage is a PSSM, forever sterile, so that gay marriages are not "qualified" to produce children or meet the definition of a regular marriage—unless a State or Congress says so. (As for sterile heterosexuals, "policing them" out of marriage might be not just offensive but even impossible: e.g., a couple may think they're sterile, but find, nine months and a pregnancy later, that their doctor was wrong.)

One topical issue re gays and occupational qualification is the military. Amicus thinks it makes sense to allow openly gay soldiers in the military, as long as good order is kept and they can do their jobs. Amicus sees the issue through a "duty" prism, not always a "rights" one, e.g., gays never should have been able to avoid military service in the first place, and avoid dying for their country, just because they're gay. Even heterosexuals have been able to avoid military service through pretense of homosexuality, *see, e.g.*, BBC News, *Hendrix 'quit army with gay lie'*[32] (guitarist Jimi Hendrix pretended homosexuality to drop out of 101st Airborne); but they apparently don't have that option now.

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[32] Updated July 30, 2005, 12:44 p.m. GMT, http://news.bbc.co.uk/2/hi/entertainment/4730547.stm.

Sentimentalists may say, that if gays are risking their lives for the country in the military, they should be allowed State-recognized marriage. However, one could say the same for a man and two women who served in the military and then desire to enter a polygamous relationship. Their service is appreciated, but it doesn't necessitate throwing out our family laws and traditions, nor does it allow the Equal Protection Clause to be unlawfully drafted into attempts to throw them out.

VIII. GAY MARRIAGE LEADING TO POLYGAMY: NO JOKE, UNFORTUNATELY

Indeed, polygamy is part of the real "slippery slope" created if the Court decides local decisions on gay marriage are an outrageous, illegal oppression. If consenting adults are entitled to any marriage they want, why not *ménage à trois*—or *ménage à quatre, cinq*, etc.? And under *Lawrence*, gays, while not entitled to a government-recognized marriage, are free to openly marry at the church, synagogue, or coven of their choice.

See, e.g., Coven Oldenwilde, *Asheville's 18th Annual Free Public Witch Ritual on Samhain (Halloween) Mass Wedding & Handfasting*:[33]

> GET HITCHED BY WITCHES IN
> DOWNTOWN ASHEVILLE THIS
> HALLOWEEN!

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[33] Undated but re Halloween 2012, http://oldenwilde.org/oldenwilde/samhain/rite2012/upcoming2012.html.

> . . . Following trance dancing to magical music and an opportunity for singles to mingle and meet, Coven Oldenwilde's High Priestess Lady Passion and High Priest *Diuvei will conduct a mass handfasting and broom-jumping for partners of any gender or number who wish to declare or renew their vows to one another. . . .
> . . . "Prejudice is petty. This will be a spirited demonstration for love equality," emphasizes Lady Passion. "We'll use the olde words from the Gardnerian Book of Shadows to sanctify anyone's marital bonds, including polyamorous groups." . . .

Id. Note the connection "Lady Passion" makes between gay marriage and polyamory, *see id.* Once off the rails of traditional marriage, what's to stop a plunge down the cliff?

Some may claim that polygamy is inherently dangerous and unequal in a way that a pair of married gay people is not. However, what if, say, there were an isogamous multipair marriage ("IMM"), "isogamous" roughly from the Greek, "iso" ("equal") plus "gamous" ("marriage"), which had an even number of partners, both in total and in balance of female and male. E.g., two men marrying two women. Or three marrying three. There could be an upper bound set by a State, e.g., ten people (five pairs) would be too many, so an eight-person marriage would be the maximum. But "equality" would reign, and gender balance. What open-minded gay couple could complain about an "IMM"?

An "IMM" would be horrific, as all polygamy (or polyandry) is; but could one claim it to be so unequal and inherently dangerous, that it *ipso facto* is less legalizable than gay marriage? One wonders. (And as vile as polygamy is, at least it makes children.)

But this all, horrifically enough, is not just conjecture these days. *See, e.g.*, Paul Foy, ***Federal court hears 'Sister Wives' lawsuit***, Associated Press, AnnArbor.com,[34]

> A federal judge heard arguments on whether Utah can prohibit plural marriage but issued no immediate ruling in a lawsuit by the stars of the reality show "Sister Wives[", Kody Brown and his four wives.]
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> . . . .
>
> The hearing dealt with the legalities of due process and freedom of association.
>
> . . . .
>
> [The Browns' lawyer, constitutional law professor Jonathan] Turley said Utah has to prove the harm of polygamy[.] He argued . . . that Utah was trying to enforce morality.
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> "We're asking for what Justice Brandeis called the most important

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[34] Jan. 18, 2013, 4:01 a.m., http://hosted2-2.ap.org/MIARB/de28c0fc889d40d9b250be473495121a/Article_2013-01-18-Sister%20Wives/id-c1ed807330de46cd99a808d6c5d20a75.

> constitutional right, the right to be left alone," Turley said[.]

Id. So to speak, the barbarians are at the gate. Does the Court want to throw it open?

IX. RATIONAL BASIS SANS ANIMUS IS THE RIGHT LEVEL OF SCRUTINY, THOUGH DOMA (OR PROPOSITION 8) MAY PASS HIGHER LEVELS AS WELL

Any rational basis should be enough to prevent legalized polygamy, or gay marriage. As in *Romer v. Evans*, 517 U.S. 620 (1996), rational basis "with a bite", *see id. passim*, is the correct level of scrutiny to sift governmental actions re gay marriage. The "bitelessness" refers to the need for the State actions to lack animus towards gays. Since gays are not a "protected group", i.e., a racial or religious group, rational basis sans animus ("RBSA") is appropriate, instead of stricter scrutiny.

This is especially so since gays are less oppressed than they used to be. Since *Romer*, there has been *Lawrence* (2003), most notably. Also, gays are now free to serve openly in the armed forces. There is a publicly lesbian U.S. Senator now, Tammy Baldwin, *see, e.g.*, Emanuella Grinberg, *Wisconsin's Tammy Baldwin is first openly gay person elected to Senate*, CNN,[35] who can hold or block, on her own, legislation she deems injurious to gays. And Baldwin's state *bans gay marriage, see id.*, which helps disprove the idea that a ban on gay marriage shows "animus". If Wisconsinites hate gays so much, why did they elect one to the Senate?

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[35] Updated 3:01 p.m., Nov. 7, 2012, http://www.cnn.com/2012/11/07/politics/wisconsin-tammy-baldwin-senate/index.html.

So, since gays are actually in better shape than formerly, why should "rational basis" be dropped in favor of heightened scrutiny?

An additional strike against heightened scrutiny is the relative amorphousness of homosexual status. E.g., is homosexuality present from birth, with no element of choice present? One doubts this. —A hypothetical: even if tomorrow science mysteriously discovered a new radioactive element, call it, say, "lesbium", which predisposes people to be gay in proportion to how much of it is in a particular person: this would only show a tendency, not a tyranny. People overcome, or simply ignore, many of their tendencies.

For example, there is actress Anne Heche, who was in a lesbian relationship with Ellen DeGeneres but has gone on to have two children with two different men, *see, e.g.*, Alex Witchel, *Anne Heche Is Playing It Normal Now*, N.Y. Times.[36] If gayness is immutable, how explain Heche? Those who are "pro-choice" may want to acknowledge that she made choices of lifestyle, and was not just the helpless puppet of congenital Sapphic desires.

But even if heightened scrutiny is somehow necessary, the various rational bases already adduced (plus any mentioned in the meritorious briefs on the sides of BLAG and Hollingsworth), when added together, form at least an important, or very important, government interest or interests, with the non-endorsement of gay marriage substantially related to those interests. E.g., not giving tax or bankruptcy breaks to gay couples is obviously seriously related to the public fisc.

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[36] July 31, 2009, http://www.nytimes.com/2009/08/02/magazine/02heche-t.html?_r=3&pagewanted=all&.

In fact, even strict scrutiny might be met by the interests adduced. E.g., the interest in gender diversity of parents may be at least compelling as racial or gender diversity at colleges; and this compelling interest is met in practically as narrowly tailored a manner as can be. People are not arrested for not entering opposite-sex marriages, or propagandized or harassed by State billboards or mandatory "get married" classes into entering them; rather, people are just not actively *subsidized and lionized* by government for entering another type of marriage, same-sex marriage.

Similarly, with the disease- and injury-risking practice of sodomy—and reduction of AIDS and cancer seems to be a compelling national interest—, *Lawrence* prohibits punishing sodomy, so how can sodomy be not encouraged? By...being not *encouraged*, which is what the illegality of gay marriage does, since no State "merit badge" or financial benefit, no reward, is given to gay marriage, which is a marriage physically centered on sodomy. (People are legally free to engage in sodomy in private all they want.)

This is arguably even more narrowly tailored than government-funded "safe sex" classes, which may actively mention the danger of practices like anal intercourse. By contrast, the lack of gay marriage doesn't even *mention* anything, or *do* anything at all; it is just a gap, a lack of State approval and reward.

X. GENEROUS ALTERNATIVES TO COURT-ORDERED LEGAL GAY MARRIAGE

While the Court is not obliged to force States or Congress to grant any benefits to gay couples whatsoever, it may, for all Amicus knows, feel obliged to grant something. Then, here, in ascending order of desirability, is what the Court could order, in lieu of ordering nationwide gay marriage:

1. Mandatory legality of civil unions or similarly-named arrangements, with much or all of the benefits of marriage, but sans the name "marriage"

2. The same as in 1, *supra*, but with "domestic partnerships" in place of "civil unions".

3. Mandatory bundle of rights or entitlements, e.g., hospital visitation, funding, etc., with much or all of the benefits of marriage, but sans the name "marriage", "civil union", or "domestic partnership". I.e., there would be rights or entitlements, but with no official union/partnership recognized by the State. If a name is needed, it could be called a "Co-Resident Long-Term Contract" or such.

4. Mandatory individual and *a la carte* rights or entitlements, e.g., hospital visitation, or any other particular measure or measures, which might be considered so crucial that it would putatively be illegally inhumane for any American governmental unit to deny them.

The least undesirable level would be level 4, *supra*, since it is the least intrusive on the will of the States and Congress. But Amicus is not recommending the Court impose any of the levels above upon America.

XI. HOW COURT-ORDERED GAY MARRIAGE MAY HURT THE CAUSE OF GAY MARRIAGE

Even gay-marriage advocates, ironically, may not want the Court to impose at all on these issues. *See, e.g.*, Jonathan Rauch, *How Can the Supreme Court Help Gay Rights? By Keeping Out Entirely*, The New Republic,[37]

> Until this year, gay-marriage proponents lost in every state referendum where they made their case to the voters. Last month, the tide turned; we won four out of four. . . .
>
> . . . .
>
> Gay Americans are in sight of winning marriage not merely as a gift of five referees but in public competition against the [sic] all the arguments and money our opponents can throw at us. A Supreme Court intervention now would deprive us of that victory.

Id.

This is not even mentioning those gays who *oppose* gay marriage, *see, e.g.*, Gays Against Gay

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[37] Dec. 12, 2012, 12:00 a.m., http://www.tnr.com/blog/plank/110949/the-only-way-the-supreme-court-can-help-gay-marriage-staying-out-it#.

Marriage, *Gay Marriage IS a Threat — To Gay Sexual Freedom*,[38] "Gay activists are rejecting civil unions that are literally identical to state-enforced marriage contracts except in name, on principle. This is because they want to mimic the religious heterosexuals that hate them." *Id.*; Jonathan Soroff, *Gays Against Adam and Steve*, The Good Men Project,[39]

> It's demonstrably not the same thing as a marriage between a man and a woman. It's two guys or two girls, and no matter how much Mendelssohn and matching white outfits you dress it up in, the religious and social significance of a gay wedding ceremony simply isn't the same. We're not going to procreate as a couple (until science catches up), and while the desire to demonstrate commitment might be laudable, the religious traditions that have accommodated same-sex couples have had to do some fairly major contortions to do so . . . . So the promise part is nice. Otherwise, "gay marriage" is beside the point. And for precisely that reason, I find it cringe-worthy to watch gay couples aping the rituals of a heterosexual wedding ceremony.

Id.

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[38] July 5, 2011, http://nogaymarriage.wordpress.com/2011/07/05/gay-marriage-is-a-threat-to-gay-sexual-freedom/.

[39] June 8, 2011, http://goodmenproject.com/featured-content/gays-against-adam-and-steve/.

"Straights" (heterosexuals) may disagree with, and gays may agree with, the two Jonathans, *supra*. Or vice versa. In any case, all these perplexities are for the People and their representatives to hash out. And hash them out civilly, sans animus or rancor, in respectful agreement or disagreement, "with malice toward none, with charity toward all".[40] And these battles may even be recalled 10 or 20 years hence, "*Forsan et haec olim meminisse iuvabit*",[41] over a glass of Bailey's Irish Cream—not that there's anything wrong with that.[42]

CONCLUSION

Amicus respectfully asks the Court to reverse the judgment of the court of appeals; and humbly thanks the Court for its time and consideration.

January 29, 2013 Respectfully submitted,

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[40] President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865).

[41] Virgil, the *Aeneid*, bk. I, l. 203, translatable, *see id.*, as "Maybe one day we'll look back on these things and laugh."

[42] *Pace* the Cameroonian opinion, Guardian article, *supra* at 27.

AMICUS
CURIAE
BRIEF

Nos. 12-144, 12-307

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

◆

DENNIS HOLLINGSWORTH, ET AL.,

Petitioners,

v.

KRISTIN M. PERRY, ET AL.,

Respondents.

◆

UNITED STATES,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, in her Capacity as Executor of the Estate of Thea Clara Spyer, and BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,

Respondents.

◆

On Writs Of Certiorari To The United States Courts Of Appeals For The Ninth And Second Circuits

◆

BRIEF *AMICUS CURIAE* OF CATHOLIC ANSWERS, CHRISTIAN LEGAL SOCIETY, AND CATHOLIC VOTE EDUCATION FUND IN SUPPORT OF PETITIONER HOLLINGSWORTH AND RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS AND SUPPORTING REVERSAL

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QUESTIONS PRESENTED

1. Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.
2. Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. Religious Liberty Is A Fundamental Right That, When Properly Respected, Broadly Protects The Personal Duty To Live One's Faith 6

II. A Broad And Fundamental Conflict Exists Between Religious Liberty And Sexual Orientation Protections 11

III. Recognizing Sexual Orientation As A Suspect Class Will Legally Undermine The Ability Of Many Religious People To Live Their Faiths 22

A. Exclusion from the Public Square 24

B. Encroachment on Private Liberty 28

C. Defining Millions of Religious Believers as Bigots.. 32

CONCLUSION 34

TABLE OF AUTHORITIES

Page

CASES

Adarand Constr., Inc. v. Peña, 515 U.S. 200 (1995) 22

American Family Ass'n v. City & Cnty. of San Francisco, 277 F.3d 1114 (9th Cir. 2002) 17

Arizona Christian Sch. Tuition Org. v. Winn, ___ U.S. ___, 131 S. Ct. 1436 (2011) 7

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Page

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Page

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TABLE OF AUTHORITIES – Continued

Page

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U.S. Const., amend. I....*passim*

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Page

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Page

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Page

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Page

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INTEREST OF THE *AMICI CURIAE*[1]

The **Christian Legal Society** ("CLS") believes that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their beliefs and speech. For that reason, CLS was instrumental in passage of the Equal Access Act of 1984, which protects the right of students to meet for "religious, political, philosophical or other" speech on public secondary school campuses. 20 U.S.C. §§ 4071-4074 (2013). *See* 128 Cong. Rec. 11784-85 (1982) (Sen. Hatfield). Nearly every case decided under the Act has been brought by either a religious or homosexual student group seeking to meet for disfavored speech. CLS is proud of its 35 years of work to protect freedoms of speech and expressive association for all Americans.

CLS is an association of Christian attorneys, law students, and law professors, with student chapters at approximately ninety public and private law schools. As Christian groups have done for nearly two millennia, CLS requires its leaders to agree with a statement of central, traditional Christian beliefs, by which CLS has defined itself for over fifty years. CLS law student chapters typically are small groups of students who meet for weekly prayer, Bible study, and worship at a time and place convenient to the students. CLS meetings are open to all students.

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[1] All parties consented to the filing of this brief. Neither a party nor its counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. Only *amici curiae*, their members, and their counsel made a monetary contribution.

For the past two decades, CLS student chapters have been threatened with exclusion from university campuses by university administrators who misuse nondiscrimination policies. These policies typically serve important interests, including protecting religious students. Too frequently, however, university administrators misinterpret university nondiscrimination policies to exclude religious student groups from campus because they refuse to recant their traditional religious beliefs in favor of ideologies that are more fashionable on campus.

As a result of its own experience as a religious organization that has been excluded from the public square for holding traditional Christian beliefs, CLS is deeply concerned about the impact of these cases upon the ability of persons of faith to follow their religious beliefs if the Court were to adopt a standard of "intermediate scrutiny" when reviewing laws using sexual orientation as a suspect (or quasi-suspect) classification.

Catholic Answers is America's largest lay-run organization dedicated to Catholic apologetics and evangelization. It began in 1979 and uses a wide variety of media to explain and defend the teachings of the Catholic Church. These media include print, audio, and video publications, as well as a daily, live, call-in radio program and extensive online resources.

Catholic Answers is an apostolate dedicated to serving Christ by bringing the fullness of Catholic truth to the world. It helps good Catholics become better Catholics, brings former Catholics "home," and leads non-Catholics into the fullness of the faith.

The **CatholicVote Education Fund** is a non-partisan voter education program devoted to building a culture that embodies respect for the sanctity of life, religious liberty, marriage, and the family. Members of CatholicVote.org seek to serve their country by supporting educational activities designed to promote an authentic understanding of ordered liberty and the common good in light of the Roman Catholic religious tradition. They firmly believe that the lively interplay of the natural law tradition and religious faith present at the founding of this great nation account for its tremendous contribution to the progress of western civilization. *See* www.youtube.com/catholicvote. Moreover, members of CatholicVote maintain that the commitment to democratic self-government which provides the fundamental premise upon which this nation rests requires that the will of the people be respected where, as here, it is fully consistent with the natural law.

Members of CatholicVote.org believe there is no institution more important to the continued vitality of our illustrious nation, and its great tradition of ordered liberty and respect for the common good, than the institution of the family, properly understood in light of the natural law tradition as the union of one man and one woman in marriage.

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SUMMARY OF ARGUMENT

This Court is being asked to recognize sexual orientation as a suspect or quasi-suspect class for purposes of federal equal protection jurisprudence. But to do so would, at both a theoretical and a practical level, necessarily diminish the ability of our nation's religious individuals and communities to live according to their faith.

Federal courts have overwhelmingly refused to recognize sexual orientation as a suspect classification, in part because to do so would have "far-reaching implications." *Massachusetts v. U.S. Dept. of Health & Human Srvs.*, 682 F.3d 1, 9 (1st Cir. 2012). One of the most significant of those far-reaching consequences would be its harmful impact on religious liberty. There is already a broad and intense conflict between the gay rights movement and religious liberty regarding marriage, family, and sexual behavior. If the Court creates a new suspect classification for sexual orientation, it will take sides in that conflict and place millions of religious believers and organizations at a potentially irreversible disadvantage in their efforts to consistently live out their faith.

This brief first addresses the nature of religious liberty itself, particularly its essential element that believers have space to not just *believe* their faith but to *live* it, both privately and publicly. Next, the brief describes the existing conflict between the gay rights movement and religious believers and organizations. Finally, the brief identifies three specific ways in which raising sexual orientation to a suspect class would intensify the conflict in a manner that would deeply harm the lives of religious believers.

Notably, this harm to religious liberty will occur even though equal protection principles serve to restrict *government* rather than private actors. In an era of pervasive government influence on private life, what affects the government inevitably affects the governed, and all the more so when the change results from a shift in basic constitutional values. Transforming sexual orientation into a new suspect class will pressure government actors to deny religious citizens participation in the public square, an exclusion that will effectively prevent believers from acting on their faiths' call to serve in the public square. Such a change will also provide a legal basis for government agents to restrict the freedom of religious people in the "private square" through the misuse of antidiscrimination laws to penalize religious believers for holding traditional religious beliefs. In sum, if this Court declares that religious judgments about marriage, family, and sexual behavior are the legal equivalent of racism, it will diminish the religious liberty of millions of religious believers and religious communities.

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ARGUMENT

I. Religious Liberty Is A Fundamental Right That, When Properly Respected, Broadly Protects The Personal Duty To Live One's Faith.

Religion necessarily involves not just belief but also behavior. A group of religious liberty experts, including adherents of Christianity, Judaism, and Islam, recently explained: "Religion is . . . the effort to achieve a harmony with whatever transcendent order of reality there may be." Timothy Samuel Shah, The Witherspoon Institute Task Force on International Religious Freedom, *Religious Freedom: Why Now? Defending an Embattled Human Right* 12 (2012) (hereinafter "*Religious Freedom*"). This effort at harmony is not embodied "simply [in] a set of theoretical beliefs about reality" but rather in vibrant "human *response* to what is ultimate in reality." Joseph Boyle, *The Place of Religion in the Practical Reasoning of Individuals and Groups*, 43 Am. J. Juris. 1, 3 (1998) (emphasis added). Moreover, this conscience-compelled behavior must often be manifested in a community. *See* Monica Duffy Toft, *et al.*, *God's Century: Resurgent Religion and Global Politics* 21 (2011).

Religious liberty, then, means "the freedom to engage one's entire self" – including the self in the context of community – "in pursuit of ultimate reality." *Religious Freedom* at 16. Our country's founders, who made religious liberty the "first freedom in our Bill of Rights," *Canyon Ferry Baptist Church of E. Helena v. Unsworth*, 556 F.3d 1021, 1037 (9th

Cir. 2009) (Noonan, J., concurring), recognized this fundamental human right and its primacy. James Madison himself, "the leading architect of the religion clauses of the First Amendment," *Arizona Christian Sch. Tuition Org. v. Winn*, ___ U.S. ___, 131 S. Ct. 1436, 1446 (2011) (citation and internal quotation marks omitted), understood that:

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe.

James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in Everson v. Board of Educ. of Ewing,* 330 U.S. 1, 64 (1947) (appendix to dissent of Rutledge, J.).

Like many other faiths, Christianity has never limited its reach to matters of theology and ceremonial observance. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 713 (2012) (Alito, J., concurring) ("Religious teachings cover the gamut from moral conduct to metaphysical truth."). A fundamental necessity in many religions, including Christianity, is a code of conduct that appears superficially unrelated to worship, prayer, or theology, and is often manifested by service in the public square. *See, e.g., Isaiah* 58:5-7 (rejecting purely religious rituals and commanding believers to instead oppose and cure social injustice as a form of religious worship); *James* 1:27 ("Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress.") (New International Version (hereinafter "NIV")). Christianity specifically teaches that actions that may not appear inherently religious are a direct, even required, act of service to God, as Jesus taught:

> Then the King [will say] . . . "I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in, I needed clothes and you clothed me, I was sick and you looked after me, I was in prison and you came to visit me." Then the righteous will answer him, "Lord, when did we [do these things for you]?" The King will reply, "I tell you the truth, whatever you did for one of the least of these brothers of mine, you did for me."

Matthew 25:34-40 (NIV).

This same religious obligation to serve God beyond the context of ceremonial worship occurs in other faiths, including Judaism and Islam. *See*, *e.g.*, *Deuteronomy* 15:11 (NIV) ("I command you to be openhanded toward your brothers, and toward the poor and needy in your land."). *See also* The Koran 662, *Surah* 107:1-7 (Arthur J. Arberry, trans., Oxford Univ. Press 1983) (admonishing to provide for the physical needs of the poor); *id.* at 431, *Surah* 33:35

(identifying almsgiving as a precondition to forgiveness).

Thus, religious believers fulfill spiritual obligations by meeting the physical needs of people in a myriad of ways, through adoption agencies, homeless shelters, orphanages, medical clinics, job training, and other practical assistance. This service has deep theological roots in the Christian office of "deacon," which the early Church established to set apart spiritual leaders whose main duty was to "wait on tables" and serve those in need. *Acts* 6:2-4 (NIV). Thus, while an act of service may not include explicitly "spiritual" conduct, it retains a fundamentally religious character for many persons of faith. *See Hosanna-Tabor*, 132 S. Ct. at 709 (noting that even the "heads of congregations" have "secular" duties, "such as helping to manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities").

Throughout Church history, this call to serve God by serving His people has often been understood to require political engagement, an understanding which played a key role in our nation's founding and in its great civil rights movements. *Canyon Ferry*, 556 F.3d at 1036-37 (Noonan, J., concurring). As Martin Luther King, Jr. explained, a church that had no impact outside its four walls and stood silent in the face of immorality was an "irrelevant social club," not the vibrant life-changing – even culture-changing – institution God commanded it to be. Martin Luther King, Jr., *Letter From Birmingham Jail* (1963), *available at* http://www.stanford.edu/group/King/frequentdocs/birmingham.pdf at 9 (last visited January 15, 2013). Similarly, the Catholic Church teaches its members not only to recognize certain things as immoral, but also to oppose through lawful means such immorality as a matter of justice. *See Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1047 (9th Cir. 2010) (en banc) (noting that the Catholic Church taught that "it was the moral duty of Catholics to oppose" certain changes regarding family life and structure). The "very existence" of religious groups is "dedicated to the collective expression and propagation of shared religious ideals," a mission for which the First Amendment gives "special solicitude." *Hosanna-Tabor*, 132 S. Ct. at 712-13 (Alito, J., concurring).

Despite this expansive legal, theological, and cultural recognition of religion as an all-encompassing way of life, some wish to push religious believers and communities out of public life by shrinking the First Amendment to protect only "freedom to worship." Ronald J. Colombo, *The Naked Private Square* (2012), Hofstra Univ. Legal Studies Research Paper No. 12-26, at 29-30, *available at* http://ssrn.com/abstract=2173801 (detailing recent governmental efforts to limit "free exercise" to "freedom of worship"). Labeling it as "extreme," this Court has unanimously rejected the government's analogous argument that the First Amendment affords religious groups only the same constitutional protections that "social club[s]" enjoy. *Hosanna-Tabor*, 132 S. Ct. at 706, 709.

Yet by making sexual orientation a new protected class under our Constitution, this Court would hand the government a tremendous tool to constrain traditional churches, synagogues, and mosques to catechism and ceremony, and to force religious believers to restrict the exercise of their faith to those narrow confines. As this Court observed in the context of nondiscrimination laws' application to religious organizations, the "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987).

II. A Broad And Fundamental Conflict Exists Between Religious Liberty And Sexual Orientation Protections.

If sexual orientation is found to be the constitutional equivalent of race, then religious believers who affirm traditional beliefs regarding marriage and sexuality will suddenly become the equivalent of racists, as will their organizations, ministries, and outreach efforts. Both gay activists and traditional religious believers recognize that there is a fundamental conflict between their positions. According to Professor Chai Feldblum, current Commissioner of the Equal Employment Opportunity Commission, "an inevitable choice between liberties must come into play" so that:

> Just as we do not tolerate private *racial* beliefs that adversely affect African-Americans in the commercial arena, even if such beliefs

> are based on religious views, we should similarly not tolerate private beliefs about sexual orientation . . . that adversely affect the ability of LGBT people to live in the world.

Chai R. Feldblum, *Moral Conflict and Conflicting Liberties, in Same-Sex Marriage and Religious Liberty: Emerging Conflicts*, 123-56, 153 (Douglas Laycock, *et al*. eds. 2008).

Commissioner Feldblum claimed that the inevitable clash is between "identity liberty" (of homosexuals and bisexuals) and "belief liberty" (of religious people). *Id.* at 130. But that assertion falsely assumes that many religious persons do not define their identities by their faith. This incorrect assumption goes to the core of the conflict: many gay-rights advocates see sexual orientation as a matter of personal identity but dismiss religious liberty as merely a matter of personal opinion, occasionally to be tolerated but generally to be suppressed. Too often gay rights advocates equate traditional religious beliefs regarding sexual orientation and sexual conduct to racism, insisting that these traditional religious beliefs should not be tolerated outside a tightly restricted personal sphere.

By contrast, many traditional religious believers approach issues regarding sexual orientation as primarily religious questions about sexual behavior, rather than personal identity. Moreover, many traditional religious believers experience religion as a matter of personal identity and, thus, deem religious liberty to be a fundamental right necessary to allow them to fulfill that identity by living out their duty to obey God. To these people, all sexual behavior outside the bond of marriage between a man and a woman is sinful and, out of obedience to God, should be avoided on both a personal and societal level. Indeed, Christian Scripture identifies marriage as the sole proper context for sex, and family as inseparably fundamental to the purpose of sex. This understanding forms the foundation of traditional Christian belief on sexuality.[2]

Such religious beliefs are, of course, in deep conflict with popular conceptions of sexuality. The point here is not to resolve the dispute, but to simply point out that it exists and generates serious social and legal tensions. As Princeton Professor of Jurisprudence Robert P. George, currently a visiting professor at Harvard Law School, recently reported:

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[2] As an example, a leading contemporary pastor and author, Timothy Keller, head minister at the Church of the Redeemer in New York City, explains the basic Christian understanding of sexual relationships as follows: "The Christian sex ethic can be summarized like this: Sex is for use within marriage between a man and woman." Timothy Keller, *The Meaning of Marriage: Facing the Complexities of Commitment with the Wisdom of God* 221 (2011). As to the biblical understanding of marriage, traditional Christianity teaches that "[a]ccording to the Bible, God devised marriage to . . . create a stable human community for the birth and nurture of children, and to accomplish . . . this by bringing the complementary sexes into an enduring whole-life union." *Id.* at 16.

> Advocates of [same-sex marriage] are increasingly open in saying that they do not see these disputes about sex and marriage as honest disagreements among reasonable people of goodwill. They are, rather, battles between the forces of reason, enlightenment, and equality – those who would "expand the circle of inclusion" – on one side, and those of ignorance, bigotry, and discrimination – those who would exclude people out of "animus" – on the other. The "excluders" are to be treated just as racists are treated – since they are the equivalent of racists. . . . [This treatment will include] stigmatiz[ing] them and impos[ing] various forms of social and even civil disability upon them and their institutions. In the name of "marriage equality" and "non-discrimination," liberty – especially religious liberty and the liberty of conscience – and genuine equality are undermined.

Robert P. George, *Marriage, Religious Liberty, and the "Grand Bargain"* (July 19, 2012) *available at* http://www.thepublicdiscourse.com/2012/07/5884/ (last visited Jan. 11, 2013).

Preeminent religious liberty scholar, Professor Douglas Laycock, recently warned: "For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle – suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized." Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407, 407 (2011). Professor Laycock explains his "sense . . . that the deep disagreements over sexual morality . . . have generated a much more pervasive hostility to certain kinds of religion, and this hostility has consequences." *Id.* at 414. After providing examples to support his sense that "[t]he gay rights movement sees traditional religious teachings about same-sex relationships as simple bigotry," *id.* at 415, he warns against taking a "path [that] causes the very kinds of human suffering that religious liberty is designed to avoid," a path leading to an America in which religious persons "who cannot change their mind [about a moral issue] are sued, fined, forced to violate their conscience, and excluded from occupations if they refuse." *Id.* at 419.

Lest such a warning seem extreme, consider the proceedings below in which a federal district court adopted *as a finding of fact* that "[r]eligious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians." *Perry v. Schwarzenegger,* 704 F.Supp. 2d 921, 985 (N.D. Cal. 2010) (Finding No. 77). In support of this remarkable finding, the district court cited the religious doctrine of the Catholic Church, the Southern Baptist Convention, the Evangelical Presbyterian Church, the Free Methodist Church, the Lutheran Church – Missouri Synod, and the Orthodox Church of America. *Id.* at 986 (Finding Nos. 77(j), (k), (l), (m), (n), (o), (p)). It relied upon a witness's testimony that "religion is the chief obstacle for gay and lesbian political progress." *Id.* at 985 (Finding No. 77(c)). The court also cited a CNN exit poll that claimed that "84 percent of people who attended church weekly voted in favor of Proposition 8." *Id.* (Finding No. 77(g)).

But the First Amendment prohibits federal courts from sitting in judgment of churches' religious doctrine. "[T]he First Amendment precludes" such an inquiry because "'the law knows no heresy, and is committed to the support of no dogma.'" *United States v. Ballard,* 322 U.S. 78, 86 (1944) (quoting *Watson v. Jones*, 13 Wall. 679, 728 (1873)). "When the triers of fact undertake" to determine the truth of religious doctrines or beliefs, "they enter a forbidden domain." 322 U.S. at 87. Protection of religious beliefs does not "turn on a judicial perception of the particular belief or practice in question." *Thomas v. Review Board,* 450 U.S. 707, 714 (1981). Quite simply, "[c]ourts are not arbiters of scriptural interpretation." *Id.* at 716. At bottom, "[p]articularly in this sensitive area, it is not within the judicial function and judicial competence to inquire" into religious doctrine. *Id. See Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 833-834 (1989).

Or consider a number of recent cases involving conflicts between the gay rights movement and religious liberty:

- A wedding photographer was fined nearly $6700 because she declined to photograph a same-sex commitment ceremony solely because doing so would violate her religious beliefs. *Elane Photography, LLC v. Willock*, 284

P.3d 428 (N.M. Ct. App. 2012), *cert. granted*, 2012-NMCERT-8 (N.M. Aug. 16, 2012);

- Two graduate students at public universities were expelled from their programs because they were honest about the effect that their religious beliefs would have on their ability to counsel same-sex couples. *Compare Ward v. Polite,* 667 F.3d 727 (6th Cir. 2012) (reviving student's free speech and free exercise claims) *with Keeton v. Anderson-Wiley,* 664 F.3d 865 (11th Cir. 2011) (denying preliminary injunctive relief to student);

- An African-American woman was fired from her job as a public university administrator for writing a letter to the editor of the local newspaper expressing her personal viewpoint based on her religious beliefs that the gay rights movement should not be equated with the civil rights movement. *Dixon v. Univ. of Toledo*, 702 F.3d 269 (6th Cir. 2012);

- A municipal government adopted an official resolution "denouncing the Catholic Church and doctrines of its religion" as "hateful and discriminatory rhetoric" because of the church's position that "Catholic agencies not place children for adoption in homosexual households." *Catholic League,* 624 F.3d at 1047. *See also American Family Ass'n v. City & Cnty. of San Francisco,* 277 F.3d 1114 (9th Cir. 2002) (addressing an official resolution by the same municipality denouncing other religious groups' speech);

- Religious psychologists have challenged a recent California law banning psychologists from counseling minor clients, at their and their parents' request, about ways to diminish sexual attraction toward – or sexual conduct with – members of the client's same sex. *Welch v. Brown,* ___ F.Supp. 2d ___, 2012 WL 6020122 (E.D. Cal. Dec. 3, 2012) (granting preliminary injunction); *Pickup v. Brown,* ___ F.Supp. 2d ___, 2012 WL 6021465 (E.D. Cal. Dec. 4, 2012) (denying preliminary injunction);
- Parents of elementary public schoolchildren challenged a school district's failure to notify them that their children would be taught to accept homosexual relationships despite their parents' contrary religious beliefs. *Parker v. Hurley,* 514 F.3d 87 (1st Cir. 2008);
- Public school students have been forbidden from expressing a traditional religious viewpoint regarding homosexual behavior. *See, e.g., Zamecnik v. Indian Prairie Sch. Dist. No. 204,* 636 F.3d 874 (7th Cir. 2011); *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602 (6th Cir. 2008); *Hansen v. Ann Arbor Pub. Schs.*, 293 F.Supp. 2d 780 (E.D. Mich. 2003).

See also Marc D. Stern, *Same-Sex Marriage and the Churches, in* Same-Sex Marriage and Religious Liberty: Emerging Conflicts 1-58 (Douglas Laycock, *et al.* eds., 2008) (collecting cases).

Conflicts outside of court have been just as common. For example, Catholic Charities has provided adoption services nationwide for over a century, specializing in placing children with special needs. Yet it was excluded by state governments from providing adoption and foster care services in Massachusetts, Illinois, and Washington, D.C., because of its faith-based refusal to place adoptive children with homosexual couples.[3]

In New Jersey, an evangelical ministry was found to have violated state antidiscrimination law for refusing to rent its facilities for a same-sex commitment ceremony.[4] Small businesses run by religious owners have faced charges before human rights commissions for refusing to create expressive products that advocate "gay pride" or endorse homosexual behavior.[5]

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[3] *See* Laurie Goodstein, *Bishops Say Rules on Gay Parents Limit Freedom of Religion*, N.Y. Times, Dec. 28, 2011, *available at* http://www.nytimes.com/2011/12/29/us/for-bishops-a-battle-over-whose-rights-prevail.html?pagewanted=all (last visited Jan. 25, 2013).

[4] *See* Jill P. Capuzzo, *Group Loses Tax Break Over Gay Union Issue*, N.Y. Times, Sept. 18, 2007, *available at* http://www.nytimes.com/2007/09/18/nyregion/18grove.html (last visited Jan. 25, 2013).

[5] *See* Scott Sloan, *Commission Sides with Gay Group against Hands on Originals*, Lexington Herald-Leader, Nov. 26, 2012, *available at* http://www.kentucky.com/2012/11/26/2421990/city-rules-hands-on-originals.html (last visited Jan. 25, 2013).

In Massachusetts, following the state supreme court's recognition of same-sex marriage, the state's chief legal counsel told justices of the peace that they must perform same-sex marriages despite religious objections or face liability for discrimination. The same thing happened with town clerks in Iowa and New York.[6]

Relatedly, Congress' recent enactment of religious liberty protection for military service members, including explicit protection for military chaplains whose religious beliefs prohibit them from conducting same-sex commitment ceremonies, National Defense Authorization Act for Fiscal Year 2013, § 533(b), was criticized in the President's signing statement as "an unnecessary and ill-advised provision." Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, 2013 Daily Comp. Pres. Docs. 00004, p. 1 (Jan. 2, 2013).

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[6] *See* Katie Zezima, *Obey Same-Sex Marriage Law, Officials Told*, N.Y. Times, April 26, 2004, *available at* http://www.nytimes.com/2004/04/26/us/obey-same-sex-marriage-law-officials-told.html (last visited Jan. 25, 2013); *see also* Thomas Kaplan, *Rights Collide as Town Clerk Sidesteps Role in Gay Marriages*, N.Y. Times, Sept. 27, 2011, *available at* http://www.nytimes.com/2011/09/28/nyregion/rights-clash-as-town-clerk-rejects-her-role-in-gay-marriages.html (last visited Jan. 25, 2013); *Official: Iowa Clerks Must Obey Marriage Ruling*, Sioux City Journal, April 17, 2009, *available at* http://siouxcityjournal.com/news/official-iowa-clerks-must-obey-marriage-ruling/article_b4f5e728-35b1-5d30-941d-8df2d4b34206.html (last visited Jan. 25, 2013).

Perhaps the sharpest blows to religious liberty came in the wake of Proposition 8's passage in California in 2008. Numerous religious believers lost their jobs, and businesses owned by religious believers faced boycotts when it was discovered that they had donated to the pro-Proposition 8 campaign. *See* Lynn D. Wardle, *A House Divided: Same-Sex Marriage and Dangers to Civil Rights*, 4 Liberty U.L.Rev. 537, 555-57 (2010). Mormons in particular were heavily targeted after their names and addresses were published on the internet resulting "in a spate of violent threats against, attacks upon, and intrusions upon select Mormons, their places of worship, their communities, their businesses, and numerous other vindictive acts of harassment and intimidation by homosexual activists to punish and 'pay back' that religious community." *Id.*

Religious liberty must be reinforced. The "right to religious freedom" cannot be redefined to mean the "right to resign one's job" or the "right to recant one's beliefs." Instead, it must remain the right to hold traditional religious beliefs, even those not shared by the current cultural elite, and to do so without fear of retaliation at the workplace or expulsion from the public square.

III. Recognizing Sexual Orientation As A Suspect Class Will Legally Undermine The Ability Of Many Religious People To Live Their Faiths.

In considering whether a law violates the Equal Protection Clause of the Fourteenth Amendment or the implicit equal protection guarantee of the Fifth Amendment, this Court applies different levels of scrutiny to different types of classifications. *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 217 (1995) (explaining that this Court's analysis of Fifth and Fourteenth Amendment equal protection claims is "precisely the same"). Classifications based on, for instance, race and national origin are subject to strict scrutiny, while classifications based on sex and illegitimacy receive intermediate scrutiny. *Clark*, 486 U.S. at 461. Virtually all other classes receive rational basis scrutiny, which deferentially asks only whether the statutory classification in question is conceivably "rationally related to a legitimate governmental purpose." *Id.* Classifications based on sexual orientation have always been subject to rational basis scrutiny, including in cases before this Court, *see, e.g., Romer v. Evans*, 517 U.S. 620, 632 (1996), and in eleven of the twelve federal courts of appeals to rule on the issue. *See Windsor v. United States*, 699 F.3d 169, 189 (2d Cir. 2012) (Straub, J., dissenting in part) (observing the majority's break with this Court and eleven other circuits when it found that sexual orientation was entitled to heightened scrutiny).

As with recognizing fundamental rights, courts must be careful about identifying new suspect classes because such recognition takes important decisions out of the normal "democratic processes." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Such caution is particularly apt here given the "far-reaching implications" of raising sexual orientation to a suspect class. *U.S. Dept. of Health & Human Srvs.*, 682 F.3d at 9.

Constitutional guarantees of equal protection generally limit only *government* action, not private conduct. But there are at least three broad ways in which changing the constitutional status of sexual orientation will harm religious liberty. First, a change in status will increase pressure on government entities to exclude religious groups from public programs and opportunities. Second, governments with sexual orientation antidiscrimination laws will more likely argue that forbidding discrimination based on sexual behavior is a sufficiently compelling interest to override the free exercise, free speech, and free association rights of religious individuals and entities. Third, adding sexual orientation to the same legal category as race will unmistakably endorse the message to society that traditional religious beliefs about marriage and the family are – as a matter of constitutional law – akin to racism, a form of condemnation that will result in marginalization and ostracism of religious believers.

A. Exclusion from the Public Square

Raising sexual orientation to a suspect class might effectively bar religious citizens from public life. To determine whether government may restrict First Amendment liberties in order to protect a certain class, courts look to whether this Court has recognized that class as suspect for purposes of equal protection jurisprudence. If a class has been so recognized, courts are much more willing to find that the government's action is supported by a compelling interest, and thus allow regulations to diminish constitutional liberties in order to protect the class. By contrast, if this Court does not recognize a class as suspect, then other courts are much less likely to find government motives to be compelling.

As Justice Thomas has observed, the fact that a certain class had "never been accorded any heightened scrutiny under the Equal Protection Clause of . . . the federal . . . Constitution[ ]" is prime evidence that an antidiscrimination law protecting that class likely does not protect a sufficiently compelling interest to override religious liberty. *Swanner v. Anchorage Equal Rights Commission*, 513 U.S. 979, 981 (1994) (Thomas, J., dissenting from denial of certiorari) (internal quotation marks and citations omitted). As Judge O'Scannlain explained in greater detail:

> [A]lthough equal protection analysis may not be determinative of the compelling interest inquiry, it assuredly is not . . . [ ] irrelevant.[ ] The Equal Protection Clause is concerned

> more specifically than any other constitutional provision with the issue of discrimination; it is therefore eminently sensible to look to equal protection precedent as a proxy for the importance that attaches to the eradication of particular forms of discrimination. The fact that courts have not given unmarried couples any special consideration under the Equal Protection Clause is potent circumstantial evidence that society lacks a compelling governmental interest in the eradication of discrimination based upon marital status.

Thomas v. Anchorage Equal Rights Commission, 165 F.3d 692, 715 (9th Cir. 1999), *rev'd on other grounds en banc*, 220 F.3d 1134 (9th Cir. 2000).

Concluding that "[n]ot all discrimination is created equal," the panel found that "there is simply no support from any quarter for recognizing a compelling government interest in eradicating marital-status discrimination that would excuse what would otherwise be a violation of the Free Exercise Clause." 165 F.3d at 717. *Cf. Attorney Gen. v. Desilets*, 636 N.E.2d 233, 239 (Mass. 1994) ("Because there is no constitutionally based prohibition against discriminating on the basis of marital status, marital status discrimination is of a lower order than those discriminations" referred to in the state constitution, *i.e.,* "sex, race, color, creed or national origin.").

By contrast to the marital status discrimination at issue in *Swanner* and *Thomas*, fashioning sexual orientation as a new suspect class akin to race might create significant support for allowing even non-neutral and non-generally-applicable sexual orientation antidiscrimination laws to infringe upon religious liberty. *See, e.g.*, *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 921 (1st Cir. 1988) (Bownes, J., dissenting in part) ("The Supreme Court has noted that the states and the federal government have a compelling interest in eliminating invidious discrimination by private persons on the basis of race and sex. Consequently, it routinely has upheld statutes aimed at eradicating such discrimination, even though they have the incidental effect of abridging the First Amendment rights of the discriminators.") (citations omitted).

A good example of how the public square could be closed to believers is a case dealing with the exclusion of the Boy Scouts from a state employees' charitable giving program. In *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003), shortly after this Court's decision in *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), a Connecticut government official unilaterally launched an investigation into whether to remove the Boy Scouts from the state employees' charitable giving program because the Boy Scouts do not permit homosexual individuals to become Boy Scout leaders. The state official removed the Boy Scouts from the program, justifying the action as an effort to avoid being "a party to discrimination in violation of Connecticut's Gay Rights Law." *Id.* at 85. After the Boy Scouts sued, the State affirmed that it excluded the

Scouts "to ensure that state facilities not be used in furtherance of discrimination and that State employees not be subjected to solicitation on behalf of discriminating organizations." *Id.* at 87. While the court ultimately ruled against the Scouts on unrelated grounds, one member of the court expressed his opinion that a simpler route to the same conclusion would have been simply to hold that Connecticut had a compelling interest in enforcing its antidiscrimination statute that overrode the Boy Scouts' associational rights. *Id.* at 92 n.5. Such weighing would undoubtedly gain much greater authority were this Court to elevate sexual orientation to a suspect classification.

The potential impact of such a change is staggering. On the public level, religious organizations and individuals may be frozen out of, or tightly restricted within, professions like psychological counseling to which states control licensure and ethical requirements.[7] Religious adoption and foster care services, already targeted for exclusion in certain states, may be constitutionally compelled to cease adoption and foster-care placement.[8] Access to public funding for family services conducted by religious organizations could be slashed or barred entirely. Already existing efforts to revoke tax-exempt status for traditional religious groups would intensify. Access to public facilities could become severely restricted,[9] inflicting a potentially fatal blow to the many religious groups and churches that rent school facilities for religious services.[10] Governments may condition access to facilities and programs that effectively bar many religious citizens from participation in the public square.

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[7] *See Ward*, 667 F.3d at 730; *Keeton*, 664 F.3d at 880-81; *Welch*, 2012 WL 6020122 at *17; *Pickup*, 2012 WL 6021465 at *26.

[8] For example, in *Lofton v. Sec'y of Dept. of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), the court upheld under rational basis review a Florida law that limited adoption of children to opposite-sex couples; however, were sexual orientation made a suspect class, a different result might be reached.

B. Encroachment on Private Liberty

The employment practices of many religiously-affiliated entities, like schools, hospitals, and social welfare services, would be open to challenge. Religious business owners, even those whose services are primarily expressive (like photographers and graphic artists), would be compelled to create expressive products that violate their beliefs.

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[9] *See Cradle of Liberty Council, Inc. v. City of Philadelphia*, 851 F.Supp. 2d 936 (E.D. Pa. 2012) (addressing the city's attempt to evict a Boy Scout troop because of the Boy Scout's leadership policies).

[10] *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 120 (2d Cir. 2007) (Leval, J., concurring) (suggesting church could be barred from renting a public facility because it withholds communion from persons who are not baptized members of the church); *Bronx Household of Faith v. Bd. of Educ.*, 876 F.Supp. 2d 419 (S.D.N.Y. 2012) (describing the importance of access to public buildings for small religious groups), *on appeal*, No. 12-2730 (oral arg. Nov. 19, 2012).

As a setback for both religious liberty and federalism, states and municipalities that have enacted religious liberty exemptions to their sexual orientation antidiscrimination laws may face lawsuits seeking judicial rescission under the federal Constitution. These needed exemptions have already been the subject of criticism. *See, e.g.*, Feldblum, *Moral Conflict and Conflicting Liberties, supra*, at 150-55 (arguing that religious liberty exemptions from sexual orientation laws should be extremely limited); Mark Strasser, *Public Policy, Same-Sex Marriage, and Exemptions for Matters of Conscience*, 12 Fla. Coastal L.J. 135 (2010) (arguing that conscience exemption may violate constitutional guarantees); Jennifer Abodeely, *Thou Shall Not Discriminate: A Proposal For Limiting First Amendment Defenses to Discrimination in Public Accommodations*, 12 Scholar 585 (2010) (discussing ways to circumvent religious liberty defenses against sexual orientation discrimination laws).

Transforming sexual orientation into a new suspect class would not only significantly increase calls for removal of the exemptions, it would provide a legal basis for challenging them. In *Barnes-Wallace v. City of San Diego*, ___ F.3d ___, 2012 WL 6621341 (9th Cir. Dec. 20, 2012), a same-sex couple and an agnostic couple challenged as unconstitutional a lease in which San Diego permitted the Boy Scouts use of public land. The plaintiffs alleged that the leases violated the Equal Protection Clause "by endorsing, supporting, and promoting defendants' discrimination based on sexual orientation." *Id.* at *13. The Ninth Circuit ultimately rejected the claim, *id.* at *14, but the district court had suggested in dicta that such a claim could be colorable. *See Barnes-Wallace v. Boy Scouts of Am.*, 275 F.Supp. 2d 1259, 1381 (S.D. Cal. 2003). If this Court gives the government a compelling interest in eradicating sexual orientation discrimination, lower courts might conclude that the Constitution bans accommodations of religion in the context of sexual orientation laws.

The carefully negotiated efforts of states and their citizens to strike a balance in the conflict between religious liberty and sexual orientation protections could be swept aside. If states and municipalities were forced to remove their religious liberty exceptions, religious individuals and communities might have very limited legal recourse to protect their ability to fully live out their faiths. In recognizing sexual orientation as a new suspect class, the Court could unintentionally destroy the compromises that State and local laws have enacted, replacing efforts toward mutual accommodation with an all-or-nothing battle worse than the conflicts that led to the compromises.

A related harm from elevating sexual orientation to a suspect class would be the corresponding diminished protection that Title VII, 42 U.S.C. § 2000e, would offer to shield believers from private discrimination. Employers will have less incentive to, and perhaps even feel pressured not to, accommodate expressions of conventional religious beliefs about marriage and the family. For instance, employers could argue that it would be an "undue burden" to permit such expression because they would upset a protected class. At least one appellate court has already accepted a form of that argument under the current rational-basis standard. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004). More recently, a federal district court signaled a willingness to consider a similar argument. *Gadling-Cole v. West Chester Univ.*, 868 F.Supp. 2d 390, 397-98 (E.D. Pa. 2012). *See also Buonanno v. AT&T Broadband, LLC*, 313 F.Supp. 2d 1069, 1081 (D. Colo. 2004) (employee improperly fired for refusing to sign a statement demanding that he "value" the beliefs of coworkers, implicitly including beliefs that were immoral under his religious faith, which employer claimed created an undue hardship by, for instance, losing innovative ways to reach homosexual consumers).

Similarly, employees who are required to fulfill job functions that directly conflict with their beliefs will be more likely to face situations where they must either violate their faith or lose their livelihood. For instance, in *Slater v. Douglas Cnty.*, 743 F.Supp. 2d 1188 (D. Or. 2010), a county fired a long-time employee from her position as county clerk because she requested that she not be required to register domestic partners. While the county's argument that accommodating the request would cause "an undue hardship" was ultimately unsuccessful, *id.* at 1191, it would likely have carried more weight were sexual orientation a suspect class.

C. Defining Millions of Religious Believers as Bigots

In essence, Respondents ask this Court to declare that the traditional religious beliefs of many Americans are completely wrong on a subject of singular societal importance. And not merely wrong in the way that we may consider those who disagree with us to be wrong about one of the myriad issues of electoral politics, but wrong about a fundamental commitment enshrined in our nation's Constitution. To be a devout Catholic, Protestant, Mormon, Muslim, or Orthodox Jew will become the effective equivalent of being a member of a racist organization.

In short, respondents seek affirmation of their own preferences, and corresponding condemnation of contrary religious faiths in many ways, and one of the most potent is in obtaining suspect class status for sexual orientation. Suspect class status has been historically reserved for morally neutral categories, categories upon which people could discriminate only for reasons that our history and traditions decisively condemn as "evil." *See Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (noting that racism is a "revolting moral evil" that the country wisely restricted through constitutional amendment and statutory law). By elevating sexual orientation to suspect class status, the Court would correspondingly consign traditional religious beliefs regarding marriage and the family to the same circle of constitutional purgatory as racism. Thus, simply by virtue of affirming the traditional faith that their churches, synagogues, or mosques have publicly supported for centuries, tens of millions of religious believers in the United States would be branded as the legal equivalent of racists.

Religious believers will then face harsh dilemmas, rarely faced in a country founded as a refuge for those seeking religious liberty. While the treatment of race as a suspect category broadly accords with their religious beliefs, privileging sexual orientation and its related conduct as a new suspect category will deepen and provoke further widespread tensions. The faith communities that, for millennia, have been committed to the belief that sexual conduct should occur only within the marital union of a man and a woman are unlikely to change those beliefs or otherwise fade away.

Besides contradicting the spirit and purposes of the First Amendment, treating religion with such hostility would not "succeed in keeping religious controversy out of public life, given the political ruptures caused by the alienation of segments of the religious community." *McDaniel v. Paty*, 435 U.S. 618, 641 n.25 (1978) (Brennan, J., concurring in the judgment) (citation omitted). The Court has long recognized that establishing *any* official orthodoxy creates social and religious strife. *West Va. Bd. of Ed. v. Barnette,* 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."). *Cf.* Shima Baradaran-Robison, *et al.*, *Religious Monopolies and the Commodification of Religion*, 32 Pepp. L. Rev. 885, 888, 936-37 (2005) (state-sanctioned orthodoxy can embolden the dominant society to persecute those who hold disfavored views). Establishment of a new government orthodoxy would be particularly inappropriate here, where it would make political heretics out of faithful religious citizens and spawn profoundly corrosive conflicts between church and state.

◆

CONCLUSION

The judgments below should be reversed.

Respectfully submitted,

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Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL.,
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit

BRIEF OF THE CATO INSTITUTE AND CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. This Court Has Consistently Ruled That The Constitution's Equal Protection Guarantee Secures Equal Rights For All And Forbids Invidious Discrimination 4

  A. The Constitution Forbids the Federal Government From Enacting Laws Singling Out a Class of Individuals For Disfavored Legal Status 4

  B. Laws That Discriminate Arbitrarily or Based on Animus Are Subject to Meaningful Judicial Review, Whether Under Strict Scrutiny or Rational Basis Review 7

II. Under Any Standard Of Review, Section 3 Of DOMA Violates The Fifth Amendment's Equal Protection Guarantee 12

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 4, 5, 7

Allegheny Pittsburgh Coal Co. v. Webster,
488 U.S. 336 (1989) 8

Bernal v. Fainter,
467 U.S. 216 (1984) 7

Bowers v. Hardwick,
478 U.S. 186 (1986) 18

City of Cleburne, Tex., v. Cleburne Living Center,
473 U.S. 432 (1985) 7, 8, 9, 10, 11

Civil Rights Cases,
109 US 3 (1883) 6

Clark v. Jeter,
486 U.S. 456 (1988) 7

Craig v. Boren,
429 U.S 190 (1976) 3, 6

District of Columbia v. Heller,
554 U.S. 570 (2008) 16

Free Enterprise Fund v. Public Co. Accounting Oversight Bd.,
130 S. Ct. 3138 (2010) 13

TABLE OF AUTHORITIES (cont'd)

Page

Hampton v. *Mow Sun Wong*,
426 U. S. 88 (1976) 4

Heller v. Doe,
509 U.S. 312 (1993) 7, 17

Hirabayashi v. United States,
320 U.S. 81 (1943) 5

J.E.B. v. Alabama ex rel. T.B.,
511 U.S. 127 (1994) 5, 7, 9

Lawrence v. Texas,
539 U.S. 558 (2003) 12, 17, 18

Louisville Gas & Elec. Co. v. Coleman,
277 U.S. 32 (1928) 13

LULAC v. Perry,
548 U.S. 399 (2006) 15

Lyng v. Castillo,
477 U.S. 635 (1986) 4

Massachusetts v. U.S. Dep't of Health & Human Servs.,
682 F.3d 1 (1st Cir. 2012) 17

Matthews v. Lucas,
427 U.S. 495 (1976) 11

TABLE OF AUTHORITIES (cont'd)

Page

Metro Broadcasting, Inc. v. FCC,
497 U.S. 547 (1990) 5

Metropolitan Life Ins. Co. v. Ward,
470 U.S. 869 (1985) 16

Mississippi Univ. for Women v. Hogan,
458 U.S. 718 (1982) 7

National Fed'n of Independent Business v. Sebelius,
132 S. Ct. 2566 (2012) 9

Palmore v. Sidoti,
466 U.S. 429 (1984) 10

Plessy v. Ferguson,
163 U.S. 537 (1896) 6, 18

Plyler v. Doe,
457 U.S. 202 (1982) 16

Railroad Retirement Bd. v. Fritz,
449 U.S. 166 (1980) 13

Romer v. Evans,
517 U.S. 620 (1996) .... *passim*

TABLE OF AUTHORITIES (cont'd)

Page

Sweatt v. Painter,
339 U.S. 629 (1950) 8, 11

U.S. Dep't of Agriculture v. Moreno,
413 U.S. 528 (1973) 9, 10, 14

Village of Willowbrook v. Olech,
528 U.S. 562 (2000) 5

Weinberger v. Wiesenfeld,
420 U.S. 636 (1976) 4

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 6

Zobel v. Williams,
457 U.S. 55 (1982) 5, 7, 8, 16

Constitutional Provisions and Legislative Materials

142 Cong. Rec. (1996) 13, 14

INTEREST OF *AMICI CURIAE*[1]

Amicus Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. Cato's interest in this case lies in enforcing the age-old principle of "equality under the law," as enshrined in the Constitution through the Fifth and Fourteenth Amendments.

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and the scope of the Constitution's guarantee of the equal protection of the laws.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, *amici curiae* state that all parties have consented to the filing of this brief; letters of consent have been filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

In its very design and purpose, Section 3 of the Defense of Marriage Act ("DOMA") violates the basic constitutional requirement of equality under the law, establishing an across-the-board rule—applicable to more than 1,000 federal legal protections—denying to legally-married same-sex couples the full range of federal rights and benefits that exist to help support committed, loving couples form enduring, life-long bonds. Under DOMA's sweeping mandate of discrimination, legally-married same-sex couples do not stand equal before the law and do not receive its equal protection. The Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG") cannot offer any legitimate reason—independent of the purpose of demeaning gay and lesbian married couples that pervades DOMA—that rationalizes this system of government-sponsored discrimination.

Under any standard of review, DOMA's sweeping discrimination against married gay men and lesbians contravenes the plain, well-established meaning of the guarantee of the equal protection of the laws. The Fifth Amendment's guarantee of the equal protection of the laws extends to all persons, including legally-married gay men and lesbians, who, despite having "political power to participate in the democratic process," BLAG Br. at 50, have been subjected to arbitrary, invidious discrimination by the government. There is only one standard of equal protection, and it requires the state "to govern impartially," *Craig v. Boren*, 429 U.S 190, 211 (1976) (Stevens, J., concurring), respecting the equal dignity of *all* persons.

BLAG attempts to portray this case as a "quite narrow" dispute, BLAG Br. at 19, that raises no issue of constitutional first principles and turns solely on whether DOMA's Section 3 was a rational solution to a legitimate federal problem within Congress' purview. Urging this Court to ratify an unprecedented system of discrimination against legally-married gay and lesbian couples, BLAG's submission never confronts the essential meaning of the Constitution's guarantee of the equal protection of the laws, which this Court has long held is an element of due process binding on the federal government. At every step of its argument, BLAG would give the federal government broad, sweeping power to discriminate against individual Americans, refusing to honor the Constitution's universal guarantee of equality under the law that protects all Americans from being treated as inferior, second-class persons.

If this Court concludes that it has jurisdiction, the judgment of the court of appeals should be affirmed.

ARGUMENT

I. This Court Has Consistently Ruled That The Constitution's Equal Protection Guarantee Secures Equal Rights For All And Forbids Invidious Discrimination.

A. The Constitution Forbids the Federal Government From Enacting Laws Singling Out a Class of Individuals For Disfavored Legal Status.

The Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment guarantee to all persons the equal protection of the laws. While, of course, the text of the Fifth Amendment "is not as explicit a guarantee of equal treatment as the Fourteenth Amendment," this Court has repeatedly held that "the Constitution imposes upon federal, state, and local government actors, the same obligation to respect the personal right to equal protection of the laws." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213, 231-32 (1995); *see also Lyng v. Castillo,* 477 U.S. 635, 636 n.2 (1986) ("The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment.") (quoting *Hampton* v. *Mow Sun Wong,* 426 U. S. 88, 100 (1976)); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1976) (observing that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment"). These repeated holdings reflect that "equality of citizenship is the essence of our Republic." *Zobel v. Williams*, 457 U.S. 55, 70 (1982) (Brennan, J., concurring).

"The Fifth and Fourteenth Amendments to the Constitution protect *persons*, not groups," *Adarand*, 515 U.S. at 227, reflecting "our constitutional tradition" that "an individual possesses rights that are protected against lawless action by the government." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring). As a personal right that belongs to all individuals, the right of equal protection secures equality to all persons—whether black or white, man or woman, gay or straight, native-born or immigrant. "'At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial or sexual . . . class.'" *Id.* at 152-53 (Kennedy, J., concurring) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)).

As this Court's precedents reflect, laws that discriminate and treat any group of persons as inferior, whether enacted by a state government or by Congress, are "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Indeed, even intentional and arbitrary discrimination by the government against a "class of one"—whose only distinguishing characteristic is the fact of being singled out by the government for adverse treatment—violates the Constitution's guarantee of equal protection. *See Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

The plain, well-established meaning of "equal protection" is composed of equality under the law and equality of rights for all persons. The Court's earliest equal protection cases, decided nearly 150 years ago, establish that the constitutional guarantee of the equal protection of the laws "extends its protections to race and classes," prohibiting any legislation "which has the effect of denying to any race or class, or to any individual, the equal protection of the laws." *Civil Rights Cases*, 109 US 3, 24 (1883). Time and again, this Court has confirmed that the guarantee of the equal protection of the laws "is a pledge of the protection of equal laws," *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), that forbids all forms of "class legislation." *Civil Rights Cases*, 109 US at 24. As the first Justice Harlan put it, the Constitution "neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

This Court's precedents today firmly establish that the constitutional guarantee of equal protection demands "neutrality where the rights of persons are at stake," forbidding the government from "singling out a certain class of citizens for disfavored legal status or general hardships," *Romer v. Evans*, 517 U.S. 620, 623, 633 (1996), and requiring the state "to govern impartially," *Craig*, 429 U.S. at 211 (Stevens, J., concurring). As *Romer* teaches, these settled equal protection principles apply with full force to legislation, such as DOMA, that discriminates against gay men and lesbians on account of their sexual orientation. The Constitution's guarantee of the equal protection of the laws means that the government may not deny gay men and lesbians rights basic to "ordinary civic life in a free society," *Romer*, 517 U.S. at 631, in order "to make them equal to everyone else." *Id.* at 635.

B. Laws That Discriminate Arbitrarily or Based on Animus Are Subject to Meaningful Judicial Review, Whether Under Strict Scrutiny or Rational Basis Review.

In giving effect to the constitutional requirement of equal protection, this Court has consistently held that when legislation discriminates on account of race, alienage, or national origin—factors "so seldom relevant to the achievement of any legitimate state interest" and often "reflect[ing] prejudice and antipathy," *City of Cleburne, Tex., v. Cleburne Living Center*, 473 U.S. 432, 440 (1985)—the law must be subject to strict scrutiny and will be struck down unless narrowly tailored to a compelling state interest. *See, e.g.*, *Adarand*, 515 U.S. at 223-30; *Bernal v. Fainter*, 467 U.S. 216, 219-20 (1984). Likewise, this Court demands heightened scrutiny of laws that discriminate on account of gender and illegitimacy, establishing a "strong presumption that [such] classifications are invalid." *J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring). *See, e.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-26 (1982); *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Even in the instances in which legislative classifications are subject to rational basis review, requiring "a rational relationship between the disparity of treatment and some legitimate governmental purpose," *Heller v. Doe*, 509 U.S. 312, 320 (1993), the rational basis test does not permit the government "to divide citizens into expanding numbers of permanent classes," *Zobel*, 457 U.S. at 64, act on the basis of prejudice or animus, or single out individuals for adverse treatment in an arbitrary manner. *See Allegheny Pittsburgh Coal Co. v. Webster*, 488 U.S. 336 (1989).

In striking down Section 3 of DOMA, the Second Circuit applied heightened scrutiny, concluding that sexual orientation is properly treated as a quasi-suspect class. As Windsor and the government demonstrate in their briefs, the Second Circuit's comprehensive analysis of the four factors bearing on suspect-class status fully supports application of heightened scrutiny in this case. Windsor Br. at 17-31; U.S. Br. at 18-36. But this Court need not reach the question of the proper standard of review in order to invalidate Section 3; as discussed further in Part II of this brief, *infra*, Section 3 violates the essential meaning of the equal protection guarantee and cannot be sustained even under the most forgiving of the Court's doctrinal formulations.

This Court's cases applying rational basis review recognize that, at a minimum, the Constitution's equal protection guarantee establishes equality under the law for all persons and prohibits "'indiscriminate imposition of inequalities' . . . born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 633, 634 (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950)). Under any standard of review, class legislation that singles out individuals and treats them as inferior persons, "not as worthy or deserving as others," *Cleburne*, 473 U.S. at 440, violates the personal, individual right to the equal protection of the laws. Where, as here, Congress subjects individuals to invidious discrimination that results in "injury . . . to personal dignity," *J.E.B.*, 511 U.S. at 153 (Kennedy, J., concurring), this Court has a constitutional obligation to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S, at 633. Thus, while BLAG is correct that rational basis scrutiny is deferential to congressional policy judgments, *see* BLAG Br. at 22-23, this measure of deference has *never* entailed judicial abdication in the face of arbitrary, invidious discrimination inconsistent with the equal protection guarantee. *See Nat'l Fed'n of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) (explaining that "deference in matters of policy cannot . . . become abdication in matters of law").

Indeed, this Court, when applying the rational basis standard of review, has always insisted that government—whether state or federal—act consistent with the most fundamental principle underlying the personal guarantee of equal protection: that all persons are entitled to equality before the law and may not be subject to arbitrary and invidious discrimination based on their status or personal characteristics. In so doing, the Court has required a focused inquiry into the challenged statute's discrimination and the particular, concrete justifications offered to explain the adverse treatment. *See Cleburne*, 473 U.S. at 453 (Stevens, J., concurring).

For example, in *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973), this Court struck down a federal statutory provision that denied federal food stamp benefits to a household composed of unrelated individuals living together as a violation of the equal protection guarantee. Finding that the provision had been designed to deny food stamps to "hippies" and served no other conceivable purpose independent of discrimination, this Court held that the statute was inconsistent with the constitutional guarantee of equality under the law. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest." *Id.* at 534.

Similarly, in *Cleburne Living Center*, this Court held unconstitutional a municipal zoning ordinance that required a special-use permit for homes for mentally disabled persons, but not for other group homes. Finding that the discriminatory permit requirement rested on "negative attitudes," "fear," and "irrational prejudice," 473 U.S. at 448, 450, this Court held the ordinance violated the constitutional guarantee of equality under the law. "The City may not avoid the strictures of th[e Equal Protection] Clause by deferring to the wishes or objections of some fraction of body politic. 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'" *Id.* at 448 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

Most relevant here, applying rational basis review, this Court in *Romer* held unconstitutional a state constitutional amendment that prohibited state or local government action to protect gay men and lesbians from discrimination. Stressing that the government had "impos[ed] a broad and undifferentiated disability on a single named group," this Court held the amendment was a patent violation of the venerable principle of equality before the law: "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 632, 634-35. The amendment was a denial of equal protection, a "status-based enactment" that denied equal rights to gay men and lesbians, "not to further a proper legislative end but to make them unequal to everyone else." *Id.* at 635. Even under rational basis review, "[i]t is not within our constitutional traditions to enact laws of this sort . . . 'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.'" *Id.* at 633 (quoting *Sweatt*, 339 U.S. at 635).

As these cases hold, rational basis scrutiny, while properly deferential, does not require a reviewing court to abdicate its constitutional responsibility to enforce the guarantee of equal protection for all persons. This Court's cases applying rational basis scrutiny do not permit the government to subject any group of persons to adverse treatment "born of animosity toward the class of persons affected." *Id.* at 634. For that reason, this Court has been "especially vigilant in evaluating the rationality of any classification involving a group that has been subject to a 'tradition of disfavor'" in order to prevent use of a "stereotyped reaction that may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made.'" *Cleburne*, 473 U.S. at 453 n.6 (Stevens, J., concurring) (quoting *Matthews v. Lucas*, 427 U.S. 495, 520-21 (1976) (Stevens, J., dissenting)).

II. Under Any Standard Of Review, Section 3 Of DOMA Violates The Fifth Amendment's Equal Protection Guarantee.

DOMA's Section 3 cannot be squared with basic equal protection principles because it discriminates against married same-sex couples in virtually every aspect of their lives. Affecting more than 1,000 federal statutory provisions, Section 3 denies federal legal recognition of the marriages of gay men and lesbians recognized under state law, denying to these couples the many important legal protections, rights and benefits that the federal government provides to all other married couples. On matters from Social Security to taxation, from health care and employee benefits to immigration, DOMA commits the federal government and all its agencies to a policy of prejudiced discrimination vast in its reach. *See* Windsor Br. at 6-7. Furthermore, Section 3 governs the interpretation of federal statutes, such as the Employee Retirement Income Security Act, and thus imposes discriminatory costs on private-sector employers who choose to provide benefits to employees with same-sex spouses. The provision violates the essential meaning of the equal protection guarantee and cannot be sustained even under the most relaxed standard of review, let alone heightened scrutiny. "Freedom extends beyond spatial bounds," *Lawrence v. Texas*, 539 U.S. 558, 562 (2003), and marriage equality is properly an aspect of liberty, upon which the government cannot adequately justify discriminatory restrictions.

The ability to marry the person of one's choosing and partake of the legal protections and benefits of civil marriage are rights basic to "ordinary civic life in a free society," even if they are "protections taken for granted by most people," *Romer*, 517 U.S. at 631. Never before in our nation's history has the federal government enacted a legal regime of marriage discrimination. "The absence of precedent for [DOMA] is itself instructive; '[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)); *see also Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010) (observing that sometimes "the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent" for Congress' actions). DOMA cannot survive this "careful consideration."

"If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect." *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring). Here, as BLAG all but concedes, DOMA's classifications were "drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633. Driven by the purpose to deny basic legal equality to married same-sex couples, *e.g.*, 142 Cong. Rec. 17,089 (1996), DOMA was enacted in order to ensure that gay men and lesbians in state-recognized marriages would not receive *federal* recognition of those same marriages—and thus would be denied the important federal legal protections, rights, and benefits that attach to all other marriages in this country. Against the backdrop of fear that states would recognize marriage equality, Congress wrote into federal law a sweeping rule mandating discrimination against married same-sex couples. *See* BLAG Br. at 30 (explaining that DOMA was enacted to respond to judicial decisions that "raised the prospect" of state recognition of "same sex couples").

Section 3 was not, as BLAG argues, a rational solution to a legitimate federal problem. BLAG Br. at 19. Instead, as the debates in Congress reflect, DOMA was "born of animosity towards the class of persons affected," seeking to make married gay and lesbian couples "unequal to everyone else." *Romer*, 517 U.S. at 634, 635. By enacting DOMA, federal legislators sought to "express their disapprobation through the law," 142 Cong. Rec. 17,089 (1996), asserting that same-sex couples were "immoral," depraved," "unnatural," "based on perversion," and "an attack on God's principles." *Id.* at 16,972, 17,074, 17, 082. *See generally* Windsor Br. at 8-10. The very point of DOMA was to make the "general announcement that, gays and lesbians shall not have any particular protections from the law" when it comes to marriage, inflicting on committed, loving married same-sex couples "immediate, continuing, and real injuries" to their equal dignity and status as equal citizens. *Romer*, 517 U.S. at 635. Section 3 violates the constitutional requirement of the equal protection of the law, carving out one group of people from the protection of federal laws that help support and sustain the institution of marriage. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.* at 634 (quoting *Moreno*, 413 U.S. at 534).

BLAG argues that Section 3 is justified by the need to encourage responsible procreation by married heterosexual couples as well as by other ostensible federal goals, but it was only when same-sex couples sought to fulfill the Constitution's promise of freedom and equality by entering into loving, committed marriages that Congress enacted DOMA. *Cf. LULAC v. Perry*, 548 U.S. 399, 440 (2006) ("In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination . . . ."). Both the provision's vast reach and the context of its passage condemn it as a "status-based enactment" that "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Romer*, 517 U.S. at 635.

The governmental interests suggested by BLAG do not suffice to justify Section 3 even under rational basis scrutiny. BLAG argues that Section 3 is a permissible effort to establish a uniform standard for federal benefits and programs based on marital status that supports responsible procreation and conserves federal resources. BLAG Br. at 28-48. But BLAG has not advanced, and cannot advance, any legitimate reason—independent of invidious discrimination—for establishing, for the first time in our nation's history, a uniform federal definition of marriage that denies legal recognition to the marriages of one group of citizens. A concern for uniformity or for the "preservation of resources . . . can hardly justify the classifications used in allocating those resources. The State must do more than justify its classification with a concise expression of intention to discriminate." *Plyler v. Doe*, 457 U.S. 202, 227 (1982).

Uniformity and cost-savings are undoubtedly legitimate government interests, but the constitutional guarantee of equal protection takes discrimination against disfavored persons "off the table," *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008), as a means of furthering these federal ends. Were it otherwise, the federal government would have the power to "divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible." *Zobel*, 457 U.S. at 64. BLAG cannot explain why it was reasonable to take the extreme step of "singling out a certain class of citizens for disfavored legal status," *Romer*, 517 U.S. at 633, in order to pursue these purported governmental ends. *Cf. Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985) (finding that state goal of encouraging in-state investment was not a "legitimate state purpose when furthered by discrimination").

This is no small matter—it goes to the heart of why Section 3 cannot be squared with the constitutional requirement of equal protection. "The search for the link between classification and objective gives substance to the Equal Protection Clause . . . . By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 632, 633. DOMA, whose "sheer breadth . . . seems inexplicable by anything but animus toward the class it affects," *id.* at 632, fails this basic inquiry.

BLAG also argues that the government has a federal interest in adopting what it calls the "traditional definition of marriage" in order to foster a governmental interest in responsible procreation. BLAG Br. at 43-48. This, too, fails even the minimum test of rationality. In the first place, there is absolutely no reason to believe that excluding same-sex couples from the institution of marriage has any impact at all on the likelihood that opposite-sex couples will get married. Moreover, there are many classes of persons who cannot procreate, such as the elderly, infertile, or incarcerated, in addition to those opposite-sex couples who may be able to bear children but choose not to—yet DOMA singles out only gay men and lesbians. As the First Circuit observed, "DOMA does not increase benefits to opposite-sex couples—whose marriages may in any event be childless, unstable or both—or explain how denying benefits to same-sex couples will reinforce heterosexual marriage. . . . This is not merely a matter of poor fit of remedy to perceived problem, but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage." *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 14-15 (1st Cir. 2012).

Perhaps more important, "tradition" alone does not provide a legitimate government interest sufficient to justify a statute that denies the equal protection of the laws to gay men and lesbians in marriages recognized by state law. "Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller*, 509 U.S. at 326; *see also Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("[T]he fact that the governing majority . . . has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.") (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)). Inequality rooted in "tradition" is as much a blot on the Constitution's guarantee of equal protection as novel forms of discrimination. *Compare Plessy*, 163 U.S. at 550-51 (upholding the constitutionality of segregation based on "the established usages, customs, and traditions of the people"), *with Lawrence*, 539 U.S. at 577-78 (explaining that "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack").

In short, DOMA's "breadth . . . is so far removed from these particular justifications that . . . it [is] impossible to credit them." *Romer*, 517 U.S. at 635. Section 3 is "inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Romer*, 517 U.S. at 632. For same-sex and heterosexual couples alike, the "State cannot demean their existence or control their destiny." *Lawrence*, 539 U.S. at 578. Accordingly, Section 3 cannot survive equal protection scrutiny and must be invalidated as inconsistent with the Constitution's guarantee of equality under law.

CONCLUSION

If this Court concludes that it has jurisdiction, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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No. 12-307

In the
Supreme Court of the United States

UNITED STATES OF AMERICA

Petitioner,

v.

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the estate of THEA CLARA SPYER, ET AL.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES (JURISDICTIONAL ISSUES)

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QUESTIONS PRESENTED

1. Whether the President can deprive this Court of jurisdiction to consider the constitutionality of an act of Congress by refusing to defend the act when it is challenged?
2. Whether the Bipartisan Legal Advisory Group has Article III standing as the duly-authorized representative of the United States House of Representatives to defend a statute enacted by Congress and signed into law by the President when a subsequent President declines to defend the statute in litigation challenging its constitutionality?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES.......................................iv

IDENTITY AND INTEREST OF AMICUS CURIAE..1

INTRODUCTION..1

SUMMARY OF ARGUMENT......................................4

ARGUMENT 5

- I. The Executive Branch's Continued Involvement in this Case, and Continued Enforcement of DOMA, Sufficiently Keeps Alive the Case or Controversy Necessary For Ongoing Jurisdiction, But That Is Not the Exclusive Source of Jurisdiction. 5
  - A. The Origins of the Take Care Clause Strongly Suggest that the President's Duty to "Faithfully Execute" the Laws Prevents him from Conspiring with Private Litigants to Have the Judiciary Effect Suspension of Laws with which the President Disagrees. 9
  - B. Accepting the Propositions of Both Non-Defense and Sole Authority to Defend that the Department of Justice Has Proffered Would Create an Opportunity For Manipulation of the Judicial Process In Order to Give the Executive a *De Facto* Post-Enactment Veto. 11

II. The Bipartisan Legal Advisory Group Has Authority to Defend Section 3 of the Defense of Marriage Act. 15

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Clinton v. City of New York,
524 U.S. 417 (1998) 8

Confiscation Cases,
74 U.S. (7 Wall.) 454 (1868) 15

Dragovich v. U.S. Dep't of the Treasury,
764 F. Supp. 2d 1178 (N.D. Cal. 2011) 13

F.C.C. v League of Women Voters of California,
468 U.S. 364 (1984) 8

FEC v. NRA Political Victory Fund,
513 U.S. 88 (1994) 18

Gill v. Office of Personnel Mgmt.,
699 F.Supp.2d 374 (D. Mass. 2010) 12

Hamdi v. Rumsfeld,
542 U.S. 507 (2004) 1

I.N.S. v. Chadha,
462 U.S. 919 (1983) 5, 16

In re Kandu,
315 B.R. 123 (Bankr. W.D. Wash. 2004) 12

Karcher v. May,
484 U.S. 72 (1987) 16, 17

Kendall v. U.S. ex rel. Stokes,
37 U.S. 524 (1838) 10

League of Women Voters of California v F.C.C.,
547 F.Supp 379 (C.D. Cal 1982) 8

League of Women Voters of California v. F.C.C.,
489 F. Supp. 517 (C.D. Cal. 1980) 7

National Federation of Independent Business v. Sebelius,
__ U.S. __, 132 S. Ct. 2566 (2012)............................1

Raines v. Byrd,
521 U.S. 811 (1997)..19

Sackett v. E.P.A.,
__ U.S. __, 132 S. Ct. 1367 (2012)............................1

Smelt v. County of Orange,
374 F.Supp.2d 861 (C.D. Cal. 2005)......................12

United States v. Lovett,
328 U.S. 303 (1946)..16

United States v. Smith,
27 F. Cas. 1192 (C.C.D.N.Y. 1806)........................10

Statutes

2 U.S.C. § 130f...17

2 U.S.C. § 288B..17

28 U.S.C. § 530B..13

28 U.S.C. § 530D..8

31 U.S.C. § 3730(b)..16

Other Authorities

American Bar Association Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, *Report* (2006).....11

Americanus I, Virginia Independent Chronicle, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1 (John P. Kaminski, *et al.* eds 2009).......................10

Attorney General William French Smith, Press Release 5 (May 6, 1982) 7

Decl. of Indep. (U.S. 1776) 9

Defendants' Mem. of Points and Authorities in Opposition to Summary Judgment, 2010 WL 1935803, *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services*, 698 F.Supp.2d 234 (D. Mass. 2010) 3

Fisher, Sydney George, 1 THE STRUGGLE FOR AMERICAN INDEPENDENCE (Ulan Press 2011) 9

H.R. Rep. No. 104-664, *reprinted in* 1996 U.S.C.C.A.N. 2905 12

H.R. Res. 5, 113th Cong., 1st Sess., § 4(a)(1)(A) (Jan. 3, 2013) 18

Lawson, Gary and Moore, Christopher D., *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267, 1304-05 (1995-96) 10

New York Lawyers Code of Professional Responsibility, Canon 7, Ethical Consideration 7-1 13

Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 Yale L. J. 970 (1983) 7

Notification to Joint Leadership Group from Senate Legal Counsel in Respect to League of Women Voters v. F.C.C., *reprinted in* 125 Cong. Rec. 35,416 (1979) 7

Reilly, Ryan J., *DOJ Official: Defending DADT, DOMA 'Difficult' For Administration*, TMPMuckraker (Nov. 22, 2012) 3

The Attorney General's Duty to Defend the Constitutionality of Statutes, 5 U.S. Op. Off. Legal Counsel 25 (O.L.C.), 1981 WL 30934 14

Virginia Ratification Debates, reprinted in 10 The Documentary History of the Ratification of the Constitution, Virginia No. 3 (John P. Kaminski, *et al.* eds 2009) 10

Rules

House Rule II.8, 113th Cong. (2013) 17

Sup. Ct Rule 37.3(a) 1

Sup. Ct. Rule 37.6 1

Constitutional Provisions

Delaware Declaration of Rights § 7 (1776) 9

U.S. Const., art. II, § 1, cl. 8 6

Vermont Constitution of 1786, Ch. I, § XVII 10

Virginia Declaration of Rights § 7 (1776) 9

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence,[1] is dedicated to upholding and restoring the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition that the President has no power to suspend the laws. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *National Federation of Independent Business v. Sebelius*, __ U.S. __, 132 S. Ct. 2566 (2012); *Sackett v. E.P.A.*, __ U.S. __, 132 S. Ct. 1367 (2012); and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

INTRODUCTION

This suit challenging the constitutionality of Section 3 of the Defense of Marriage Act was brought by Edith Windsor against the United States on November 9, 2010. J.A. 77. After the Department of Justice entered an appearance on behalf of the United States, J.A. 78 (Dkt. #4), participated in pre-trial conferences, J.A. 80, and apparently even advised the Court that it would be filing a motion to dismiss the suit, J.A. 79 (Dkt. # 6), the President of the United States directed the Department of Justice to cease defending the statute, having determined for himself, contrary to the holdings of every court to have addressed the issue, that sexual orientation was a suspect classification subject to heightened scrutiny and that, again in his own determination, Section 3 of DOMA was therefore unconstitutional. J.A. 179, 181, 183-85, 191. The Department then switched sides in the litigation, aggressively litigating *against* the constitutionality of the statute it had previously defended successfully elsewhere. In so doing, the Department ceased its representation of the United States and instead undertook to represent the President in challenging a law the President had a duty to faithfully execute.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief, either through blanket consents filed with the Clerk or by individual consent submitted with this brief. Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in any manner, and no party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

In the prior cases, the Department had expressly disavowed every single rationale that had been offered by Congress in support of the statute when it was adopted, inappropriate concessions that the Department apparently believed, however erroneously, became materially significant once the Department began pushing for heightened scrutiny in the case *sub judice*. *See* U.S. Response to Plaintiff's Mot. for Summary Judgment at 24 (J.A. 106, Dkt. #71) ("nor is there some other important governmental interest identified by Congress and substantially advanced by Section 3 of DOMA, as required under heightened scrutiny"). Indeed, arguably in violation of the ethical obligations of its attorneys, the Department specifically relied on the concessions against interest and mischaracterizations of Congress's purpose it had made in prior cases, to bolster its arguments of *unconstitutionality* after it switch sides in the present case. *See, e.g.*, Defendants' Mem. of Points and Authorities in Opposition to Summary Judgment, 2010 WL 1935803, *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services*, 698 F.Supp.2d 234 (D. Mass. 2010) ("The defendants . . . have expressly disavowed any reliance on the purported interests set forth in DOMA's legislative history"); *see also* Ryan J. Reilly, *DOJ Official: Defending DADT, DOMA 'Difficult' For Administration*, TMPMuckraker (Nov. 22, 2012) (quoting statement by Assistant Attorney General Tony West during a November 2010 meeting with reporters that the Department had "presented the court through our briefs with information which seemed to undermine some of the previous rationales that have been used [in] defense of" DOMA) (available at http://tpmmuckraker.talkingpointsmemo.com/2010/11/doj_official_defending_dadt_doma_difficult_for_administration.php).[2]

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[2] The Department did file its own motion to dismiss on August 1, 2011, but "purely as a procedural matter, to ensure that [the district court could consider arguments on both sides of the constitutional issue and that the court [would have] jurisdiction to enter judgment on the basis of those arguments." J.A. 208; J.A. 98 (Dkt. #49). It then filed a brief *in support* of Plaintiff's motion for summary judgment. J.A. 106 (Dkt. #71). In essence, the Department sought to use the judiciary to accomplish a suspension of a law with which the President disagreed.

Not surprisingly, the House of Representatives, acting through its designated Bipartisan Legal Advisory Group ("BLAG"), sought to intervene under Rule 24 in order to defend the constitutionality of DOMA, which had been approved in 1996 by overwhelming majorities in Congress (85-14 in the Senate, 342-67 in the House) and signed into law by President Clinton. Although the Department of Justice sought to limit BLAG's role in the case to something akin to an *amicus curiae*, J.A. 212, the District Court rejected the Department's position, granting BLAG's motion for full intervention as of right under Rule 24(a)(2). J.A. 225-26.

SUMMARY OF ARGUMENT

The manipulation of the judicial process outlined above, by top legal officers of the United States, should not be countenanced by this Court. Although the Department of Justice has in this case voluntarily taken steps to preserve this Court's jurisdiction to consider the constitutionality of the statute the Department is now actively challenging, it has also made clear its view that, absent those steps, there would be no jurisdiction. The potential for future judicial manipulation by any administration not only declining to defend a statute with which it disagreed, but refusing to file a notice of appeal or petition for writ of certiorari from an adverse judgment is simply too great to be ignored. Thus, while *amicus* agrees with the Department's argument that the steps it has taken *in this case* do provide the necessary elements for jurisdiction in this Court, we reject the notion that the Department's course is the only source of jurisdiction.

The Bipartisan Legal Advisory Group, as the duly authorized representative of the House of Representatives, also has standing to intervene as a party to defend statutes adopted by Congress, particularly when the President abrogates his duty to "take care that the laws be faithfully executed." To hold otherwise would give the President a *de facto* authority to suspend the law, the very concern that the Take Care Clause was designed to protect against.

ARGUMENT

I. The Executive Branch's Continued Involvement in this Case, and Continued Enforcement of DOMA, Sufficiently Keeps Alive the Case or Controversy Necessary For Ongoing Jurisdiction, But That Is Not the Exclusive Source of Jurisdiction.

Amicus agrees with the Department of Justice that the combination of its *procedural* conduct in this case (filing a perfunctory motion to dismiss, filing a notice of appeal, and filing the petition for writ of certiorari) as well as its ongoing enforcement of DOMA is more than adequate to retain the live "case or controversy" necessary for Article III jurisdiction. Brief for the United States on the Jurisdictional Questions ("U.S. Br."), at 5; J.A. 437-39; J.A. 522; U.S. Pet'n for Writ of Certiorari before Judgment; *see also* U.S. Br. at 11 (citing *I.N.S. v. Chadha*, 462 U.S. 919, 939 (1983)).

But Amicus vehemently disagrees with the Department's position that jurisdiction *only* obtains in such circumstances, that the Bipartisan Legal Advisory Group of the House of Representatives (or even

Congress as a whole) has no standing to defend a statute that the Department refuses to defend. U.S. Br., at 8. The view is based on the Department's erroneous claim that the President's constitutional duty to "take care that the laws be faithfully executed" vests in the President not only the exclusive authority *to execute* the laws of the United States, but also the exclusive authority *to defend* those laws (or, as here, to determine whether they should be defended at all). The first proposition cannot be squared with long-standing authority of private relators to enforce the laws of the United States via *qui tam* actions, and the second set of propositions not only finds no support in our nation's history, but is actually contrary to the Founders' deliberate efforts to prevent the President from having the power to suspend duly-enacted laws.

Indeed, the history of the Take Care Clause strongly leans in the opposite direction of what the Department asserts. That history strongly suggests that the Clause imposes on the President the *duty* to defend all laws of the United States, even those the President believes to be of dubious constitutionality. The time for the President to press his constitutional concerns is prior to enactment, by use of the veto, not post-enactment, by use of default in litigation raising a constitutional challenge.

To be sure, the Constitution also imposes on the President, by oath, the duty to "preserve, protect and defend the Constitution of the United States." U.S. CONST., art. II, § 1, cl. 8. But the almost universal practice of the Department of Justice to reconcile these at-times conflicting duties has been to defend the laws despite any constitutional concerns by the Executive. The only exceptions recognized by the Department have been extremely narrow: laws that intrude on the executive powers of the President, and laws that are "clearly unconstitutional" under existing precedent of this Court. *See* Attorney General William French Smith, Press Release 5 (May 6, 1982) ("[T]he Department of Justice has the responsibility to defend acts of Congress unless they intrude on executive powers or are clearly unconstitutional") (cited in Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 Yale L. J. 970, 975 n.19 (1983)). Neither of those exemptions pertains here.

The Department of Justice created quite a controversy when it asserted a much broader view during the Carter administration, namely, that it could decline to present in court any defense of an arguably constitutional federal statute that the Department had determined for itself (independently of Congress and the Judiciary) to be unconstitutional. *League of Women Voters of California v. F.C.C.*, 489 F. Supp. 517, 518 (C.D. Cal. 1980). After the Department notified Congress of its decision not to defend the statute, the Office of Senate Legal Counsel warned the Senate that if the statute were struck without a defense, the precedent would be established that the executive branch could nullify laws with which it disagrees by a default in court. *See* Notification to Joint Leadership Group from Senate Legal Counsel in Respect to League of Women Voters v. F.C.C., *reprinted in* 125 Cong. Rec. 35,416 (1979) (cited in Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 Yale L. J. 970, 1000

(1983) ("*Congressional Defense of Statutes*"). The district court dismissed the action for lack of an adversarial party (the Senate had intervened as an *amicus curiae* rather than a party), but while the appeal was pending, the Department under a new Attorney General advised the Court of Appeals that it would defend the statute, which was held unconstitutional after remand to the district court, a holding that was ultimately affirmed by this Court. *League of Women Voters of California v F.C.C.*, 547 F.Supp 379, 381 (C.D. Cal 1982), *aff'd sub nom. F.C.C. v League of Women Voters of California*, 468 U.S. 364 (1984).

The concerns that arose out of that controversy led eventually to the adoption of 28 U.S.C. § 530D, which requires the Attorney General to notify Congress any time he determines to refrain from defending any act of Congress on the ground that he believes the act is unconstitutional. But mere notification of the Executive's decision *not to defend* a duly-enacted law does nothing to address the problem that the President might, by deliberate non-defense, give to himself the power to suspend laws with which he disagrees. Section 530D necessarily assumes, therefore, that Congress has the power to take action when the President refuses to defend the law. Moreover, the contrary view would effectively give to the President a post-enactment veto power that this Court has expressly held to be unconstitutional. *Clinton v. City of New York*, 524 U.S. 417 (1998). And it would sanction a "suspension" power that the Take Care Clause was specifically designed to prevent.

A. The Origins of the Take Care Clause Strongly Suggest that the President's Duty to "Faithfully Execute" the Laws Prevents him from Conspiring with Private Litigants to Have the Judiciary Effect Suspension of Laws with which the President Disagrees.

One of the charges leveled against King George III in the Declaration of Independence was that he suspended laws adopted by the colonies until his assent to them should be obtained and then, once suspended, utterly neglected to attend to them. Decl. of Indep. Para. 4 (U.S. 1776). The concern was that the King was reasserting a power that had provoked serious tension between Parliament and the Stuart Kings during the 17th Century, where laws properly enacted through the political process were "dispensed with," or suspended, at the whim of the monarch. *See* Sydney George Fisher, 1 THE STRUGGLE FOR AMERICAN INDEPENDENCE 131 (Ulan Press 2011) ("the colonists, as good Whigs and lovers of liberty, would surely not uphold the wicked dispensing power of the Stuart Kings against whom their . . . ancestors had fought"). Early state constitutions also refused to countenance the view that the executive had the power to suspend laws. *See* VIRGINIA DECLARATION OF RIGHTS § 7 (1776) ("That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people, is injurious to their rights, and ought not be exercised."); DELAWARE DECLARATION OF RIGHTS § 7 (1776), ("That no power of suspending Law . . . ought be exercised unless by the legislature"); VERMONT

CONSTITUTION OF 1786, Ch. I, § XVII ("The power of suspending laws, or the execution of laws, ought never be exercised, but by the Legislature, or by any authority derived from it, to be exercised in such particular cases only as the Legislature shall expressly provide for").

The ratification debates reveal that the Take Care Clause was adopted to prevent the President in the new constitutional system from being able to exercise such a power to suspend duly-enacted laws with which he disagreed. *See* Americanus I, Virginia Independent Chronicle, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1 (John P. Kaminski, *et al.* eds 2009) at 203-04 (arguing that under the Constitution, the President had no power to affect laws without participation of Congress); Virginia Ratification Debates, reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 3 (John P. Kaminski, *et al.* eds 2009) at 1552 (proposing an explicit amendment to prohibit a "power of suspending laws"); Gary Lawson and Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267, 1304-05 (1995-96) (reviewing scholarship demonstrating that Take Care Clause was a "textual rejection by the framers of the various royal devices for avoiding executive implementation of the laws"); *see also Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 613 (1838) (holding that there is no "dispensing power" in the President); *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) ("The president of the United States cannot control the statute, nor dispense with its execution").[3] But as the Senate Legal Counsel recognized in response to the Department's actions in *League of Women Voters*, the ability to suspend or even "nullify" a law can be as effectively accomplished indirectly by non-defense and default in response to a constitutional challenge as it can be directly by refusal to enforce the law in the first place.

B. Accepting the Propositions of Both Non-Defense and Sole Authority to Defend that the Department of Justice Has Proffered Would Create an Opportunity For Manipulation of the Judicial Process In Order to Give the Executive a *De Facto* Post-Enactment Veto.

The Department's claim that the President can decline to defend any statute that he believes to be unconstitutional, even when perfectly reasonable arguments in support of its constitutionality exist, when combined with the further claim that the Department alone has the authority to defend Acts of Congress that have been enacted into law, creates a serious risk that the judicial system might be manipulated to give the President a *de facto* post-enactment veto or suspension power.

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[3] *Cf.* American Bar Association Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, *Report*, 18 (2006) ("because the 'take care' obligation of the President requires him to faithfully execute all laws, his obligation is to veto bills he believes are unconstitutional. He may not sign into law and then emulate King James II by refusing to enforce them") (available at http://www.greenmountainpac.com/ABA_SigningStatementsTF.pdf).

The risk is more than hypothetical, but has manifested itself in this very case, for the Department has done more than simply decline to defend the Defense of Marriage Act; it has actively sought to tilt the scales of justice by defaulting on the rationales Congress had for its overwhelming approval of the law, and then using those defaults to attack the law.

The legislative history of the Act contains several rationales that Congress asserted were both important and furthered by the Defense of Marriage Act, including the development of relationships that are optimal for procreation and encouraging the creation of stable relationships that facilitate the rearing of children by both of their biological parents. H.R. Rep. No. 104-664, at 13, *reprinted in* 1996 U.S.C.C.A.N. 2905.

In several prior court decisions, these rationales were held to be more than sufficient to uphold the law's constitutionality. *See, e.g., Smelt v. County of Orange*, 374 F.Supp.2d 861, 880 (C.D. Cal. 2005), *aff'd in part, vacated in part, remanded*, 447 F.3d 673 (9th Cir 2006); *In re Kandu*, 315 B.R. 123, 145 (Bankr. W.D. Wash. 2004); *Wilson v. Ake*, 2004 WL 3334722 (M.D.Fla.) Yet in *Gill v. Office of Personnel Mgmt.*, 699 F.Supp.2d 374 (D. Mass. 2010), the Department "disavowed" all of the rationales that had been identified by Congress, choosing instead to rely on the hypothesized interest in maintaining the status quo. Consolidated Mem. of Points and Authorities in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiff's Motion for Summary Judgment, 2010 WL 1935803 (April 30, 2010); *see also Dragovich v. U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178, 1189 (N.D. Cal. 2011) ("Federal Defendants disavow the governmental interests identified by Congress in passing the DOMA, and instead assert a post-hoc argument that the DOMA advances a legitimate governmental interest in preserving the status quo").

Then, in the case *sub judice*, the Department mischaracterized the rationales actually advanced by Congress, contending instead that "the legislative history demonstrates that the statute was motivated in significant part by animus towards gays and lesbians." U.S. Br. in Support of Plaintiff's Mot. for Summary Judgment (Dkt. #71), at 22. Indeed, the Department made concession after concession in the court below that no lawyer, complying with the ethical obligation to zealously advocate *for* his client,[4] would have made. *See, e.g.*, *id.* at 4 (contending that opposite-sex and same-sex couples are "similarly situated"); *id.* at 22 (equating the view that homosexual

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[4] *See, e.g.*, New York Lawyers Code of Professional Responsibility, Canon 7, Ethical Consideration 7-1 ("The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law"); *see also* 28 U.S.C. § 530B(a) ("An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.").

conduct is immoral with animus toward gays and lesbians); *id.* at 24 (accusing Congress of having the "bare desire to harm a politically unpopular group"); *id.* at 25 (contending that "Congress's interest in 'promoting responsible procreation and child-rearing'" is "not materially advanced by" Section 3 of DOMA). The Department even urged the court to apply heightened scrutiny after acknowledging that numerous other courts, including this Court, had applied rational basis review to sexual orientation classifications. *Id.* at 5 n.1. And then, having "disavowed" or mischaracterized the rationales actually relied upon by Congress, the Department argued that Section 3 must be held unconstitutional because, under heightened scrutiny, "a statute must be defended by reference to the 'actual [governmental] purpose behind it, not a different 'rationalization'" (such as the one the Department itself had offered in the *Gill* case). *Id.* at 22.

The Department's conduct in this case is thus a far cry from long-standing policy that the Department has a duty to defend the constitutionality of an Act of Congress whenever a *reasonable argument* can be made in its support, even if the Attorney General concludes that the argument may ultimately be unsuccessful in the courts." *The Attorney General's Duty to Defend the Constitutionality of Statutes*, 5 U.S. Op. Off. Legal Counsel 25 (O.L.C.), 1981 WL 30934 at *25 (emphasis added). It does not come close to "zealous advocacy" for the client—in this case, the United States itself, the policies of which are reflected in the laws—that the standards of ethical conduct require.[5] It is, instead, a manipulation of the judiciary to have a duly-enacted Act of Congress declared unconstitutional.

When combined with the Department's attempts to deny standing to the Bipartisan Legal Advisory Group of the House of Representatives (or even, as it argued, the full Congress), and even to silence it, *see* U.S. Br. at 29 ("no counsel will be heard for the United States in opposition to the views of the Attorney General," *citing Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458 (1868)), the danger of nullification about which the Office of Senate Legal Counsel warned more than three decades ago is manifest.

II. The Bipartisan Legal Advisory Group Has Authority to Defend Section 3 of the Defense of Marriage Act.

Happily, there is a remedy to the dangers identified above. Congress has its own institutional interest in defending duly-enacted laws that the Executive branch refuses to defend.[6] As this Court noted in *Chadha*, "Congress is the proper party to defend the validity of a statute when a Government agency, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is unconstitutional." 462 U.S. at 921; *see also Karcher v. May*, 484 U.S. 72 (1987) (permitting state legislative officials, in their official capacities and on behalf of the legislature itself, to defend the constitutionality of a statute when the state Attorney General declined to do so); *United States v. Lovett*, 328 U.S. 303 (1946) (authorizing special counsel of Congress to appear to defend the Urgent Deficiency Appropriation Act).

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[5] Neither can the Department's refusal to defend be characterized as an exercise of prosecutorial discretion. There is a dramatic difference between a decision not to prosecute in a particular case, and a decision not to defend a statute: the former permits a prosecutor to prosecute some but not all violations of criminal statutes, while the latter effectively wipes a statute off the books. In any event, the Department's conduct in this case goes far beyond simple refusal to defend. Instead, the Department has manipulated the judicial process in an attempt to effect a Presidential Suspension. The Department has purposefully defaulted on Congress' purposes, and has used those defaults to attack the law.

There is nothing in this Court's prior discussions that requires a different result when one house, rather than the whole Congress, determines to intervene to defend a statute. Indeed, the fact that *Chadha*'s holding was rooted as much in bicameralism as in presentment strongly counsels in favor of single-house intervention. The power to suspend or repeal a law requires the full exercise of the lawmaking power – House, Senate, and President (or House and Senate with override of a Presidential veto). Any one of the three therefore has an institutional interest in defending the handiwork of the legislative process.

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[6] The Department's claim that Congress itself would not have standing because "enforcement" of the law is a power exclusively assigned to the Executive conflates the power to "enforce" and the power to "defend." The two are significantly different, and the case law upon which the Department relies addresses only enforcement. (And even the claim that enforcement is exclusively assigned to the executive is overstated. *See* 31 U.S.C. § 3730(b) (authorizing private persons to bring a *qui tam* action "in the name of the Government" to enforce the requirements of the False Claims Act)).

The House of Representatives, as an institution, therefore has standing to intervene in defense of a duly-enacted law when the Executive refuses to provide that defense. And the Bipartisan Legal Advisory Group is the entity within the House duly authorized to undertake that responsibility on behalf of the House, just as the legislative leaders in *Karcher v. May* had been authorized (until they lost their legislative positions) to represent the institutional interests of the New Jersey legislature in defense of a state statute that the Attorney General of that state refused to defend. *Karcher*, 484 U.S. at 77. House Rule II.8, 113th Cong. (2013) established the Office of the General Counsel "for the purpose of providing legal assistance and representation to the House." The office functions "pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group." The attorneys in the office, including any counsel specially retained by the office, are also statutorily authorized "to enter an appearance in any proceeding before any court of the United States or of any State . . . ." 2 U.S.C. § 130f.[7]

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[7] Together, the Rule and the Statute thus provide to the Office of the General Counsel of the House an authority parallel to that provided to the Office of Senate Legal Counsel by 2 U.S.C. § 288B.

Moreover, if there were any ambiguity in the authority conferred upon the Bipartisan Legal Advisory Group by the Rule itself, the "continuing authority for the Bipartisan Legal Advisory Group" of the 113th Congress to "act as successor in interest" to the Bipartisan Legal Advisory Group of the 112th Congress "with respect to civil actions in which it intervened" to defend the constitutionality of Section 3 of DOMA (including explicitly in this case), was confirmed by the adoption of House Resolution 5 at the outset of the current Congress. H.R. Res. 5, 113th Cong., 1st Sess., § 4(a)(1)(A) (Jan. 3, 2013). The House Resolution expressly noted that "Pursuant to clause 8 of Rule II, the Bipartisan Legal Advisory Group *continues* to speak for, and articulate the institutional position of, the House in all litigation matters in which it appears, including in *Windsor v. United States.*" *Id.*, § 4(a)(1)(B) (emphasis added).[8]

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[8] The Department's reliance on *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994), for the proposition that the January 2013 House Resolution could not authorize the December 2012 filing of a petition for writ of certiorari by the Bipartisan Legal Advisory Group is misplaced, for two reasons. First, the Resolution clearly confirms that the necessary institutional litigation authority already existed by virtue of the longstanding Rule II.8 . Second, *FEC v. NRA* dealt with a retroactive authorization by the Solicitor General for an agency to file a petition for writ of certiorari, but the authorization was not granted until after the time for filing a petition had lapsed. 513 U.S. at 98-99. The January 3, 2013 resolution confirming the litigation authority of the Bipartisan Legal Advisory Group was within the 90-day window for filing a petition for writ of certiorari.

Raines v. Byrd, 521 U.S. 811 (1997), also relied on by the Department and by the Court-appointed *amicus curiae*, is not to the contrary. *Raines* rejected standing for legislators seeking to protect a non-particularized interest as individual legislators, not standing for legislators authorized to speak on behalf of the institution itself. *Id.* at 829. Indeed, the Court expressly noted that it "attach[ed] some importance to the fact that appellees ha[d] not been authorized to represent their respective Houses of Congress in th[e] action." *Id.* Because the Bipartisan Legal Advisory Group has been expressly authorized to represent "the institutional position of[] the House in all litigation matters in which it appears," including specifically in this action, *Raines* is inapposite.

CONCLUSION

The continued participation by the Department of Justice in this case, by filing a notice of appeal and then a petition for certiorari, combined with the Executive's continued enforcement of DOMA, is alone sufficient for this Court to have jurisdiction to consider the merits of the case. But, contrary to the Department's claim, that is not the sole basis of jurisdiction.

The Bipartisan Legal Advisory Group, duly authorized to represent the *institutional* interests of the House of Representatives, also has standing to intervene, to appeal, and to petition this court for a writ of certiorari, in order to present a defense of a duly-enacted statute when the Department of Justice refuses to do so. Not only does such standing comport with the requirements of Article III, it is crucial to counter the danger, manifested by this very case, that the Executive might lay claim to a *de facto* post-enactment veto power by declining to defend and/or deliberately undermining the defense of the law at issue.

DATED: March 1, 2013

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AMICUS
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BRIEF

NO. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the estate of THEA CLARA SPYER, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Amicus Curiae Brief of the Center for Fair Administration of Taxes (CFAT) in Support of Respondents

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

A. Courts and the Internal Revenue Service Have Traditionally Looked To State Law in Determining Whether a Valid Marriage Exists for Federal Tax Purposes 4

B. DOMA Creates Horizontal Inequity and Harms Tax Compliance 8

C. Under DOMA Same Sex Couples Who Are Validly Married Under State Law Are Deprived of Benefits Under the Tax Laws 10

D. Under DOMA The IRS Is Deprived of the Ability to Deal with Abuses of the Tax Laws 12

E. Under DOMA, Where State Law Recognizes Same Sex Marriages and Bestows the Same Privileges and Obligations Under The Tax Laws on All Couples Who Are "Married" Under State Law, Same Sex Married Couples in these States Are Subject to Inconsistent Treatment By Federal and State Taxing Agencies..................................13

CONCLUSION..15

TABLE OF AUTHORITIES

Page(s)

Cases

Commissioner v. Evans,
211 F.2d 378 (10th Cir. 1954) 7

Eccles v. Commissioner, 19 T.C. 1049 (1953)
aff'd, 208 F.2d 796 (4th Cir. 1953) 5, 7

Estate of Goldwater,
539 F.2d 878 (2d Cir. 1976) 5

Estate of Steffke v. Commissioner,
538 F.2d 730 (7th Cir. 1976), *cert. denied*,
429 U.S. 1022 (1976) 6

Gaitan v. Commissioner,
103 T.C.M. (CCH) 2010) 7

Gersten v. Commissioner,
267 F.2d 195 (9th Cir. 1959) 7

Glaze v. United States,
641 F.2d 339 (5th Cir. 1981) 6

Nicholas v. Commissioner,
62 T.C.M. (CCH) 467 (1970) 7

Poe v. Seaborn,
282 U.S. 101 (1930) 11

Ross v. Commissioner.,
31 T.C.M. (CCH) 488 (T.C. 1972) 7

Schmidt v. Commissioner,
41 T.C.M. (CCH) 793 (1991) 7

United States v. Mitchell,
403 U.S. 190 (1971) 8

Statutes

26 U.S.C.

§ 66 10

§ 66(c) 11

§ 71 13

§ 71(b)(1)(A) 13

§ 267 12

§ 267(c)(4) 12

§ 417 13

§ 4975 12

§ 6013(b)(2) 6

Other Authorities

Defense of Marriage Act in 1996 .... *passim*

IRS Revenue Ruling 58-66, 1958-1 C.B. 60 8

http://www.irs.gov/Retirement-Plans/Plan-Participant,-Employee/Retirement-Topics---Beneficiary (last viewed Feb. 28, 2013) 10

INTEREST OF *AMICUS*

Amicus Center for the Fair Administration of Taxes ("CFAT") is a section 501(c)(3) non-profit organization seeking to promote fairness in the administration of the tax laws to taxpayers as a whole. Currently, the primary means utilized to achieve this goal is through the filing of briefs as *amicus curiae* in tax-related cases throughout the United States. CFAT works jointly with the Chapman University School of Law Appellate Tax Clinic, offering law students the opportunity to assist in the preparation of the *amicus curiae* briefs filed by CFAT. CFAT acknowledges the valuable assistance provided by Roman Macias, a J.D. Candidate at the Chapman University School of Law, in drafting this Brief. A. Lavar Taylor, the Director for CFAT and Adjunct Professor of Law at Chapman Law School, has over 31 years of experience in the handling of civil and criminal tax controversies, both in government and in private practice.[1]

Amicus is filing this brief in support of Respondent Edith Windsor to demonstrate that, for purposes of determining whether a person is "married" or "not married" under the federal income tax laws, Courts have traditionally looked to state law to determine whether a valid marriage exists. *Amicus* also discusses the practical problems that will continue to result in the administration of the federal tax laws if section 3 of the Defense of Marriage Act (DOMA) is held to be constitutional.

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[1] No person other than the named *amicus* or their counsel authored this brief or provided financial support for this brief. This *Amicus* Brief is being filed with the blanket consent filed by all parties other than Edith Windsor. Counsel for Edith Windsor consented to the filing of this Brief via email.

Determining whether a person is "married" or "not married" for purposes of the federal tax laws has consequences far beyond those at stake in the present case. The term "spouse" appears in over 170 different sections of the Internal Revenue Code. These Code sections deal with a wide variety of subjects, including a) the avoidance of income tax and gift tax consequences for transfers of property between "spouses" b) the avoidance of income tax consequences for transfers of funds held in retirement accounts to a "spouse" or former "spouse," c) the imposition of excise taxes on persons such as the "spouses" of certain persons, d) taxation of alimony payments made to "spouses" and former "spouses," e) the taxation of income derived by Native Americans from exercise of fishing rights through a qualified entity owned by a Native American and his or her "spouse," and f) establishing a retirement annuity for Tax Court Judges and their surviving "spouse." Thus, the effect of DOMA on the question of whether a person is considered "married" for purposes of the federal tax laws is extremely far reaching.

SUMMARY OF ARGUMENT

Courts and the Internal Revenue Service (IRS) have traditionally looked to state law to determine whether an individual is "married" or "not married" for purposes of the administration of the tax laws. This is true in a variety of contexts. Thus, whenever a same sex couple has or had a valid marriage under state law, DOMA requires results under the Internal Revenue Code that are inconsistent with the results for other identically situated opposite sex couples who have or had a valid marriage under state law. DOMA thus compels outcomes under the Internal Revenue Code that are completely at odds with a long tradition of looking to state law to determine the validity of a marriage for federal income tax, gift tax and estate tax purposes.

The inconsistent results under DOMA create a number of difficulties. First, there is a lack of horizontal equity with respect to couples who are (or were) validly married under state law. The mere lack of horizontal equity discourages compliance with the tax laws. Second, same-sex couples who are (or were) validly married under state law are deprived of "tax benefits" that are available to other couples who are (or were) validly married under state law.

Third, the IRS is hamstrung in preventing abuses of the tax laws where enforcement of these abuses is linked to the status of a person as another person's "spouse." Finally, where state law recognizes same sex marriages and bestows the same privileges and obligations under the tax laws on all couples who are "married" under state law, same sex married couples in these states will be subject to inconsistent treatment by federal and state taxing agencies.

CFAT urges this Court to uphold the ruling of the Second Circuit in order to avoid the numerous problems that will continue to result in the administration of the tax laws under DOMA.

ARGUMENT

A. Courts and the Internal Revenue Service Have Traditionally Looked To State Law in Determining Whether a Valid Marriage Exists for Federal Tax Purposes

Prior to the enactment of DOMA, it was well established that the status of an individual as "married" or "not married" for purposes of the Internal Revenue Code and federal tax administration depended on whether that individual was validly "married" under applicable state law. While federal law establishes the obligations and privileges for married individuals under the tax laws, the status of individuals as "married" or "not married" for purposes of tax administration was always determined by looking to state law. This created certainty and uniformity in the application of federal tax laws for all persons living in a particular state. Each state was allowed to determine when a person was married, and that determination was respected by the IRS in the administering of the tax laws.

There is a wide variety of judicial decisions which illustrate how this principle has operated in practice. In 1953, the Fourth Circuit affirmed a Tax Court decision that plainly and unambiguously stated that "Marriage, its existence and dissolution, is particularly within the province of the states." *Eccles v. Commissioner*, 19 T.C. 1049, 1051 (1953) *aff'd*, 208 F.2d 796 (4th Cir. 1953). In *Eccles*, the taxpayer was divorced under an interlocutory decree on August 2nd, 1949, but the divorce became final six months later. The taxpayer filed a joint return for 1949, and the Commissioner assessed a deficiency, claiming that the taxpayer was not allowed to file a joint return because he was no longer married as of August 2nd, 1949.

The Fourth Circuit held for the taxpayer. The Court stated that, because the laws of the state provided that the type of decree entered did not end a marriage until after the close of the taxpayer year in question, the taxpayer was entitled to file a joint return for 1949. *Id.*

Since the decision in *Eccles*, multiple Courts of Appeal have reiterated the principle that state law determines whether a valid marriage existed for purposes of administering the tax laws. In 1976, the Second Circuit affirmed a Tax Court decision, holding that, in determining whether an individual qualifies as a "surviving spouse" for purposes of federal estate tax law, "there is no alternative but to follow the law of the state" where the individual is domiciled. *Estate of Goldwater v. Commissioner*, 539 F.2d 878, 881 (2d Cir. 1976). The issue decided in

Goldwater is the same issue presented here, without the overlay of DOMA.

In *Estate of Steffke v. Commissioner*, 538 F.2d 730 (7th Cir. 1976), *cert. denied*, 429 U.S. 1022 (1976), the Seventh Circuit looked to state law to determine whether a Mexican divorce should be recognized for federal estate tax purposes. The Court held that, because the Mexican divorce was not recognized by state law, the decedent's "new spouse," whom he had "married" after the Mexican divorce, was not the decedent's wife. Thus, the "new spouse" could not qualify for an estate tax marital deduction.

The Fifth Circuit similarly acknowledged that state law controls whether a person was married for purposes of administering the federal tax laws in *Glaze v. United States*, 641 F.2d 339 (5th Cir. 1981). *Glaze* addressed the ability of a putative surviving spouse to elect to file a joint return with the decedent. At the time of the decedent's death, a proceeding was instituted in State Court to determine whether the decedent was married at the time of death.

After the court proceeding determined that the decedent was in fact married, the administrator filed an amended joint tax return. The United States argued that the three-year statute of limitations for filing an amended joint return under Internal Revenue Code § 6013(b)(2) had run. The Court, in addition to holding that this limitations period only applied to married taxpayers who previously filed separate returns, held that the "decedent's administrator could not have filed a joint return within the meaning of §6013(b)(2)" before state law could determine whether the decedent was in fact married at the time of death. *Id.* at 341.

The Ninth Circuit held, in *Gersten v. Commissioner*, 267 F.2d 195 (9th Cir. 1959), that a person could not file a joint federal income tax return because his Mexican divorce was not recognized as valid under California law.

The Tenth Circuit likewise affirmed a Tax Court decision in applying the principle discussed in *Eccles*. *See Commissioner v. Evans*, 211 F.2d 378, 379 (10th Cir. 1954) (Holding that since the taxpayer wife was not divorced under state law, income received by her under an interlocutory divorce decree did not constitute taxable income).

Lower courts have likewise relied upon state law to determine the marital status of an individual in various contexts for purposes of administering the federal tax laws. *See, e.g., Schmidt v. Commissioner*, 41 T.C.M. (CCH) 793 (1991) (Court looked to Texas law to determine whether there was a valid marriage and thus whether the taxpayer was required to report income generated by putative community property), *Nicholas v. Commissioner*, 62 T.C.M. (CCH) 467 (1970) (Taxpayer not allowed to claim his putative spouse as a dependent because Utah did not recognize common law marriage), *Ross v. Commissioner*, 31 T.C.M. (CCH) 488 (1972) (Taxpayer allowed to claim putative spouse and her parents as dependents because the District of Columbia recognized common law marriage), and

Gaitan v. Commissioner, 103 T.C.M. (CCH) 2010) (Court looked to state law to determine marital status for purposes of deciding whether to allow competing claims for "innocent spouse" relief under the Code).

This Court has looked to state law for purposes of determining which spouse must report community property income on their federal income tax return. *United States v. Mitchell*, 403 U.S. 190, 197 (1971).

The IRS itself has administratively announced that state law determines the marital status of individuals under the Internal Revenue Code. See Revenue Ruling 58-66, 1958-1 C.B. 60 ("the marital status of individuals as determined under state law is recognized in the administration of the Federal income tax laws").

In sum, the result reached by the Second Circuit below is consistent with the historical approach applied by the IRS and by the courts, including this Court, in administering federal tax laws. The application of DOMA to the facts of this case would run counter to this historical approach.

B. DOMA Creates Horizontal Inequity and Harms Tax Compliance

Under DOMA, couples who are validly married under local law are treated differently under the federal tax laws. That is illustrated by the significant financial difference between the two possible outcomes of the present case. If the estate of

Ms. Spyer (Ms. Windsor's deceased spouse) is deprived of the same marital deduction which is available to the estates of decedents who were married to a person of the opposite sex, Ms. Spyer's estate will be deprived of a significant sum of money.

Where a state has chosen to recognize a marriage, different tax treatment under the federal tax laws based on different "types" of marriages which are nevertheless valid under state law creates significant horizontal inequities. Based on the personal observations of counsel for *amicus*, who has over 30 years of experience in dealing with taxpayers who have fallen out of tax compliance, these horizontal inequities will, over time, do damage to the voluntary compliance system which is the very foundation of our system of taxation.

The IRS regularly depends upon taxpayers to voluntarily comply with tax laws. The IRS is only able to audit a tiny fraction of filed tax returns to verify that taxpayers are complying with the tax laws. Perceived unfairness in the administration of the tax laws, *i.e.*, treating similarly situated taxpayers differently, will over time damage voluntary tax compliance, to the detriment of all.

The adverse effects on the voluntary compliance system of treating a marriage that is valid under local law as being non-existent for federal tax purposes merely because both spouses are atheists, are Muslims, are autistic, are left-handed or are of mixed ethnic backgrounds are not difficult to imagine. Where a state recognizes that a marriage is valid, and the IRS treats some marriages as valid and other marriages as not valid for purposes of the tax laws for discriminatory reasons, resentment by those who believe that this discrimination is unfair and improper will result in a decrease in tax compliance.

C. Under DOMA Same Sex Couples Who Are Validly Married Under State Law Are Deprived of Benefits Under the Tax Laws

Because the word "spouse" appears in so many different sections of the Internal Revenue Code, it is impossible to list here all of the tax "benefits" that are lost by same sex spouses as the result of DOMA. Some of these benefits are obvious, such as the availability of the marital deduction for estate tax purposes, which is at issue in this case.

Other benefits, some of which may be less obvious, include the following. When a person dies and leaves their IRA to their "spouse," that "spouse" can receive more favorable tax treatment of the funds in the IRA than if the IRA was left to someone other than a "spouse." See the discussion on the IRS website at http://www.irs.gov/Retirement-Plans/Plan-Participant,-Employee/Retirement-Topics---Beneficiary (last viewed Feb. 28, 2013).

Another example is the availability of relief under section 66 in community property states. In community property states, one-half of all post-marital earnings of both spouses are deemed to be earned by each spouse. *See Poe v. Seaborn*, 282 U.S. 101 (1930), *United States v. Mitchell, supra*. If the spouses file separate returns, each must include as income their one-half share of community income, even if all of the income in question was physically earned by one spouse.

Sometimes, where spouses in a community property file separate income tax returns, one spouse ("Spouse A") will fail to disclose all of their income to the other spouse ("Spouse B"), resulting in an understatement of tax by Spouse B. Legally, one-half of that undisclosed income must be reported on the tax return of Spouse B. *Poe v. Seaborn, supra.*

Section 66(c) allows Spouse B to avoid paying taxes on their one-half share of community income that was earned by Spouse A if Spouse B did not know about the unreported income and meets certain other requirements. If DOMA were to apply to the Internal Revenue Code, same sex spouses in community property states would be ineligible for relief under section 66(c). These same sex spouses would end up having to pay income tax on income that they never received or controlled.

These are but two of many examples of how same sex married couples would be penalized if DOMA were to apply to the administration of the federal tax laws.

D. Under DOMA The IRS Is Deprived of the Ability to Deal with Abuses of the Tax Laws

Treating couples who are validly married under local law as not being married for purposes of the federal income tax laws will also deprive the IRS of the ability to deal with abuses of the tax laws in certain circumstances. For example, section 267 of the Code provides special rules for dealing with transactions between "related" taxpayers. These rules are designed to prevent related taxpayers from engaging in certain conduct and claiming certain tax benefits in situations that Congress deemed it inappropriate to claim these tax benefits.

These rules apply to "family" members. Section 267(c)(4) defines a family to include a "spouse." Treating a person who is validly married under state law as if they are not a "spouse" for purposes of section 267 can result in same sex married couples being able to engage in transactions and claim losses that would be prohibited if the marriage was treated as valid for federal income tax purposes.

For example, if the sale of stock by a person to his or her spouse results in a loss, section 267 prevents the person selling the stock from claiming this loss on their tax return. This rule prevents spouses from selling assets to each other to obtain the benefit tax losses. Under DOMA, same sex couples who are married can sell assets to each other and claim losses from such sales on their tax returns.

Similarly, section 4975 of the Code imposes an excise tax on certain types of "prohibited transactions" involving pension plans. Certain persons, including the "spouses" of those persons, are penalized if they engage in certain types of conduct. If DOMA were to apply to the administration of the federal tax laws, same sex spouses would not be prohibited from engaging in these types of prohibited transactions.

Thus, for example, if a fiduciary of pension plan sells assets of the pension plan to himself or herself, or to his or her spouse, such a sale is a "prohibited transaction" which is taxed under section 4975. Under DOMA, a pension plan fiduciary who is married to a spouse of the same sex could sell pension plan assets to his or her spouse without penalty.

E. Under DOMA, Where State Law Recognizes Same Sex Marriages and Bestows the Same Privileges and Obligations Under The Tax Laws on All Couples Who Are Married Under State Law, Same Sex Married Couples in these States Are Subject to Inconsistent Treatment By Federal and State Taxing Agencies

Under DOMA, if a state has an income tax system which is similar to the federal income tax system (but which treats a same sex married couple as "spouses" for state income laws), then same sex couples who are validly married under state law must deal with two sets of rules which will often be wildly inconsistent. For example, the Internal Revenue Code requires the inclusion in gross income of any alimony received by a spouse under a divorce or separation instrument. 26 U.S.C. §71(b)(1)(A). How will alimony received under a valid divorce decree under State law be taxed at the federal level if the Federal government did not recognize the marriage in the first place? However it is taxed at the federal level, it will almost certainly be different than how it is taxed at the state level, since section 71 applies only to "spouses" and former "spouses."

Similarly, Section 417 of the Code deals with elections to waive a qualified joint and survivor annuity or a pre-retirement survivor annuity in retirement plans where the spouse must consent to the waiver. With conflicting rules at the federal and state level, it will be difficult to deal with such situations.

Faced with such conflicting rules for their citizens, states will have to make a choice between adopting the definition of marriage that they see fit and dealing with the consequences of not having it recognized by the Federal government, or adopting the Federal Definition of marriage under DOMA.

CONCLUSION

For the reasons set forth above, CFAT urges this Court to invalidate Section 3 of DOMA creating a "Federal" definition of Marriage and to hold that the definition of marriage will be determined under state law for purposes of federal tax administration. Such a result will avoid numerous difficult problems in administering the federal tax laws.

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AMICUS
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RECORD
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In the Supreme Court of the United States

UNITED STATES,
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EDITH SCHLAIN WINDSOR
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BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* CHAPLAIN ALLIANCE FOR RELIGIOUS LIBERTY, ET AL., IN SUPPORT OF THE BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS AND SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. The military makes unique demands of its service members and has a unique system to provide for the religious liberty needs of its Service members. 5

   A. The military's mission creates unique burdens on service members. 6

   B. The chaplaincy is the means of lifting much of the burden on religious liberty created by military life. 8

II. If this Court upholds the decision below, service members who adhere to traditional religious beliefs on marriage and family will likely be penalized and marginalized, and the chaplaincy's efforts to protect religious liberty will face severe conflicts. 11

   A. Many service members' careers would likely be stifled and terminated. 15

   B. Service members and, more often, chaplains would face direct conflicts between military duties and religious conviction 16

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Adair v. *England*,
183 F. Supp. 2d 31 (D.D.C. 2002) 8

Akridge v. Wilkinson,
178 F. App'x. 474 (6th Cir. 2006) 18

Cutter v. *Wilkinson*,
544 U.S. 709 (2005) 7

Emp't. Div., Dep't of Human Res. of Or. v. *Smith*,
494 U.S. 872 (1990). 12

Everson v. *Bd. of Ed. of Ewing Twp*.,
330 U.S. 1 (1947) 9

Goldman v. *Weinberger*,
475 U.S. 503 (1986) 6, 7, 14, 21

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. *EEOC*,
132 S. Ct. 694 (2012) 9

In re England,
375 F.3d 1169 (D.C. Cir. 2004) 9

Katcoff v. *Marsh*,
755 F.2d 223 (2d Cir. 1985) 6, 8, 9

Keeton v. Anderson-Wiley,
664 F.3d 865 (11th Cir.2011) 18

Murphy v. *Ramsey*,
114 U.S. 15 (1885) 13

Orloff v. *Willoughby*,
345 U.S. 83, 94 (1953) 6

Parker v. *Levy*,
417 U.S. 733 (1974) 6

Phelps v. Dunn,
965 F.2d 93 (6th Cir. 1992) 18

Rigdon v. Perry,
962 F.Supp. 150 (D.D.C. 1997) 19, 20

Ward v. Polite,
667 F.3d 727 (6th Cir. 2012) 18

Watson v. *Jones*,
80 U.S. (13 Wall.) 679 (1871) 10

Zorach v. *Clauson*,
343 U.S. 306 (1952) 11

Constitutional Provisions

U.S. Const. amend I 7, 9, 14, 21

Statutes

1 U.S.C. § 7 .... 5, 16, 22

10 U.S.C. § 1789 16

10 U.S.C. § 6031 11

10 U.S.C. § 632 15

10 U.S.C. § 654 .... 5, 21

10 U.S.C. § 774 8

National Defense Authorization Act for Fiscal Year 2013 § 533, Pub. L. No. 112-239 .... 11, 22

Regulations

Air Force Instruction 52-101 11

Army Regulation 165-1, Army Chaplain Corps Activities 9, 11, 20

Army Regulation 623-3, Evaluation Reporting System 15

DOD Instruction 1304.28, Guidance for the Appointment of Chaplains for the Military Departments 10

Other Authorities

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tell-attack-grow-with-new-revelations-from-active-duty-chaplain/ 19

James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) 10

Letter from Chaplain Endorsers on Hosting Same-Sex Weddings in Military Chapels, http://oldsite.alliancedefensefund.org/userdocs/ChaplainEndorsersLetter.pdf 21

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Rachel Swans, *Military Rules Leave Gay Spouses Out in Cold*, N.Y. Times, Jan. 19, 2013, http://www.nytimes.com/2013/01/20/us/gay-spouses-face-a-fight-for-acceptance-in-the-military.html?pagewanted=1 &_r=1 17

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Southern Baptist Endorsed Chaplains/Counselors in Ministry, Statement Regarding Ministry Expectations, http://www.namb.net/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=8590121959&libID=8590121973 17

The Holy Bible 13

The Manhattan Declaration, http://manhattandeclaration.org/man_dec_resources/Manhattan_Declaration_full_text.pdf 13, 17

INTEREST OF AMICI[1]

The *amici curiae* are primarily religious organizations that serve as official representatives of their faith groups to certify chaplains for service in the U.S. Armed Forces. This function, known as "endorsement," is required by the Armed Forces as a prerequisite to accepting a chaplain for service in the military. The endorser *amici* endorse more than 2,250 military chaplains serving on Active Duty or in the Reserve Component—well over one-third of the military's chaplains. The endorser *amici* represent faith groups that have more than 29,600,000 members and more than 68,000 churches. Each endorser *amici* maintains an active relationship with the military and with its endorsed chaplains through an endorsing agent. Almost all of *amici*'s endorsing agents are military veterans, most of whom served as chaplains. Thus, *amici* not only have an official and ongoing relationship with the Armed Forces and its chaplaincy, they are largely represented by individuals who have served in the military. *Amici* bring that wealth of experience to bear in this brief and speak as representatives of the military chaplains who could be harmed by the Court's ruling in this case.

The endorser *amici* are: North American Mission Board Chaplaincy Services (which is the military's largest single endorser), Presbyterian and Reformed Commission on Chaplains and Military Personnel, Lutheran Church-Missouri Synod Ministry to the Armed Forces, Military Chaplain Commission of the Evangelical Church Alliance, Chaplaincy of Full Gospel Churches, Chaplain Commission of the American Counsel of Christian Churches, and the endorsing agencies of the Anglican Church in North America, Conservative Baptists of America, Associated Gospel Churches, Evangelical Free Church of America, Christian and Missionary Alliance, International Church of the Foursquare Gospel, General Association of Regular Baptist Churches, Grace Churches International, Baptist Bible Fellowship International, Plymouth Brethren, Church of God of Prophecy, Fellowship of Grace Brethren Churches, Christian Communion International, Conservative Congregational Christian Conference, and Episcopal Missionary Church.

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[1] No counsel for a party authored this brief in whole or in part, and neither the parties nor their counsel financially contributed to the preparation or submission of this brief. All parties consented to the filing of this brief; the letters of consent are attached to this brief.

The lead *amicus*, the Chaplain Alliance for Religious Liberty ("CALL"), is an association of endorsing agencies that works to ensure that chaplains can defend and provide for the freedom of religion and conscience that the Constitution guarantees all chaplains and those whom they serve. CALL has over 25 endorsing agency members, many of whom are signatories to this brief. CALL's leadership served for decades in the military, generally as chaplains, and all of the leadership still serve as endorsing agents for their faith groups.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Since before our Nation's founding, the military chaplaincy has existed for a single purpose: providing for the free exercise of faith for all service members and their families. As the official endorsing agents for their faith groups' military chaplains, *amici* have a similar, and similarly singular, purpose for this brief: protecting military religious liberty.

The military is a unique State institution that may, by law and by necessity, make uniquely comprehensive demands over individual service members that it cannot make over any other free member of society. The demands that the State is empowered to make can and often do infringe service members' liberties, including their constitutionally protected religious liberty. Our Nation has a history, though, of working hard to protect and accommodate military religious liberty, a tradition which has limited restrictions on service members' ability to live their faiths. Indeed, in keeping with the best of our national traditions, our military has long been a place where citizens could, as the Army Chaplain Corps' motto states, serve *Pro Deo et Patria*—for God *and* Country.

But that history of accommodation is now facing the threat of being replaced by a constitutional mandate requiring many service members and chaplains to serve God *or* country. If this Court accepts the United States' and Windsor's view that the Constitution mandates that Federal Government recognize same-sex marriage or accord sexual orientation heightened scrutiny, that view will quickly work drastic change to military policy. And the close relationship between the military and service members means that service members' individual liberties are particularly sensitive to military policies. Combining that sensitivity with the institutional diminution of service members' religious liberties, it is very likely that service members who hold traditional religious beliefs on marriage and family will face, for the first time, military policies and duties that sharply hostile to their beliefs.

This unprecedented conflict would likely take place most quickly and clearly in the chaplaincy, the military institution that exists to protect military religious liberty. Crucially, the conflict for chaplains would not concern *whom* they serve but *how* they serve. Every chaplain is duty-bound to respectfully provide for the religious needs of all service members, including those who do not share or even oppose their beliefs. But chaplains must, as a matter of both law and conscience, make this provision while remaining distinct representatives of their faith groups, representatives who teach, preach, counsel, and advise in accordance with their faith group's beliefs. While there is no question chaplains will continue to serve all service members, if military policy becomes directly antithetical to their beliefs on the fundamental issues of marriage and family, chaplains will find their hands tied as to how they can serve. On a wide variety of issues, including some that are very important to military families, it seems likely that military policy would directly conflict with a chaplain's responsibility to provide the full spectrum of religious counsel.

Put in stark terms, if laws affirming marriage as the union of one man and one woman are invalidated as irrational and unconstitutional, then service members and chaplains belonging to and espousing the views of faith groups that support traditional marriage would not only be marginalized, but also would be forced to choose between their duty to obey

God and their chosen vocation of serving their country.

Many of the *amici* raised similar concerns when our Nation considered repeal of 10 U.S.C. § 654, the law popularly known as Don't Ask, Don't Tell. While Congress and the President ultimately determined to repeal the law, they did so in a way that declined to raise sexual orientation to a protected class and respected the definition of marriage in Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"). Further, at the urging of *amici* and others, Congress passed a law to help protect military religious liberty post-repeal. But if this Court strikes down DOMA via the changes to our constitutional law that the United States and Windsor request, that will not only sweep aside the carefully calibrated efforts to balance religious liberty with competing interests, it will also intrude into the lives and lived convictions of our Nation's religious service members. We respectfully submit that this Court should refrain from making such a change.

ARGUMENT

I. The military makes unique demands of its service members and has a unique system to provide for the religious liberty needs of its Service members.

To understand the threat that a judicial declaration of DOMA's unconstitutionality poses to military religious liberty, it is necessary to first consider the unique military context and the means by which the military accommodates its members' right to religious liberty.

A. The military's mission creates unique burdens on service members.

As this Court has explained, "the military is, by necessity, a specialized society separate from civilian society." *Goldman* v. *Weinberger*, 475 U.S. 503, 506-07 (1986) (quoting *Parker* v. *Levy*, 417 U.S. 733, 743 (1974)). To accomplish its mission, the military "must insist upon a respect for duty and a discipline without counterpart in civilian life," an insistence that drills into every service member an "instinctive obedience, unity, commitment, and espirit de corps." *Goldman*, 475 U.S. at 507 (internal citations and quotation marks omitted). Far from the celebration of individual liberty that marks civilian society and our Nation's legal traditions, "the essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'" *Id.* (quoting *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953)).

This military emphasis on service over self and on its vital mission create unique stressors on service members: short-notice moves, personal stress from following demanding orders, lengthy separations from family, deployments to foreign countries with language and cultural barriers, and, perhaps most significantly, life-or-death decisions and actions. *Katcoff* v. *Marsh*, 755 F.2d 223, 226-34, 236-37 (2d Cir. 1985); *accord* Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. Va. L. Rev. 89, 119 (2007) ("[T]he military presents service members with a range of stresses . . . that are unique, especially those related to participation in combat"). Further, not only does the military impose special obligations on its members, it also creates a special, set-apart community for them. "[U]nlike virtually all other professions . . . [the military] constitutes a distinct community, providing even in domestic bases virtually all facets of ordinary life: from housing, schools, and healthcare to shopping, recreation, and entertainment." Tuttle, *supra*, at 119.

This set-apartness of mission and life means that "there is simply not the same [individual] autonomy" in the military "as there is in the larger civilian community." *Cutter* v. *Wilkinson*, 544 U.S. 709, 722 (2005) (quoting *Goldman*, 475 U.S. at 507).

An immediate consequence of this diminished autonomy is an attendant diminution in personal liberty, including religious liberty. "The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment," which can mean the military need not accommodate even fairly benign religious conduct such as wearing unobtrusive religious apparel. *Goldman*, 475 U.S. at 507, 509-10. Accordingly, judicial "review of military regulations challenged on First Amendment grounds is *far more deferential* than constitutional review of similar laws or regulations designed for civilian society." *Id.* at 507 (emphasis added); *see also id.* (courts considering "a particular restriction on religiously motivated conduct" must "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."). Thus, in *Goldman*, this Court rejected a Jewish service member's claim that the Free Exercise Clause required the military to permit him to wear a yarmulke despite regulations to the contrary. *Id.* at 510 (holding superseded in part by Congressional revision of the regulations, 10 U.S.C. § 774).

In sum, the military's unique mission and its unique relationship with service members justify some significant restrictions on even our Nation's most fundamental freedoms.

B. The chaplaincy is the means of lifting much of the burden on religious liberty created by military life.

Although the military may, as a part of its mission, diminish some aspects of religious liberty, it may not extinguish it. Indeed, since the military can burden the religious free exercise of service members by, among other things, ordering them to go to regions of the world where their faith communities are not available to them, it is a "crucial imperative" that the government make provision for service members' religious needs. *Adair* v. *England*, 183 F. Supp. 2d 31, 51 (D.D.C. 2002) ("making religion available to soldiers qualifie[s] as a crucial imperative"). And our nation has admirably addressed this imperative since before its birth via the establishment of the chaplaincy, a diverse and pluralistic body of officers. *Cutter*, 544 U.S. at 722 (identifying military chaplains as the means by which "the Federal Government[] accommodate[es] . . . religious practice by members of the military."); *Katcoff*, 755 F.2d at 225 (noting that military chaplains have been protecting religious liberty since before our Nation's founding).

Without chaplains, the burdens of military life—particularly being compelled to move "to areas of the world where religion of [service members'] own denomination[] is not available to them"—would infringe service members' rights secured under the Religion Clauses of the First Amendment. *Katcoff*, 755 F.2d at 234. "Unless the [military] provided a chaplaincy it would deprive the [service member] of his right under the Establishment Clause not to have religion inhibited and of his right under the Free Exercise Clause to practice his freely chosen religion." *Id.*

Chaplains, though, are not generic "religious" officers, but rather representatives of specific faith groups. *In re England*, 375 F.3d 1169, 1171 (D.C. Cir. 2004) (chaplains serve simultaneously as "a professional representative of a particular religious denomination and as a commissioned [military] officer.") (citation omitted); *accord* Army Regulation 165-1, Army Chaplain Corps Activities ("Army Reg. 165-1") at § 4-3(a) ("Army chaplains have a dual role as religious leaders and staff officers."). This is necessary to ensure that service members of specific faith groups have chaplains from those specific faith groups to meet their religious needs. *Katcoff*, 755 F.2d at 232. But though the military must obtain chaplains to serve the many specific faith groups represented within the military, it has neither the authority nor competence to determine whether an individual qualifies as a representative of a particular religious group. *See Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 715 (2012) (Alito, J., concurring) (rejecting an argument that "civil court[s]" should "make . . . judgment[s] about church doctrine" and the importance of religious beliefs); *Everson* v. *Bd. of Ed. of Ewing Twp.*, 330 U.S. 1 n.31 (1947) (rejecting the notion that "the Civil Magistrate is a competent Judge of Religious truth" (quoting James Madison, *Memorial and Remonstrance*

Against Religious Assessments (1785)); *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 727 (1871) (government may not become entangled in matters touching upon "questions . . . of faith, or ecclesiastical rule, custom, or law").

Thus, the military must rely upon each specific faith group, through organizations like the *amici's*, to endorse particular chaplains to act as its representative to the members of that faith group serving in the Armed Forces.[2] If a chaplain ever ceases to faithfully represent his religious organization, the organization can rescind their endorsement, at which point he ceases to be a chaplain and must generally be separated from the military.[3]

To protect a chaplain's role as a faith group representative, and thereby the chaplain's usefulness to the military, Congress and the military have crafted safeguards to keep chaplains from being forced to engage in ministry activities that violate their faith group's beliefs.[4] Thus, for instance, Jewish chaplains need not (and cannot) conduct Mass for Catholic service members. That commitment to protecting the ability of service members and chaplains to serve their country without denying their faith was embodied recently in the passage of a law mandating the broad accommodation of religious belief. *See* National Defense Authorization Act for Fiscal Year 2013 § 533, Pub. L. No. 112-239 (section entitled "[p]rotection of rights of conscience of members of the Armed Forces and chaplains of such members.").

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[2] *See* DOD Instruction 1304.28, Guidance for the Appointment of Chaplains for the Military Departments ("DOD Instruction 1304.28"), establishes the process that allows religious organizations to provide chaplains to meet the religious needs of their members:

> **Endorsement**. The internal process that religious organizations use when designating RMPs [Religious Ministry Professionals] *to represent their religious organizations to the Military Departments* and confirm the ability of their RMPs to conduct religious observances or ceremonies in a military context.

Enclosure 2, § E2.1.7 (emphasis added).

[3] *See* DOD Instruction 1304.28 at § 6.5 (stating that the process for separating the chaplain from service begins "immediately" upon the endorser's withdrawal of endorsement).

II. If this Court upholds the decision below, service members who adhere to traditional religious beliefs on marriage and family will likely be penalized and marginalized, and the chaplaincy's efforts to protect religious liberty will face severe conflicts.

Our Nation's effort to accommodate service members' religious needs has been remarkably successful and "follows the best of our traditions." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952) (praising the State's efforts to accommodate, and thus respect, the "spiritual needs" of citizens). But a judicial overruling of DOMA based on a broad constitutional sanction of either same-sex marriage or sexual orientation as a suspect class threatens to upset this history of accommodation. If, for instance, traditional religious beliefs and practices on marriage and the family become the constitutional equivalent of animus-based racism, service members who order their lives around those beliefs and practices will likely be forced to abandon either their faiths or their careers.[6] Similarly, chaplains who represent *amici*'s faith groups could face tremendous pressure to self-censor when teaching about marriage and family, topics that are vitally important to fully meeting service members' religious needs. Short of a constitutional amendment, there likely would be little that either the military or Congress could do after the fact to remedy the loss of religious liberty.

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[4] *See, e.g.*, 10 U.S.C. § 6031(a) ("An officer in the Chaplain Corps may conduct public worship according to the manner and forms of the church of which he is a member.") (statute for Navy chaplains); Air Force Instruction 52-101 § 2.1 ("Chaplains do not perform duties incompatible with their faith group tenets . . . ."); Army Reg. 165-1 § 3-5(b) ("Chaplains are authorized to conduct religious services, rites, sacraments, ordinances, and other religious ministrations as required by their respective faith group. Chaplains will not be required to take part in religious services, rites, sacraments, ordinances, and other religious ministrations when such participation would be at variance with the tenets of their faith.").

As this Court has recognized, religious believers exercise their faith "not only [via] belief and profession but [also] the performance of (or abstention from) physical acts," including religious associations, actively sharing religious beliefs with non-believers, and avoiding (or even condemning) conduct understood as immoral. *See Emp't. Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 877 (1990). Engaging in such conduct is often a religious duty, one that particularly extends to protecting the institution of marriage and the family. Under the traditional religious view, sex is permissible only within the context of marriage, and marriage exists only between a man and a woman. *See, e.g.*, *Genesis* 2:24, *Matthew* 19:5, *1 Corinthians* 6:16. This Court has both recognized and affirmed that view as "the sure foundation of all that is stable and noble in our civilization." *See Murphy* v. *Ramsey*, 114 U.S. 15, 45 (1885) (lauding "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony"). Over one hundred religious leaders, including those from *amici*'s faith groups and from other faith communities that supply the majority of Armed Forces chaplains, recently joined hundreds of thousands of other Americans and publicly acknowledged their firm religious duty to broadly protect that "sure foundation."[6]

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[6] *See* Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 13, noting that the United States has argued that DOMA was enacted based on "animus."

Thus, service members who share *amici*'s beliefs and chaplains who represent those beliefs must both live and share their faith group's teaching on the nature of marriage and family. When faced with circumstances that require them to treat any sexual union other than one between a man and a woman as the equivalent of marriage, such service members and chaplains will be required by conscience to abstain. To do anything less would be a failure of their duty to God and, for the chaplains, would destroy their role as religious representatives of the *amici*. But to adhere to their duty to God may, if this Court accepts the United States' and Windsor's arguments, jeopardize their continued service in the military.

While the cause of this jeopardy is discussed in detail in the amicus briefs of The Becket Fund for Religious Liberty and of Catholic Answers, it is fairly simple to explain here: the military has no tolerance for racists, so service members who are openly racist are not service members for long.[7] And if the traditional religious views on marriage and family become the constitutional equivalent of racism, the many service members whose traditional religious beliefs shape their lives will be forced out of the military.

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[6] *See* The Manhattan Declaration at 9, *available at* http://manh[illegible]eclaration.org/man_dec_resources/Manhattan_Declaratio[illegible]ext.pdf (last visited Jan. 24, 2013).

This dynamic will exist in the civilian world, especially among government employees, but it will play out with particular force in the military. *Goldman*, 475 U.S. at 507 (noting that the military is a world "without counterpart in civilian life," where obedience to unity and mission must be "instinctive"). Protecting its unique mission allows the military to exercise its "considered professional judgment" in determining what policies must be subject to immediate and unwavering compliance. *Id.* at 509. If this Court constitutionally mandates same-sex marriage or establishes sexual orientation as a suspect class, that determination will surely and quickly transform military policy. And if the First Amendment does not ensure that service members may deviate from policy on matters such as the wearing of small and unobtrusive religious garments, *id.* at 510, it seems unlikely that military policy changes based on this Court's interpretation of our Nation's fundamental law could be judicially flexed enough to accommodate dissenting religious believers.

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[7] *See, e.g.*, Sec'y of the Air Force Memorandum at 1 (condemning as intolerable discrimination on the basis of, *inter alia*, race, and instructing Airmen to oppose it); *available at* http://www.af.mil/shared/media/document/AFD-110510-017.pdf (last visited Jan. 24, 2013).

A. Many service members' careers would likely be stifled and terminated.

The harm to military religious liberty will be felt in at least two broad ways. The first, as *amici*'s collective centuries of military experience instructs, would be the weeding out of service members who hold traditional religious beliefs about marriage and the family. Service members are evaluated for promotion and retention via processes, such as Officer Evaluation Reports, which specifically ask whether the service member under consideration promotes the military's equal opportunity policy.[8] If this Court declares irrational and impolitic traditional religious beliefs about marriage, that inquiry would, for the first time, prove toxic for many devoutly religious service members. Even if nothing directly negative was put into such Reports, the lack of the superlative commendations that are necessary for advancement would be enough to permanently stall a service member's career. And in the military, if a service member is not on the way up, he is on the way out. *See* 10 U.S.C. § 632 (providing that, in most instances, an officer who twice fails to be selected for promotion must be discharged). Thus, traditional religious service members and chaplains would slowly find their promotion ceilings decreasing, their range of service possibilities shrinking, and their careers ending. By contrast, service members and chaplains who accept the new constitutional orthodoxy would likely be viewed as "team players" with upward potential, leaving behind those whose faith prevents them from falling in line.

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[8] *See* Army Officer Evaluation Report at 2 (asking whether the evaluated officer "promotes dignity, consideration, fairness, and EO [i.e., equal opportunity]," *available at* http://armypubs.army.mil/eforms/pdf/A67_9.PDF (last visited Jan. 25, 2013); *see generally* Army Regulation 623-3, Evaluation Reporting System.

B. Service members and, more often, chaplains would face direct conflicts between military duties and religious conviction.

The second form of negative pressure on religious would arise from situations where a service member's or, more often, a chaplain's military duty will force him into a direct conflict with his religious beliefs. The military's marriage-building programs stand out as particularly problematic for both commanding officers and chaplains. Congress authorized these programs to provide chaplain-led support for the marital relationship between active duty service members and their spouses. *See* 10 U.S.C. § 1789. Thus, for instance, the Army chaplaincy provides, with the full support of commanding officers, a marriage enrichment program known as Strong Bonds.[9] Strong Bonds courses instruct married couples on how to strengthen and renew their marital bonds. While Strong Bonds is not a religious program, its marital instruction is currently congruent with traditional religious beliefs about marriage as the union of one man and one woman, and Strong Bonds is protected by DOMA from having to run contrary to those beliefs.[10] But that would almost certainly have to change if this Court accepts the United States' and Windsor's invitation to constitutionalize their view of marriage. If marriage programs like Strong Bonds are bluntly restructured based on a broad constitutional mandate to treat same-sex unions as the equivalent of marriages, chaplains and commanding officers from *amici*'s faith groups who personally administer the programs would face a direct conflict with their faith.

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[9] *See* Army Strong Bonds Home Page, *available at* http://www.strongbonds.org/skins/strongbonds/home.aspx (last visited Jan. 24, 2013).

This conflict illustrates a chaplain's complete willingness to serve whomever needs care, but not however the military demands. *Amici*'s chaplains want to minister to service members who are in same-sex sexual relationships on any number of issues, but they cannot treat those relationships as the equivalent of marriage without violating both their conscience and their endorsement.[11] If the constitution is interpreted to mandate same-sex marriage, though, the military will probably be required to do the same with its marriage enrichment programs, with a likely result of forcing *amici*'s chaplains and those of faith groups with similar beliefs—together, half of military chaplains—out of an entire category of chaplaincy service.

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[10] *See* Rachel Swans, *Military Rules Leave Gay Spouses Out in Cold*, N.Y. Times, Jan. 19, 2013, http://www.nytimes.com/2013/01/20/us/gay-spouses-face-a-fight-for-acceptance-in-the-military.html?pagewanted=1 &_r=1 (last visited Jan. 25, 2013).

[11] *See, e.g.*, Southern Baptist Endorsed Chaplains/Counselors in Ministry, Statement Regarding Ministry Expectations at 2, *available at* http://www.namb.net/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=8590121959&libID=8590121973 (last visited Jan. 24, 2013) (statement by the NAMB, the military's largest endorser, that its chaplains may not participate in "marriage enrichment . . . training" if doing so would "endorse[] . . . homosexuality.") (last visited Jan. 24, 2013); *accord* Manhattan Declaration, *supra* at n.6 (confirming that religious believers cannot treat same-sex sexual unions as the equivalent of marriage).

Because their military and religious duties call them to express their religious beliefs regularly and in a number of different ways, chaplains would likely face a number of similar direct conflicts. For instance, chaplains may be disciplined for refusing to turn their worship services over to individuals who unrepentantly engage in sexual behaviors that the chaplains' faith group understands as immoral.[12] Chaplains may be punished for declining to privately counsel same-sex couples on certain matters relating to a couple's relationship[13] or for counseling them according to their faith group's traditional religious beliefs on marriage.[14] Chaplains with traditional religious beliefs who, as is commonplace now, are required to advise their commander about questions of sexual ethics or to teach ethics courses at military schools, may be punished for expressing their convictions in those capacities. Chaplains, who are often entrusted with hiring civilians for military ministry positions such as Sunday School, may be punished if they allow their religious beliefs to inform their hiring choices.

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[12] *See Akridge* v. *Wilkinson*, 178 F. App'x. 474 (6th Cir. 2006) (upholding a prison's punishment of a prison chaplain for refusing to allow an openly homosexual prisoner to lead a worship service); *accord Phelps* v. *Dunn*, 965 F.2d 93 (6th Cir. 1992) (allowing a volunteer prison chaplain to be sued for refusing to permit an openly homosexual prison inmate to take a leadership role in chapel services).

[13] *See Ward* v. *Polite*, 667 F.3d 727 (6th Cir. 2012) (addressing a government university's requirement that a counseling student violate her religious beliefs and affirm homosexual relationships); *Keeton* v. *Anderson-Wiley*, 664 F.3d 865 (11th Cir.2011) (same).

[14] *See* Daniel Blomberg, *Mounting Religious Liberty Concerns*, Daily Caller, Aug. 6, 2010, http://dailycaller.com/2010/08/06/mounting-religious-liberty-concerns-in-dont-ask-dont-tell-attack-grow-with-new-

Even in the context of chaplains' performing religious services, where statutory and regulatory protections of religious liberty are at their height, it remains to be seen what would happen if the Commander-in-Chief decides to ban chaplains from sharing traditional religious views on marriage and family, as the Clinton administration did on the topic of partial-birth abortion.[15] Currently, such a restriction would violate not only the chaplains' free exercise and free speech rights guaranteed by a plethora of constitutional, statutory, and regulatory provisions, but also—and more importantly—the religious liberty rights of the service members to whom the chaplain was preaching. Yet after a sea change as fundamen-

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revelations-from-active-duty-chaplain/ (last visited Jan. 24, 2013) (recounting the experience of a U.S. military chaplain serving in a foreign military that recognizes same-sex marriage; the chaplain, after a private and amicable counseling discussion with one service member that briefly discussed the chaplain's religious beliefs on homosexuality, was threatened with punishment by a senior officer for expressing those beliefs).

[15] In *Rigdon* v. *Perry*, 962 F. Supp. 150 (D.D.C. 1997), the court held unconstitutional the Executive's attempt to censor chaplain sermons encouraging congregants to write Congress about pending legislation on partial-birth abortion.

tal as the constitutional redefinition of marriage, it is unclear whether those protections for religious liberty could trump what would be seen as the legal equivalent of racism.[16]

Each of these direct conflicts injure not only chaplains, but also—and more importantly—those whom they serve. Restrictions on chaplains are restrictions on the service members whom chaplains exist to serve. If chaplains representing faith groups with traditional religious beliefs on marriage and family are removed from or kept from roles that, after a constitutional redefinition of marriage, would be prone to experiencing conflict—such as administering the Strong Bonds program—then they, the faith groups they represent, and the service members whose religious beliefs they serve will all see that as direct government hostility to their faiths. The Federal Government would effectively establish preferred religions or religious beliefs within the military. *Rigdon*, 962 F. Supp. at 164 (finding that a military policy allowing Catholics of one belief on abortion to share that belief while ordering Catholics of a contrary belief to remain silent impermissibly "sanctioned one view of Catholicism . . . over another."). And service members, locked in a close relationship with the government that features diminished First Amendment protections, *see Goldman*, 475 U.S. at 507, would have little effective recourse to restore their ability to both live their faith and serve their county.

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[16] Notably, in each of these instances where chaplains may face conflict, commanding officers may also be subject to punishment if chaplains cross the newly created constitutional lines. This is because it is commanders who are ultimately responsible for protecting the free exercise rights of service members under their command, and they use chaplains to fulfill that responsibility. *See* Army Reg. 165-1 §§ 1-6(c), 1-9. Indeed, to limit any vulnerability to perceived constitutional line-crossing by their chaplain-agents, some commanders may feel pressured to restrict chaplains even more than the constitutional rules require.

This broad harm to military religious liberty is emphatically a feature of the United States' and Windsor's effort to constitutionalize their view of marriage and family. By contrast, when *amici*, along with numerous veteran chaplains and many other endorsing organizations, raised similar religious liberty concerns during the debate about repealing 10 U.S.C. § 654,[17] Congress and the military had the capacity to respond with solutions. First, they determined that sexual orientation should not be treated as a protected class akin to race.[18] Second, Congress passed a statute ensuring that religious liberty must be protected and accommodated in the post-repeal military. *See* National Defense Authorization Act for Fiscal Year 2013 § 533, Pub. L. No. 112-239. But if this Court strikes DOMA on constitutional grounds, not only would such compromise measures likely be lost, so also would that whole capacity for democratically derived protection of religious liberty in this area of the law.

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[17] *See* Letter from Sixty-Six Veteran Chaplains on Religious Liberty Concerns with Repeal of 10 U.S.C. § 654, http://adfwebadmin.com/userfiles/file/DADTletter%209_16_10.pdf (last visited Jan. 24, 2013) (letter to President, Congress, and military from sixty-six veteran chaplains raising religious liberty concerns with repeal and urging adoption of broad religious liberty protections); *see also* Letter from Chaplain Endorsers on Hosting Same-Sex Weddings in Military Chapels http://oldsite.alliancedefensefund.org/userdocs/ChaplainEndorsersLetter.pdf (last visited Jan. 24, 2013) (letter from endorsing agents to Chiefs of Chaplains urging adoption of broad religious liberty protections in wake of repeal).

[18] *See, e.g.*, Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell" at 137, *available at* http://www.defense.gov/home/features/2010/0610_dadt/DADTReport_FINAL_20101130(secure-hires).pdf (last visited Jan. 25, 2013) ("[I]n the event of repeal, we do *not* recommend that the Department of Defense place sexual orientation alongside race, color, religion, sex, and national origin as a [protected] class").

CONCLUSION

Replacing the only definition of marriage that federal law has ever known with a broad judicial declaration that the Constitution mandates a contrary definition will have jarring results on the military. One of the first casualties will likely be service members' and chaplains' religious liberty. *Amici* believe that the best way to protect religious liberty—and avoid the distinct risk that the religious beliefs of many of our service members might become the equivalent of invidious discrimination—is simply to retain DOMA. But if repeal must ever take place, it should come via Congress, which, unlike the judiciary, can structure the repeal in a way that is responsive to the religious liberties of service members and chaplains. *Amici* urge this Court to avoid jeopardizing the constitutional rights of the men and women who have given their liberty, and are willing to give their lives, to protect their fellow citizens' constitutional rights.

For the foregoing reasons, *amici* respectfully request that this Court reverse the Second Circuit's decision and uphold DOMA's constitutionality.

Respectfully submitted.

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No. 12-307

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In The
Supreme Court of the United States

◆

UNITED STATES OF AMERICA,
Petitioner,
v.

EDITH SCHLAIN WINDSOR,
in Her Capacity as Executor of the Estate
of Thea Clara Spyer, *et al.*,
Respondents.

◆

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

◆

BRIEF OF *AMICUS CURIAE* OF CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON ON THE MERITS IN SUPPORT OF RESPONDENT EDITH SCHLAIN WINDSOR

◆

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court, *amicus curiae* Citizens for Responsibility and Ethics in Washington ("CREW") submits this corporate disclosure statement.

CREW does not have a parent company, and is not a publicly-held company with a 10% or greater ownership interest.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. DOMA'S DEFINITIONS OF "MARRIAGE" AND "SPOUSE" SERIOUSLY UNDERMINE A SIGNIFICANT NUMBER OF FEDERAL ETHICS LAWS 5

II. DOMA FRUSTRATES SIGNIFICANT ANTI-AVOIDANCE PROVISIONS OF THE INTERNAL REVENUE CODE 12

III. DOMA FRUSTRATES VARIOUS PROTECTIONS FOR CREDITORS IN THE BANKRUPTCY CODE 20

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

Arrowsmith v. Commissioner,
344 U.S. 6 (1952) 19-20

Dean v. Veterans Administration,
51 F.R.D. 83 (N.D. Ohio 1993) 5

Commonwealth of Massachusetts v. Department of Health & Human Services,
682 F.3d 1 (1st Cir. 2012)................................2

Golinski v. Office of Personnel Management,
824 F. Supp. 2d 968 (N.D. Cal. 2012) 2, 3

Windsor v. United States,
699 F.3d 169 (2d Cir. 2012)............................3

STATUTES

1 U.S.C. § 7...1, 3

2 U.S.C. § 31-2(a) 9

2 U.S.C. § 352(2)(C)..10

5 U.S.C. App. 4 §§ 102(e)(1)(A)-(D)...........................6

5 U.S.C. App. 4 § 103 6

5 U.S.C. App. 4 § 103(l)..6

5 U.S.C. App. 4 § 109(16) 5

5 U.S.C. App. 4 § 501(c) 1, 7

5 U.S.C. § 2302(b)(7) 7

5 U.S.C. § 3110(a)(3) 8

5 U.S.C. § 3110(b) 7

5 U.S.C. § 7342(a)(1)(G) 10

5 U.S.C. § 7342(b)(2) 10

7 U.S.C. § 2012(n) 18

7 U.S.C. § 2014(c) 18

10 U.S.C. § 1787(a) 11

11 U.S.C. § 101(14A)(A)(i) 21

11 U.S.C. § 302(a) 20, 21

11 U.S.C. § 302(b) 21

11 U.S.C. § 522(b)(1) 24

11 U.S.C. § 522(b)(2) 24

11 U.S.C. § 522(d) 24

11 U.S.C. § 523(a)(5) 21

11 U.S.C. § 523(a)(15) 22

11 U.S.C. § 541(a)(2) 22

11 U.S.C. § 707 23

11 U.S.C. § 1322(d) 23

18 U.S.C. § 115(a) 11

18 U.S.C. § 115(c)(2) 11

18 U.S.C. § 208(a) 10, 11

26 U.S.C. § 23 16

26 U.S.C. § 23(b)(1) 16

26 U.S.C. § 23(d)(1)(C) 16

26 U.S.C. § 23(h) 16

26 U.S.C. § 32 17

26 U.S.C. § 32(d) 18

26 U.S.C. § 63(c)(2)(C) 14

26 U.S.C. § 63(c)(6)(A) 14

26 U.S.C. § 267 15

26 U.S.C. § 267(a)(1) 15

26 U.S.C. § 267(c)(4) 15

26 U.S.C. § 1041 16

26 U.S.C. § 1041(a)(1) 15

26 U.S.C. § 1041(a)(2) 15

26 U.S.C. § 4941 17

26 U.S.C. § 4946(a)(1)(D) 17

26 U.S.C. § 4946(d) 17

26 U.S.C. § 9035 10

28 U.S.C. § 455(b)(4) 9

28 U.S.C. § 455(c) 9

28 U.S.C. § 631 8

28 U.S.C. § 631(b)(4) 8

28 U.S.C. § 1930(a)(1) 21

28 U.S.C. § 3301(5) 25

28 U.S.C. § 3301(5)(A)(i) 25

28 U.S.C. § 3304 25

28 U.S.C. § 3305 25

29 U.S.C. § 432(a)(1) 7

29 U.S.C. § 1055(c)(2) 22

29 U.S.C. § 1056(d) 22

29 U.S.C. § 1056(d)(3) 22

31 U.S.C. § 1353(a) 10

42 U.S.C. § 290b(j)(2) 10

42 U.S.C. § 300e-17(b)(4) 7

42 U.S.C. § 601 18

42 U.S.C. § 607 18

42 U.S.C. § 1396a(a)(10)(A)(v) 18

42 U.S.C. § 1396d(n) 18

42 U.S.C. § 8622(5) 18

42 U.S.C. § 8624(b) 18

OTHER AUTHORITIES

142 Cong. Rec. H7488 (July 12, 1996) 19

142 Cong. Rec. S10103 (Sept. 10, 1996) 19

142 Cong. Rec. S10111 (Sept. 10, 1996) 19

Ethics in Government Act,
Pub. L. No. 95-521, 92 Stat. 1824 5

H.R. Rep. No. 104-664 (1996) 19

Manual Guide – Human Resources Management Manual CDC Chapter 310-1, § IV A (Jan. 20, 1998) 8

Manual Guide – Human Resources Management Manual CDC Chapter 310-1, § IV C (Jan. 20, 1998) 8

Patricia A. Cain of Santa Clara Law School, *DOMA and the Internal Revenue Code*, 84 Chi. - Kent L. Rev. 481 (2009) 12

S. Rep. No. 95-170, at 31 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4216 5

S. Rep. No. 112-244 (2012) 6

Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 Wash. & Lee L. Rev 1529, 1573 (2008) 17

Jackie Gardina, *The Defense of Marriage Act, Same-Sex Relationships and the Bankruptcy Code*, (Vt. L. Sch. Faculty Working Paper No. 04-12, 2011) *available at* http://ssrn.com/abstract=1850926 20

INTEREST OF *AMICUS CURIAE*[1]

Citizens for Responsibility and Ethics in Washington ("CREW") is a non- profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principal activities, CREW monitors the conduct of members of Congress and the executive branch and, where appropriate, files complaints with Congress, the Federal Election Commission, the U.S. Department of Justice, and the federal courts.

CREW also publishes reports on a range of issues, including the ethical and legal lapses of members of Congress. For example, in *Family Affair*, CREW detailed how certain members of Congress in leadership roles used their positions to financially benefit family members. Part of the information for this report was gleaned from personal financial disclosure reports that members are required to file, which include financial information about their spouses.

CREW is participating as an *amicus* in this case principally to highlight the impact that section

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[1] Pursuant to Supreme Court Rule 37.2, no person other than counsel for the *amicus curiae* authored this brief in whole or in part. No person other than amicus and its counsel made a monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing on this brief.

3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, has on key federal ethics statutes, including those requiring public officials and candidates to disclose sources of income for themselves and their spouses, and anti-nepotism statutes designed to guard against the undue influence resulting from the employment of spouses of high-level officials and judges. If the constitutionality of section 3 is upheld, same-sex married couples who are public officials, employees, and candidates for public office will be subject to differing disclosure requirements than those to which officials, employees, and candidates in opposite-sex marriages are subject, with a resulting decrease in transparency and accountability. Similarly, the public will lose the protection against corruption and undue influence afforded by the anti-nepotism laws if they are not also applied to married same-sex couples. These ethics arguments were first made in CREW's amicus brief filed in the First Circuit case and were relied upon by the court in finding DOMA unconstitutional. *Commonwealth of Massachusetts v. Dep't of Health & Human Servs.*, 682 F.3d 1, 13 & n.8. (1st Cir. 2012), *petitions for certiorari pending*, Nos. 12-13, 12-15, & 12-97.

After filing its brief in the First Circuit, CREW realized that the perverse effects of DOMA extend beyond federal ethics laws and that DOMA produces serious unintended consequences under the Internal Revenue Code and the Bankruptcy Code. For that reason, its *amicus* brief in the Ninth Circuit case of *Golinski v. Office of Personnel Management*, Nos. 12-15388 & 12-15409, *petition for certiorari before judgment pending*, No. 12-16, addressed those additional issues. Thereafter, CREW filed a brief in this case in the Second Circuit, similar to the brief it filed in *Golinski*. The arguments made in that brief were cited by the majority below in striking down DOMA. *Windsor v. United States*, 699 F.3d 169, 187 (2d Cir. 2012).

This brief is filed with the blanket consent of counsel for the United States and the Bipartisan Legal Advisory Group of the United States House of Representatives, and a letter of consent from counsel for respondent Edith Windsor, which is being filed with this brief.

SUMMARY OF ARGUMENT

DOMA mandates that the words "marriage" and "spouse," as used in any federal statute, regulation, ruling, or interpretation, "refer[] only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7. Plaintiff challenges this provision as unconstitutionally depriving her of equal protection by denying her the spousal marital property exclusion under the Internal Revenue Code that would be available had her spouse been of the opposite sex.

As the briefs of plaintiff and her *amici* make clear, section 3 of DOMA is an utterly irrational law, unsupported by any legitimate purpose. They demonstrate conclusively that the purposes asserted by the Bipartisan Legal Advisory Group either are illusory, illegitimate, relevant only to state interests, and/or, in the case of conserving scare resources, not factually supported.

This brief has a different focus. Not only does DOMA not advance any valid purposes, but DOMA's differential treatment of the same-sex marriage of plaintiff Windsor and her deceased spouse, and other similarly situated married couples, undermines important protections in federal laws in three areas: conflicts of interest, federal income taxation, and bankruptcy. By preferring marriages by same-sex couples over marriages by opposite-sex couples in a number of ways, DOMA produces perverse results that a rational Congress could not have intended. In challenging DOMA, plaintiff and other same-sex spouses like her seek not only the federal protections and benefits that stem from recognition of their marriages, but also demonstrate their willingness to share the same burdens and obligations imposed by federal law on other married couples.

Because DOMA was imposed in a blunderbuss, across-the-board manner, Congress failed to consider its impact on more than 1000 federal laws in which marriage is relevant. Given the complexity of our legal system and the great variety of contexts in which marriage may be pertinent, the completely irrational impact of DOMA is hardly surprising. Its unanticipated impact on other laws reinforces a basic truth: DOMA was not driven by rational considerations, but instead by a desire to strike out at same-sex married couples regardless of the repercussions. DOMA would be unconstitutional under rational basis review even absent such perverse consequences, but the senseless subversion of meritorious statutes crystalizes its irrationality.

ARGUMENT

I. DOMA'S DEFINITIONS OF "MARRIAGE" AND "SPOUSE" SERIOUSLY UNDERMINE A SIGNIFICANT NUMBER OF FEDERAL ETHICS LAWS.

In 1978, in the aftermath of Watergate, Congress passed the Ethics in Government Act ("EIGA"), Pub. L. No. 95-521, 92 Stat. 1824, to "preserve and promote the accountability and integrity of public officials and of the institutions of the Federal Government." S. Rep. No. 95-170, at 31 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4216. Its goal is "to prevent corruption and other official misconduct before it occurs . . . ." *Dean v. Veterans Admin.*, 151 F.R.D. 83, 87 (N.D. Ohio 1993), *quoting* S. Rep. No. 95-170 at 31. One way EIGA accomplishes this is by imposing annual reporting requirements on members of Congress, candidates for federal office, certain high-level federal employees, the president, the vice president, federal judges and Supreme Court justices, and certain congressional and judicial employees.

Many of EIGA's provisions apply to both the reporting individual and "relative[s]" of that individual, broadly defined to include, *inter alia*, that individual's "husband" or "wife" as well as "the grandfather or grandmother of the spouse of the reporting individual" and even "the fiance or fiancee of the reporting individual." 5 U.S.C. App. 4 § 109(16). Among the items EIGA requires to be reported are income in excess of $1,000, honoraria, and specified gifts of the reporting individual's "spouse." 5 U.S.C. App. 4 §§ 102(e)(1)(A)-(D). Under DOMA, these provisions exclude from their coverage any "husband," "wife," or "spouse" in a same-sex marriage. As a result, those in same-sex marriages need not report any of the financial information pertaining to their spouses (or relatives of their spouses) EIGA otherwise requires of opposite-sex married couples. Without this information, identifying potential financial conflicts of interest is difficult, if not impossible. Thus, for example, post-DOMA, a same-sex spouse of an agency head could receive significant income from an entity regulated directly by the agency with no duty to report such income, even though that situation could present a serious conflict of interest.

Similarly, the Stop Trading on Congressional Knowledge Act, known as the STOCK Act, was enacted in 2012 in response to public concern that members of Congress were trading stock on inside information. S. Rep. No. 112-244, at 1-2 (2012). The statute amended EIGA to require both members of Congress and executive branch officials to report certain stock sales or purchases within 45 days. 5 U.S.C. App. 4 § 103(l). Congress subsequently passed further legislation to clarify that stock transactions made by spouses (and children) of covered officials must be reported. 5 U.S.C. App. 4 § 103 note; Pub. L. No. 112-173, 126 Stat. 1310. Under DOMA, however, the same transactions made by same-sex spouses are exempt from disclosure.

DOMA undermines other provisions of EIGA as well. EIGA dictates the treatment of honoraria paid to charitable organizations in lieu of paying them directly to a member of Congress, officer, or employee. 5 U.S.C. App. 4 § 501(c). Such payments cannot exceed $2,000, and also cannot be made to a charitable organization in which, *inter alia*, the "spouse" of a member, officer, or employee "derives any financial benefit." *Id.* Again, the purpose is to protect against financial conflicts of interest, which is undermined by DOMA's exclusion of same-sex spouses from this ban.

DOMA's reach extends beyond the reporting requirements in EIGA to other statutes intended to protect against financial conflicts of interest. For example, officers and employees of labor organizations must report certain financial assets they or their spouses hold, a requirement that does not, by virtue of DOMA, extend to same-sex spouses. *See* 29 U.S.C. § 432(a)(1). Further, by statute, health maintenance organizations ("HMOs") must disclose certain financial information to the Secretary of Health and Human Services, including certain transactions between the HMO and a "party in interest," defined to include the spouse of the party in interest. 42 U.S.C. § 300e-17(b)(4). Under DOMA, this requirement does not extend to same-sex spouses.

DOMA also thwarts the goals of "anti-nepotism" and judicial recusal laws. Under the federal anti-nepotism law, public officials are prohibited from appointing, employing, promoting, or advancing "any individual who is a relative of the public official." 5 U.S.C. § 3110(b); *see also* 5 U.S.C. § 2302(b)(7) (forbidding advocating the appointment or employment of a relative, including a spouse). By outlawing favoritism based on kinship, anti-nepotism laws promote fairness in the workplace in hiring and promotions. The term "relative" is defined under these laws to include husbands and wives, and also a variety of "in-laws" and "step" relations. 5 U.S.C. § 3110(a)(3). Because DOMA excludes from the anti-nepotism law same-sex married couples, such couples are legally free to hire and supervise their own spouses and family members of their spouses. This situation presents the very danger of serious conflicts that anti-nepotism laws were enacted to prevent.[2]

DOMA creates loopholes in other similar statutes as well. In the federal judicial system, district judges are empowered to appoint magistrate judges. 28 U.S.C. § 631. That power is limited to appointing individuals who are "not related by blood or marriage to a judge of the appointing court or courts . . ." *Id.* at § 631(b)(4). Under DOMA, however, appointing judges are free to appoint their same-sex spouses to be magistrate judges, even though such appointments raise the same potential conflicts as the prohibited appointment of opposite-sex spouses.

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[2] DOMA also affects agency regulations and policies implementing federal law. For example, the Centers for Disease Control and Prevention ("CDC") has adopted a policy that prohibits "CDC managers, supervisors, and others in positions to influence personnel actions" from advocating for or employing, promoting, or advancing a relative to any position within the CDC. Manual Guide - Human Resources Management Manual CDC Chapter 310-1, § IV C (Jan. 20, 1998). Relative is defined to include, *inter alia*, "father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law," *id.* at § IV A.; same-sex married relationships are excluded from the policy because of DOMA.

DOMA has an equally irrational effect on judicial recusal laws. All federal justices, judges, and magistrate judges are required to disqualify themselves in a variety of circumstances, including where their

> spouse[s] . . . ha[ve] a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

28 U.S.C. § 455(b)(4). Further, judges are required to "make a reasonable effort to inform [themselves] about the personal financial interests of [their] spouse[s] . . ." *Id.* at § 455(c). Yet DOMA operates to excuse judges in same-sex marriages from these recusal requirements, meaning a judge can preside over a proceeding in which his or her same-sex spouse has a substantial financial interest, despite the obvious conflict this presents.

Beyond EIGA and anti-nepotism laws, DOMA undermines the transparency and accountability afforded by a wide range of statutes and regulations, from gift bans imposed on senators and their spouses,[3] to limitations on spending of personal funds, including funds of family members, by a presidential candidate receiving matching funds.[4] DOMA impacts the ban on accepting certain travel and travel-related expenses from non-federal sources that applies to federal employees and their spouses, 31 U.S.C. § 1353(a), and excludes same-sex spouses from the foreign gift ban applicable to opposite-sex spouses in 5 U.S.C. §§ 7342(a)(1)(G) and (b)(2).

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[3] *See* 2 U.S.C. § 31-2(a) (barring members, officers, and employees of the Senate and their spouses from accepting gifts in excess of $250 from certain sources).

DOMA also undermines statutes intended to guard against potential conflicts in commission membership and participation. For example, spouses are barred from membership in the Citizens' Commission on Public Service and Compensation when their opposite-sex spouses sit on the commission, 2 U.S.C. § 352(2)(C), while same-sex spouses face no such prohibition. Similarly, members of the Foundation for the National Institutes of Health are barred from participating in any foundation matter in which their opposite-sex spouses have a financial interest, 42 U.S.C. § 290b(j)(2), yet the same-sex spouses of foundation members are not subject to the bar.

DOMA produces some of the most noxious results when applied to criminal statutes. "Bribery, graft, and conflicts of interest" are defined to include "[a]cts affecting a personal financial interest" of an employee of the federal or District of Columbia government, as well as those of a spouse and certain other listed persons. 18 U.S.C. § 208(a). DOMA removes from the automatic coverage of section 208(a) same-sex spouses. As a result, same-sex spouses might avoid culpability for engaging in conduct that would be criminal for opposite-sex married couples.

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[4] *See* 26 U.S.C. § 9035 (barring presidential candidates who receive matching funds from spending more than $50,000 from the personal funds of their families, including their spouses and the spouses of any listed family members).

It is also a federal crime to retaliate against a federal official by threatening or injuring an immediate family member of the official. 18 U.S.C. § 115(a). "Immediate family member" is defined to include the official's spouse and any other person related by marriage. *Id.* at § 115(c)(2). By excluding same-sex spouses from the definition of "spouse," however, DOMA effectively decriminalizes retaliation when committed against a same-sex spouse of a federal official.

DOMA further affects analogous statutes that protect other important values. For example, the Secretary of Defense is required to request that each state report on suspected instances of child abuse and neglect of children of members of the armed forces or their spouses. 10 U.S.C. § 1787(a). Because of DOMA's restrictive definition of spouse, children of a same-sex spouse who are being abused are not protected by this reporting requirement.

* * *

Most federal officials are ethical, but the conflict of interest laws are written for those who are not, or who might not be if the law did not apply to them. Same-sex married couples are not inherently more or less ethical than their opposite-sex counterparts, yet by exempting them from important ethics requirements, DOMA treats them as if they were. Of course, like opposite-sex married couples, many same-sex married couples will make disclosures about their spouses regardless of DOMA. Similarly, most spouses employed by federal agencies will refuse to participate in matters in which their same-sex spouses have an otherwise disqualifying financial interest. Bizarrely, however, DOMA serves to excuse those most in need of regulation – the least ethical – from federal ethics laws. On this basis alone, DOMA fails constitutional scrutiny.

II. DOMA FRUSTRATES SIGNIFICANT ANTI-AVOIDANCE PROVISIONS OF THE INTERNAL REVENUE CODE.[5]

One of the perennial problems in designing an income tax system is deciding on the appropriate unit of taxation in a nation in which many people are unmarried, many are married with relatively similar incomes, and many are married to spouses with very different incomes. Moreover, some families have children, and some have other relatives who live with them and are supported by the family. As a result, there is no system that produces perfect fairness, even among persons with similar incomes.

The Internal Revenue Code permits married couples to file their tax returns together, combining their income and deductions on one return, or separately, with each person including his or her income and the deductions to which he or she is entitled. But separate filing can create problems with joint expenses, such as mortgage interest and property tax payments that are the legal responsibility of both spouses. Congress resolved that problem by allowing either spouse to claim all such joint expenses. This system has proven generally workable, but nevertheless has created potential for abuse, or perhaps more precisely, opportunities to manipulate the tax code. To deal with these problems, Congress created special exceptions (or loophole closers), and it is these exceptions that DOMA renders inoperative.

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[5] Many of the ideas for this section came from the article by Professor Patricia A. Cain of Santa Clara Law School, *DOMA and the Internal Revenue Code*, 84 Chi. Kent L. Rev. 481 (2009).

Plaintiff Windsor is addressing the denial to same-sex spouses of the right to file joint returns and obtain other federal tax benefits available to opposite-sex married couples. The loophole closers, on the other hand, present the opposite problem: thanks to DOMA, some same-sex married couples can obtain tax benefits that Congress plainly never intended to grant them.

First, as noted above, Congress allows married couples to elect whether to file jointly or separately, and allows one spouse to claim all of the couple's allowable joint deductions. Because many taxpayers either do not keep adequate records or do not have significant recognized deductions, Congress determined each person should be permitted a minimum deduction, called the standard deduction. It also allowed most taxpayers to choose between taking the standard deduction and itemizing their deductions. Some married taxpayers, who were filing separate returns, sought to take advantage of these two options by having one spouse claim all the joint deductions and the other claim the standard deduction. Congress concluded this was unfair, because the standard deduction is designed in part to replicate the actual deductions other taxpayers take. Therefore, it enacted 26 U.S.C. § 63(c)(6)(A), which for married couples filing separately, reduces the standard deduction from $3300 (section 63(c)(2)(C)) to zero, thereby removing the unfair advantage.

DOMA, however, removed the marital status under federal laws for same-sex lawfully married couples. Those married couples cannot file joint returns because they are not "federally married." Accordingly, when they file separate returns, nothing prevents one spouse from itemizing and taking all of the joint deductions and the other spouse from taking the standard deduction. This absurd result is the very kind of tax avoidance section 63(c)(6)(A) was enacted to prevent.

Second, one way taxpayers minimize their taxes is by incurring losses that offset gains. To incur a loss, a taxpayer must dispose of an asset, and if the amount realized from the sale is less than the basis of the asset (amount paid in most cases), the taxpayer can claim a loss. In that situation the loss is real, and the reduction in taxable income is proper. But in the past, some taxpayers (or perhaps their advisers) tried to gain the advantage of loss recognition by "selling" the asset to a family member. Although technically the taxpayer no longer would own the asset, it still belonged to the family and might even be re-purchased after a period of time; thus in a real economic sense, there was no "loss". Or, more precisely, that is what Congress concluded when it enacted 26 U.S.C. § 267(a)(1), which prevents taxpayers from claiming a loss involving sales to family members, who, in subsection (c)(4), are defined to mean "brothers and sisters (whether by the whole or half-blood), spouse, ancestors, and lineal descendants." Once again, because DOMA decrees that a same-sex spouse is not a spouse under section 267, same-sex spouses can engage in a tax avoidance scheme Congress tried to prohibit.

Third, 26 U.S.C. § 1041(a)(1) has a similar rule for certain transfers, including gifts, and it extends to recognitions of gains as well as losses. As with section 267(a)(1), one of the provision's goals is to prevent sham transactions that would produce similar unjustified tax losses. Section 1041(a)(2), however, applies the non-recognition principal to a former spouse for transfers of property incident to a divorce, thereby making a divorce and any resulting transfer of property – which would include part ownership of the family home – a non-event for tax purposes. Through this statute, Congress denied some taxpayers (especially wealthy ones) the opportunity, as part of a divorce, to transfer property in which there was a loss, to the former spouse, and thereby lower the transferring spouse's taxable income. Essentially, Congress sought to ensure taxpayers could not have the IRS pay for part of the cost of a divorce. This provision also was intended to prevent unsophisticated taxpayers from having to pay considerable taxes if they transferred property to a spouse as part of a divorce without realizing the transfer was a taxable event. Regardless of the wisdom of this law as a matter of social and economic policy, its non-recognition effect is clear. But, once again, because DOMA transforms a same-sex spouse into a non-spouse, section 1041 does not apply, and same sex couples may engage in tax avoidance or, conversely, find themselves in tax traps.

A fourth example relates to the special treatment for expenses of adoption provided by 26 U.S.C. § 23. If a taxpayer incurs certain expenses in connection with an adoption, the taxpayer is entitled to a credit – which is a direct reduction of taxes otherwise owed and hence is more valuable than a deduction – subject to certain limitations based on the taxpayer's income. The self-evident purpose of section 23 is to encourage adoptions by having the United States Treasury fund the costs in varying amounts, originally up to $10,000 (subsection 23(b)(1)), but now over $13,000 as a result of the inflation adjustment in subsection 23(h). Because federal generosity has its limits, Congress excluded from adoptions eligible for the credit "expenses in connection with the adoption by an individual of a child who is the child of such individual's spouse." 26 U.S.C. § 23(d)(1)(C). Of course, under DOMA, same-sex married couples are not "spouses" under federal law. Therefore, a limit plainly included in the law to prevent a married spouse from taking a tax credit for the adoption expenses of a step-child is inapplicable to a same-sex spouse who can use the credit even when adopting his or her step-children.

Fifth, 26 U.S.C. § 4941 imposes significant taxes on those who control a private foundation (referred to as "disqualified persons") when they engage in self-dealing with their foundation. A "disqualified person" includes anyone who is an officer, director, or trustee of the foundation or who is a substantial contributor to it, including a 20% owner of any entity that was a substantial contributor, as well as the family of such person. 26 U.S.C. § 4946(a)(1)(D). Family, in turn, is defined to include "only" the person's "spouse, ancestors, children, grandchildren, great grandchildren, and the spouses of children, grandchildren, and great grandchildren." 26 U.S.C. § 4946(d). Once again, because DOMA excludes same-sex spouses from the reach of all federal laws using the term spouse, unethical same-sex spouses could engage in the very acts of self-dealing for which opposite-sex spouses would have to pay substantial taxes.

Finally, and perhaps most perversely, DOMA makes the Earned Income Tax Credit ("EITC") in 26 U.S.C. § 32 much more expensive for the Government. The EITC is now the largest federal anti-poverty program, and the credit is refundable – meaning individuals whose income as determined by the EITC is so low that their credit is larger than any tax withheld or owed actually receive a check from the Treasury on top of their refunds.[6] DOMA affects the EITC in ways Congress never intended.

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[6] *See* Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 Wash. & Lee L. Rev. 1529, 1573 (2008), which brought the impact of DOMA on the EITC to the attention of CREW's counsel. In addition, section 32 includes other

The EITC is less a tax provision than a means of assisting low income families who are close to the poverty level by refunding some or all of the income tax their employers withheld. Quite sensibly, Congress insisted that for married couples, the income of both spouses be taken into account, which is why subsection 32(d) provides that married couples are eligible for the credit "only" if they file a joint return. But because DOMA means same-sex married couples are not considered married (and cannot file joint federal returns), this condition is eliminated. The result is that, if one same-sex spouse is income eligible under section 32, the fact that such individual's same-sex spouse is a significant income producer is legally irrelevant in determining eligibility of that married couple for the credit. Of all the provisions of the Tax Code perversely impacted by DOMA, surely its effects on the EITC are the most dubious.[7]

Indeed, the notion that the Congress that enacted DOMA intended to provide low income same-sex married couples and their families *more* taxpayer dollars than opposite-sex married couples

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marriage sensitive limits and exclusions significantly undermined by DOMA and which result in increased federal dollars accruing to same-sex married couples. *Id.* at 1574-77.

[7] Some federal anti-poverty programs avoid these problems by defining eligibility in terms of households. *See* 7 U.S.C. §§ 2014(c), 2012(n) (food stamps); 42 U.S.C. §§ 8624(b), 8622(5) (home energy assistance). Others use family, without any spousal element. *See* 42 U.S.C. §§ 601, 607 (Temporary Assistance to Needy Families, including "2-parent families"); 42 U.S.C. §§ 1396a(a)(10)(A)(v), 1396d(n) (Medicaid – "qualified family members").

in identical financial circumstances is antithetical to the stated position of DOMA's supporters that the federal government should not support same-sex married couples in any way. In fact, expanding federal benefits directly contradicts one of the central justifications proffered for DOMA when it was passed. *See* H.R. Rep. No. 104-664, at 18 (1996) ("To deny federal recognition to same-sex 'marriages' will thus preserve scarce government resources, surely a legitimate government purpose."); 142 Cong. Rec. H7488 (July 12, 1996) (statement of DOMA sponsor Rep. Barr) ("if you do not believe it is fiscally responsible to throw open the doors of the U.S. Treasury to be raided by the homosexual movement, then the choice is very clear"); 142 Cong. Rec. S10103 (Sept. 10, 1996) (statement of DOMA sponsor Sen. Nickles) ("Another reason this bill is needed now concerns Federal benefits. . . . [I]f Hawaii, or any other State, gives new meaning to the words 'marriage' and 'spouse,' reverberations may be felt throughout the Federal Code."); *Id.* at S10111 (statement of Sen. Byrd) ("the costs associated with such a change could amount to hundreds of millions of dollars, if not billions – if not billions – of Federal taxpayer dollars").

While there are other examples of DOMA's inadvertent impact on the Internal Revenue Code, even these few demonstrate that – aside from basic unfairness to same-sex married couples – DOMA seriously undermines anti-avoidance provisions of the Internal Revenue Code because of its wholly irrational exclusion of same-sex married couples under all federal laws. Justice Robert Jackson's wise reminder in *Arrowsmith v. Commissioner*, 344 U.S.

6, 12 (1952), that tax is "a field beset with invisible boomerangs," is truer post-DOMA than when he wrote it.

III. DOMA FRUSTRATES VARIOUS PROTECTIONS FOR CREDITORS IN THE BANKRUPTCY CODE.[8]

The federal Bankruptcy Code attempts to balance the interests of debtors in starting afresh, against the interest of creditors, often including the U.S. Government, in reducing their losses when debtors cannot pay in full. Coupled with these interests is the goal of conducting the proceedings promptly, at the lowest cost consistent with the level of fairness and accuracy required for the parties.

According to the Bankruptcy Judges Division of the Administrative Office of the U.S. Courts, for calendar year 2011, 33.7% of chapter 13 cases were joint filings under 11 U.S.C. § 302(a) (136,719 of 405,994). In addition, 31.5% of individual, as contrasted with business, bankruptcies under chapter 7 were joint filings (309,544 of 984,195). Allowing married couples to file jointly makes sense because often both spouses are signatories to the family debts and own everything from a car to a house jointly. The filing of a joint case does not automatically result in consolidation of the debtors' estates; that is up to the judge under 11 U.S.C. § 302(b). In some cases, it is not clear who owns the property or who is the obligated debtor; a consolidated proceeding eliminates the need to decide such questions. In addition, when both spouses file, there is less chance they will engage in avoidance tactics that will harm the interests of creditors.

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[8] Many of the ideas for this section came from *The Defense of Marriage Act, Same-Sex Relationships and the Bankruptcy Code*, written by Professor Jackie Gardina of the Vermont Law School for the Federal Judicial Center in 2011. It is available at http://ssrn.com/abstract=1850926, last revised April 19, 2012.

Section 302(a) allows the filing of a joint case only by a debtor and "such individual's spouse," which under DOMA excludes same-sex married couples. As a result, both persons in a same-sex marriage who choose to file for bankruptcy have to pay separate filing fees of $235 (chapter 13) or $245 (chapter 7) pursuant to 28 U.S.C. § 1930(a)(1) (which in the end reduces the amount available for creditors); both must prepare and file separate petitions and schedules, including sorting out who owns and owes what (which adds to the costs and reduces the funds available for creditors); and both are precluded from consolidating their cases, almost certainly adding to costs and delays on all sides. Moreover, DOMA enables debtors who are married to same-sex spouses to organize their affairs to their advantage and to the disadvantage of their creditors in ways opposite-sex married couples cannot.

For a debtor in bankruptcy, the goal is to obtain as broad a discharge from prior debts as possible. The Bankruptcy Code generally supports that goal, but includes some limitations. For example, 11 U.S.C. § 523(a)(5) excludes a "domestic support obligation," defined in 11 U.S.C. § 101(14A)(A)(i) to include alimony, maintenance, and other support obligations (past and future) owed "to a spouse or former spouse." Similarly, section 523(a)(15) excludes a debt owed "to a spouse, former spouse, or child of the debtor . . . that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit." The public policy behind these exclusions is to prevent a spouse from escaping prior and future liability to a former spouse by going through bankruptcy, thereby thwarting state law. Because DOMA treats same-sex spouses as non-spouses, the exclusions do not apply, undermining congressional and state policies and potentially plunging children and non-working parents into precarious financial positions.[9]

DOMA also may create particular problems for bankruptcies in community property states like California, where property acquired during a marriage is owned jointly by both spouses. Under 11 U.S.C. § 541(a)(2), the bankrupt estate is broadly defined to include all property of the debtor, extending to all "interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is-- (A) under the sole, equal, or joint management and control of the debtor." Because DOMA does not recognize same-sex spouses, the community property of a same-sex couple cannot be included in the estate, resulting in confusion, additional costs and delays, and harm to creditors.

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[9] DOMA also vitiates similar spousal protection provisions in ERISA. Under 29 U.S.C. § 1056(d), interests in pension plans covered by ERISA cannot generally be alienated or assigned. Subsection 1056(d)(3) provides an exception for qualified domestic support orders, including orders for the protection of children and spouses. Similarly, 29 U.S.C. § 1055(c)(2) prevents one spouse from using the pension for his or her own purposes without the written consent of the other spouse. Again, DOMA nullifies these protections as applied to same-sex marriages.

DOMA frustrates congressional policy in another important respect. In 2005, Congress determined that individual debtors with regular incomes and mostly consumer debts were choosing liquidation bankruptcy under chapter 7, which excludes future income from the estate, instead of chapter 13, which requires debtors to devote some of their future income to a payment plan. Congress concluded that many of the debtors choosing chapter 7 could afford to repay more of their debts without undue hardship, and so it amended 11 U.S.C. § 707 to require the dismissal of any chapter 7 case filed by debtors with incomes above a certain threshold (the so-called "means test") and to require them to utilize chapter 13. Congress simultaneously amended chapter 13 to require debtors whose incomes exceed the median income for the state in which they reside to continue to repay their debts for a period of five years, whereas below-median income debtors need only make payments for three years. 11 U.S.C. § 1322(d).

In determining who is an above-median income debtor for purposes of section 1322(d), the income of the debtor's spouse, as well as that of the debtor, is taken into account. The theory behind this provision is that, if the non-debtor spouse has income that can be used to pay for future living expenses, the debtor spouse has more money available to repay creditors. Because DOMA excludes same-sex spouses from all federal definitions of spouse, however, the income of the non-debtor spouse in a same-sex married couple cannot be counted. The result is that for two married couples with identical incomes, expenses, and debts, the same-sex couple may fall below the median income and the opposite-sex couple above it, allowing a same-sex spouse debtor to repay debts for only three years while a debtor in an opposite-sex marriage will have to make payments for five years.

Finally, 11 U.S.C. §§ 522(b)(1) and (2) offer debtors a choice of electing federal or state law to govern what property may be exempt from availability to creditors, unless state law precludes this choice. Under the federal option, subsection 522(d) lists 12 categories of property any debtor may elect for his or her exemptions, regardless of the law of the debtor's domicile. A state-authorized exemption may be more generous than its federal counterpart in some areas, but not necessarily in others. The caveat, however, is that if both spouses are in bankruptcy, they must make the same choice: both must choose federal exemptions or both must choose the state exemptions. 11 U.S.C. § 522(b)(1). This provision was clearly intended to prevent one spouse, for example, from taking advantage of a generous homestead exemption under state law, while the other takes advantage of other more favorable exemptions under federal law. Of course, pursuant to DOMA, only "husband and wife" debtors must make the same choice; same-sex married couples are free to game the system to their advantage and to the disadvantage of their creditors.[10]

As unfair as this may be to opposite-sex spouses, the real losers are creditors, such as banks, credit card companies, local merchants, and the federal government. Because of DOMA, bankruptcy costs will increase for same-sex married debtors, leaving less for creditors, while at the same time, same-sex married debtors may be able to manipulate the law to protect more of their assets than Congress intended. All of this stems from DOMA's irrational alteration of the definition of marriage to exclude same-sex married couples.

CONCLUSION

DOMA's unthinking, across-the-board exclusion of same-sex married couples from all federal laws relating to marriage creates irrational effects on federal laws, especially those dealing with conflicts of interest, income taxation, and bankruptcy. If DOMA were not indefensible on its own, the illogical, indeed incomprehensible, impact of the statute on federal laws conclusively demonstrates its irrationality. In short, the Defense

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[10] Outside of bankruptcy, the United States is entitled to set aside certain fraudulent conveyances by insolvent debtors, including those to "insiders." 28 U.S.C. §§ 3304, 3305. Insiders are defined to include relatives, such as a "spouse." 28 U.S.C. §§ 3301(5)(A)(i) and 3301(5)[sic, should be (7)]. Nevertheless, DOMA serves to limit this to opposite-sex spouses, potentially enabling certain same-sex married couple debtors to avoid paying their obligations to the government.

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CURIAE
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IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

Brief *Amicus Curiae* on the Merits of Citizens United's National Committee for Family, Faith and Prayer, Citizens United Foundation, U.S. Justice Foundation, Gun Owners Foundation, The Lincoln Institute, Public Advocate of the U.S., Declaration Alliance, Western Center for Journalism, Institute on the Constitution, Abraham Lincoln Foundation, Conservative Legal Defense and Education Fund, English First, Protect Marriage Maryland PAC, Delegate Bob Marshall, and Senator Dick Black in Support of Resp. Bipartisan Legal Advisory Group

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TABLE OF CONTENTS

Page

Table of Authorities iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. THE CONSTITUTIONALITY OF DOMA SECTION 3 IS GOVERNED BY THE NECESSARY AND PROPER AND SUPREMACY CLAUSES, NOT BY THE TENTH AMENDMENT 5

  A. Both Courts Below Have Mistakenly Based Their Decisions on the Ground that DOMA Section 3 Is a Plenary Regulation of Marriage 5

  B. DOMA Section 3 Is a Constitutional Exercise of the Powers Vested in Congress by the Necessary and Proper Clause of Article I, Section 8, as Confirmed by Court Precedent 8

  C. As Applied to the Federal Estate Tax, DOMA Section 3 Meets the McCulloch Test 11

II. DOMA SECTION 3 IS NOT PROHIBITED BY THE FIFTH AMENDMENT 13

A. The Necessary and Proper Clause Empowers Congress, Not the Courts, to Determine the Degree of Necessity of the Means Chosen to Carry Out Its Enumerated Powers 16

B. The Constitutional Inquiries Engaged in by Both Lower Courts Related to the Degree of Necessity of DOMA Section 3, Not to Any Principled Prohibition in the Due Process Clause 19

C. The Due Process Guarantee Does Not Justify Any Departure from the McCulloch Rule of Deference to Congress's Choice of the Efficacy of Means 22

D. Homosexuals Are neither Politically Powerless nor Singled Out by Law for Discriminatory Treatment 26

E. Stripped of the Judicially Invented Equal Protection Component, DOMA Section 3 Is Not Prohibited by the Due Process Clause 31

CONCLUSION 39

TABLE OF AUTHORITIES

Page

HOLY BIBLE
Genesis 1:26-28 31
Genesis 5:1-3 31

U.S. CONSTITUTION
Article I, Section 8 . . . . 2, 8, 10
Article VI 32
Amendment V . . . . 3, *passim*
Amendment X 10
Amendment XIII 36
Amendment XIV 14, 33, 34, 35
Amendment XV 36

STATUTES
26 U.S.C. section 2056(a) 11
Defense of Marriage Act, Pub. L. 104-199 . 2, *passim*
Don't Ask, Don't Tell Repeal Act of 2010, Pub. L.
  111-321 . . . . 3, 23

CASES
Adarand Constructors, Inc. v. Pena, 515 U.S.
  200 (1995) 14, 33, 35
Baker v. Nelson, 409 U.S. 810 (1927) 5
Bolling v. Sharpe, 347 U.S. 497 (1954) 4, 35
Brown v. Board of Education, 347 U.S. 483
  (1954) 35
Church of the Holy Trinity v. United States,
  143 U.S. 457 (1892) 31
Ferguson v. Skrupa, 372 U.S. 726 (1963) 38
Griswold v. Connecticut, 381 U.S. 479 (1965) . . . 15

Holmes v. Jennison, 39 U.S. (14 Peters) 579 (1840) 33, 34
Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) 38
Lochner v. New York, 198 U.S. 45 (1905) 37
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 15, 32
McCray v. United States, 195 U.S. 27 (1904) . . . 13
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) . . . . 2, *passim*
Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856) 37
National Federation of Independent Business v. Sebelius, 567 U.S. __, 132 S.Ct. 2566 (2012) . 13
New York Trust Co. v. Eisner, 256 U.S. 345 (1921) 12
Olsen v. Nebraska, 313 U.S. 236 (1941) 38
Reynolds v. United States, 98 U.S. 145 (1879) . . 29
Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873) 34, 37
South Carolina v. Barnwell Bros., 303 U.S. 177 (1938) 23
Steward Machine Co. v. Davis, 301 U.S. 548 (1937) 9
United States v. Carolene Products Co., 304 U.S. 144 (1938) 23, 24, 37
United States v. Doremus, 249 U.S. 86 (1919) . . 12
United States v. Kahriger, 343 U.S. 22 (1953) . . 13
West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) 37
Wright v. United States, 302 U.S. 583 (1938) . . . 37

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INTEREST OF THE *AMICI CURIAE*[1]

Citizens United (including its National Committee for Family, Faith and Prayer), Public Advocate of the United States, Abraham Lincoln Foundation for Public Policy Research, Inc., and English First are nonprofit social welfare organizations, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC").

Citizens United Foundation, U.S. Justice Foundation, Gun Owners Foundation,[2] The Lincoln Institute for Research and Education, Declaration Alliance, Western Center for Journalism, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3).

The Institute on the Constitution is an educational organization. Project Marriage Maryland PAC is a political committee.

Delegate Bob Marshall is a senior member of the Virginia House of Delegates, and the author of the Virginia Marriage Constitutional Amendment.

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[1] It is hereby certified that counsel for petitioner and for respondent Bipartisan Legal Advisory Group filed blanket consents with the Court, and that counsel for respondent Windsor has consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] Gun Owners Foundation and English First join in Section II of this brief, opposing judicial usurpation of the legislative powers of Congress.

Senator Dick Black is a member of the Virginia State Senate.

Most of these *amici* have filed *amicus* briefs in this and other courts, and each is interested in the proper interpretation of state and federal constitutions and statutes. Most of the *amici curiae* herein filed an *amicus* brief in support of the petition for certiorari in a similar case regarding the constitutionality of DOMA. *See* Brief *Amicus Curiae* of Capitol Hill Prayer Alert Foundation, *et al.*, in Bipartisan Legal Advisory Group v. Gill, No. 12-13 (Aug. 2, 2012).[3]

SUMMARY OF ARGUMENT

The courts below mistakenly assume that DOMA Section 3 invades the exclusive authority of the States to regulate family relations, including marriage. Instead, DOMA's definition of marriage is a "rule of construction" defining the meaning of "marriage" and "spouse" as those words are used in the United States Code. As a rule of construction, DOMA Section 3 is an exercise of the power vested in Congress under the "Necessary and Proper" Clause to prescribe the means by which federal statutes and programs are carried out.

As an exercise of its "Necessary and Proper" powers, DOMA Section 3 is governed by the rule set down in McCulloch v. Maryland — that the degree of necessity of a means chosen by Congress is a matter within its legislative discretion, and therefore outside the authority of the judiciary. Instead of honoring this well-established boundary separating judicial from legislative power, the courts below misused the Fifth Amendment to impose their judicial will, by substituting their view as to whether DOMA's definitions of "marriage" and "spouse" were necessary enough to carry out the constitutionally legitimate purposes of enforcing the federal tax code, providing for federal programs, and administering Congress's exclusive power over naturalization.

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[3] http://www.lawandfreedom.com/site/constitutional/DOMA_amicus.pdf.

Additionally, the court of appeals erroneously concluded that homosexuals as a class are "quasi-suspect," on the theory that they have been discriminated against, and that they constitute a discrete and insular minority which is politically powerless to represent their interests in Congress, requiring special judicial protection. As evidenced by the President of the United States and his Department of Justice having taken their side in this litigation, as well as other signal events such as Congressional enactment of the Don't Ask, Don't Tell Repeal Act of 2010 (Pub. L. 111-321), the lobby for gay and lesbian rights is hardly politically powerless at the national level. Moreover, historically, homosexuals have not been singled out for discriminatory treatment in the ways that the court of appeals assumed below.

More significantly, the court of appeals has completely missed the fact that, as Circuit Court Judge Chester John Straub pointed out dissenting in part, unless Congress defines "marriage" and "spouse" for the "purposes of federal law," state law will. And as Chief Justice John Marshall pointed out in McCulloch with respect to the Maryland tax on the Bank of the United States, a burden would be imposed upon the people of the United States without their consent, the people of all of the States but one (Maryland) having been completely excluded from the political process that generated the tax. Likewise, if the Court of Appeals prevails in this case, then the government of New York would be empowered to establish for its own citizens which federal taxes they would pay and which federal benefits they would receive, regardless of the impact that New York's marriage policy would have on the people of the other 49 States.

Finally, the decisions of the courts below are grounded in a judicial fiction which should be recognized, admitted, and repudiated. By its own rules of construction of the Constitution, there is no legitimate basis for this Court to add an "equal protection component" to the Due Process Clause of the Fifth Amendment. Stripped of that mythical component, the due process guarantee imposes no equal protection limit upon Congress's authority to enact DOMA Section 3. It is past time for this Court to bring to an end the line of atextual cases begun with Bolling v. Sharpe in 1954, and to place itself back under the authority of the Constitution as it is written.

ARGUMENT

I. THE CONSTITUTIONALITY OF DOMA SECTION 3 IS GOVERNED BY THE NECESSARY AND PROPER AND SUPREMACY CLAUSES, NOT BY THE TENTH AMENDMENT.

A. Both Courts Below Have Mistakenly Based Their Decisions on the Ground that DOMA Section 3 Is a Plenary Regulation of Marriage.

The two courts below agreed that DOMA Section 3 is unconstitutional for what appear to be quite different reasons. In fact, however, both decisions are erroneously based upon the false assumption that DOMA Section 3 is an illegitimate exercise of the legislative power of Congress to regulate marriage for federal taxing and spending purposes.

In what appears to be a headlong pursuit[4] to develop support for its conclusion "that DOMA's section 3 does not pass constitutional muster," the district court below found that section to be unconstitutional because it "operates to reexamine the states' decisions concerning same-sex marriage...."

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[4] The district court below evaded the question whether the Supreme Court's holding in Baker v. Nelson, 409 U.S. 810 (1972) — which "summarily affirmed a challenge to a Minnesota state law that denied a marriage license to a same-sex couple" — "require[d] it to dismiss Windsor's case." Windsor I at 399. Then, after rehearsing the differing standards of review applied to "equal protection" challenges, the court refused to be bound by any existing review standard. Instead, "mindful" of what the district court euphemistically called "the Supreme Court's jurisprudential cues" (*id.* at 402), the court fashioned a standard to achieve its desired outcome. *See id.* at 400-06.

> [DOMA Section 3] sanctions some of those [state] decisions and rejects others. But such a sweeping federal view in this arena does not square with our federalist system of government, which places matters at the "core" of the domestic relations law **exclusively** within the province of the state. [Windsor v. United States, 833 F. Supp. 2d 394, 402, 405 (S.D.N.Y. 2012) (hereinafter "Windsor I") (emphasis added).]

In short, the district court struck down DOMA Section 3 because enactment of that section exceeded Congress's enumerated powers and unconstitutionally "intrud[ed] upon the states' business of regulating domestic relations." *Id.* at 405. Thus, the district court concluded Congress had no legitimate interest in defining marriage for any purpose, failing even rational basis review. *See id.* at 405-06.

Although the court of appeals below commended the district court for its "thorough opinion," it could not embrace the district court's remarkable view that DOMA Section 3 had "no rational basis to support it." Windsor v. United States, 699 F.3d 169, 176 (2d Cir. 2012) (hereinafter "Windsor II"). Instead, the court of appeals "conclud[ed] that review of Section 3 of DOMA requires heightened [judicial] scrutiny" (*id.* at 181) — that DOMA's definition of marriage "must be 'substantially related to an important government interest.'" *Id.* at 185. The court of appeals purported to rest its decision to apply a heightened standard of review on the ground that homosexuals were a "quasi-suspect" class. *Id.* In fact, however, prior to articulating that justification, the court of appeals had already unilaterally determined that the higher standard of review was dictated by considerations of federalism. "[W]hen it comes to marriage, legitimate regulatory interests of a state differ from those of the federal government," the court intoned, because "[r]egulation of marriage is 'an area that has long been regarded as a virtually exclusive province of the States'" (*id* at 179):

> Therefore, our **heightened scrutiny** analysis of DOMA's marital classification under federal law is **distinct from** the analysis necessary to determine whether the marital classification of a **state** would survive such scrutiny. [*Id.* (emphasis added).]

Not surprisingly, then, when the court of appeals began its analysis to determine whether DOMA Section 3 "with[stood] intermediate scrutiny," it led with the argument that Section 3 was not "substantially related to an important [federal] government interest," because "'the states, at the time of the adoption of the Constitution, possessed *full power* over the subject of marriage and divorce[, t]he Constitution [having] delegated *no authority* to the Government of the United States on the subject of marriage and divorce.'" *Id.* at 186.

The district court's and the court of appeals' federalism rationale is mistaken. DOMA Section 3 is not an unconstitutional federal regulation of marriage binding upon the people of the several States. Rather, Section 3 is a constitutional exercise of the power of Congress to enact "necessary and proper" laws as a means for carrying on its enumerated powers vested by the Constitution including, but not limited to, "the power to lay and collect taxes ... to provide for the general welfare of the United States."

B. DOMA Section 3 Is a Constitutional Exercise of the Powers Vested in Congress by the Necessary and Proper Clause of Article I, Section 8, as Confirmed by Court Precedent.

DOMA Section 3 reads as follows:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife. [Pub. L. 104-199 (1996).]

As an amendment to Chapter 1 of Title 1, United States Code, Section 3 is, as it purports to be, a "rule of construction" defining the words "marriage" and "spouse" as those words appear in statutes in the United States Code. *See* 1 U.S.C. Chapter 1 – Rules of

Construction. It is **not**, as the courts below assumed it to be, a regulation of domestic relations — a subject that rightfully belongs to the States. As dissenting Circuit Judge Chester John Straub observed:

> The subject of domestic relations, including marriage, has been the province of the states..... But DOMA does not change this, and does nothing to strip the status that states confer on couples they marry. [Windsor II, 699 F.3d at 202 (Straub, J., concurring and dissenting).]

Rather, as Judge Straub continued, DOMA Section 3 "limits the *federal* benefits, rights, privileges, and responsibilities of marriage to a subset of those deemed married under state law." *Id.* (italics original).

To be sure, DOMA Section 3 changes the previous federal policy that federal benefits, rights, privileges, and responsibilities were governed solely by "those deemed married under state law." *See id.* But there is nothing in the Constitution obligating Congress to defer to state domestic relations law in the exercise of its taxing power to provide for the general welfare, even though it impacts on regulations of matters that are the exclusive province of the States. After all, it is for Congress to determine whether a federal expenditure "provides for the general welfare," not the States. *See* Steward Machine Co. v. Davis, 301 U.S. 548 (1937). Further, unlike a federal statute enacted by Congress pursuant to the powers vested in it by the Constitution, statutes enacted by state legislators pursuant to powers not delegated to the United States, as provided by the Tenth Amendment, do not qualify as "the Supreme Law of the Land." And rightfully so. The legislature of any one State is not empowered by the Tenth Amendment to enact laws having the extraterritorial effect of binding the people of the United States. "Otherwise," as Judge Straub pointed out, "'marriage' and 'spouse' for the purposes of federal law would depend on the outcome of th[e] [same sex marriage] debate in each state, with the meanings of those terms under federal law changing with any change in a given state." Windsor II, 699 F.3d at 204 (Straub, J., concurring and dissenting).

DOMA Section 3, then, was designed to "limit the national impact of state-level policy development" (*id.*) over the definition of marriage, not to resolve that policy debate by imposing a national definition of marriage upon the domestic relations codes of the several States. Instead, DOMA Section 3 is a rule of construction governing **only** the meaning of "marriage" and "spouse" in **federal statutes**, pursuant to the power vested in Congress "to make all Laws which shall be necessary and proper for carrying into Execution the ... Powers vested by this Constitution in the Government of the United States," as a means "to maintain consistency and uniformity in distributing federal benefits and administering federal programs." Windsor II, 699 F.3d at 204-05 (Straub, J., concurring and dissenting). As Judge Straub so ably demonstrated, the definitions of "marriage" and "spouse" are instrumental to the federal government's administration of a wide variety of federal statutes enacted pursuant to the powers vested in Congress by Article I, Section 8, including the levying of taxes, providing for the general welfare, and even establishing rules governing naturalization. *See id.* at 202-03.

It has been well established for nearly 200 years that the constitutionality of such statutes is governed by the standard laid down in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." By erroneously positing that the purpose of DOMA Section 3 was to establish a national marriage policy as an end in itself, the courts below poisoned the constitutional well, placing upon DOMA's defenders a burden that they could not discharge no matter what level of scrutiny was applied. Had the courts below followed the McCulloch rule, they would have been required to defer to Congress's choice of means — so long as that means is clearly designed to meet a constitutional end and, so long as the means adopted is not clearly prohibited by the Constitution.

C. As Applied to the Federal Estate Tax, DOMA Section 3 Meets the McCulloch Test.

The threshold legal issue in this case, then, is whether DOMA's rule of construction of the meaning of "spouse" as it appears in 26 U.S.C. section 2056(a) is within the powers of Congress to tax or to make any law that is a necessary and proper means to exercise its taxing power. It has long been settled that Congress has the power to levy an estate tax. *See* New York Trust Co. v. Eisner, 256 U.S. 345 (1921). In Eisner, the executor of the estate contended that the levying of the estate tax was unconstitutional, in part, on the ground of "interference with the rights of the States to regulate descent and distribution" (*id.* at 348) and of "inequalities in the amounts that beneficiaries might receive in case of estates of different values." *Id.* at 349. Both contentions were rejected by this Court.

Limiting the marital deduction to only those surviving "spouses," as defined by DOMA Section 3, is no greater an interference with the powers of the States to regulate descent and distribution of estates than is generally the case in the calculation of the taxable estate for federal purposes. And denial of the marital deduction to a person who is not a spouse within DOMA's Section 3 definition does not single out partners of same-sex marriages for unique treatment. Various categories of relatives of the testator (*e.g.*, brothers, sisters, mothers, fathers) are not entitled to the marital deduction. According to the reasoning in Eisner, then, DOMA Section 3 meets the threshold standard of constitutionality.

Additionally, this Court has consistently ruled that Congress's power to tax is not limited to the purpose of raising revenue. Thus, this Court found that it is permissible for Congress to adopt a taxing policy for the purpose of deterring certain activities by the levying of a tax on them, as well as for the purpose of collecting revenue. *See, e.g.*, United States v. Doremus, 249 U.S. 86 (1919). Therefore, according to precedent, it is a constitutionally permissible exercise of Congress to adopt a tax policy for the purpose of nurturing traditional marriage as the ideal family structure for raising children, just as this Court has recently observed, that it is perfectly permissible for Congress to impose a tax "to encourage people to quit smoking" or "to shape decisions about whether to buy health insurance." *See* National Federation of Independent Business v. Sebelius, 567 U.S. __, 132 S.Ct. 2566 (2012). Indeed, as Justice Robert Jackson observed, "[o]ne cannot formulate a revenue-raising plan that would not have economic and social consequences." United States v. Kahriger, 345 U.S. 22, 35 (1953) (Jackson, J., concurring). It is not for the courts to second-guess whether Congress should promote a traditional family policy in the exercise of its taxing powers. *See* McCray v. United States, 195 U.S. 27 (1904). The only question that remains, therefore, is whether promoting a Congressional policy is "prohibited" by another provision of the Constitution.

II. DOMA SECTION 3 IS NOT PROHIBITED BY THE FIFTH AMENDMENT.

Both courts below ruled that DOMA Section 3 was prohibited by the so-called "equal protection component" of the Fifth Amendment. Declining to decide the question whether homosexuals were a quasi-suspect class,[5] the district court ruled that the application of DOMA Section 3 to deny Windsor the benefit of the surviving spouse exemption in the computation of her share of her partner's estate had no legitimate or rational basis. *Id.*, 833 F. Supp. 2d at 402-06. After finding that homosexuals are a "quasi-suspect class,"[6] the court of appeals decided that DOMA Section 3 was not "'substantially related to an important government interest.'" *Id.*, Windsor II, 699 F.3d at 186-88. Both judicial rulings are inconsistent with this Court's established McCulloch test and, therefore, constitute a constitutionally illegitimate usurpation of Congress's legislative power.

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[5] Windsor I, 833 F. Supp. 2d at 401-02.

Additionally both rulings are based on a judicial fiction, completely without textual support in the Constitution. On its face, there is no language in the Fifth Amendment's Due Process Clause that suggests or even hints that it contains an "equal protection component." The Fourteenth Amendment, which contains a Due Process Clause identical to the one in the Fifth Amendment, also contains an Equal Protection Clause. If the Fifth Amendment due process guarantee and the Fourteenth Amendment Equal Protection Clause contain identical "indistinguishable ... equal protection obligations," as this Court has ruled,[7] then the Equal Protection Clause is mere surplusage, unnecessary because the Fourteenth Amendment has its own Due Process Clause. Such disregard of the constitutional text undermines the legitimacy of judicial review, which is premised upon the proposition that the courts, too, are governed by the written text, not the other way around. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) ("Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government.").

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[6] Windsor II, 699 F.3d at 181-85.

[7] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217 (1995).

Clothed and emboldened by this Court's procrustean precedents that substitute judicially devised tests for the plain language of the Due Process Clause, both courts below have, as Circuit Court Judge Staub observed,[8] "expand[ed] a constitutionally guaranteed right [by] substitut[ing] for the crucial ... words of [the due process] guarantee []other ... words, more ... flexible and ... less restricted in meaning."[9] By failing to honor the constitutional text, both courts issued opinions masquerading as the exercise of judicial power, whereas in reality they were exercising legislative power vested by the Constitution in Congress alone.

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[8] Windsor II, 699 F.3d at 207 (Staub, J., concurring and dissenting).

[9] *See* Griswold v. Connecticut, 381 U.S. 479, 509 (1965) (Black, J., dissenting).

A. The Necessary and Proper Clause Empowers Congress, Not the Courts, to Determine the Degree of Necessity of the Means Chosen to Carry Out Its Enumerated Powers.

DOMA Section 3 is one of eight "rules of construction," each of which is designed by Congress to define words that appear throughout the federal code. Each definition serves as a means of administering a wide variety of federal statutes and programs. The definitions of "marriage" and "spouse" are among the words defined, and as Circuit Judge Straub recognized, those definitions are tailored to carry out a "broad range of federal laws to which marital status is relevant." *See* Windsor II, 699 F.3d at 191 (Straub, J., concurring and dissenting).

Because DOMA Section 3 is designed as a means of carrying out other federal laws and purposes, its constitutionality is determined under the Necessary and Proper Clause. *See* McCulloch, 17 U.S. at 406-12. And, according to the rule of McCulloch, the constitutionality of DOMA Section 3 is initially subject to examination to determine whether it is a valid exercise of a power vested in Congress, before addressing the question whether it is constitutionally prohibited. *See id.* at 421. In McCulloch, the question before the Court was whether Congress had authority to authorize the incorporation of a bank of the United States. Because the Court found nothing in the enumerated powers vested in Congress to create a bank, the Court turned its attention to the "necessary and proper" clause, which prescribes the constitutional rule governing the power of Congress to authorize the incorporation of a bank as a means to the exercise of one or more enumerated powers.

Counsel for Maryland, which sought to tax the bank, argued that the word "necessary" limited Congress's "power to pass all laws ... for carrying into execution" those enumerated powers vested in the general government, contending that only those means "as are indispensable, and without which the power would be nugatory" are constitutionally permissible. *Id.*, 17 U.S. at 413. In response, Chief Justice Marshall observed that the word "necessary" embraced a wide range of meanings, including, "convenient, or useful, or essential." The word, the Chief Justice wrote, "has not a fixed character peculiar to itself[,] admit[ting] of all degrees of comparison, which increase or diminish the impression the mind receives of the urgency it imports":

> A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. [*Id.* at 414.]

Because the word "necessary" has no fixed meaning, Chief Justice Marshall rejected Maryland's argument, asserting that "the choice of means" was vested in Congress which "was free to adopt [any means] which might be appropriate, and which were conducive to the end." *Id.*, 17 U.S. at 415. Thus, the Chief Justice concluded:

> [W]e think the sound construction of the

> constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. [*Id.*, 17 U.S. at 421.]

After stating the oft-repeated McCulloch rule,[10] the Chief Justice summed up the matter:

> [W]here the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the **degree of its necessity,** would be to **pass the line** which circumscribes the judicial department, and to **tread on legislative** ground. This court disclaims all pretensions to such a power. [*Id.*, 17 U.S. at 423 (emphasis added).]

While both courts below purported to find in the "equal protection component" of the Due Process Clause a prohibition against DOMA Section 3, the reasoning of both courts demonstrate that, by ignoring McCulloch, they have substituted their views for those of Congress as to what means are needful for the enforcement of a wide variety of federal laws, and in doing so, both courts have crossed the boundary line dividing the exercise of judicial power vested in the courts from the exercise of legislative power vested in Congress.

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[10] "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and the spirit of the constitution, are constitutional." *Id.*, 17 U.S. at 421-22.

B. The Constitutional Inquiries Engaged in by Both Lower Courts Related to the Degree of Necessity of DOMA Section 3, Not to Any Principled Prohibition in the Due Process Clause.

By employing "intermediate scrutiny" to measure DOMA Section 3's constitutionality, the court of appeals requires that DOMA's definition of marriage "be '**substantially related** to an important government interest.'" Windsor II, 699 F.3d at 185 (emphasis added). Indeed, the court of appeals required the connection between DOMA Section 3 and the congressional policies to be "'**exceedingly** persuasive.'" *Id.* (emphasis added). According to this line of reasoning, it is not enough for DOMA Section 3 to be a "conducive" or an "useful" means to further constitutionally permissible federal interests; indeed, it is not even enough for the connection to be "very necessary"; rather it must be "exceedingly necessary" — which is as close to "absolutely necessary" as possible.

By opening the door to judicial examination of the degree of necessity, the use of a heightened standard of scrutiny enabled the court of appeals (i) to cast "suspicion" on the real purpose of DOMA Section 3 (*id.* at 185), and (ii) to raise doubts on the effectiveness of the means chosen (*id.*), and then (iii) to conclude:

> [b]ecause DOMA is an unprecedented breach of longstanding deference to federalism that singles out same-sex marriage as the only inconsistency (among many) in state law that requires as federal rule to achieve uniformity, the rationale premised on uniformity is **not** an **exceedingly persuasive** justification for DOMA. [*Id.* at 186 (emphasis added).]

In like manner, the court of appeals dismissed DOMA's connection to protecting the federal "fisc" (*i.e.*, treasury), finding it "so broad, touching more than a thousand federal laws, that it is not **substantially related** to fiscal matters." *Id.* at 187 (emphasis added). Under the "heightened scrutiny" standard, it is not enough that DOMA might be useful, conducive, or even somewhat necessary means to carry out numerous federal programs, none of which the court of appeals found to be outside the enumerated powers of Congress.

The court of appeals also found that preserving traditional marriage was neither an "important" nor a sufficiently "substantial" goal to satisfy its heightened scrutiny test. *Id.* at 187. While the court of appeals conceded that "promotion of procreation **can be** an important government objective," it just did "not see how DOMA is **substantially** related to it." *Id.* at 188 (emphasis added). In other words, two members of the majority of the court of appeals panel announced (in 2012), that if they had been members of Congress (in 1996), they would have voted "nay" on DOMA because they were not convinced that Section 3 was necessary enough.

Had the district court judge been serving in the 104th Congress, she too would have joined her appellate judicial colleagues by voting "no." While it is difficult to discern just what standard of review the district court applied to DOMA Section 3, the district court ruminated that "rational basis analysis can vary by context," requiring "intensified scrutiny of purported justifications," or even "special clarity." Windsor I, 833 F. Supp. 2d at 402. After taking an inventory of Congress's justifications for DOMA, the district court, like the court of appeals, assumed that it was a judicial task to determine if there was sufficient nexus between DOMA Section 3 and the federal purposes that Congress believed would be served. *See id.* at 402-06. For example, the district court found that the means chosen by Congress to promote traditional marriage was not very effectual. *Id.* at 403-04. As for Congress's interest in promoting child rearing, the district court found that "DOMA has no **direct** impact on heterosexual couples at all" and thus "its ability to deter those couples from having children outside marriage or incentivize couples that are pregnant to get married, is **remote**, at best." *Id.* at 404 (emphasis added). As for the goal of conserving the nation's financial resources, the district court found the means chosen to be "arbitrary," unworthy of even serious consideration. *Id.* at 406.

To sum up, both the court of appeals and the district court purportedly found that the mythical "equal protection component" of the Fifth Amendment's Due Process Clause entrusted the courts with ample discretion to second-guess and override the means chosen by Congress in the exercise of its powers under the Necessary and Proper Clause. By so ruling, the two courts unconstitutionally crossed the line, usurping legislative power in disregard of the rule in McCulloch that the **degree of necessity** of the means, chosen by Congress to reach a legitimate goal, belongs exclusively to Congress.

C. The Due Process Guarantee Does Not Justify Any Departure from the McCulloch Rule of Deference to Congress's Choice of the Efficacy of Means.

Although the district court toyed with the idea that it might be required to give a reason for second-guessing Congress's choice of means, it declared that it "need not decide ... whether homosexuals are a suspect class." Windsor I, 833 F. Supp. 2d at 402. The court of appeals disagreed, stating that, in order for it to apply "heightened scrutiny," it was required that it first establish homosexuals to be a "quasi-suspect class." Cobbling together four factors from this Court's precedents, the court of appeals concluded that, because homosexuals have been (i) historically discriminated against (ii) for no good societal reason, then because of (iii) the immutability of their sexual orientation and (iv) their political powerlessness, review of DOMA Section 3 "requires heightened scrutiny" under the equal protection component buried in the Fifth Amendment. Windsor II, 699 F.3d at 181-85.

Of these four factors, the court of appeals determined that factors (iii) and (iv) — "[i]mmutability and lack of political power are not strictly necessary factors to identify a suspect class." *Id.* at 181. Yet, it was precisely those two factors that historically have given rise to the notion that, in exceptional cases, courts could intrude upon matters that were otherwise within the discretion of legislatures:

> [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. [United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).]

In support of this proposition, Justice Harlan Fiske Stone cited two cases — McCulloch,[11] in which the Court struck down a state tax on a federally-created instrumentality; and South Carolina v. Barnwell Bros.[12] in which the Court observed that state regulations affecting interstate commerce are constitutionally more vulnerable when the regulatory burden falls principally upon those without the state — such legislation not likely to have been subject to the political restraints exerted on legislation that adversely affects in-state interests.

In this case, it is not the lesbian plaintiff and her fellow New York homosexuals who are "politically powerless," as that term was originally coined and applied in Carolene Products. Rather, here it is the people of the other 49 States who are not citizens of New York and, therefore, who have no say in the decision of the New York judiciary to "recognize[] foreign same-sex marriages before the state passed its marriage statute in 2011." *See* Windsor II, 699 F.3d at 177. Just as the people of the other States had no political standing in Maryland to influence Maryland's decision to tax the Bank of the United States, the people of the other States are excluded from participating in the political decision in New York to redefine marriage, so as to open the door to a whole range of federal benefits that theretofore were available only to persons in a traditional marriage relationship. As Chief Justice Marshall observed in McCulloch:

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[11] *Id.*, 17 U.S. at 428.

[12] 303 U.S. 177, 184 n.2 (1938).

> The **people of a state** ... give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a State to tax them sustained by the same theory. Those means are not given by the people of a particular State, not given by the constituents of the legislature, which claim the right to tax them, but by the **people of all the states**. They are

> given by all, for the benefit of all — and upon theory, should be subjected to that government only which belongs to all. [*Id.*, 17 U.S. at 428-29 (emphasis added).]

Applying this principle, dissenting Circuit Judge Straub recognized that Congress was endowed with the political authority to enact DOMA Section 3 "to maintain the status quo":

> Otherwise, "marriage" and "spouse" for the purposes of federal law would depend on the outcome of [the] debate [over "same-sex marriage] in each state, with the meanings of those terms under federal law changing with any change in any given state. [Windsor II, 699 F.3d at 204 (Straub, J., concurring and dissenting).]

When viewed in this light, DOMA Section 3 protects the politically powerless — not the other way around. By "fr[eezing] federal benefits policy as it existed in 1996 with respect to same-sex marriage,"[13] DOMA Section 3 ensured that Congress, not a legislature or court or plebiscite of a single State, would decide how, if any, recognition of "same-sex marriage" would impact on federal programs that would affect all of the people of the United States.

As a class, homosexuals and their supporters are hardly disenfranchised. As citizens of the United

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[13] Windsor II, 699 F.3d at 204.

States, they are well represented in Congress, the legislative body that enacted DOMA Section 3, and that has the power to modify or repeal it.[14]

D. Homosexuals Are neither Politically Powerless nor Singled Out by Law for Discriminatory Treatment.

As Respondent Bipartisan Legal Advisory Group has well-documented, homosexuals "are far from politically powerless." *See* Brief on the Merits for Respondent BLAG of the U.S. House of Representatives, pp. 51-54. They are not only has the Obama Administration embraced their side in this and similar litigation, President Obama highlighted "gay rights" in his January 21, 2013 inaugural address, declaiming that "[o]ur journey is not complete until our gay brothers and sisters are treated like anyone else under the law — for if we are truly created equal, then surely the love we commit to one another must be equal as well."[15]

Although the court of appeals acknowledged that "homosexuals have [clearly] achieved political successes over the years,"[16] it still questioned whether homosexuals "have the strength to politically protect themselves from wrongful discrimination." *Id.* In order to answer this question impartially, one must first ask what is meant by "wrongful discrimination." As a class, homosexuals have not been discriminated against in the way that the court of appeals has so "easily"[17] assumed. The appellate panel below concluded that "the most telling proof of animus and discrimination is that, for many years and in many states, homosexual conduct was criminal." *Id.* Yet historically, even the crime of sodomy was not so targeted. Rather, it was defined as "carnal copulation against the order of nature by man with man; or in the same unnatural manner with woman; or by man or woman in any manner with a beast." *See* W. Clark, Handbook of Criminal Law § 125, p. 420 (3d ed. West: 1915). Thus, the crime of sodomy was "known in the common law by the convertible and equivalent name[] of 'crime against nature.'" *Id.* at 421. As a "crime against nature," the offense not only extended to opposite sex unnatural couplings, but was one of several sexual offenses that fit under a broad category of "offenses against the public health, safety, comfort, and morals." *Id.* at Chapter XII, p. 398. Among these sexual offenses were bigamy, adultery, fornication, lewdness and illicit cohabitation, incest, miscegenation, and seduction, all of which could be committed by persons of the opposite sex. *See id.* §§ 116-124, pp. 406-28. Rather than a narrow negative purpose, these laws reflected a perceived concern for the public health, safety, comfort, and morals of certain sexual behaviors.

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[14] *See, e.g.*, Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. 111-321.

[15] Inaugural Address by President Barack Obama, http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama.

[16] Windsor II, 699 F.3d at 184.

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[17] *Id.* at 182.

Not only did the court of appeals ignore the broader picture that homosexual behavior was only one of a number of sexual acts prohibited by the criminal law, but it completely overlooked the criminal law revolution beginning in the 1960's with the Model Penal Code which led a nationwide effort to decriminalize private sexual conduct between consenting adults. As one astute observer noted with respect to the new 1971 Oregon Criminal Code[18]:

> Prior to the new Code, Oregon's laws dealing with sexual offenses proscribed a vast array of activities commonly practiced between willing partners. Those prohibitions included adultery, lewd cohabitation, fornication, and sodomy, in addition to others. Chapter 167 of the Oregon Revised Statutes was entitled "Crimes Against Morality and Decency," and the title gave an accurate description of the interests sought to be protected. The former Oregon law, in common with laws in most jurisdictions, was "designed to provide an enormous chastity belt encompassing the whole population and proscribing everything but solitary and joyless masturbation and 'normal coitus' inside wedlock." [G. Fields, "Privacy 'Rights' and the New Oregon Criminal Code," 51 *Or. L. Rev.* 494, 501 (1972).]

Since the 1960's and 1970's the political power of homosexuals and their libertarian and privacy allies has grown, not shrunk.

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[18] Or. Law 1971, ch. 743.

Equally missing from the court of appeals' "easy ... conclu[sion] that homosexuals have suffered a history of discrimination" is its failure to recognize that the statutes defining marriage have not just excluded persons of the same sex from being recognized as married couples, but certain opposite sex unions as well, including incest (such as father/daughter and brother/sister), nonage, venereal disease, impotence, mental incapacity, limited purpose (*e.g.*, immigration), and, of course, bigamy. *See* H. Clark, The Law of Domestic Relations in the United States, pp. 21-124 (West, 2d ed.: 1988). Indeed, "[a]t common law, the second marriage was always void ... and from the earliest history of England polygamy has been treated as an offense against society." Reynolds v. United States, 98 U.S. 145, 164 (1879).

The prohibition against polygamy is especially noteworthy because the court of appeals finding that "[t]he only class affected by Section 3 of DOMA is composed entirely of persons of the same sex who have married each other"[19] is demonstrably false. A polygamous marriage, if recognized by a State, would not meet the DOMA Section 3's standard that a marriage is a union between one man and one woman.

The court of appeals simply eschews engaging in any serious discussion of whether homosexuals as a class deserve special judicial attention on account of political powerlessness or discrimination, preferring instead to impose its views by judicial fiat based on nothing more than personal preference:

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[19] Windsor II, 699 F.3d at 184.

> It is **difficult to say** whether homosexuals are 'under-represented' in positions of power and authority without knowing their number relative to the heterosexual population. But **it is safe to say** that the seemingly small number of acknowledged homosexuals so situated is attributable either to **hostility** that excludes them or to a **hostility** that keeps their sexual preference private.... [Windsor II, 699 F.3d at 184-85 (emphasis added).]

So quick to condemn DOMA Section 3 on grounds of "hostility," the court of appeals' concluding apologia — that it reached its decision by "straightforward legal analysis"[20] — is impossible to accept. Remarkably, the court itself admits that its opinion "sidesteps the fair point that same-sex marriage is unknown to history and tradition,"[21] by artificially separating the civil aspect of marriage from its unquestionable religious foundation. *See* H. Clark's Law of Domestic Relations at 21-25. By so secularizing marriage, the court of appeals has disregarded the historical interrelationship between Biblical Christianity[22] and the American constitutional republic. *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 465-70 (1892). As Justice Joseph Story remarked, upon his inauguration as Dane Professor of Law at Harvard University, remarked that "[t]here never has been a period in which the Common Law did not recognise Christianity as lying at its foundations," and that "[t]he perfect lawyer ... should examine well the precepts of religion, as the only solid basis of civil society...." J. Story, "Discourse Pronounced upon the Inauguration of the Author, as Dane Professor of Law in Harvard University, August 25th 1829," reprinted in The Legal Mind in America, pp. 178, 185-86 (P. Miller, ed., Cornell Univ. Press: 1962).

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[20] *Id.* at 188.

[21] *Id.*

E. Stripped of the Judicially Invented Equal Protection Component, DOMA Section 3 Is Not Prohibited by the Due Process Clause.

But for this Court's atextual precedents interjecting an "equal protection component" into the Fifth Amendment Due Process Clause, neither the court of appeals nor the district court opinion would have been possible. Accordingly, it would be a mistake for this Court (i) to limit its review solely to whether the court of appeals contravened this Court's equal protection precedents, or (ii) if it finds the court of appeals opinion does conform with those precedents, to limit itself to formulate its own explanation of those precedents. Rather, in utmost respect for Congress's judgment and good faith, this Court should examine Section 3 of DOMA to determine if it conforms to the United States Constitution, not whether it conforms to its own precedents. After all, Article VI of the Constitution states that "the laws of the United States which shall be made in pursuance" of the Constitution — not in pursuance of this Court's judicial opinions — is "the supreme Law of the Land." Indeed, in establishing the practice of judicial review of the constitutionality of a statute duly enacted by the Congress of the United States, this Court has acknowledged that it is because "[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803). But the Constitution was not written for Congress alone. As the Marbury Court also stated, "the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature."[23]

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[22] Indeed, the courts below give no regard whatsoever to the originator and definer of marriage who created us male and female (*see* Genesis 1:26-28) and enabled male and female couples to procreate offspring in his image (*see* Genesis 5:1-3).

> God's mandate and benediction that the **man and the woman** procreate his image is to be exercised within the confines of monogamy. God institutes marriage by giving Adam his bride, defining them as **husband and wife**, and ordains the man to leave his parents and cling to his wife, forming a new home. By instituting marriage in the Garden of Eden ... God represents marriage as an ideal and holy state, an act of worship. (Heb. 13:4). [B. Waltke, An Old Testament Theology (Zondervan 2007), p. 237 (emphasis added).]

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[23] *See id.* at 179-180.

Both opinions of the courts below are based upon the assumption that the "equal protection component" of the Fifth Amendment is identical to the Equal Protection Clause of the Fourteenth Amendment. There is ample support for this claim in this Court's precedents. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217 (1995). This position would be unremarkable if supported by the constitutional text, but it is not. Rather, this Court's equal protection doctrine, insofar as it rests upon the Fifth Amendment Due Process Clause, has been developed in flagrant disregard of a well-established rule of construction dating back to at least 1840: "In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840). If the Due Process Clause of the Fifth Amendment contains the same equal protection standard as the Equal Protection Clause of the Fourteenth Amendment, then the latter guarantee was "needlessly added" to an amendment that, like the Fifth Amendment, already contained a provision that no person may be "deprive[d] ... of life, liberty or property without due process of law." In short, this Court's equal protection doctrine renders the Fourteenth Amendment's equal protection guarantee "superfluous or unmeaning,"[24] the due process guarantee being sufficient by itself to have imposed the "equal protection" guarantee upon the States. *See, e.g.*, L.

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[24] *Id.* at 571.

Seidman, Constitutional Law: Equal Protection of the Laws, at 32-33 (Foundation Press, New York: 2003).

Additionally, this Court's current equal protection doctrine utterly disrespects the "high talent, the caution, and the foresight of the illustrious men who framed" the Constitution, in which "[e]very word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood." Holmes, 39 U.S. at 571. In the Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873), decided just five years after the ratification of the Fourteenth Amendment, this Court treated the due process and equal protection guarantees as distinct and independent limits upon the States, each of which embodied entirely different principles dealing with issues arising from entirely different historical periods. *Id.* at 80-81. The Due Process Clause was traced back to the late 18th century, having made its appearance not only in one of the first 10 amendments to the United States Constitution, but "in the constitutions of nearly all the States, as a restraint upon the power of the States." *Id.* at 80. On the other hand, the Equal Protection Clause grew out of the nation's post civil war period, and was designed to remedy the evil of the "existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class...." *Id.* at 81.[25]

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[25] Even the dissenting justices in the Slaughter House Cases did not find an "equal protection component" in the due process guarantee. Rather, they relied primarily upon the "privileges and immunities" guarantee as having secured to everyone access to

Until May 17, 1954, the day upon which this Court struck down "racially segregated public schools" in the States under the equal protection guarantee of the Fourteenth Amendment,[26] it was generally understood that the due process guarantee of the Fifth Amendment did not have an equal protection component. As this Court observed in Adarand, "[t]hrough the 1940's, this Court had routinely taken the view ... that, 'unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress.'" *Id.* at 213. However, in Bolling v. Sharpe, 347 U.S. 497 (1954), this Court shoehorned equal protection into the due process text by sheer will, declaring "it would be **unthinkable** that the same Constitution would impose a lesser duty on the Federal Government." *Id.* at 500 (emphasis added). *See also* Adarand, 515 U.S. at 215-16.

To the contrary, it was and is eminently "thinkable" that the Reconstruction Congress, led by abolitionist Republicans, would propose an amendment to the Constitution that would increase the powers of the federal government at the expense of the States. Indeed, on February 13 and 26, 1866, Congressman Bingham of Ohio introduced the first version of what would become the Fourteenth Amendment. It read that "'**The Congress shall have**

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the "ordinary avocations of life" without "discrimination" in favor of state-granted monopolies. *See, e.g., id.* at 96-111 (Field, J., dissenting) and at 111-122 (Bradley, J., dissenting).

[26] *See* Brown v. Board of Education, 347 U.S. 483 (1954).

the power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of the citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty and property.'" *See* G. Stone, L. Seidman, C. Sunstein, and M. Tushnet, Constitutional Law, p. 482 (2nd ed., Little, Brown: 1991) (emphasis added). Later, on April 30, 1866, the Joint Committee on Reconstruction substituted a new proposal, which read:

> **No state shall** make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction equal protection of the laws. [*See id.* at 482-83 (emphasis added).]

Additionally, the Committee "coupled" these prohibitions against the States with a grant of power to Congress to enforce them by "appropriate legislation." *Id.* at 483. Had Congress intended that the equal protection guarantee apply to the federal government as well as the states, it would have so written it, just as it did in the Thirteenth Amendment, outlawing slavery and involuntary servitude in the United States, and in the Fifteenth Amendment, protecting the right to vote in both state and federal elections free from racial discrimination.

In sum, this Court's Fifth Amendment equal protection doctrine "disregard[s] a deliberate choice of words and their natural meaning," and is, therefore, unquestionably "a departure from the first principle of constitutional interpretation" that "'every word must have its due force, and appropriate meaning....'" *See* Wright v. United States, 302 U.S. 583, 588 (1938).

The question remains whether the due process guarantee, standing alone, prohibits DOMA Section 3. Originally, due process of law was limited to determine whether a claimed life, liberty, or property interest could be denied without judicial process. *See, e.g.*, Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856). *See also* Sources of Our Liberties, p. 132 (R. Perry & J. Cooper, eds., Rev. Ed, ABA Found: 1978). Any claim based upon the proposition that the Due Process Clause protected a certain substantive life, liberty, or property interest was subject to summary dismissal. *See, e.g.*, The Slaughter House Cases, 83 U.S. (16 Wall.) 36, 80-81 (1873).

From 1905 through the mid-1930's, however, the courts rejected this understanding, extending due process protection to certain common law economic rights, regardless of whether those rights were afforded judicial process before being denied. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). While the end of substantive protection of economic rights did not herald a wholesale return to the original textual meaning of procedural due process,[27] this Court did rule in at least three cases that the Due Process Clause did not subject economic measures even to a "rational basis" test. *See* Olsen v. Nebraska, 313 U.S. 236 (1941); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); and Ferguson v. Skrupa, 372 U.S. 726 (1963). Rather, as Justice Black stated in Ferguson:

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[27] Carolene Products, 304 U.S. at 154. As the district court observed, with respect "'commercial, tax and like regulation,'"

> Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a 'superlegislature to weigh the wisdom of legislation.....'" [*Id.*, 372 U.S. at 731.]

While there may be arguments Ms. Windsor and the Obama Administration might want to raise to support their view that limiting certain tax benefits to only persons within a traditional marriage relationship has no social utility, such arguments are properly addressed to Congress, not the Courts. The Fifth Amendment's Due Process Clause neither contains an "equal protection component" nor, by the plain meaning of the words of its text, does it elevate this Court over Congress in determining the degree of need of any particular means to carry out constitutionally permissible federal purposes.

"courts must accept as constitutional those legislative classifications that bear a rational relationship to a legitimate government interest." [Windsor I, 833 F. Supp. 2d at 400.]

CONCLUSION

For the reasons stated, the decision of the court of appeals below should be reversed.

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AMICUS
CURIAE
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RECORD
AND
BRIEFS

No. 12-307

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

Brief *Amicus Curiae* on Jurisdiction and Standing Questions of Citizens United's National Committee for Family, Faith and Prayer, Citizens United Fdn., U.S. Justice Fdn., Gun Owners of America, Inc., Gun Owners Fdn., The Lincoln Institute, Public Advocate of the U.S., Declaration Alliance, Western Center for Journalism, Institute on the Constitution, Abraham Lincoln Foundation, English First, English First Fdn., CLDEF, Protect Marriage MD PAC, Delegate Bob Marshall, and Senator Dick Black in Support of Resp. Bipartisan Legal Advisory Group

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. BLAG HAS ARTICLE III STANDING 4

  A. BLAG's Standing is Not Determined as a Party Plaintiff 4

  B. BLAG's Standing is Determined as a Party Defendant 7

  C. Congress's Standing Need Not Be Based on a Claim of Judicial Nullification 8

  D. Congress Has a Specific Interest in Laying and Collecting Taxes 11

  E. Congress Has a Specific Interest in Protecting its Power over the Purse 13

  F. The House of Representatives Serves Different Constituencies than the Senate, and Thus Has a Distinct, Protectable Interest, Separate from Congress as a Whole 16

G. The House of Representatives Has a Specific Interest in Protecting its Power over Origination of Revenue Raising Bills 18

II. THE VESTING OF THE EXECUTIVE POWER IN THE PRESIDENT DOES NOT PRECLUDE BLAG FROM HAVING ARTICLE III STANDING 19

III. THE UNITED STATES IS THE REAL DEFENDANT PARTY IN INTEREST, PRESENTING A GENUINE CASE OR CONTROVERSY 24

IV. BOTH CHADHA AND LOVETT SUPPORT JURISDICTION IN THIS CASE 27

V. VESTING LEGISLATIVE POWERS IN CONGRESS DOES NOT FORECLOSE BLAG FROM HAVING ARTICLE III STANDING 30

CONCLUSION 35

TABLE OF AUTHORITIES

Page

U.S. CONSTITUTION
Article I, Section 1 31
Article I, Section 7, Clause 1 19
Article I, Section 7, Clause 2 . . . . 17, 21
Article I, Section 8, Clause 1 12
Article I, Section 9, Clause 7 . . . . 14, 15, 16
Article II, Section 1 . . . . 20, 34
Article II, Section 2, Clause 2 . . . . 18, 31
Article II, Section 3 . . . . 3, 20, 21
Article III, Section 2 . . . . 5, 7, 19, 20, 23
Amendment XVI 12

STATUTES
Defense of Marriage Act . . . . 2, *passim*
28 U.S.C. Section 515 25
28 U.S.C. Section 1252 27
28 U.S.C. Section 1254 27

CASES
Bob Jones University v. United States, 461 U.S. 574 (1983) 26
Buckley v. Valeo, 434 U.S. 1 (1976) 31, 33
Confiscation Cases, 74 U.S. 454 (1868) 34
Diamond v. Charles, 476 U.S. 54 (1986) 7
I.N.S. v. Chadha, 462 U.S. 919 (1983) . . . . 4, *passim*
Marbury v. Madison, 5 U.S. 137 (1803) 23
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 11
Newdow v. United States, 313 F.3d 495 (9th Cir. 2002) 8
Raines v. Byrd, 521 U.S. 811 (1997) 5

United States v. Lovett, 328 U.S. 303 (1979) 4, 18, 29, 30

United States v. Munoz-Flores, 495 U.S. 385 (1990) 17, 18, 19

MISCELLANEOUS

Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011) 24, 25

F.R.Civ.P. Rule 24 . . . . 7, 8, 33

The Federalist (G. Carey and J. McClellan, eds., Liberty Fund: 2001) 13, 23

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J. Story, Commentaries on the Constitution (1833) 15, 16

L. Tribe, American Constitutional Law (Foundation Press: 2d ed. 1988) 9

St. George Tucker, View of the Constitution of the United States (Liberty Fund: 1999) 23

INTEREST OF THE *AMICI CURIAE*[1]

Citizens United (including its National Committee for Family, Faith and Prayer), Gun Owners of America, Inc., Public Advocate of the United States, Abraham Lincoln Foundation for Public Policy Research, Inc., and English First are nonprofit social welfare organizations, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC").

Citizens United Foundation, U.S. Justice Foundation, Gun Owners Foundation, The Lincoln Institute for Research and Education, Declaration Alliance, Western Center for Journalism, English First Foundation, and Conservative Legal Defense and Education Fund ("CLDEF") are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3).

The Institute on the Constitution is an educational organization. Project Marriage Maryland PAC is a political committee.

Delegate Bob Marshall is a senior member of the Virginia House of Delegates, and the author of the Virginia Marriage Constitutional Amendment.

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[1] It is hereby certified that counsel for petitioner and for respondent Bipartisan Legal Advisory Group filed blanket consents with the Court, and that counsel for respondent Windsor has consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than these *amici* [illegible] their members, or their counsel made a monetary contribution to its preparation or submission.

Senator Dick Black is a member of the Virginia State Senate.

Most of these *amici* have filed *amicus* briefs in this and other courts, and each is interested in the proper interpretation of state and federal constitutions and statutes. Most of the *amici curiae* herein filed an *amicus* brief in support of the Respondents on the merits of this case.[2] Most of the *amici curiae* herein also filed an *amicus* brief in support of the petition for certiorari in a similar case regarding the constitutionality of the Defense of Marriage Act ("DOMA").[3]

SUMMARY OF ARGUMENT

In order to have standing to defend DOMA, the Bipartisan Legal Advisory Group ("BLAG") need not meet the standing requirement for a plaintiff. If that were so, even the Executive Branch would fail the test. Rather, as an intervenor-defendant under Rule 24(a)(2) of the Federal Rules of Civil Procedure, BLAG need only demonstrate (i) that it has a cognizable interest in defending DOMA and (ii) that its interest is concrete and particular, not a generalized grievance.

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[2] http://lawandfreedom.com/site/constitutional/CU_DOMA_Amicus_SC.pdf

[3] *See* Brief *Amicus Curiae* of Capitol Hill Prayer Alert Foundation, *et al.*, in Bipartisan Legal Advisory Group v. Gill, No. 12-13 (Aug. 2, 2012). http://www.lawandfreedom.com/site/constitutional/DOMA_amicus.pdf.

BLAG has claimed that it has standing on the ground that its core legislative function would be impaired because the Executive Branch seeks a decision from this Court that would "completely nullify" DOMA. The Court need not reach the question whether a judicial decision of unconstitutionality of DOMA would erase it from the statute books. Rather, Congress as a whole, and the House as one of its parts, have several concrete and particular interests in defending DOMA.

First, Article I of the Constitution gives Congress not only the authority to "lay," but also the power to "collect" taxes, which gives it the right ensure that taxes that are levied will be collected. Second, Congress also has the power to protect the nation's purse, vested with the authority to ensure that federal spending be drawn out of appropriations made by law. Third, as a representative body of with constituencies different from that of the Senate, the House serves as check on the latter's power. And fourth, the House has an interest distinct from the Senate in that all revenue raising bills must originate with it, and the refusal to defend DOMA implicates that power.

The fact that the Executive power is vested in the President, including the duty to "take care that the laws be faithfully executed," does not preclude the House from defending DOMA. The Take Care Clause is not a grant of power, but rather a limitation on it — obliging the President to defend the laws of the United States. The President may not, by refusing to defend a statute, unilaterally decide the constitutionality of that statute.

As an alternative theory, Congress should not be required to establish that it have standing to be a defendant in this suit. Congress is not appearing as a party defending Congressional interests. Rather, Congress is simply attempting to litigate this case on behalf of the United States, after the Executive Branch declined to do so.

Finally, contrary to the argument by the appointed *Amica Curiae*, Chadha and Lovett support jurisdiction in this case. Because the legislative branch appeared as *amicus curiae* in both cases, the Solicitor General contends that the House may participate in this case only in an *amicus* capacity, not as a party representing the United States. The Solicitor General has argued that the United States must speak with one voice — and that voice is the President's — because the Constitution vests in the President the full sovereignty of the nation to enforce the law. But the President's authority is not exclusive. And he certainly does not possess the prerogative power unilaterally to decide the constitutionality of DOMA by refusing to defend it in court.

ARGUMENT

I. BLAG HAS ARTICLE III STANDING.

A. BLAG's Standing is Not Determined as a Party Plaintiff.

The court-appointed *amica curiae* ("Ct. Amica") has recognized that this case was initiated against the United States by an "executor of [an] estate ... seeking a tax refund...."[4] However, she has addressed the question of Article III standing as if the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") were the plaintiff, seeking a declaratory judgment that Section 3 of the Defense of Marriage Act ("DOMA") is constitutional. Citing four cases, each of which addresses whether a plaintiff has Article III standing, Ct. Amica launches her argument against standing with the statement that:

> An irreducible component of Article III standing is a "concrete," "personal **injury**," "fairly traceable to the **defendant's** allegedly unlawful **conduct** and likely to be redressed by the **requested relief**." [Ct. Amica Br., p. 8 (emphasis added).]

While true if applied to a plaintiff, this statement makes no sense in the context of this case when applied to BLAG's standing as a defendant. Yet, relying foremost on Raines v. Byrd, 521 U.S. 811 (1997) — in which this Court found that plaintiff members of Congress did not have standing to wage a court battle over the constitutionality of the Line Item Veto Act — Ct. Amica asserts that "BLAG's claim of injury arising from the constitutional challenge to DOMA ... falls short of Article III's particularized injury requirement." *Id.* at 13. By approaching the question of standing from the plaintiff's side, as if BLAG were seeking a ruling that DOMA Section 3 is constitutional in all its applications, Ct. Amica frees herself to argue that "BLAG asserts only a generalized interest in seeing statutes that Congress enacted implemented, an interest that is widely shared by the people at large." *Id.* at 8.

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[4] Brief for Court-Appointed *Amica Curiae* Addressing Jurisdiction ("Ct. Amica Br."), p. 2.

According to Ct. Amica's inverted approach to the standing question, even the Executive Branch would not have standing, since its interest in DOMA Section 3 is no more than what Ct. Amica has characterized BLAG's interest to be — a "generalized interest in seeing [DOMA] implemented, an interest that is widely shared by the people at large." *Id.* It would be unthinkable, however, even to entertain such an argument.[5]

It should be no different here, where the House is defending DOMA. As Ct. Amica has recounted, BLAG sought permission from the district court to intervene under Rule 24 of the Federal Rules of Civil Procedure ("F.R.Civ.P."), and the "court then allowed BLAG to intervene as of right (and as a 'full party') under Rule 24(a)(2), because [the district court found that] BLAG has a **cognizable interest** in defending the enforceability of statutes the House has passed when the President declines to enforce them...." Ct. Amica Br., pp. 3-4 (emphasis added). Thus, whether BLAG has constitutional standing turns on whether BLAG has a sufficiently protectable interest as a defendant.

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[5] It is indeed unthinkable that Congress would not have standing. If Congress lacks standing, then no one would have standing to step in for the Executive who has refused to act. If there is no proper defendant, there is no "case or controversy," and thus this Court lacks jurisdiction to entertain an appeal. If that were the case, and the Court of Appeals below was also without jurisdiction, and its opinion should be overturned. The question would then become whether the district court had jurisdiction. Since the government defended DOMA at that stage, presumably the district court's opinion would stand. If the federal district court in this case is the final arbiter of the constitutionality of DOMA, then its opinion presumably would only apply to that district, and every other district court could come to its own conclusion. The IRS could never enforce the tax code if a taxpayer could simply move to another district. If Congress lacks standing, and this court has no jurisdiction, confusion in the lower federal and state courts will reign.

B. BLAG's Standing is Determined as a Party Defendant.

In Diamond v. Charles, this Court declined to "decide ... whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III." *Id.*, 476 U.S. 54, 69 (1986). It may be argued, as it was in Diamond, that "[t]o continue this suit" in light of the refusal of the executive department to defend the constitutionality of DOMA Section 3,[6] the respondent "must satisfy the requirements of Art. III." *See id.* Without conceding that point, these amici submit that BLAG both meets the requirements of Rule 24(a)(2), and also has Article III standing.

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[6] In Argument III below, these amici contend that there remains a case or controversy between Windsor and the United States because, as the court of appeals below has explained, "[n]otwithstanding the withdrawal of its advocacy, the United States continues to enforce Section 3 of DOMA, which is indeed why Windsor does not have her money." *See* Windsor v. United States, 699 F.3d 169, 176 (2d Cir. 2012).

F.R.Civ.P. Rule 24(a)(2) states that "the court **must** permit anyone to intervene who ... claims an **interest** relating to the **property** ... that is the **subject of the action**, and is so situated that **disposing of the action** may as a practical matter **impair or impede** the movant's ability to protect its **interest**, unless existing parties adequately represent that interest." (Emphasis added.) As noted above, the subject matter of this lawsuit is whether the plaintiff Windsor is entitled to a tax refund of $363,053. If DOMA Section 3's definition of marriage as a union of a man and a woman unconstitutionally discriminates against Windsor, then the United States will be obligated to draw from its treasury and pay $363,503 to Windsor. If, however, Section 3 of DOMA is constitutional, then the money will remain in the United States treasury as a lawfully collected tax.

BLAG's interest as an intervenor-defendant, then, is not just a "general desire to see [DOMA] enforced as written, such as that alleged by the Senate as intervenor-defendant in Newdow v. United States, 313 F.3d 495, 498 (9th Cir. 2002). Rather BLAG's interest is concrete and particularized.

C. Congress's Standing Need Not Be Based on a Claim of Judicial Nullification.

In its brief on jurisdiction, BLAG claims it has Article III standing because the Executive Branch, "by invoking the powers of the [judicial] branch of government" to declare DOMA Section 3 unconstitutional, has "'completely nullified'" DOMA, thereby undermining Congress's "core lawmaking function." *See* Brief on Jurisdiction for Respondent BLAG ("BLAG Juris. Br."), p. 13. BLAG argues that it is one thing for the executive simply to choose not to enforce DOMA based solely upon the Obama administration's view that DOMA is unconstitutional. *Id.*, p. 12. But it is quite another thing, BLAG believes, for the Executive Branch to take "the position that it would issue Ms. Windsor a refund only if the district court declared DOMA unconstitutional." *Id.*, p. 12. In the former case, BLAG asserts DOMA "would remain on the books and could be enforced by subsequent administrations." *Id.* But in the latter case, if this Court finds DOMA Section 3 unconstitutional, DOMA Section 3 would be erased from the statute books, "permanently undo[ing] the *House's* constitutionally mandated role in the passage of a law...." *Id.*, pp. 14-15.

BLAG's position — that a judicial ruling of unconstitutionality completely nullifies a federal statute, so that Congress would be required to reenact that statute for it to become law again — is a disputed proposition. While it is "perhaps the dominant view" that a statute found unconstitutional by the courts "is not a law ... as though it had never been passed;" the "opposite position refuses to grant such import to a judicial pronouncement of unconstitutionality in a given case." *See* L. Tribe, American Constitutional Law, § 3.3, p. 27 (Foundation Press: 2d ed. 1988). In support of the latter view, Stanford Law Professor Gerald Gunther has ably stated that "[u]nder the classic Marbury theory, a court confronted with an unconstitutional statute simply refuses enforcement to that law in the case before it." G. Gunther, Constitutional Law, p. 28 (Foundation Press: 12th ed. 1985). Thus, Professor Gunther has observed:

> [A] law held unconstitutional in an American court is by no means so wholly a nullity, as the Attorney General quite persuasively advised President Roosevelt in 1937[,] "that the courts have no power to repeal or abolish a statute, and notwithstanding a decision holding it unconstitutional a statute continues to remain on the statute books." [*Id.*]

Happily, however, BLAG's standing does not turn on whether DOMA Section 3 is rendered a "complete nullity" by a judicial ruling. Even if such a judicial decision does not amount to judicial nullification, and instead binds only the parties to the case, then even so, under the doctrine of stare decisis,[7] that decision would practically nullify the enforcement of DOMA Section 3.

Furthermore, as BLAG has pointed out, if DOMA Section 3 is found unconstitutional under the "heightened standard of review for legislation that classifies on the basis of sexual orientation," it will also "diminish the House's legislative power [to enact] legislation that classifies on the basis of sexual orientation." BLAG Juris. Br., p. 13. Indeed, as these *amici* have pointed out in their merits brief, imposing a heightened standard of review for such classifications would dramatically diminish Congress's power under the Necessary and Proper Clause, as employed since McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).[8] As BLAG has asserted, the "House's interest in the scope of its legislative powers is not widely shared by the populace at large" and, therefore, its "interests in this case are concrete and particularized, not generalized grievances." BLAG Juris. Br., p. 14.

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[7] *See* G. Gunther, Constitutional Law, p. 28

D. Congress Has a Specific Interest in Laying and Collecting Taxes.

Despite the fact that the American people have no enumerated legislative powers in the U.S. Constitution, Ct. Amica insists that the House's interest in the tax refund from the United States treasury is indistinguishable from the "diffuse, generalized interests of all citizens." Ct. Amica Br., p. 7. Indeed, in an effort to distinguish this case from I.N.S. v. Chadha,[9] Ct. Amica asserts that BLAG's interest in the $365,503 is only a "generic, broadly held interest in the constitutionality of laws for their own sake," and not an interest "to defend distinct, statutorily created powers of the Houses of Congress that were specifically, concretely and uniquely tied to the provisions of the particular statute the constitutionality of which was at issue." Ct. Amica

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[8] *See Amicus Curiae* Brief on the Merits of Citizens United's National Committee for Family, Faith and Prayer, *et al* ("C.U. Merits Br."), pp. 16-26.

[9] 462 U.S. 919 (1983).

Br., p. 10. Ct. Amica's claim ignores the congressional role in the levying of taxes.

Article I, Section 8, Clause 1 vests in Congress the enumerated "power to **lay and collect** taxes...." (Emphasis added.) Similarly, the Sixteenth Amendment confers upon Congress "the power to **lay and collect** taxes on incomes, from whatever source derived...." (Emphasis added.) It is no accident that the Constitution explicitly vests Congress with the full power to tax (subject only to a presidential veto), including the authority to specify the means by which such taxes are collected. Under the Articles of Confederation, the Continental Congress found that its essentially voluntary "requisitions" to the States "have been so irregular in their operation, so uncertain in their collection, and so evidently unproductive, that a reliance on them ... would be dangerous to the welfare and peace of the Union." *See* 30 Journals of the Continental Congress (15 Feb. 1786), reprinted as item 1 in 2 The Founders' Constitution, p. 408 (P. Kurland & R. Lerner, eds.) (Univ. Chi.: 1987) (hereinafter "Founders"). Vesting Congress with a more complete power to both levy and to collect taxes, Alexander Hamilton observed, was essential, because:

> [m]oney is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions. A **complete power, therefore, to procure** a regular and adequate supply of it ... may be regarded as an indispensable ingredient in every constitution. From a deficiency in this

> particular, one of two evils must ensue; either the people must be subjected to continual plunder ... or the government must sink into a fatal atrophy.... [*Federalist No. 30*, pp. 145-46 (G. Carey and J. McClellan, eds., Liberty Fund: 2001) (emphasis added).]

Thus, to free Congress from depending on the States to raise and collect necessary revenues, Congress was fully empowered to "make all laws which shall be necessary and proper for carrying into execution" its power not only to levy taxes, but also to collect them. Indeed, DOMA Section 3 is a constitutionally "necessary and proper" exercise of congressional power regarding the spousal tax exemption on decedent estates. *See* C.U. Merits Br., pp. 5-13.

E. Congress Has a Specific Interest in Protecting its Power over the Purse.

DOMA Section 3 is not just a "necessary and proper" means enacted by Congress to carry out its taxing powers. Rather, it is also a constitutionally necessary and proper means enabling Congress to control the nation's purse. Indeed, "the legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated." *Federalist No. 78*, *supra*, p. 402. A judgment in favor of Windsor could not only "impair or impede [Congress'] ability to protect its interest"[10] in its power to lay and collect taxes, but also it could infringe on its duty "to pay the debts and provide for the common defense and general welfare."[11] BLAG's standing, then, is properly resolved by also addressing Congress' specific interest in the application of DOMA Section 3 to Windsor's claim of entitlement to a tax refund. *See* Brief on the Jurisdictional Questions for Respondent Edith Schlain Windsor ("Windsor Juris. Br."), p. 13.

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[10] F.R.Civ.P. 24(a)(2).

Indeed, if Ms. Windsor wins, she would be entitled to an order that she be paid out of the Judgment Fund, enacted by Congress pursuant to its appropriations power. *See id.*, pp. 33-34. Article I, Section 9, Clause 7 states that "[n]o money shall be drawn from the Treasury, but in consequence of appropriations made by law." Congress's interest, then, is not whether DOMA Section 3 is constitutional in the abstract, as the Ct. Amica presents it to be,[12] but whether DOMA serves as a constitutional means to perform its duty to pay the debts and provide for the common defense and general welfare.

As pointed out in the court of appeals below by dissenting Judge Straub, DOMA Section 3's definition of marriage was designed, in part, to "'preserv[e] scarce government resources.'" Windsor v. United States, 699 F.3d 169, 191 (2d Cir. 2012) (Straub, J., dissenting). In addition to applying the definition of marriage to the federal tax laws generally, DOMA Section 3 applies to a myriad of federal benefits programs (*id.* at 191-92), all of which are supported appropriations by Congress, funded by tax revenues and borrowing.

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[11] Article I, Section 8, Clause 1.

[12] *See* Ct. Amica Br., pp. 7 and 13.

While Article I, Section 9, Clause 7 appears in a section composed of limits upon Congress, Clause 7 also vests power in Congress, with a concomitant check upon the President and even upon the judiciary. With respect to the power vested in Congress, Joseph Story observed:

> As all the taxes raised from the people, as well as the revenues arising from other sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that congress should possess the power to decide how and when any money should be applied for these purposes. [3 J. Story, Commentaries on the Constitution, §1342 (1833).]

With respect to the check on the President, Story commented:

> If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all of its monied resources at his pleasure. [*Id.*]

And with respect to the check on the judiciary, Story conceded:

> A learned commentator has ... thought that the provision ... is defective in not having

> enabled the creditors of the government, and other persons having vested claims against it, to recover, and be paid the amount judicially ascertained to be due to them out of the public treasury, without any appropriation. [Otherwise] it might give an opportunity for collusion and corruption in the management of suits between the claimant, and the officers of the government.... [*Id. at* § 1343.]

In short, Article I, Section 9, Clause 7 makes Congress "the guardian of [the United States] treasury" not only against executive "profusion and extravagance," but also from judicial "collusion and corruption." *Id.* at § 1342-43. As an intervening defendant in this case, BLAG has not only a particularized interest in the amount the estate tax contributes to the public fisc, but also in the payment of any judgment out of the nation's purse. *See* Windsor Juris. Br., pp. 33-34.

F. The House of Representatives Serves Different Constituencies than the Senate, and Thus Has a Distinct, Protectable Interest, Separate from Congress as a Whole.

BLAG has plainly demonstrated that "there is a concrete threat to the institutional prerogatives of the legislature," implicating separation of powers — as Ct. Amica has claimed that it must.[13] Nevertheless, Ct.

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[13] *See* Ct. Amica Br., pp. 9, 13.

Amica insists additionally that "there can be no judicially cognizable injury to Congress absent both houses' action...." *Id.* at 16. Rather, according to Ct. Amica, BLAG must also demonstrate that there is a concrete threat to the prerogatives of the House, as distinct from the Senate. *Id.*

There is no doubt that the legislative department of the United States government must act in unity for a bill to become a law. *See* Article I, Section 7, Clause 2. But the very purpose and nature of a bicameral representative body is for each to serve as a check and balance on the other. *See* United States v. Munoz-Flores, 495 U.S. 385, 394 (1990). Indeed, the two houses of Congress represent quite different constituencies. The Senate is composed of 100 senators, two from each state without regard to population, and elected to terms of six years. The House of Representatives is composed of 435 members, apportioned by population of the 50 states, and elected every two years. Each house is governed separately by its own rules of procedure, practices and traditions. Ct. Amica does not — and indeed cannot — point to anything in the Constitution dictating that Article III standing principles require the two houses to act jointly. To the contrary, "the authors of the Constitution divided [certain] functions between the two Houses based in part on their perceptions of the differing characteristics of the entities."[14] Munoz-Flores, 495 U.S. at 395.

The only reason offered by Ct. Amica in support of its position that the houses must be united before they can defend DOMA is that "[t]o hold otherwise would make congressional interventions far more likely anytime the Executive declines to defend" the constitutionality of a statute, and "thereby [to] increas[e] the risks of federal courts being called on to mediate what might be partisan disagreements between elected public officials." Ct. Amica Br., p. 16. If that were to occur, the federal courts would have any number of weapons in their judicial arsenal to stay above any strictly political fray, not the least of which is the justiciability of the issues presented to it. *See, e.g.*, United States v. Lovett, 328 U.S. 303, 313 (1979).

G. The House of Representatives Has a Specific Interest in Protecting its Power over Origination of Revenue Raising Bills.

Additionally, the House of Representatives has a particular institutional interest, distinct from the

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[14] Additionally, the House and the Senate have different roles in checking and balancing the exercise of executive power. While the Senate has the power to withhold its consent from a presidential appointment, the House plays no role in the appointment process. *See* Article II, Section 2, Clause 2. While the Senate gave its consent to President Obama's appointment of Eric Holder as Attorney General, the House had no similar opportunity to assess Mr. Holder's suitability to the office. The House, therefore, may have less inhibition to check the Attorney General's decision not to defend the constitutionality of DOMA.

Senate, that provides an additional reason for finding that BLAG has Article III standing in this case. Windsor seeks a refund of estate taxes paid, based upon a claim of unconstitutionality that, if sustained, would have a substantial impact not only upon the revenues raised from taxable decedent estates, but also on other taxes levied according to the Internal Revenue Code. Not only does Article 1, Section 7, Clause 1 require that "[a]ll bills for raising revenue shall originate in the House of Representatives," but it is the prerogative of the House to "refus[e] to pass a bill if it believes that the Origination Clause has been violated." *See* Munoz-Flores, 495 U.S. at 392. And it is also the House's prerogative to decide whether a bill that raises revenue is of the kind that must originate in the House. *See id.* at 395-401. Thus, the application of DOMA Section 3 in this case, and in the array of tax and benefit programs, will impact the House of Representatives in a way different from the Senate, the House being "more accountable to the people [in performing its] primary role in raising revenue." *Id.* at 395.

II. THE VESTING OF THE EXECUTIVE POWER IN THE PRESIDENT DOES NOT PRECLUDE BLAG FROM HAVING ARTICLE III STANDING.

Notwithstanding these Article I interests, implicating separation of powers among the three branches and within the legislative branch, itself, Ct. Amica insists that it would be a usurpation of "the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,'" if this Court holds that BLAG has Article III standing. Ct. Amica Br., p. 15 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992). Ct. Amica argues that Article II, Section 3 of the Constitution vests solely in the President the "decision[] not to defend a law based on determinations of its unconstitutionality." *Id.*, p. 15. If true, then neither the House, nor the Senate, nor both together, could ever have Article III standing to defend the constitutionality of a statute that, in his unlimited discretion, the President deems to be unconstitutional. Ct. Amica misconstrues the Take Care Clause.

First, Ct. Amica implicitly assumes that the Take Care Clause is a grant of all of the power that the executive has to enforce the law. It is not. After all, Article II, Section 1 vests in the President alone "the executive Power," which standing alone would have conferred upon the President the complete power over the execution of the law. Instead, the Take Care Clause operates as a limitation on the President's discretionary executive power, imposing upon him a specific and concrete duty to "take Care that the Laws be faithfully executed." Indeed, the Take Care Clause appears in Section 3 of Article II, which specifies a number of duties of the presidential office that would otherwise have been left to his sole discretion as the Constitution's single executive officer.

Second, "[t]he history of the clause in the Constitutional Convention reinforces the conclusion that [the Take Care Clause] was designed to serve as a limitation on executive power." *See* Christopher N. May, Presidential Defiance of "Unconstitutional"

Laws, p. 17 (Greenwood Press: 1998) (hereinafter "May, Defiance"). Prompted by James Madison's observation that, whether the executive be "a unity or a plurality," it was necessary to "fix the extent of the Executive authority,"[15] the convention approved the Take Care Clause in its present form. *See* May, Defiance, p. 17.

Third, the Take Care Clause cannot be understood without reference to the 1689 English Bill of Rights, which proclaimed that "the pretended power of suspending of laws [and] dispensing with laws ... by regal authority ... is illegal." English Bill of Rights, Sections 1 and 2, reprinted in 4 Founders', Item 1, p. 123. Thus, the first two factual findings in the Declaration of Independence charged King George III with illegally interfering in the legislative process by withholding "his assent to laws most wholesome and necessary for the public good" and "suspend[ing] their operation till his assent should be obtained...." Declaration of Independence, reprinted in Sources of Our Liberties, pp. 319-320 (R. Perry & J. Cooper, eds., ABA Found., Rev. Ed.: 1978).

Fourth, the Take Care Clause must be read in conjunction with Article I, Section 7, Clause 2, which vests in the President a circumscribed veto power, which can only be exercised within a 10 day period (Sundays excepted) after presentment of a bill passed by both houses for the President's signature. It was only within that window of time that the President was authorized to object to a law on constitutional grounds. Otherwise, he would violate his duty to take care that the laws be faithfully executed:

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[15] Records of the Federal Convention, reprinted in 4 The Founders' Constitution, Item 5, p. 124.

> No one [at the constitutional convention] proposed giving the president a suspending power in *addition* to the qualified veto, for this would have rendered the veto utterly superfluous. As the framers well knew, the royal prerogative of suspending the laws closely resembled an absolute veto. If they understood the executive to possess a suspending power, there would have been no point in giving a qualified veto; for if Congress passed a law over the president's veto, he would then be free to suspend the measure. [May, Defiance, pp. 12-13.]

Instead of usurping the President's executive powers, BLAG is exercising its authority to check the Executive Branch's effort to, in effect, exercise legislative power to repeal DOMA Section 3. Under Article II, Section 3, the President may only "recommend[] to [Congress'] Consideration such Measures as he shall judge necessary and expedient." As St. George Tucker has so acutely observed, "this power of recommending any subject to the consideration of congress, carries no obligation with it":

> It stands precisely on the same footing, as a message from the king of England to parliament; proposing a subject for deliberation, not pointing out the mode of

> doing the thing which it recommends. [St. George Tucker, View of the Constitution of the United States, p. 281 (Liberty Fund: 1999).]

Instead of bringing his views about the constitutionality of DOMA Section 3 to Congress, as provided in the Constitution, the President has bypassed the legislative branch, confessing constitutional error in the courts. *See* Statement of the Attorney General on Litigation Involving the Defense of Marriage Act ("A.G. DOMA Statement") (Feb. 23, 2011).[16] And now, should this Court find that there is no case or controversy and no Article III standing, the President would bypass the judicial branch, deciding for himself that DOMA Section 3 is not the Supreme law of the land because it is not, in his unilateral opinion, enacted pursuant to the Constitution.

But the American constitutional republic is founded on a tripartite system of separated powers, and checks and balances. The Executive Branch may not unilaterally and exclusively decide the constitutionality of a statute after it has become law, to circumvent the Supreme Court passing judgment on that law in accordance with the powers vested in it by Article III, Section 2. It is not for the President to "say what the law is." Rather, that is the province of the judicial branch. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803). While the judiciary may be dependent upon the "executive arm ... for the efficacy of its judgments" (Federalist No. 78), it is not within the scope of executive power to evade altogether the judiciary's judgment by refusing to defend DOMA Section 3.

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[16] http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

III. THE UNITED STATES IS THE REAL DEFENDANT PARTY IN INTEREST, PRESENTING A GENUINE CASE OR CONTROVERSY.

Ct. Amica argues that "[t]he United States' effort to obtain review of a decision with which it agrees presents no case or controversy." Ct. Amica Br., p. 28. But it is not the United States which has refused to defend DOMA, and it is not the United States which agrees with the decision of the Court of Appeals, as Ct. Amica asserts. *Id.*, pp. 23-24. Rather, it is simply the Executive Branch, as an agent of the United States, which has done so. The Executive Branch, by refusing to defend DOMA, is not speaking for the United States — which clearly has an interest in the validity of its statutes. Rather, the Executive Branch is stating that it declines to speak for the United States, requiring someone else to do so. *See* A.G. DOMA Statement.

To that end, the clear second choice to defend DOMA is the lawmaking branch — Congress — also an agent of the United States. *See id.* Ct. Amica argues that Congress must possess a "'concrete,' 'personal injury.'" Ct. Amica Br., p. 8. However, in this case, the House need not demonstrate that it has any special interest, or Article III standing. By defending DOMA, Congress is not seeking to vindicate its interests, but rather is advocating the interests of the United States, just as the Executive Branch had done previously. The House is not acting on its own as an intervenor-defendant, but rather as the defendant, for the United States. The House is not seeking to add or interject its own interests into the case, but rather to step into the shoes of the Executive Branch and defend the United States' interests which are already involved in the case.

The United States of America is still the defendant in this case in both name and reality. The principal change is which lawyers are representing the United States — those of the House of Representatives' or those of the Executive Branch. There is no need to show any special or additional interest in the case, since the United States' interest in the case is obvious.

Ct. Amica argues that the executive's only reason for continuing to litigate the case is to "obtain[] a precedent from a higher court." Ct. Amica Br., p. 29. Nothing could be further from the truth. While the Executive was victorious on the merits in both courts below, it retained its position as the attorney of record to ensure BLAG's continued position as intervenor-defendant, as the Attorney General had represented that he would do.[17] *See* A.G. DOMA Statement, *supra*.

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[17] A more appropriate method to ensure that the interests of the United States were protected in such a circumstance is specifically authorized by law. Pursuant to 28 U.S.C. Section 515, the Attorney General should have appointed a special counsel to represent the United States, instructing him to defend the constitutionality of DOMA Section 3, in recognition that there were reasonable arguments to be made in support of its constitutionality.

Both the Executive Branch and the House agree that Congress is competent, and the House is willing, to step into the shoes of the Executive and defend DOMA and the interests of the United States.

Even though the Executive Branch in essence confessed error on the merits, it continued to contest the payment of any judgment. This is not, therefore, a case where the Executive Branch has "settled" a case to the satisfaction of both parties, as Ct. Amica contends. Ct. Amica Br., pp. 31-32. Indeed, Ms. Windsor has asserted that, until she is paid the tax refund for which she has sued, she will not be satisfied. Windsor Juris. Br., pp. 10, 13. As Ct. Amica points out, the Attorney General's notification to Congress that the President would no longer defend DOMA Section 3 in court also advised "'that the Executive Branch would continue to enforce DOMA ... unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality.'" Ct. Amica Br., p. 2. More remarkably, Ct. Amica noted that the Government's decision in Bob Jones University v. United States, 461 U.S. 574 (1983), to enforce a regulation that the Government agreed to be invalid did not divest this Court of jurisdiction. *See id.* at 28, n.16. As the Court explained in I.N.S. v. Chadha, 462 U.S. 919 (1983):

> Even though the Government largely agreed with the opposing party on the merits of the controversy, we found an adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party. [*Id.* at 939, n. 12.]

IV. BOTH CHADHA AND LOVETT SUPPORT JURISDICTION IN THIS CASE.

Ct. Amica has acknowledged that there are two cases in which this Court "exercised jurisdiction to decide the constitutionality of a federal statute that the Executive refused to defend, where that Branch appealed from a lower court judgment with which it agreed." Ct. Amica Br., p. 25. Ct. Amica argues that neither decision supports court jurisdiction here. *Id.*, p. 24.

Ct. Amica argues that Chadha is inapplicable here because the Court's determination of jurisdiction in that case was based solely on 28 U.S.C. Section 1252, which provided for mandatory jurisdiction when the requirements of the statute were met. Ct. Amica Br., p. 36.[18]

However, Ct. Amica appears to recognize that "'[even if a party] has statutory authority to seek review in this Court, [it] may not have Art. III standing,'" meaning that a party must have both statutory and constitutional authority to appeal. Ct. Amica Br., p. 26, n.13. Of course this is so, since Congress does not have the prerogative to override Article III's standing requirements. Review can be mandatory, such as the former 28 U.S.C. Section 1252, or review can be discretionary, such as provided by 28 U.S.C. Section 1254. However, a court must still make the determination that a case presents a genuine Article III case or controversy. Otherwise, a court would be issuing nothing more than an advisory opinion.

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[18] Ct. Amica notes that, in 1988, Congress repealed Section 1252, leaving only 28 U.S.C. Section 1254, which provides for discretionary jurisdiction. *Id.*

Ct. Amica argues that, in Chadha, "the Court spoke only in statutory terms" and that "the Court carefully avoided addressing ... Article III standing...." Ct. Amica Br., p. 26. Thus, Ct. Amica's argument appears to dismiss Chadha, arguing that it stands for the improper rule that if a party has "statutory authority" to bring a petition, it need not have Article III standing. Yet Ct. Amica never bothers to say that Chadha was wrongly decided, and that it should be ignored or overruled.

On the contrary, the Chadha Court clearly considered Article III requirements independent of Section 1252, and determined that the dispute therein presented a case or controversy. In Chadha, the Court recognized the necessity of statutory and constitutional authority, stating that "[i]n addition to meeting the statutory requisites ... an appeal must present a justiciable case or controversy under Art. III." *Id.* at 931 n.6. The Court found that "[s]uch a controversy clearly exists ... because of the presence of the two Houses of Congress as adverse parties." *Id.* at 939. The Court held that Congress "is both a proper party [under Article III] and a proper petitioner under [Section] 1254." The Court then stated that "[w]e have long held that Congress is the proper party to defend the validity of a statute when [the executive] agrees with plaintiffs that the statute is inapplicable or unconstitutional." *Id.* at 940.

United States v. Lovett, 328 U.S. 303 (1946), is almost procedurally identical to this case. In Lovett, "President Roosevelt signed the Act ... but ... he had done so reluctantly because he believed Section 304 to be 'not only unwise and discriminatory, but unconstitutional....'" Lovett Petition for Certiorari (Supreme Court Docket No. 809), p. 5. Then, "the Attorney General advised Congress that he concurred in the President's opinion ... that Section 304 ... was unconstitutional, that he found it 'impossible to advocate with conviction the views of the Congress', and that in the circumstances he felt 'that the Congress should be afforded an opportunity to be represented by their own counsel.'" *Id.* at 6. Counsel was then appointed, and "appeared in the Court of Claims as amici curiae...." *Id.* After the Court of Claims found Section 304 unconstitutional, the United States filed a petition for certiorari in the Supreme Court. The petition stated "we have been requested by the Special Counsel appointed by the subcommittee ... to file this petition for certiorari so that the question ... may be brought to this Court." *Id.* at 9.

Ct. Amica would have this Court ignore Lovett on the ground that the "question of justiciability relating to the parties" was not addressed, and because the issue is one of jurisdiction, Lovett has no "'precedential effect.'" Ct. Amica Br., p. 25. However, the Lovett Court addressed the question of the justiciability of the core issue whether the challenged statute was "simply an exercise of congressional powers over appropriations, ... not subject to judicial review," or "a bill of attainder, an encroachment on exclusive executive authority, or a denial of due process" punitively terminating three individuals of "continued employment" by the United States government. *Id.* at 306-07. By implication, resolving the justiciability of the issues was tantamount to resolving whether the plaintiffs had presented an individual grievance redressable by a court in a concrete case or controversy. Had there been a serious question of party standing independent of the jusiticiability of the issue, dissenting Justice Frankfurter would surely have raised it. *See* Windsor Juris. Br., p. 18, n.6.

V. VESTING LEGISLATIVE POWERS IN CONGRESS DOES NOT FORECLOSE BLAG FROM HAVING ARTICLE III STANDING.

While both BLAG and the Solicitor General agree that both Chadha and Lovett support BLAG's participation in this case, the Solicitor General contends that neither case supports BLAG's intervention as a party representing the United States. Indeed, Solicitor General devotes his entire Argument II.C. to persuade this Court that Chadha does not establish BLAG's standing to appeal. *See* Brief of the United States on the Jurisdictional Questions ("S.G. Br."), pp. 34-37. Rather, as was true in Chadha so here, the Solicitor General maintains that BLAG may participate in defending a statute which the Executive Branch "has declined to defend," but only in "an amicus-type role [to ensure] that both sides of the constitutional questions will be before the court." S.G. Br. at 34. According to the Solicitor General, BLAG must be relegated to amicus status because "[i]n the federal system, the authority to assert in litigation the sovereign's interest in the constitutionality of its laws belongs to the Executive Branch alone." S.G. Br. at 8. Because the Solicitor General's constitutional premise is wrong, so is his objection to BLAG's Article III standing.

Relying almost entirely upon phrases cherry-picked from Buckley v. Valeo, 424 U.S. 1 (1976), the Solicitor General correctly points out that the legislative power vested in Congress by Article I, Section 1 does not include the power "to enforce [laws made by Congress] or appoint the agents charged with the duty of such enforcement." S.G. Br., p. 28. But BLAG's entry into this litigation is not pursuant to any law creating an agency of enforcement populated by officers appointed by Congress, such as in Buckley. Therefore, unlike Buckley, there is no question whether the members of BLAG have been appointed by the House "enforce" DOMA Section 3 in violation of Article II, Section 2, Clause 2, the president's appointment power. To the contrary, the Attorney General announced on February 23, 2011, before BLAG intervened in the district court below, that he had "informed Members of Congress of [the Obama administration's] decision, so Members who wish to **defend** the statute may pursue that option." A.G. DOMA Statement, *supra* (emphasis added).

By its entry, pursuant to F.R.Civ.P. Rule 24((a)(2), BLAG did not seek to take over the enforcement of DOMA Section 3, but intervened "to protect its interest" in maintaining the constitutionality of that statute that, without question, was being impaired and impeded by the failure of the Department of Justice to "adequately represent that interest." As BLAG's Brief on Jurisdiction states, "[t]he House is not asking this Court to compel the executive to enforce DOMA Section 3." BLAG Juris. Br., p. 23. Rather, it is utilizing the rules of judicial procedure available to it to defend the interests of the United States in upholding the constitutionality of a federal statute governing the laying and collecting of taxes, in which, and among other matters, Congress and the House have an interest. *See* Arguments I.D through I.G. *supra*.

The Solicitor General, however, insists that the "full sovereign interests" of the United States are being protected by the Department of Justice which has "invoked both the court of appeals' and this Court's jurisdiction." S.G. Br. at 7. It is difficult to believe that the "full sovereign interests" of the United States are being protected by an Attorney General who has publically announced that the Department of Justice has decided not only to cease defending the constitutionality of DOMA Section 3, but to wage a relentless attack upon it on the ground that no "reasonable arguments can be made in its defense." *See* A.G. DOMA Statement. As BLAG highlights in its brief, "the Department did not merely bow out of DOMA litigation[,] it immediately and consistently attacked DOMA in court." BLAG Juris. Br., p. 4.

The Solicitor General, nevertheless, now argues that only the Department of Justice is ensconced by the Constitution in the "exclusive role in representing the United States' interests." S.G. Br. at 8. He urges that BLAG can only participate as *amicus curiae*, whose role, as defined by Rule 37.1 of the Rules of this

Court, to submit a "brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties." Additionally, Rule 37.1 provides that an amicus brief that "does not serve this purpose burdens the Court, and its filing is not favored." Relegating BLAG to amicus status would send the message that BLAG's interest is no different from the thirty other "interest groups"[19] which have filed such briefs in this case.

But BLAG's participation in this litigation is not that of an interest group, nor did it enter in this litigation on an *amicus curiae* basis. Rather, it qualified as an intervenor defendant of right under F.R.Civ.P. Rule 24(a)(2). Thus, its interests as one of the three branches of government in the constitutionality of DOMA Section 3 are not comparable to those of an *amicus*. While the Solicitor General places the Legislative and the Executive Branches into two tightly closed categories, the Constitution does not. Rather, as this Court recognized in Buckley, "[t]he men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics who ... saw that a hermetic sealing off of the three branches ... would preclude the establishment of a Nation capable of governing itself effectively." *Id.*, 424 U.S. at 121.

Thus, the framers set up a system of "checks and balances ... as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Id.*, 424 U.S. at 122. To be sure, as the Solicitor General has asserted, this Court once stated that "'no counsel will be heard for the United States in opposition to the views of the Attorney General,'"[20] but the Solicitor General failed to acknowledge that the Court reached that conclusion only "in pursuance of an act of Congress,"[21] not pursuant to the Take Care Clause upon which the Solicitor General has relied.[22] As established in Section II above, the Take Care Clause is a limit on the Executive power that would otherwise have been vested in the President by Article II, Section 1.

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[19] *See* J. Kearner and T. Merrill, "The Influence of Amicus Curiae Briefs on the Supreme Court," 148 *U. Pa. L. Rev.* 743, 746-47 (1999-2000).

What the Solicitor General is really seeking is a return to an Executive department clothed with the "formidable prerogative powers once wielded by the British Crown ... whereunder the kings and queens of England routinely suspended or dispensed with laws, often on the ground that a law was unconstitutional." May, Defiance, p. 3. Unlike 17th century England, the "full sovereignty" of the United States is not wrapped up in the person of the President. Nor is the constitutionality of DOMA Section 3 to be determined solely by him through confession of error. Rather, it is a matter requiring the attention of all three branches of the federal government, including the United States House of Representatives. The President certainly has no prerogative power to claim that he is the sole repository of the nation's sovereignty.

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[20] *See* S.G. Br. at 29.

[21] *See* Confiscation Cases, 74 U.S. 454, 458 (1868).

[22] *See* S.G. Br. at 28.

CONCLUSION

For the reasons stated, this Court should recognize that BLAG has standing to defend the United States and DOMA Section 3, and that this Court has jurisdiction because there is a genuine case or controversy.

Respectfully submitted,

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March 1, 2013

AMICUS
CURIAE
BRIEF

Nos. 12-144, 12-307

In the Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL., *Petitioners*,
v.
KRISTIN M. PERRY, ET AL., *Respondents*.

UNITED STATES, *Petitioner*,
v.
EDITH SCHLAIN WINDSOR, ETC.,
AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *Respondents*

On Writs of Certiorari to the United States Court of Appeals for the Ninth and Second Circuits

AMICUS CURIAE BRIEF OF COALITION FOR THE PROTECTION OF MARRIAGE IN SUPPORT OF HOLLINGSWORTH AND BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS AND SUPPORTING REVERSAL

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QUESTIONS PRESENTED

No. 12-144:

Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.

Whether petitioners have standing under Article III, §2 of the Constitution in this case.

No. 12-307:

Whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their state.

Whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case.

Whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.

TABLE OF CONTENTS

Pages

Table of Authorities .... iv-x

Interest of Amicus 1

Summary of Argument 4

Argument.. 9

- I. The man-woman meaning at the core of the marriage institution provides multiple valuable social goods that society has a compelling interest in perpetuating 9
  - a. Changing the definition of marriage would eliminate valuable social benefits that this vital social institution provides. 12
  - b. Man-woman marriage protects the child's bonding interest and the concept of natural parenthood......................... 21
  - c. Man-woman marriage protects rights in family relations against the state's impulse to act as if it were the source and dispenser of those rights and hence to infringe them 25
  - d. The man-woman marriage institution is the sole source of the socially and personally valuable statuses and identities of *husband* and *wife*. 26

        e. Each of several other social goods produced by the institutionalized man-woman meaning also qualifies as a compelling societal reason for preserving that meaning 31

    II. Social institutional realities refute a key pro-genderless marriage argument based on a state's provision of domestic partnerships 34

Conclusion 37

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INTEREST OF AMICUS[1]

The Coalition for the Protection of Marriage ("Coalition") is a Nevada non-profit corporation created in 1999 to propose and campaign for an initiative to amend Nevada's constitution to add its article 1, section 21: "Only a marriage between a male and female person shall be recognized and given effect in this state" ("Marriage Amendment"). In the campaigns leading up to the successive general elections of 2000 and 2002, the Coalition provided leadership and resources to support the initiative. In both elections, Nevada's voters overwhelmingly approved the Marriage Amendment, giving state constitutional protection to the man-woman meaning that since territorial days had been at the core of Nevada's marriage institution and of its marriage statutes.

In April 2012, a group of eight same-sex couples represented by Lambda Legal Defense Fund and O'Melveny & Myers initiated in Nevada's federal district court a 42 U.S.C. § 1983 civil action, asserting that the Marriage Amendment deprives them of equal protection of the laws in violation of the Fourteenth Amendment and seeking by force of law to change the meaning of marriage from the union of a man and a woman to the union of any two persons so that they can either be legally married in

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[1] The parties to these two cases have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the Coalition, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The Coalition has no parent corporation and no shareholders.

Nevada or have their foreign marriages legally recognized there. *Sevcik v. Sandoval*, Case No. 2:12-CV-00578-RCJ (PAL).

As the proponent of the ballot initiative leading to the Marriage Amendment, the Coalition timely moved to intervene as a party defendant. The district court granted that motion, and thereafter the Coalition played a major role in defense of the Marriage Amendment. Of particular importance to this *amicus* brief, the Coalition presented to the district court in fully substantiated and elaborated form certain social institutional realities regarding contemporary American marriage. Those realities constitute what is known in the literature as the "social institutional argument for man-woman marriage." This argument is of extraordinary importance to this Court's consideration of the merits in both *Perry* and *Windsor* because:

- it demonstrates that society and hence government (i) have compelling interests in perpetuating the man-woman meaning constitutive of the social institution of marriage and (ii) can preserve those interests in no way other than by preserving that meaning; hence, man-woman marriage can withstand all constitutional attacks regardless of the level of judicial scrutiny applied;
- the building blocks of the argument are supported by and indeed are uncontroversial in contemporary institutional studies; and
- the social institutional argument defeats every legal argument advanced by proponents of the

two-persons definition of marriage ("genderless marriage").

The district court granted the Coalition's motion for summary judgment and denied the plaintiffs' motion. *Sevcik v. Sandoval*, ___F. Supp.3d___, 2012 WL 5989662 (D. Nev. Nov. 26, 2012). The plaintiffs appealed to the Ninth Circuit Court of Appeals. On December 5, 2012, the Coalition filed with this Court a petition for writ of certiorari before judgment. *Coalition for the Protection of Marriage v. Sevcik,* No. 12-689. That petition is still pending.

This Court should not rule on the fundamental marriage issue without carefully engaging the social institutional argument in support of man-woman marriage. The fundamental marriage issue is whether constitutional norms of equality and liberty require that the legal definition of marriage be changed from the union of a man and a woman to the union of any two persons so as to enable otherwise eligible same-sex couples to marry. That issue may be the most nationally important and consequential issue to come before this Court in many years. Over the past twenty years, the level of judicial and extra-judicial engagement with that issue has been extraordinarily high. In the midst of all this engagement with the legal meaning of marriage, a crucial question is whether federal constitutional norms require marriage's redefinition. For the authoritative answer to that question, the people of the Nation now look to this Court. Yet if this Court mandates genderless marriage, the resulting social divisions and political contentions will probably equal and may surpass those resulting from *Roe v. Wade*, 410 U.S. 113 (1973). In such a situation where public respect for this Court generally and its marriage decision in particular is especially important, prudence counsels that the Court's marriage decision (however it comes down) reflect engagement with the strongest argument for man-woman marriage. We respectfully submit that means engagement with the social institutional argument.

The Coalition presents that argument in this *amicus* brief.

SUMMARY OF ARGUMENT

A fundamental issue in the contest over the constitutionality of man-woman marriage is: What *is* marriage? All advocacy for genderless marriage is built upon a narrow view that marriage is *no more than* love and friendship, security for adults and their children, economic protection, and public affirmation of commitment. Although genderless marriage proponents rarely express that notion of "no more than," the notion is *always* implicit in their arguments. At the same time, proponents of man-woman marriage advance a broader view of marriage. That broader view encompasses the social benefits ("goods") identified with the narrow view but also much more. The broader view encompasses the marriage institution's vital role and social goods (i) centered in children (those now living and for generations to come), including making meaningful the child's bonding right, providing adequate private welfare to the vast majority of children (those conceived through passionate, heterosexual coupling), and perpetuating the optimal childrearing mode; (ii) essential in the statuses and identities of *husband* and *wife*; and (iii) necessary for protection of the fundamental rights of natural parenthood and family relations.

The narrow view is misleading because it is materially incomplete. The broader view is more factually accurate in answering the question: What *is* marriage?

Marriage is a vital and fundamental social institution. Like all important social institutions, it consists of a web of interrelated public *meanings*. One of those core meanings is the union of a man and a woman. Institutionalized meanings, including the man-woman meaning at the core of marriage, teach, form, and transform individuals, providing them with statuses, identities, perceptions, aspirations, and projects and guiding their conduct. By forming and transforming individuals in these ways, institutionalized meanings provide the social goods that society needs and that justify society's expenditure of resources to perpetuate the institution.

The institutionalized man-woman meaning provides materially and even uniquely a number of valuable social goods. The man-woman marriage institution is:

- the social predicate indispensable to advance and make meaningful the child's interest in knowing and being raised by her own mother and father, with exceptions made only in the best interests of the child, not for the gratification of any adult desires ("child's bonding interest");

- the social predicate indispensable to advance the interests of natural parents and of society in defining and constructing parenthood on the basis of the parent-child biological bond;
- the real-world foundation of the natural family as a buffer between family members and the state and as the situs of relationships and rights independent of the state;
- the only source of the personally and socially valuable statuses and identities of *husband* and *wife*;
- humankind's best means for maximizing private welfare to the vast majority of children (those conceived by passionate, heterosexual coupling); and
- the irreplaceable foundation of the optimal child-rearing mode.

Because of the role of language in creating and sustaining social institutions, society cannot have at the same time two institutions denominated *marriage* with different core meanings or a single institution denominated marriage with different, conflicting core meanings. Society can have an institution of marriage with the core meaning of the union of a man and a woman or an institution of marriage with the core meaning of the union of any two persons, but not both (any more than society can have monogamy as a core, institutionalized meaning if it also allows polygamy).

Although interacting with and influenced by other institutions such as law, property, and religion, marriage in our society is a distinct, unitary social institution and does not have two separate, independent existences, one "civil" and one "religious."

In material ways, genderless marriage will be an institution radically different from the man-woman marriage institution. This radical difference between the two possible marriage institutions could not be otherwise: fundamentally different meanings, when magnified by institutional power and influence, produce divergent social identities, aspirations, projects, or ways of behaving, and thus different social goods. To say otherwise would be to ignore the undisputed effects that social institutions have in the formation and transformation of individuals. The reality is that changing the meaning of marriage to that of "any two persons" will transform the institution profoundly, if not immediately then certainly over time as the new meaning is mandated in texts, in schools, and in many other parts of the public square and voluntarily published by the media and other institutions, with society, especially its children, thereby losing the ability to discern the meanings of the old institution.

The law did not create the man-woman marriage institution. However, the law has the power to suppress the now widely shared man-woman meaning. By mandating a genderless marriage regime, the law will over time indeed suppress that meaning by displacing it with the different any-two-persons meaning. By suppressing and displacing the man-woman meaning in that way, the law will cause the diminution over time and then the loss of the valuable social goods that meaning now provides.

A genderless marriage regime is and will be socially hostile and politically adverse to:

- the child's bonding interest;
- natural parenthood as the foundation for the construction of parenthood in our society;
- the concept that relational rights within the natural family are not created, dispensed, and withdrawn at the will of the state; and
- the personally and socially valuable statuses and identities of *husband* and *wife*.

Even though this summary of the relevant social institutional realities of contemporary American marriage is necessarily compressed,[2] it serves to illuminate the profound importance and the broad and deep social consequences of this Court's resolution of the fundamental marriage issue. Regarding consequences: First, if federal constitutional law were to suppress the man-woman meaning at the core of the marriage institution, society would see first the diminution over time and then the loss of the valuable social goods that meaning uniquely provides. Those valuable social goods have no source in our society other than the man-woman marriage institution, and a genderless marriage regime will not produce them; indeed, it will be inimical to them. Second, at the same time, a constitutionally mandated genderless marriage regime will effectively advance a particular conception of the moral equality of forms of sexuality, a conception grounded in the influential "comprehensive doctrines"[3] of some Americans, particularly among the Nation's elites, but one contested by the comprehensive doctrines of many other Americans.

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[2] For a full treatment of that argument and those realities, see, e.g., Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 Duke J. Const. L. & Pub. Pol'y 1 (2006) [hereinafter *Institutional Realities*]; Monte Neil Stewart, *Marriage Facts*, 31 Harv. J.L. & Pub. Pol'y 313 (2008) [hereinafter *Marriage Facts*]; and Monte Neil Stewart, Jacob Briggs & Julie Slater, *Marriage, Fundamental Premises, and the California, Connecticut, and Iowa Supreme Courts*, 2012 BYU L. Rev. 193 [hereinafter *Fundamental Premises*].

ARGUMENT

I. The man-woman meaning at the core of the marriage institution provides multiple valuable social goods that society has a compelling interest in perpetuating.

This *amicus* brief does not address the level-of-judicial-scrutiny issue. Although the Coalition sees rational-basis review as clearly the correct approach in both *Perry* and *Windsor*, we need not engage that question for two reasons. One, society has a compelling interest in perpetuating the valuable social goods materially and even uniquely provided by the man-woman meaning at the core of the marriage institution—and which over time will diminish and then be lost if this Court mandates a nationwide genderless marriage regime. Two, society has no way of perpetuating those social goods other than by preserving the man-woman meaning of marriage. In other words, even if this Court were to apply the most rigorous form of judicial scrutiny, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984), it should still rule in favor of man-woman marriage.

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[3] *See* John Rawls, *Political Liberalism* 13 (1995); *see also* Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 Brit. J. Amer. L. Studies 411 (2012); John Rawls, *The Idea of Public Reason Revisited*, 64 Chi. L. Rev. 765 (1997).

Although virtually everyone, from personal life experiences, has substantial knowledge about some aspects of marriage, most do not think about marriage as the social institution that it is. This is understandable because, although important social institutions like marriage affect individuals and societies greatly, we are largely unconscious of them.

> We live in a sea of human institutional facts. Much of this is invisible to us. Just as it is hard for the fish to see the water in which they swim, so it is hard for us to see the institutionality in which we swim. Institutional facts are without exception constituted by language, but the functioning of language is especially hard to see. . . . [W]e are not conscious of the role of language in constituting social reality.[4]

Nevertheless, scholars have long addressed questions like what constitutes institutions, what sustains or changes them, what their influence is on human behavior, what good they do, why societies even have them, etc. In making our argument for preserving the man-woman meaning in marriage and the valuable social benefits that flow from it, we draw from a rich body of academic literature on social institutions that to date has been insufficiently attended to in the legal debate over marriage.

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[4] John R. Searle, *Making the Social World: The Structure of Human Civilization* 90 (2010) [hereinafter "Searle, *Social World*"].

In resolving the issue whether society has sufficiently weighty reasons for perpetuating the man-woman meaning in marriage, the legislative facts are what really matter, and the most consequential legislative facts are the social institutional realities of contemporary American marriage.

Generally speaking, advocacy for genderless marriage elides those institutional realities. All advocacy for genderless marriage, including the arguments for it in *Perry* and *Windsor*, is built upon a narrow description of contemporary American marriage.[5] That description, however, is materially incomplete because it refuses to acknowledge the social institutional realities encompassed by the competing broad description. In the narrow description, marriage's social goods are *no more than* "love and friendship, security for adults and their children, economic protection, and public affirmation of commitment."[6] Although genderless marriage proponents rarely expressly state that notion of "no more than," it is *always* implicit in their arguments, as the literature demonstrates.[7]

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[5] The narrow description of marriage and the phenomenon of its ubiquitous role in all advocacy for genderless marriage are examined in detail at *Marriage Facts*, *supra* note 2, at 320–38, and *Fundamental Premises*, *supra* note 2, at 197–212.

[6] Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* 6 (2006); *see generally* David Blankenhorn, *The Future of Marriage* 12–19 (2007).

In reality, the social institution of contemporary American marriage encompasses much more than just the social goods described by the narrow description. It also encompasses the marriage institution's vital role and social goods (i) centered in children (those now living and for generations to come), including making meaningful the child's bonding interest, providing adequate private welfare to the vast majority of children (those conceived through passionate, heterosexual coupling), and perpetuating the optimal childrearing mode; (ii) essential in the statuses and identities of *husband* and *wife*; and (iii) inherent in the fundamental rights of natural parenthood and family relations.

The following sections address those additional social goods and their connection to the man-woman meaning at the core of the marriage institution.

a. Changing the definition of marriage would eliminate valuable social benefits that this vital social institution provides.

Marriage is a vital social institution,[8] and like all social institutions, is constituted by a unique web of shared public meanings.[9] For important institutions, including marriage, many of those meanings rise to the level of norms.[10] Such social institutions affect individuals profoundly. Institutional meanings and norms teach, form, and transform us. They supply identities, purposes, practices, and projects. They guide conduct.[11]

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[7] *See supra* note 5.

[8] *E.g.*, *Williams v. North Carolina*, 317 U.S. 287, 303 (1942) ("[T]he marriage relation [is] an institution more basic in our civilization than any other."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941. 948 (Mass. 2003) ("Marriage is a vital social institution.").

Those meanings, as the constitutive elements of social institutions, are the source of the social goods that any institution provides. In other words, an institution's constitutive meanings generate social goods by teaching and transforming individuals across society.[12] These social goods justify the institution's perpetuation.[13]

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[9] *See, e.g.*, John R. Searle, *The Construction of Social Reality* 32 (1995) [hereinafter "Searle, *Construction*"]; *see also Institutional Realities*, *supra* note 2, at 8–28.

[10] *See, e.g.*, Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, *in* The New Institutionalism in Sociology 19 (Mary C. Brinton & Victor Nee eds., 1998) ("An institution is a *web of interrelated norms*—formal and informal—governing social relationships.") (emphasis added).

[11] *See, e.g.*, Helen Reece, *Divorcing Responsibly* 185 (2003); Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 Can. J. Fam. L. 11 (2004) [hereinafter *Judicial Redefinition*].

[12] According to Douglass North, institutions perform three unique tasks. They establish public norms or rules of the game that frame a particular domain of human life. They broadcast these shared meanings to society. They shape social conduct and relationships through these authoritative norms. *See generally* Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (1990).

[13] This link between the value of institutionally produced social goods and perpetuation of the institution is both definitional and essential. *See* Monte Neil Stewart, *Eliding in*

Just as a society can create and sustain social institutions (by the use of language),[14] a society can change its social institutions. Because social institutions are constituted by shared public meanings, they are necessarily changed when those meanings are changed or are no longer sufficiently shared. Indeed, that is the only way a social institution can be changed.[15] When previously institutionalized public meanings and norms are no longer sufficiently shared by a society, through whatever means and for whatever reason, the social institution constituted by those meanings and norms disappears.[16] This is called *de-institutionalization*.

Across time and cultures, a core meaning constitutive of the marriage institution has nearly always been the union of a man and a woman.[17] Marriage's man-woman *meaning* provides materially and even uniquely many valuable social goods, which we address in some detail later on.

Washington and California, 42 Gonzaga L. Rev. 501, 503 (2007).

[14] *See* Searle, *Construction*, *supra* note 9; Searle, *Social World*, *supra* note 4.

[15] *See, e.g.*, Eerik Lagerspetz, *The Opposite Mirrors: An Essay on the Conventionalist Theory of Institutions* 28 (1995); Eerik Lagerspetz, *On the Existence of Institutions*, *in* On the Nature of Social and Institutional Reality 70, 82 (Eerik Lagerspetz et al. eds., 2001).

[16] *See, e.g.*, Searle, *Construction*, *supra* note 9, at 117.

[17] *See, e.g.*, Claude Lévi-Strauss, *The View from Afar* 39–42 (Joachim Neugroschel & Phoebe Hoss trans., 1985); G. Robina Quale, *A History of Marriage Systems* 1–3 (1988); Institute for American Values, *Why Marriage Matters: Thirty Conclusions from the Social Sciences* 25–26 (3d ed. 2011) [hereinafter *Thirty Conclusions*].

Another important social reality is that a society can have *only one* social institution denominated *marriage*. Society cannot simultaneously have as shared, core, constitutive meanings of the marriage institution *both* "the union of a man and a woman" *and* "the union of any two persons"—any more than it can have monogamy as a core meaning if it also allows polygamy. One meaning necessarily displaces or at least precludes the other. Given the role of language and meaning in constituting and sustaining institutions, two "coexisting" social institutions known society-wide as "marriage" amount to a factual impossibility.[18] Thus, every society must choose either to retain man-woman marriage or, by force of law, replace it with a radically different genderless marriage regime.[19]

The law did not create the marriage institution.[20] Nevertheless, the law has the power to de-institutionalize it by suppressing the shared public meanings that constitute it.[21] The law's power arises from its expressive or educative function that is magnified by its authoritative voice.[22] The *Perry* respondents seek to use the law's power to suppress the man-woman meaning by replacing it with the any-two-persons meaning. (That is the only way that they can "marry" in any intelligible sense.) The reach of that power to suppress is large and sufficient, especially in light of the fact that, after

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[18] *See, e.g.*, *Institutional Realities*, *supra* note 2, at 24–25.

[19] A society actually has three options: man-woman marriage, genderless marriage, or no normative marriage institution at all. Contemporary American political reality likely precludes the third option for now; however, many of the most influential advocates of genderless marriage correctly and gladly see that as leading quite naturally to no normative marriage institution at all. For a clear example of high-level advocacy for such, see Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships 1 (2006), http://www.beyondmarriage.org/full_statement.html.

[20] Man-woman marriage is unquestionably a pre-political institution. *See*, *e.g.*, John Locke, *Second Treatise of Government* 47 (Richard H. Cox ed., 1982) (1690). In Professor Searle's explanation:

> [I]n human languages we . . . have the capacity to create a new reality by representing that reality as existing.

> We create private property, money, government, marriage, and a thousand other phenomena by representing them as existing. . . . [O]nce you have linguistic commitments, it is inevitable that you will have the extension of those to the forms of institutional realities [such as the law and government] that are the extensions of the biologically primitive forms [of institutions], such as family, marriage, property, and status hierarchies.

Searle, *Social World*, *supra* note 4, at 86; *see also* Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 Notre Dame L. Rev. 109, 114 n.29 (2000) (the law's provisions regulating marriage no more "created" the marriage institution than the Rule Against Perpetuities "created" dirt).

[21] *See, e.g.*, Nancy F. Cott, *The Power of Government in Marriage*. 11 The Good Soc'y 88 (2002); The Witherspoon Institute, *Marriage and the Public Good: Ten Principles* 7 (2008); Institute for American Values, *Marriage and the Law: A Statement of Principles* 7 (2006) [hereinafter *Marriage and the Law*]; Institute for American Values (Dan Cere, principal investigator), *The Future of Family Law: Law and the Marriage Crisis in North America* 10–11 (2005) [hereinafter *Marriage Crisis*].

[22] *See, e.g.*, Joseph Raz, *The Morality of Freedom* 162 (1986); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 69–71 (1996).

redefinition, the old meaning would be deemed "unconstitutional" and the mandate imposing the new meaning would be seen as vindicating some important "right." In those circumstances, suppression would be a legal imperative of a very high order.

Despite its power to de-institutionalize man-woman marriage, the law does *not* have the power to give same-sex couples access to the marriage institution we have always known because the very act of changing that institution's core, constitutive man-woman meaning will necessarily transform the old institution and make it into a profoundly different institution, one whose meanings, value and vitality are speculative. Some same-sex couples look to the law to let them into the privileged institution, and the law may want to, but it cannot; it can only give them access to a different institution of different value. That different institution will become the only legally sanctioned "marriage" into which any couple, whether man-woman or same-sex, can enter.[23]

Such a law-mandated change would not be "incremental" or "evolutionary" but rather radical and revolutionary. Genderless marriage is a profoundly different institution than man-woman marriage.[24] This does not mean, of course, that there is no overlap in formative instruction between the two "marriage" institutions; the significance is in the divergence. This significant divergence is seen in the nature of the two institutions' respective social goods and also in the two institutions' respective norms: man-woman marriage advances norms of biological kinship in the construction of parenthood,[25] of permanence and exclusivity in marriage,[26] and of preference for the statuses and identities of *husband* and *wife*,[27] while genderless marriage does just the opposite.[28] Further, the man-woman marriage institution is essentially child-centered;[29] a genderless marriage regime "neutralizes the law's ability to say that children need their mothers and fathers and reifies a new conception of marriage that is centered on the couple rather than children," teaching that marriage is a "private relationship between two people created primarily to satisfy the needs of adults."[30]

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[23] *See* Brian Bix, *Reflections on the Nature of Marriage*, *in* Revitalizing the Institution of Marriage for the Twenty-First Century 111, 112–13 (Alan J. Hawkins et al. eds., 2002); Sherif Girgis, Ryan T. Anderson & Robert P. George, *What Is Marriage?* 54–55 (2012); *Institutional Realities*, *supra* note 2, at 26–27.

[24] *See, e.g.*, O'Brien, *supra* note 3, at 414–15; *Marriage Facts*, *supra* note 2, at 323–24.

This radical difference between the two institutions could not be otherwise: fundamentally different meanings, when magnified by institutional power and influence, produce divergent social identities, aspirations, projects, or ways of behaving, and thus different social goods.[31] To say otherwise would be to ignore the undisputed effects that social institutions have in the formation and transformation of individuals. Indeed, well-informed observers of marriage—regardless of their sexual, political, or theoretical orientations—uniformly acknowledge the magnitude of the differences between the two possible institutions of marriage.[32]

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[25] *See infra* section I.b.

[26] *See* Girgis et al., *supra* note 23, at 32-36.

[27] *See infra* section I.d.

[28] *See infra* sections I.b–d; Girgis et al., *supra* note 23, at 68–72.

[29] *See, e.g.*, *Marriage and the Law*, *supra* note 21, at 6–7; Don Browning & Elizabeth Marquardt, *What About the Children? Liberal Cautions on Same-Sex Marriage*, *in* The Meaning of Marriage: Family, State, Market, and Morals 36 (Robert P. George & Jean Bethke Elshtain. eds., 2006) [hereinafter "Meaning of Marriage"]; Blankenhorn, *supra* note 6, at 11–20, 91, 99–102.

[30] *Marriage Crisis*, *supra* note 21, at 6–7.

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[31] *See, e.g.*, *Thirty Conclusions*, *supra* note 17, at 7; *Marriage and the Law*, *supra* note 21, at 7.

[32] *See, e.g.*, Blankenhorn, *supra* note 6, at 167 ("I don't think there can be much doubt that this post-institutional view of marriage constitutes a radical redefinition. Prominent family scholars on both sides of the divide—those who favor gay marriage and those who do not—acknowledge this reality."); Daniel Cere, *War of the Ring*, *in* Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment 9, 11–13 (Daniel Cere & Douglas Farrow eds., 2004) [hereinafter "Divorcing Marriage"]; Douglas Farrow, *Canada's Romantic Mistake*, *in* Divorcing Marriage, *supra*, at 1–5; Ladelle McWhorter, *Bodies and Pleasures: Foucault and the Politics of Sexual Normalization* 125 (1999); Joseph Raz, *The Morality of Freedom* 393 (1986); Judith Stacey, *In the Name of the Family: Rethinking Family Values in the Postmodern Age* 126–28 (1996); Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, *in* Divorcing Marriage, *supra*, at 48–56; Angela Bolt, *Do Wedding Dresses Come in Lavender? The Prospects and Implications of Same-Sex Marriage*, 24 Soc. Theory & Prac. 111, 114 (1998); Devon W. Carbado, *Straight Out of the Closet*, 15 Berkeley Women's L.J. 76, 95–96 (2000); Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 St. Thomas L.J. 33, 53 (2004); E.J. Graff, *Retying the Knot*, The Nation, June 24, 1996, at 12 ("The right wing gets it: Same-sex marriage is a breathtakingly subversive idea. . . . Marriage is an institution that towers on our social horizon, defining how we think about one another . . . . [S]ame-sex marriage . . . announces that

The reality is that changing the meaning of marriage to that of "any two persons" will transform the institution profoundly, if not immediately then certainly over time. Certainly the new meaning will be mandated in texts, in schools, and in many other parts of the public square and voluntarily published by the media and other institutions, with the result that society, especially its children, will lose the ability to discern the meanings of the old institution.[33]

If the law were to suppress the man-woman *meaning* at the core of the marriage institution, the valuable social goods that meaning uniquely provides would diminish over time and then be lost. Those valuable social goods have no source in our society other than the man-woman marriage institution, and a genderless marriage regime will not produce them; indeed, it will be inimical to them.

In light of these realities, California's citizen-voters made an eminently reasonable choice in putting Proposition 8 into their state's constitution; likewise with respect to Congress and DOMA. Both those voters and Congress chose to protect, to the greatest extent they could, the institutionalized man-woman meaning against legal suppression. The only alternative to that choice was to leave the institutionalized man-woman meaning unprotected

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marriage has changed shape."); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 Law & Sexuality 9, 12–19 (1991); Andrew Sullivan, *Recognition of Same-Sex Marriage*, 16 Quinnipiac L. Rev. 13, 15–16 (1996).

[33] *See, e.g.*, *Judicial Redefinition*, *supra* note 11, at 111; Girgis et al., *supra* note 23, at 55.

and therefore leave that meaning's valuable social goods in genuine danger.

b. Man-woman marriage protects the child's bonding interest and the concept of natural parenthood.

One of the social goods produced uniquely by the man-woman *meaning* at the core of the marriage institution is protection of the child's interest in knowing and being brought up by his or her biological parents, with exceptions being justified only in the best interests of the child, not for the gratification of any adult desires ("child's bonding interest").[34] Man-woman marriage not only supports the birthright of children to be connected to their mothers and fathers, it is the indispensable social predicate for that birthright to have meaning and reality.[35] Where marriage is a strong social institution, it is much more likely that a child knows and is raised by the man and the woman whose sexual union created her, exactly because the parents are married. Where the institution is weaker, such an outcome is less likely. Where the marriage ethos is weak or nonexistent, a child knowing and being raised by his mother and father is a mere fortuity—unless the society has expended resources in a way effective to otherwise involve the father in the child's life, a problematic undertaking.[36]

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[34] *See, e.g.*, Margaret Somerville, *Children's Human Rights to Natural Biological Origins and Family Structure*, 1 Int'l J. Jurisprudence Fam. 35 (2010); Margaret Somerville, *Children's Human Rights and Unlinking Child-Parent Biological Bonds with Adoption, Same-Sex Marriage and New Reproductive Technologies*, 13 J. Fam. Stud. 179, 179–201 (2007) [hereinafter Somerville, *Unlinking*]; Margaret Somerville, *What About the Children*, *in* Divorcing Marriage, *supra* note 32, at 63–78.

[35] *See, e.g.*, *Marriage and the Law*, *supra* note 21, at 6; Witherspoon Institute, *supra* note 21, at 6; *Fundamental Premises*, *supra* note 2, at 243–56.

The *child's* bonding interest matters to *children*. Prof. Katharine K. Baker perceived this in her analysis of bionormativity—that is, of the norm that parental rights and obligations align with biological parenthood.[37] She perceived that the interests served by that norm must be analyzed separately for the state, parents, and children.[38] Children's interests in bionormativity differ from the state's and from the parents'; children "seem to have what is potentially the strongest interest in the biology of biological parenthood."[39] Professor Baker explains that this may be because there are "psychological benefits associated with being raised by one's biological parents."[40] These considerations are luminous of some of the deep roots of the child's bonding interest recognized in our domestic and international legal regimes.[41]

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[36] *See, e.g., id.* at 247; *Thirty Conclusions, supra* note 17, at 14; Witherspoon Institute, *supra* note 21, at 6; *Marriage and the Law, supra* note 21, at 7. Regarding state efforts to involve fathers in their children's lives (other than through marriage), see Allan Carlson, *Deconstruction of Marriage: The Swedish Case*, 44 San Diego L. Rev. 153 (2007).

[37] Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 Ga. L. Rev. 649 (2008).

[38] *Id.* at 682.

[39] *Id.*

[40] *Id.* at 686.

[41] *See, e.g.*, Blankenhorn, *supra* note 6, at 188–90.

A recent study confirms Prof. Baker's suggestion regarding the "psychological benefits associated with being raised by one's biological parents." That study was the first look into the minds and hearts of adults conceived by donated sperm.[42] The study found that, compared to adopted adults and adults raised by their biological parents, donor offspring are much more: troubled by the circumstances of their conception, saddened when they see friends with their biological fathers and mothers, hurt when people talk about their genealogical background, and likely to depend on friends than family.[43] "When controlling for socio-economic factors, gamete donor offspring are significantly more likely than their peers raised by their biological parents to manifest delinquency, substance abuse, and depression. Gamete donor offspring are 1.5 times more likely to suffer from mental health problems."[44]

A genderless marriage regime is not just neutral towards the child's bonding interest; as a matter of public policy and by force of law, it thwarts that interest.[45]

> Marriage is a compound right: the right to marry and to found a family. Giving same-sex couples the right to found a family, as same-

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[42] Institute for American Values (Elizabeth Marquardt, Noval D. Glenn, & Karen Clark, co-investigators). *My Daddy's Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation* (2010).

[43] For a fuller summary of the study's findings, see O'Brien, *supra* note 3, at 450–51.

[44] *Id.*

[45] *See, e.g.*, *Marriage Crisis*, *supra* note 21, at 33–36; Blankenhorn, *supra* note 6, at 201.

> sex marriage automatically does, unlinks parenthood from biology. In doing so, it unavoidably takes away [a child's] right to both a mother and a father and [his] right (unless an exception is justified as being in the best interests of that particular child, as in adoption) to know and be reared within his own biological family. . . . The primary rule becomes that a child's parents are who the law says they are . . . . The exception to biological parenthood . . . becomes the norm.[46]

That has occurred in Canada; the same bill redefining marriage to the union of any two persons also contained, in order to maintain the coherence of the scheme, a provision ending in law the concept of "natural parenthood" and replacing it with the concept of "legal parenthood" (a child's parents are who the state says the parents are).[47] After implementation of genderless marriage, a child knowing and being raised by her biological parents would be a mere fortuity, not the result of cultural, political, and institutional aspirations and objectives.

Laws enshrining the man-woman meaning in marriage, such as Proposition 8 and DOMA, protect the child's valuable bonding interest for the benefit of generations of children to come by providing maximum legal protection to the institutionalized man-woman meaning that is the indispensable social predicate for the advancement of that interest. It also protects bionormativity in the construction of parenthood, something of value to children but also of value in differing ways to the state and to biological parents. This last point merits further elaboration.

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[46] Somerville, *Unlinking*, *supra* note 34, at 180–81 (footnotes omitted).

[47] *See id.*; Institute for American Values et al. (Elizabeth Marquardt, principal investigator), *The Revolution in Parenthood: The Emerging Global Clash Between Adult Rights and Children's Needs* 10–11 (2006).

c. Man-woman marriage protects rights in family relations against the state's impulse to act as if it were the source and dispenser of those rights and hence to infringe them.

A genderless marriage regime is inimical to the concept of natural parenthood, as Canada's experience demonstrates. It is likewise necessarily inimical to the concept of the natural family as an institutional buffer between family members and the state and as the situs of rights on which the state cannot impinge. Genderless marriage "is nothing more than a legal construct. Its roots run no deeper than positive law. It therefore cannot present itself to the state as the bearer of independent rights and responsibilities, as older or more basic than the state itself. Indeed, it is a creature of the state."[48] As a consequence, a genderless marriage regime "de-naturalize[s] the family by rendering familial relationships, in their entirety, expressions of law. But relationships of that sort—bled as they are of the stuff of social tradition and experience—are no longer family relationships at all. They are rather policy relationships, defined and imposed by the state."[49] The chilling consequence is that, by displacing man-woman marriage, genderless marriage

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[48] Douglas Farrow, *Why Fight Same-Sex Marriage?*, Touchstone, Jan./Feb. 2012, *available at* http://www.touchstonemag.com/archives/article.php?id=25-01-024-f; *see also* Seana Sugrue, *Soft Depotism and Same-Sex Marriage*, *in* The Meaning of Marriage, *supra* note 29, at 172, 180–81, 186–91.

> does away with the very institution—the only institution we have—that exists precisely in order to support the natural family and to affirm its independence from the state. In doing so, it effectively makes every citizen a ward of the state, by turning his or her most fundamental human connections into legal constructs at the state's gift and disposal.[50]

This reality constitutes yet another compelling societal interest in preserving man-woman marriage.

d. The man-woman marriage institution is the sole source of the socially and personally valuable statuses and identities of *husband* and *wife*.

Man-woman marriage is the *only* institution that can confer the status of *husband* and *wife*. Only that institution can prepare a male for the role, status and identity of *husband*, transform him into a husband, and sustain him over time in his performance of that role. The same is true for a female relative to *wife*.

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[49] F.C. DeCoste, *Courting Leviathan: Limited Government and Social Freedom in* Reference re Same-Sex Marriage, 42 Alberta L. Rev. 1099, 1122 (2005).

[50] Farrow, *supra* note 48.

> Social practices are only intelligible in terms of their "point," and any given practice can only (continue to) exist if its practitioners or participants are seized of some "sense" of the overall point of the "form of life" which the practice brings into the world. Marriage is a social practice that in life and subsequently, in law, has a point that constitutes it as a distinct practice. The point of marriage is the bestowal of a certain status on those who choose and are otherwise capable of entering into it and the creation of relations between them. The status bestowed by marriage is that of "wife" and "husband," and the relation between husband and wife is the form of life that marriage alone creates and of which it alone is the practice. [51]

Husband and *wife* each "is a distinct mode of association and commitment that carries centuries and volumes of social and personal meaning."[52] Each of those two statuses exists in association with and by reference to the other.[53] The thick, deep meanings of *husband* pertain to relationship with *wife* (and vice versa) and, relative to that relationship, shape and inform a wide range of projects, purposes, and possibilities. As one consequence of this, "marriage has always been the central cultural site of male-female relations"[54] and society's primary and most effective means of bridging the male-female divide—that "massive cultural effort of every human society at all times and in all places."[55] And despite issues relative to selection and causation factors, those who enjoy the status and identity of *husband* or *wife* are healthier, wealthier, and happier than those who do not.[56]

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[51] F.C. DeCoste, *The* Halpern *Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 Alberta L. Rev. 619, 625 (2003).

[52] Ronald Dworkin, *Is Democracy Possible Here?* 86 (2006); *see also* Monte Neil Stewart, *Dworkin, Marriage, Meanings—and New Jersey*, 4 Rutgers J.L & Pub. Pol'y 271, 302–05 (2007).

[53] *See, e.g.*, DeCoste, Halpern *Transformation*, *supra* note 51. at 625–27; *Fundamental Premises*, *supra* note 2, at 257.

An important related social reality is that social institutions, including marriage, not only constrain human conduct but also enable participants to do and become what they could not do and become without the institution; social institutions of benevolence like man-woman marriage enable and empower.[57]

Of necessity, a genderless marriage regime will be inimical to the statuses and identities of *husband* and *wife*. To the extent that a genderless marriage regime even tolerates the words *husband* and *wife*, it will have to greatly shrivel their meanings. Such a regime must suppress the "centuries and volumes of social and personal meaning" inhering in those words because, if it does not, it will reinforce the man-woman meaning of marriage, something a genderless marriage regime cannot do without jeopardizing its own supremacy and perpetuation.

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[54] Cere, *War of the Ring*, *supra* note 32, at 14.

[55] Young & Nathanson, *Future of an Experiment*, *supra* note 32, at 43; *see also* George Simmel, *The Sociology of George Simmel* 128–32 (Kurt H. Wolff, trans. & ed., 1950).

[56] *See, e.g.*, Steven L. Nock, *Marriage as a Public Issue*, 15 The Future of Children 13, 17–21 (2005) ("The accumulated research shows that married people are typically healthier, live longer, earn more, have better mental health, have better sex lives, and are happier than their unmarried counterparts.").

[57] *See, e.g.*, Searle, *Social World*, *supra* note 4, at 143–44.

> [T]he effect [of a move to a genderless marriage regime] is plain: marriage no longer has anything at all to do with the bestowal of a status which makes possible relations which, in the absence of the status, are unavailable in our lifeworld. Instead, marriage now has to do with the recognition and endorsement of *pre-existing* dispositions and relations. So viewed, marriage adds nothing to human possibility and is, as a result, de-institutionalized.[58]

Because preserving the valuable statuses and identities of *husband* and *wife* constitutes such a compelling societal interest, genderless marriage proponents make a frontal assault on the validity of this social good. They argue that state sanction of the statuses and identities of *husband* and *wife* constitutes impermissible sex discrimination. This "sexism" argument, however, makes sense only to people who have bought into a particular theory of gender advanced by radical social constructivists. That theory advocates that law not make any gender-based distinctions at all and, therefore, that law redefine marriage from a man-woman relationship to a person-person relationship.[59] But this Court, although given the opportunity to do so, e.g., *United States v. Virginia*, 518 U.S. 515 (1996), has never enshrined that theory in its equality jurisprudence.[60] This Court gives due deference to biological facts: "Physical differences between men and women, however, are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" *Id.* at 533. Because humankind is a two-sex species exactly for purposes of procreation, there is no identity or status more closely tied to the enduring biological facts than *husband* and *wife*. To call those statuses "sex-stereotyping," as genderless marriage proponents do, is to ignore biological and social reality. It is to say that a woman can be a husband, but that simply cannot be absent a massive and Orwellian governmental intervention in and interference with our language and hence our society's enduring social realities and institutions.

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[58] DeCoste, Halpern *Transformation*, *supra* note 51, at 627.

[59] For analysis of the radical social constructivist theory of gender in the context of judicial advocacy for genderless marriage, see *Judicial Redefinition*, *supra* note 11, at 86–95.

In declining to accept the radical social constructivists' theory of gender, this Court has heeded Justice Holmes's caution against the tendency of judges, consciously or unconsciously, overtly or covertly, to read social theories into the Constitution: "Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions." *Otis v. Parker*, 187 U.S. 606, 608–09 (1903).[61]

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[60] *See* Sunstein, *supra* note 22, at 76.

[61] Even more pithy was his statement that the Constitution did not "enact Mr. Herbert Spencer's *Social Statics*," a book embodying the social Darwinism that gained considerable currency for awhile in American constitutional law. It is equally certain that the Constitution did not enact Ms. Judith

Because the Fifth and Fourteenth Amendments are not a partisan of radical social constructivism's theory of gender, the "sexism" argument fails.

e. Each of several other social goods produced by the institutionalized man-woman meaning also qualifies as a compelling societal reason for preserving that meaning.

We identify here several other social goods materially produced by the institutionalized man-woman meaning but do so only in short form; other *amici* and the parties we support will elaborate. Our contribution is to re-emphasize two social institutional realities. First, the institutionalized man-woman meaning is what materially and even uniquely produces these vital social goods; the mechanism of production is found in the power of a fundamental institution's core meanings to teach, form, and transform individuals, to supply them with identities, purposes, practices, and projects, and to guide their conduct. Second, if the law suppresses the man-woman meaning—as it must to make way for a genderless marriage regime—then these vital social goods will diminish over time and then be lost to society.

One of those additional, vital social goods is this: The man-woman marriage institution almost certainly qualifies as the most effective means humankind has developed so far to maximize the level of private welfare provided to the children

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Butler's *Gender Trouble*.

conceived by passionate, heterosexual coupling.[62] As used here, the phrase *private welfare* includes not just the provision of physical needs such as food, clothing, and shelter; it encompasses opportunities such as education, play, work, and discipline and intangibles such as love, respect, and security. The provision of this social good constitutes society's deep logic of marriage because child-bearing in a setting of inadequate private welfare corrodes societal interests while child-bearing in a setting of adequate private welfare actually advances those interests. Channelling procreative passion into a social institution that assures—to the largest practical extent—that passion's consequences (children) begin and continue life with adequate private welfare is thus a fundamental and originating purpose of marriage.[63]

This social good of maximizing the level of private welfare provided to the children conceived by passionate, heterosexual coupling is a unique product of the man-woman marriage institution. Certainly it is not, nor can it be, a meaningful product of a genderless marriage regime, with its ethos of de-linking marriage and procreation.[64]

An additional, vital social good is that man-woman marriage is the irreplaceable foundation of the married mother-father child-rearing mode, and that mode correlates (in ways not subject to reasonable dispute) with the optimal outcomes deemed crucial for a child's, and hence society's, well-being. These outcomes include physical, mental, and emotional health and development; academic performance and levels of attainment; and avoidance of crime and other forms of self- and other-destructive behaviors such as drug abuse and high-risk sexual conduct.[65]

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[62] *See, e.g.*, Witherspoon Institute, *supra* note 21; *Marriage and the Law*, *supra* note 21, at 15; Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 Contraception 478, 478–85 (2011); *Judicial Redefinition*, *supra* note 11, at 44–52.

[63] *See, e.g.*, *id.*

[64] *See supra* notes 29–30 and accompanying text.

The institutional provision of the social goods just identified and related social goods often is accurately described at a more general conceptual level as one societal endeavor.

> A liberal democratic society needs sufficient children and it needs them to be educated. Therefore, a liberal democratic society needs families headed by two married parents who are the biological mother and father of the children, because such families are (a) intrinsically generative and (b) optimal for childrearing. In other words, sex between men and women makes babies; society needs sufficient babies; babies need moms and dads. Every family arrangement in which children are raised need not and cannot conform to this pattern, but the state has a legitimate interest in encouraging people to form families that do so, which the state can accomplish by enshrining this conception of marriage in the

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[65] *See, e.g.*, *Thirty Conclusions*, *supra* note 21.

> law, as conferring unique social status, and promoting it with material benefits.[66]

A fair shorthand phrase for this vital social endeavor conducted through and by the man-woman marriage institution is *the orderly reproduction of society*.[67] The important social reality is that the man-woman marriage institution is humankind's best mechanism for the orderly reproduction of society. Yet that institution and this social good must necessarily disappear over time as the law mandates a genderless marriage regime, the norms of which do not encompass this particular social good.[68]

II. Social institutional realities refute a key pro-genderless marriage argument based on a state's provision of domestic partnerships.

As seen in *Perry*, genderless marriage advocates argue that somehow enactment of domestic partnership legislation renders constitutionally infirm the laws preserving the man-woman meaning in marriage. The argument has two facets: one, the domestic partnership legislation somehow effectively repudiates all the strong public interests advanced by the man-woman marriage laws, leaving thereafter those laws with an insufficiently strong basis in policy; and, two, because all the legislature or voters are doing with the man-woman marriage laws is withholding from same-sex couples the mere word *marriage*, the state cannot possibly have a good reason for such a course, and therefore all that is at work is the kind of animus prohibited by *Romer v. Evans*, 517 U.S. 620 (1996). This argument is clearly wrong.

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[66] O'Brien, *supra* note 3, at 441 (footnotes omitted); *see also Jackson v. Abercrombie*, ___ F. Supp.3d ___, 2012 WL 3255201, at *38–44 (D. Haw. Aug. 8, 2012); *Goodridge*, 798 N.E.2d at 995–1004 (Cordy, J., dissenting).

[67] This phrase comes from O'Brien, *supra* note 3.

[68] *See, e.g.*, Browning & Marquardt, *supra* note 29, at 13–36; *see also supra* notes 29–30 and accompanying text.

The first facet of the argument fails for two reasons. First,

> [t]he overwhelming international consensus—including among liberal western democracies with established traditions of concern for the rights of gays and lesbians—is that reserving the formal institution of 'marriage' to opposite-sex couples while supporting same-sex couples through other rights and legal mechanisms is sound public policy. That consensus is based not on irrationality, ignorance, or animus toward gays and lesbians but on considered judgments about the unique nature and needs of same-sex couples and children.[69]

Second, this facet of the argument fails because man-woman marriage, even while society recognizes domestic partnerships, continues to provide society with valuable social goods that it cannot get otherwise. We explain this point in our treatment of the second facet of the argument.

Social institutional realities defeat the second facet of the argument (withholding the mere word *marriage* can only be the product of animus).

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[69] Brief for Judge Georg Ress and the Marriage Law Foundation as *Amici Curiae* Supporting Petitioners at 2, Hollingsworth v. Perry, No. 12-144 (U.S. Aug. 31, 2012).

Because social institutions are constituted by and only by complex webs of widely shared public meanings and are created by language acts, language creates the social reality that marriage unquestionably is. Marriage is an institution as fundamental, influential, and consequential as any. Accordingly, the political/legal power over the "mere word" *marriage* is a massive power. That power flows from the law's expressive effect and is reinforced by the law's coercive and pedagogical powers:

> What is the same-sex marriage debate really about? The legal institution of marriage has the expressive effect of socially recognizing, promoting and dignifying the nature of the relationships that the law deems eligible for marriage. The expressive effect of legal marriage is what the debate over same-sex unions is really about. As it is playing out in the United States and elsewhere, the debate is about which rival conception of sexual value and identity should harness law's expressive effect and be reinforced by the law's coercive and pedagogical powers.[70]

Informed genderless marriage advocates know this. "One sees the role of the vocabulary in the activities of revolutionary and reformist movements. They try to get hold of the vocabulary in order to alter the system . . . ."[71] Here the "role of the vocabulary," that is, the law's and hence society's use of the "mere word" *marriage*, will determine the fate of the child's bonding interest, of bionormativity in the construction of parenthood, of natural rights in family relations, of the statuses and identities of *husband* and *wife*, and on and on. Accordingly, a society cannot give up the "mere word" *marriage* without giving up the man-woman marriage institution and the valuable social goods that it uniquely provides. Certainly the preservation of those goods is the wholly legitimate and compelling objective of the man-woman marriage laws attacked in *Perry* and *Windsor*.

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[70] O'Brien, *supra* note 3, at 414.
[71] Searle, *Social World, supra* note 4, at 104.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgments in both those cases.

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AMICUS
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RECORD
AND
BRIEFS

No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR

AND

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF CONCERNED WOMEN FOR AMERICA, ADDRESSING THE MERITS AND SUPPORTING RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES AND REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. POLITICAL POWERLESSNESS IS A KEY FACTOR IN IDENTIFYING PROTECTED CLASSES. 4

II. A GROUP IS POLITICALLY POWERLESS WHEN IT CANNOT "ATTRACT THE ATTENTION OF LAWMAKERS." 8

III. GAYS AND LESBIANS HAVE ATTRACTED THE ATTENTION OF LAWMAKERS. 12

A. President Obama and His Administration Strongly Support Gay and Lesbian Causes. 14

B. Congressional Support for Gay and Lesbian Causes. 17

C. Political Victories in the States. 21

D. Public Support for Gays and Lesbians. 23

E. Financial Support for Gay and Lesbian Causes. 25

F. Corporate and Union Support for Gays and Lesbian Causes. 27

G. Media Support for Gay and Lesbian Causes. 31

H. Religious Support for Gay and Lesbian Causes. 32

CONCLUSION 33

TABLE OF AUTHORITIES

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138 P.3d 963 (Wash. 2006) 13

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Or. Rev. Stat. Ann. §§ 106.300-.340 22

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INTEREST OF *AMICUS CURIAE*[1]

Concerned Women for America ("CWA") is the largest public policy women's organization in the United States, with 500,000 members from all 50 states. Through our grassroots organization, CWA encourages policies that strengthen families and advocates the traditional virtues that are central to America's cultural health and welfare.

CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked— average, middle-class American women whose views are not represented by the powerful or the elite. CWA is profoundly committed to the rights of individual citizens and organizations to exercise the freedoms of speech, organization, and assembly protected by the First Amendment.

SUMMARY OF ARGUMENT

In its suspect class determination, the Second Circuit made two significant errors. First, it suggested that political powerlessness is a dispensable consideration—"not strictly necessary"—in determining whether a classification is suspect. *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012). Second, it reached the astounding conclusion that gays and lesbians are politically powerless, not because they lack political power, but because they have not triumphed in every instance of perceived discrimination. *Id.* at 184-85.

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[1] No counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution to the preparation or submission of the brief, and no person—other than the amicus curiae, its members, or its counsel—made such a monetary contribution. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk.

This brief first shows that political powerlessness has always been a critical factor in this Court's "suspect class" analysis. This brief also demonstrates that the Second Circuit's analysis of when a class is politically powerless is inconsistent with this Court's precedent. Under the Second Circuit's reasoning, every minority group that cannot win every political battle may qualify as a suspect class.

Finally, this brief illustrates that gays and lesbians are *not* politically powerless. In fact, they have repeatedly demonstrated their ability to influence public policy through democratic means. And their influence is only increasing. Their causes are supported by the mainstream media, popular culture, big labor, and big business. The most powerful figure in American politics, President Obama, vigorously supports same-sex marriage—and declared so in his recent inaugural address. The President's administration has actively promoted the agenda of gays and lesbians to the unprecedented point of not only abandoning its defense of the law at issue here—the Defense of Marriage Act—but actually switching sides and arguing against the law and for same-sex marriage. Vice President Biden also supports same-sex marriage. The Senate Majority Leader and the House Minority Leader support same-sex marriage. The 2012 Democratic National Platform declares support for "marriage equality" for "same-sex couples." One-third of the members of the House of Representatives are part of an amicus brief in this case, in support of

Respondent Windsor. And in the most recent elections, voters in three states legalized same-sex marriage, while voters in a fourth state rejected a state constitutional amendment that would have defined marriage as the union of a man and a woman.

In short, gays and lesbians have clearly "attract[ed] the attention of the lawmakers." *City of Cleburne, v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985). As a result, this Court should not take the extraordinary step of removing these issues "from the majoritarian political process." *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982) (quotation marks omitted).

ARGUMENT

The heart of this case is, of course, whether the institution of marriage should be redefined to include same-sex couples. But this case is also about *what institution* should define marriage: the people in each state, through either direct democracy or their democratically elected leaders, or an unelected judiciary?

Most courts faced with this issue have deferred to the democratic process by refusing to apply strict scrutiny to classifications based on sexual orientation. New York's highest court, for example, was conscious of this important point when it refused to redefine marriage. "Deprivation of legislative authority, by judicial fiat, to make important, controversial policy decisions prolongs divisiveness and defers settlement of the issue; it is a miscarriage of the political process involved in considering such a policy change[.]" *Hernandez v. Robles*, 26 A.D. 3d 98, 102 (N.Y. 2005).

That restraint from interference in policy decisions is consistent with this Court's prevailing view that there must be compelling reasons for the judiciary to interfere in the democratic process. Judicial intervention is the exception, and it is reserved for cases involving "prejudice against discrete and insular minorities . . . , which tends to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Since *Carolene Products*, this Court has identified only a very few "suspect" classifications that are subject to heightened scrutiny.[2] The wisdom of legislative classifications is ordinarily left to the democratic process.

I. POLITICAL POWERLESSNESS IS A KEY FACTOR IN IDENTIFYING PROTECTED CLASSES.

Going against every other federal court of appeals to rule on the issue,[3] the court below held that

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[2] Classifications based on race, *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954), national origin, *Oyama v. California*, 332 U.S. 633 (1948), and alienage, *Graham v. Richardson*, 403 U.S. 365 (1971) are subject to strict scrutiny. Classifications based on gender, *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973), and illegitimacy, *Trimble v. Gordon*, 430 U.S. 762, 766-67 (1979), are subject to heightened scrutiny.

[3] Every federal court of appeals to address the question—including the Ninth Circuit—evaluates sexual orientation classifications under rational-basis review. *See Massachusetts*

"homosexuals compose a class that is subject to heightened scrutiny." *Windsor*, 699 F.3d at 185. Citing *Cleburne*, the Court suggested that "lack of political power" is a dispensable consideration and "not strictly necessary to identify a suspect class." *Windsor*, 699 F.3d. at 181.

But far from minimizing political powerlessness as a factor, the *Cleburne* majority actually focused on it. The Court noted "the distinctive legislative response, both national and state, to the plight of those who are mentally retarded." *Cleburne*, 473 U.S. at 443. That legislative response demonstrated that "lawmakers have been addressing their difficulties in a manner that belies a continuing apathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *Id.* The Court then noted the passage of several laws protecting the mentally retarded. *Id.* This "legislative response, which could hardly have occurred and survived without public support," the Court concluded, "negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers." *Id.* at 445.

Inexplicably, the Second Circuit ignored the majority opinion in *Cleburne* and instead cited a concurring/dissenting opinion by Justice Marshall.

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v. Dep't of Health & Human Servs., 682 F.3d 1, 9-10 (1st Cir. 2012); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (citing decisions from the Fourth, Sixth, Seventh, Tenth, D.C., and Federal Circuits).

Justice Marshall's opinion criticized the *Cleburne* majority for relying on political powerlessness. *See id.* at 465-66 (Marshall J., concurring in part and dissenting in part). Thus, contrary to the Second Circuit's suggestion, the majority opinion in *Cleburne* actually confirmed the importance of political powerlessness.

Cleburne's emphasis on political power is consistent with three-quarters of a century of precedent. In the case that first raised questions about suspect classifications, this Court suggested that heightened scrutiny may be appropriate for groups that cannot rely on "the operation of those political processes ordinarily to be relied upon to protect minorities." *Carolene Products Co.*, 304 U.S. at 152–53 n.4. That dictum has since been regularly cited in cases recognizing a suspect class. *See e.g.*, *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (holding that resident aliens are a suspect class, citing *Carolene Products*). And when this Court has rejected heightened scrutiny, it has frequently noted the ability of the class at issue to participate in the political process. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

In language that has been repeatedly quoted, the Court has said that suspect-class designation is reserved for groups that have been "'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Plyler v. Doe*, 457 U.S. at n.14 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). This does not mean an inability to win most, or even some, political battles. Rather, strict scrutiny protects classes that have effectively been excluded from the political process as a result of a malfunctioning democracy. *See* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980). *See also Foley v. Connelie*, 435 U.S. 291, 294 (1978) (heightened scrutiny for alienage is "a treatment deemed necessary since aliens—pending their eligibility for citizenship—have no direct voice in the political processes").

Along the way, the Court has stressed its "revulsion" at interfering with the political process "to protect interests that have more than enough power to protect themselves in the legislative halls." *Dandridge v. Williams*, 397 U.S. 471, 520 (1970). "[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic process." *Cleburne*, 473 U.S. at 440. Thus, "judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

Consistent with its respect for democracy, this Court limits heightened scrutiny to the politically powerless. Restraint is particularly appropriate here, where the democratic process is in full sway, because doing otherwise "pre-empt[s] by judicial action a major political decision which is currently in process of resolution" and causes "democratic institutions [to be] weakened," *Frontiero*, 411 U.S. at 692 (Powell, J., concurring). In short, political powerlessness—and judicial modesty when the political process has *not* malfunctioned—is a key consideration used by this Court in determining whether to apply strict scrutiny.

II. A GROUP IS POLITICALLY POWERLESS WHEN IT CANNOT "ATTRACT THE ATTENTION OF LAWMAKERS."

The court below also misapprehended what it means to be "politically powerless." There is no disagreement that gays and lesbians are politically successful. Even the court below agreed: "The question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination." *Windsor*, 699 F.3d at 184. While there is some truth in this formulation, "the answer to the second question is powerfully influenced by the answer to the first question, because political success is the most direct, if not defining, indicator of the ability to protect oneself through political processes." *Sevcik v. Sandoval*, __ F. Supp. 2d __, 2012 WL 5989662, *12 (D. Nev., Nov. 26, 2012).

Of course, in a case in which the President himself directed the Attorney General to cease its defense of the challenged law and to instead argue on behalf of Respondent Windsor, the court below had to acknowledge the significant political successes of gays and lesbians. Yet the court below reached the perplexing conclusion that they remain politically powerless because they do not have enough power in *every* instance to triumph. *Windsor*, 699 F.3d at 184.

This Court rejected that position in *Cleburne*, explaining that "[a]ny minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect." *Cleburne*, 473 U.S. at 445. Rather, *Cleburne* said that a class must be politically powerless "in the sense that they have *no ability to attract the attention of the lawmakers*." *Id.* (emphasis added). But the court below ignored this critical part of *Cleburne*.[4]

Instead, the court below suggested that political success can coexist with political powerlessness. The court below supported its theory by noting that "[w]hen the Supreme Court ruled that sex-based classifications were subject to heightened scrutiny in 1973, the Court acknowledged that women had already achieved major political victories." *Windsor*, 699 F.3d at 184. Admittedly, the *Frontiero* plurality opinion did note that "the position of women in America has improved markedly in recent decades," but the Court found that they also still "face pervasive, although at times more subtle, discrimination ... in the political arena." *Frontiero*, 411 U.S. at 685-86. The *Frontiero* Court explained that because of a historical attitude of misguided paternalism, women continued to lack political power, despite some gains:

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[4] The test proposed in *Windsor* "is little test at all, but rather a reason behind an absolute (or nearly absolute) rule ..., *i.e.*, that a discrete minority group challenging a discriminatory law necessarily lacks political power for the purposes of level-of-scrutiny analysis based purely upon the fact that the group has not been able democratically to avoid or alter the law it is challenging in a particular case. That result obviates the Supreme Court's use of political powerlessness as a factor in assessing the level of scrutiny to be applied. If a plaintiff could necessarily win on the political powerless factor of the level-of-scrutiny analysis by the very fact that he was unable to challenge a particular law democratically, the factor would be meaningless." *Sevcik*, __ F. Supp. 2d __, 2012 WL 5989662 at *12.

> It is true, of course, that *when viewed in the abstract*, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, not a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And, as appellants point out, this underrepresentation is present throughout all levels of our State and Federal Government.

Id. at 686 n.17 (emphasis added). The fact that half the population had almost no representation in political decisionmaking bodies suggested a serious democratic malfunction, notwithstanding some important political victories.

Here, homosexuals are such a small part of the population that they certainly lack absolute numbers for political power "when viewed in the abstract." *Id.* But every minority group lacks political power "in the abstract" by the mere fact that they are a minority group. In *Frontiero*, the reality that half the population had almost no representation in decisionmaking bodies suggested a more serious problem in the democratic process. "[T]heir political voice was disproportionately small compared to their numbers." *Sevcik*, __ F. Supp. 2d at __, 2012 WL 5989662 at *13. In contrast, while homosexuals may be a small percentage of the population, their "political voice" is disproportionately loud and vastly outweighs their numbers.[5] Indeed, it is remarkable that such a small percentage of the population has dominated so much of the attention of America's lawmakers. This is far different from the circumstance described in *Frontiero*.

The relevant consideration is not the raw numbers of gay and lesbian elected officials, but their "ability to attract the attention of the lawmakers." *Cleburne*, 473 U.S. at 445. That includes homosexual and heterosexual lawmakers. For even if homosexuals are underrepresented in decisionmaking bodies (in the sense that there are fewer open homosexuals in those bodies than there are in the general population[6]), "[s]upport for homosexuals is, of course, not limited to other homosexuals." *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 n.9 (7th Cir. 1989). As discussed below, gays and lesbians clearly have attracted attention and substantial support for their interests. If anything, they hold disproportionate political power in comparison to their numbers.

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[5] In its brief to the Second Circuit, the Department of Justice explains that "[i]t is difficult to offer a definitive estimate of the size of the gay and lesbian community in the United States. According to an analysis of various data sources published in April 2011 by the Williams Institute, there appear to be 9 million adults in the United States who are lesbian, gay or bisexual, comprising 3.5 percent of the adult population." Case No. 12-CV-2335, Dkt. # 120 at 41 n.8, Brief for the United States, *citing* Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?* (April 2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf.

[6] The court below acknowledges that it cannot in fact say whether gays and lesbians are underrepresented, but the court then goes on to hypothesize that there would be more gays and lesbians in public office if not for "hostility" toward them. *Windsor*, 699 F.3d at 184. While that may be possible, such a presumption cannot form the basis for strict scrutiny.

III. GAYS AND LESBIANS HAVE ATTRACTED THE ATTENTION OF LAWMAKERS.

Two decades ago, the Seventh and Ninth Circuits both recognized the "growing political power" of gays and lesbians and appropriately refused to apply strict scrutiny. *Ben-Shalom*, 881 F.2d at 466; *accord High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990). Both quoted this Court's critical *Cleburne* language that has now been ignored by the court below. "It cannot be said [gays and lesbians] 'have no ability to attract the attention of lawmakers.'" *Ben-Shalom*, 881 F.2d at 466 quoting *Cleburne*, 473 U.S. at 445. The Ninth Circuit also explained that "legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation. Thus, homosexuals are not without political power; they have the ability to and do 'attract the attention of the lawmakers,' as evidenced by such legislation." *High Tech Gays*, 895 F.2d at 574 (quoting *Cleburne*, 473 U.S. at 445). Although the political successes noted by the Seventh and Ninth Circuits were modest, they were sufficient to show that gays and lesbians were not politically powerless. And in the intervening twenty-plus years, their political power has only grown.

In 2006, the Washington Supreme Court noted that sexual orientation had been added to the Washington State Law Against Discrimination and that "several state statutes and municipal codes provide protection against discrimination based on sexual orientation and also provide economic benefit for same sex couples." *Andersen v. King County*, 138 P.3d 963, 974 (Wash. 2006) (en banc). Additionally, "a number of openly gay candidates were elected to national, state, and local offices in 2004." *Id.* That court logically concluded that "[t]he enactment of provisions providing increased protections to gay and lesbian individuals in Washington shows that as a class gay and lesbian persons are not powerless but, instead, exercise increasing political power." *Id.* at 974-75.

In 2007, the Supreme Court of Maryland agreed that gays and lesbians possess political power:

> In spite of the unequal treatment suffered by [many gays and lesbians], we are not persuaded that gay, lesbian, and bisexual persons are so politically powerless that they are entitled to extraordinary protection from the majoritarian political process. To the contrary, it appears that, at least in Maryland, advocacy to eliminate discrimination against gay, lesbian, and bisexual persons based on their sexual orientation has met with growing successes in the legislative and executive branches of government.

Conaway v. Deane, 932 A.2d 571, 611 (Md. 2007) (internal quotation marks omitted).

Of course, since these decisions in 2006 and 2007, the political power of gays and lesbians has increased substantially. This is perhaps best evidenced by President Obama's own public evolution on the issue of same-sex marriage.

A. President Obama and His Administration Strongly Support Gay and Lesbian Causes.

Only recently, the entire nation paused to watch America re-inaugurate President Obama into office. In his inaugural address, the President spoke of the issues that are a priority for his administration. And on that highly visible inaugural stage, in three separate references to gay and lesbian interests, the President himself pledged his support for gay and lesbian political causes.[7]

The President's high-profile endorsement of gays and lesbians should come as no surprise. The official White House web page now blares: "President Obama Supports Same-Sex Marriage."[8] Newspapers across the country, lauding President Obama's support, agree that President Obama's personal shift on this issue is symbolic of a national shift in public opinion. They describe President Obama's same-sex marriage support announcement as "an important, even historic, marker of how far public opinion has shifted."[9] The New York Daily News noted that President Obama's announcement was part of a "national conversation that has moved with unprecedented speed."[10] Judicial intervention, of course, would bring that national conversation to an abrupt end.

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[7] President Obama, Inaugural Address (Jan. 21, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama.

[8] The White House Blog, *President Obama Supports Same-Sex Marriage*, http://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage.

Even before his declaration of open support for same-sex marriage, President Obama bragged that "[s]ince I took office, my Administration has worked to broaden opportunity, advance equality, and level the playing field for LGBT people and communities."[11] Support from President Obama's administration has included:

- Not only refusing to defend DOMA,[12] but filing briefs in this case arguing that DOMA is unconstitutional;
- Successfully pushing Congress to repeal 10 U.S.C. § 654 ("Don't Ask, Don't Tell");[13]
- Supporting the Hate Crimes Bill;[14]
- A presidential directive to end discrimination

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[9] *Id.* (quoting USA Today, May 10, 2012).

[10] *Id.* (quoting New York Daily News, May 10, 2012).

[11] President Obama, *Lesbian, Gay, Bisexual, and Transgender Pride Month, 2012*, A Proclamation By the President of the United States of America (June 1, 2012).

[12] Letter from Eric Holder, Att'y Gen'l, to the Hon. John A. Boehner, Speaker of the House, *On Litigation Involving the Defense of Marriage Act*, Feb. 23, 2011, http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

[13] Christine Simmons, *Obama HRC Speech: "I Will End Don't Ask, Don't Tell," Says President Obama*, Huffington Post, Oct. 10, 2009, http://www.huffingtonpost.com/2009/10/10/obama-says-he-will-end-do_n_316524.html.

[14] President Obama, *Pride Month 2012* Proclamation, *supra*.

on the basis of gender identity;[15]

- Appointing the highest-ever number of openly gay and lesbian people to his administration;[16]
- Proclaiming an annual gay pride month;[17]
- Issuing a June 2009 a memorandum to all federal executive departments and agencies ordering that same-sex partners of federal workers receive some federal benefits;[18] and
- Expanding domestic partner benefits in June 2010.[19]

President Obama has also appeared—twice—as the keynote speaker at the National Dinner for The

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[15] President Obama, *Presidential Memorandum – Hospital Visitation*, (April 15, 2010), http://www.whitehouse.gov/the-press-office/presidential-memorandum-hospital-visitation.

[16] *See, e.g.*, *Presidential Appointments Project*, Gay & Lesbian Leadership Institute, http://www.glli.org/programs/presidential ("The Presidential Appointments Project, led by the Gay & Lesbian Leadership Institute, serves as a talent bank for openly LGBT professionals seeking opportunities to improve our federal government's policies and processes" and lists names of more than 250 openly LGBT Appointees of the Obama-Biden Administration and nominated but not Senate-confirmed appointees—"more than all known LGBT appointments of other presidential administrations combined").

[17] Obama, *Pride Month 2012* Proclamation (mirroring similar proclamations in 2009, 2010, and 2011).

[18] President Obama, *Memorandum for the Heads of Executive Departments and Agencies on Federal Benefits and Non-Discrimination*, (June 17, 2009), http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-federal-benefits-and-non-discri.

[19] Ed O'Keefe, *Same-Sex Partners of Federal Workers Can Start Applying for Benefits Next Month*, Wash. Post, June 2, 2010 (reporting on June 1, 2010 announcement that that the "same-sex partners of gay and lesbian federal workers [could begin] applying . . . for long-term health-care insurance").

Human Rights Campaign, a 1.5 million member LGBT civil rights organization.[20] Former President Bill Clinton, former Vice President Al Gore, and then-Speaker Nancy Pelosi have also appeared at that event.[21] Then-Senator Hillary Clinton also appeared on behalf of then-Senator Joe Biden. Although Vice President Biden voted for DOMA as a senator, he is also now a vocal supporter of same-sex marriage.

B. Congressional Support for Gay and Lesbian Causes.

Gays and lesbians also have substantial support in Congress. The Senate Majority Leader and the House Minority Leader both support same-sex marriage. One-third of the Members of the U.S. House of Representatives filed a brief in the court below attacking the wisdom and constitutionality of DOMA.

At least some of that support comes from representatives who are themselves gay or lesbian. Six members of the U.S. House Representatives and one Senator—the recently elected Senator Tammy Baldwin of Wisconsin—are openly gay. Notably, the president and CEO of the Gay & Lesbian Victory Institute observed that "Baldwin's victory . . . is a testament to the enormous [political] power of . . .

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[20] *See, e.g.*, HRC, *Past Dinners*, http://www.hrcnationaldinner.org/pages/past-dinners; *Human Rights Campaign to Honor House Speaker Nancy Pelosi with 2007 National Equality Award*, July 23, 2007, http://www.hrc.org/press-releases/entry/nancy-pelosi-to-speak-at-hrc-dinner.

[21] *Id.*

LGBT candidates and their allies [who] showed we are willing to engage fully in the political process to win."[22]

Most gay and lesbian support, of course, comes from their impressive array of heterosexual allies. A significant number of Congressional members receive top scores for their work on LGBT issues from the Human Rights Campaign. Fifty-two Senators and 174 House members received scores of 70% or higher. [23]

Many of those legislators may owe their political seat to the work of the HRC. That organization has bragged about its success in getting LGBT allies elected to office: "We were named—by the well-respected *National Journal*—the single most effective, non-union progressive organization working in the 2006 midterm elections. We played a decisive role in electing fair-minded majorities to the U.S. House and Senate, and to legislatures from Oregon to New Hampshire."[24]

LGBT political success is no secret. Mainstream headlines have been filled with news of recent LGBT political victories in Washington: the repeal of "Don't Ask, Don't Tell," the introduction and hearings for a

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[22] Denis Dison, *Victory Fund celebrates huge night for gay candidates*, Gay Politics (Nov. 7, 2012), http://www.gaypolitics.com/2012/11/07/victory-fund-celebrates-huge-night-for-gay-candidates/.

[23] HRC, *Congressional Scorecard: Measuring Support for Equality in the 112th Congress* 6-11, 15-31 (Oct. 18, 2012), http://www.hrc.org/files/assets/resources/HRC-112th_CongressionalScorecard_Updated.pdf.

[24] HRC 2007 Annual Report 4 (2007), http://www.hrc.org/files/assets/resources/AnnualReport_2007.pdf.

DOMA repeal bill, Senate confirmation of openly gay and lesbian judges, and Congressional dispute over whether the House should defend the constitutionality of DOMA after President Obama directed the Department of Justice not to.

In addition, over the last two decades, Congress has spent tens of billions of taxpayer dollars on AIDS treatment, research, and prevention. This Congressional spending is—at least in part—a direct result of successful lobbying by LGBT constituents and their powerful allies.[25]

Political success should only grow now that the larger of this country's two major political parties has repeatedly declared its support for same-sex marriage and other gay-rights issues. The 2012 Democratic National Platform proclaims:

> We support the Employment Non-Discrimination Act . . . The Administration has said that the word 'family' in immigration includes LGBT relationships . . . We support marriage equality and support the movement to secure equal treatment under law for same-sex couples . . . We oppose . . . constitutional amendments and other attempts to [define marriage as the union of a man and a woman]. . . . We support the full repeal of the so-called Defense of Marriage Act and the

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[25] Judith A. Johnson, Cong. Research Serv., RL30731, *AIDS Funding for Federal Government Programs: FY1981-FY2009* (2008) (reporting a dramatic increase in AIDS funding, with $6 billion in discretionary funds in 2008).

> passage of the Respect for Marriage Act.[26]

A growing number of Republicans also support same-sex marriage and other gay-rights causes.[27]

Joe Solmonese, President of the Human Rights Campaign, said in 2008 that "[t]he lesbian, gay, bisexual and transgender community has made unprecedented progress in Congress over this two-year session . . . [T]hese accomplishments would not have been possible without the support of congressional leadership and allies in both the House and Senate."[28] HRC's view of subsequent Congressional terms was also complimentary.[29] Its assessment of the most recent 112th Congress again "shows the LGBT community is making gains on Capitol Hill."[30]

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[26] Platform Standing Comm., 2012 Democratic Nat'l Convention Comm., *Moving America Forward* 17, 18 (2012). The 2008 Democratic Platform also supported gay and lesbian causes, and vowed to "fight . . . in every corner of our country" to further that goal. Platform Standing Comm., 2008 Democratic Nat'l Convention Comm., *Renewing America's Promise* (2008).

[27] *See, e.g., Republicans support same-sex marriage, too*, Baltimore Sun, Nov. 1, 2012, http://articles.baltimoresun.com/2012-11-01/news/bs-ed-gop-marriage-letter-20121101_1_marriage-equality-republicans-civil-marriage-protection-act (listing notable Republican supporters of same-sex marriage); GoProud, *Advisory Council*, http://goproud.org/page.aspx?pid=354, (including Grover Norquist, "one of the most important conservative leaders in the country").

[28] HRC, *Congressional Scorecard: Measuring Support for Equality in the 110th Congress* 2 (Oct. 15, 2008) http://www.hrc.org/files/documents/Congress_Scorecard-110th.pdf.

[29] HRC, *Measuring Support for Equality: HRC's Scorecard for the 111th Congress*, http://www.hrc.org/files/assets/resources/111thCongressional_Scorecard.pdf (praising, "fair-minded leadership and a new

These political accomplishments are the work of a powerful and effective political organization. With the support of the President, Congress, and ongoing support from a major political party, gays and lesbians are surely not a politically powerless group.

C. Political Victories in the States.

LGBT political power is also reflected in state-level politics. In the 2012 election, voters in three states—Washington, Maryland, and Maine—redefined marriage to include same-sex couples. In Minnesota, voters rejected a ballot measure similar to California's Proposition 8. In 2011, New York's legislature enacted same-sex marriage, continuing the political march begun in the legislatures of Massachusetts, Vermont, and New Hampshire.[31] California's legislature has granted all of the legal rights of marriage to domestic partnerships. *Perry v. Brown*, 671 F.3d 1052, 1065 (9th Cir. 2012). And gays and lesbians have succeeded in enacting similar laws in many states and the District of Columbia that provide civil unions, domestic partnerships, and

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president who would support...measures to protect the LGBT community" that enabled "the LGBT community...to build majorities for important legislation in this Congress.").

[30] *HRC Scorecard of 112th Congress, supra.*

[31] Despite vigorous grass-roots efforts, the Massachusetts Legislature did not overturn the Massachusetts Supreme Judicial Court's recognition of same-sex marriage in 2003; Vermont's legislature adopted it in 2009; and New Hampshire's in 2010.

related benefits for same-sex couples.[32]

As of 2011, thirty-one states and the District of Columbia had laws regarding "hate crimes" based on sexual orientation.[33] In addition, the Human Rights Campaign reports that twenty-one states, the District of Columbia, and at least 181 cities and counties prohibit employment discrimination on the basis of sexual orientation.[34] "Almost half" of the states and the District of Columbia provide domestic partnership benefits for state employees.[35]

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[32] *See, e.g.*, Colo. Rev. Stat. §§ 15-22-101-112 (creating designated beneficiary agreements for same-sex couples); Conn. Gen. Stat. §§ 46b-38aa et seq. (establishing civil unions in 2005, but replaced with same-sex marriage in 2010); D.C. Code §§ 1-307.68, 1-612.31-38, 3-413, 5-113.31, 16-1001, 21-2210, 32-701-710, 42-1102, 42-3404.02, 42-3651.05, 46-401, 46-401.01, 47-858.03, 47-902, 50-1501.02, 7-201-228 (providing for and recognizing same-sex marriages and earlier provisions for same-sex partners); Haw. Rev. Stat. §§ 572C-1-7 (recognizing reciprocal benefits in 1997 and adding civil unions in 2012); Ill. Comp. Stat. 750 § 75/1-90 (establishing civil unions); 2011 IL H.B. 5170 (NS) (proposing recognition of same-sex marriage); Me. Rev. Stat. tit. 18-A, § 1-201, 19-A, § 4002, 22, § 2710, 22, §§ 2843, 2846 (establishing various benefits for domestic partners); Md. Code Ann., Fam. Law §§ 2-201, 2-202 (authorizing same-sex marriages); Md. Code Ann., Health-Gen. § 6-101 (adding domestic partnerships); Nev. Rev. Stat. Ann. §§ 122A.010-122A.510 (establishing domestic partnerships); N.H. Rev. Stat. Ann. §§ 457:1-46 (replacing prior civil union statute with same-sex marriage); N.J. Stat. Ann. §§ 26:8A-1-13, 37:1-28-36 (establishing civil unions and domestic partnerships); N.Y. Dom. Rel. Law § 10-a (enacting same-sex marriage); Or. Rev. Stat. Ann. §§ 106.300-.340 (creating domestic partnerships); R.I. Gen. Laws Ann. §§ 15-3.1-11 (establishing civil unions); Vt. Stat. Ann. tit. 15, § 8 (enacting same-sex marriage with override of governor's veto); Vt. Stat. Ann. tit. 15, § 1204 (enacting civil unions); Wash. Rev. Code Ann. §§ 26.60.010-901 (establishing domestic partnerships; amended to establish same-sex marriages); Wis. Stat. Ann. §§ 770.001-.18 (establishing domestic partnerships).

[33] Anti-Defamation League State Hate Crime Statutory Provisions, http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf.

Gay and lesbian candidates have also enjoyed political success countrywide. In the 2012 election, "[h]undreds of openly lesbian, gay, and bisexual candidates won election to public offices across America."[36] In fact, the Gay & Lesbian Victory Institute, an organization that works to "increase the number of lesbian, gay, bisexual, and transgender (LGBT) people in public office," identifies more than 100 openly LGBT members currently serving in state legislatures across the country.[37]

There is no current reason to believe this trend—which clearly reflects increasing political support for gays and lesbians—will not continue. Public opinion is clearly headed in the same direction.

D. Public Support for Gays and Lesbians.

George Chauncey, who testified as an expert in the Proposition 8 case, has written:

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[34] HRC, *The State of the Workplace* (2007-2008), http://www.hrc.org/files/assets/resources/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf.

[35] Julie Appleby, ***Many Businesses Offer Health Benefits To Same-Sex Couples Ahead Of Laws***, PBS NewsHour, May 14, 2012, http://www.pbs.org/newshour/rundown/2012/05/many-businesses-offer-health-benefits-to-same-sex-couples-ahead-of-laws.html (citing an HRC report).

[36] Dison, *supra*.

[37] *Mission*, Gay & Lesbian Leadership Institute, http://www.victoryinstitute.org/mission/mission.

> [I]t is hard to think of another group whose circumstances and public reputation have changed so decisively in so little time. For several decades now, and especially since the 1990s, Americans have become more familiar with their lesbian and gay neighbors and more supportive of them. Above all, there has been a sea change in the attitudes of the young, who have grown up in a world where they know gay people and see them treated with the respect any human deserves.

George Chauncey, *Why Marriage? The History Shaping Today's Debate Over Gay Equality* at 166 (2004).

In the last 16 years, public support for same-sex marriage has increased from 27% to 53%.[38] "Gay marriage has transitioned from a right-wing wedge issue to a position enjoying an emergent majority consensus. Marriage equality opponents are now on the defensive . . . ."[39]

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[38] Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, Gallup.com (May 20, 2011), http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx.

[39] David Schraub, *The Perils and Promise of the Holder Memo*, 2012 Cardozo L. Rev. de novo 187, 199 (2012).

E. Financial Support for Gay and Lesbian Causes.

Of course, political success requires funding. But gay and lesbian causes also enjoy generous financial support. NPR reports that "[a] new force is emerging in American politics: wealthy, gay political donors who target state-level races."[40] And gays and lesbians represent nearly 20% of President Obama's top fundraisers.[41]

Financial support for gay and lesbian interests was highly visible in the costly Proposition 8 campaign. The "No on 8" campaign raised $43 million and outspent Prop. 8 supporters by $3 million.[42] Reports indicate that the 2012 same-sex marriage ballot initiatives heavily outspent supporters of traditional marriage by even greater margins.[43]

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[40] *See, e.g.*, Austin Jenkins, *Wealthy Gay Donors a New Force in Politics*, NPR, June 26, 2007, http://www.npr.org/templates/story/story.php?storyId=11433268

[41] Michelle Garcia & Andres Harmon, *Obama's Power Gays*, Advocate.com (Oct. 24, 2011), http://www.advocate.com/news/daily-news/2011/10/24/obamas-power-gays; Dan Eggen, *The Influence Industry: Same-Sex Marriage Issue Shows Importance of Gay Fundraisers*, Wash. Post (May 9, 2012), http://www.washingtonpost.com/politics/same-sex-marriage-debate-many-of-obamas-top-fundraisers-are-gay/2012/05/09/gIQASJYSDU_story.html; *see also* John Cloud, *The Gay Mafia That's Redefining Liberal Politics*, Time, Oct. 31, 2008, http://www.time.com/time/magazine/article/0,9171,1855344,00.html (describing "the Cabinet" of wealthy homosexual men "that can quietly swoop in wherever anti-gay candidates are threatening and finance victories for the good guys."); HRC 2011 Annual Report, *supra* at 15 (showing sustained annual fundraising of approximately $40 million).

Expensive advertising and promises of campaign funding unquestionably affected New York's 2011 legislative enactment of gay marriage. "The Human Rights Campaign financed an advertising barrage . . . Several prominent Republican fund-raisers, including billionaire financial executive Paul Singer, provided financial support to the lobbying campaign [for gay marriage]."[44]

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[42] Cal. Sec'y of State, *Campaign Finance: No on 8, Equality for All*, http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1259396&session=2007&view=general (reporting $43 million in funding and expenditures); Cal. Sec'y of State, *Campaign Finance: ProtectMarriage.com – Yes on 8, A Project of California Renewal* http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1302592&session=2007 (reporting $40 million in funding and $39.6 million in expenditures).

[43] Statement of Joseph Backholm, Chairman of Preserve Marriage Washington, Nov. 8, 2012 ("our [LGBT] opponents had a giant financial advantage, outspending us by $10 million"); Susan M. Cover, *Pro-gay group outraises opponents*, Portland Press Herald, Oct. 7, 2012, http://www.pressherald.com/politics/pro-gay-group-outraises-opponents_2012-10-07.html (reporting $3.35 million raised by supporters of the Maine same-sex marriage ballot measure and only $429,794 raised by its traditional marriage supporters); Anne Linskey, *Maryland Same-Sex Marriage Donors Part of Diverse Coalition Pushing Question 6*, The Baltimore Sun, Nov. 29, 2012, http://www.huffingtonpost.com/2012/11/29/maryland-gay-donors_n_2209724.html (reporting a 2:1 funding advantage for supporters of same-sex marriage in Maryland); Catharine Richert, *Last minute money pours into ballot question funds*, MPRnews, Nov. 6, 2012, http://minnesota.publicradio.org/collections/special/columns/polinaut/archive/2012/11/last_minute_mon.shtml (estimating $10.6 million in funding for same-sex marriage but only $5 million supporting a traditional definition of marriage in Minnesota).

It is said that "[f]ew questions are as important to an understanding of American democracy as the relationship between economic power and political influence."[45] Gays and lesbians clearly understand that relationship and are using it to their political advantage.

F. Corporate and Union Support for Gays and Lesbian Causes.

Many of the largest and most influential unions also actively support the gay and lesbian community. The National Education Association (NEA), which has consistently ranked in the top fifteen of the *Fortune* Washington Power 25 list, regularly advocates for LGBT rights and same-sex marriage recognition. "[For four decades,] NEA has led the fight for the rights of the nation's GLBT students and educators."[46]

Unions lend both their influence and their money to gay and lesbian political causes. The California Teachers Association contributed $1.3

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[44] Michael J. Klarman, From the Closet to the Altar at 163 (2012).

[45] Lester M. Salamon & John J. Siegfried, *Economic Power and Political Influence: The Impact of Industry Structure on Public Policy*, 71 Am. Pol. Sci. Rev. 1026 (1977).

[46] Nat'l Educ. Ass'n, *NEA: A Voice for GLBT Educators* 1, http://www.nea.org/assets/docs/voiceforGLBTeducatorstimeline.pdf (listing timeline of LGBT advocacy actions taken by the NEA for the past forty years).

million to oppose Proposition 8.[47] The 700,000 member California State Council of the Service Employees International Union (SEIU) contributed more than $500,000 to the "No on 8" campaign and assembled a coalition of more than fifty California labor groups representing more than two million California workers to join in an *amicus* brief filed with the California Supreme Court opposing Proposition 8.[48] The 1.6 million member American Federation of State, County and Municipal Employees (AFSCME) has resolved to "continue to support the adoption of federal, state, and local civil rights laws that prohibit discrimination based on sexual orientation in employment and other areas[;] . . . encourage negotiation of anti-discrimination, pay equity and domestic partner benefits provisions in all contracts; and . . . [to] strongly oppose any law or constitutional amendment that will abridge the rights of gays and lesbians including ones that perpetuate unequal marriage treatment."[49]

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[47] *California Teachers Association, Ballot measure activism, 2008* http://ballotpedia.org/wiki/index.php/California_Teachers_Association#cite_ref-13.

[48] Paul Hogarth, *Organized Labor Joins Prop. 8 Lawsuit*, BeyondChron, Jan. 14, 2009, http://www.beyondchron.org/news/index.php?itemid=6490; *cf.* Brief for Cal. Fed. of Labor, AFL-CIO, *et al.* as *Amici Curiae* Supporting Petitioners, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (listing labor groups expressing opposition to Proposition 8).

[49] *Equal Rights for Gay and Lesbian Citizens*, AFSCME Res. 49, 36th Int'l Convention (2004), http://www.afscme.org/members/conventions/resolutions-and-amendments/2004/resolutions/equal-rights-for-gay-and-lesbian-citizens.

In addition to the unquestionable political influence of the unions, "[t]he business community . . . is one of the most important sources of interest group activity."[50] The gay and lesbian community also enjoys broad support from this important and lucrative source of interest group activity—Corporate America funds a broad range of gay and lesbian political causes. The HRC lists numerous corporate sponsors, including American Airlines, Chevron, Citibank, Coca-Cola, Dell, IBM, Lexus, Macy's, Marriott, Nike, and Starbucks.[51] These corporations provide a significant amount of HRC's sustained forty million dollar annual budget. The Gay, Lesbian, and Straight Education Network (GLSEN) is also supported by America's most recognized corporate names.[52] And Lambda Legal, "the oldest national organization whose mission is to safeguard and advance the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation," boasts donations from the nation's top law firms and corporations.[53]

At times, businesses also take very public positions on political issues. Illinois corporations and business owners have just recently written to State lawmakers, encouraging them to redefine marriage to include gay and lesbian couples.[54] In California's Proposition 8 battle, many Silicon Valley corporate leaders used their influence to rally voters to oppose that measure.[55]

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[50] Wendy L. Hansen & Neil J. Mitchell, ***Disaggregating and Explaining Corporate Political Activity: Domestic and Foreign Corporations in National Politics***, 94 Am. Pol. Sci. Rev. 891 (2000).

[51] HRC, ***National Corporate Sponsors***, http://www.hrc.org/the-hrc-story/corporate-partners.

[52] Gay, Lesbian, & Straight Educ. Network, ***2010 Annual Report*** 2 (2010), http://www.glsen.org/binary-data/GLSEN_Annual_Report_FY10.pdf.

[53] ***Our Work***, Lambda Legal, http://www.lambdalegal.org/our-work/.

Corporations also influence public policy through their own internal policies. And there, too, gays and lesbians have valuable and effective allies. The 2013 Human Rights Campaign's Corporate Equality Index reported that ninety-nine percent of America's top grossing companies—including companies in the Fortune 1000, Forbes 200 top private firms, and/or American Lawyer's top 200 law firms—had policies prohibiting discrimination on the basis of sexual orientation.[56]

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[54] Manya Brachear, *Business Leaders Come Out in Support of Gay Marriage in Illinois*, Chicago Trib. (Jan. 14, 2013); http://www.chicagotribune.com/news/local/breaking/chi-illinois-gay-marriage-business-endorsement,0,5903141.story.

[55] Press Release, Equality Cal., *Silicon Valley Leaders to Denounce Proposition 8 in Newspaper Ad* (Oct. 30, 2008), http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=4061163&content_id=%7BF3AB95F6-93FA-40B1-82B7-CAA2C038EDAF%7D&notoc=1; Sergey Brin, *Our Position on California's No on 8 Campaign*, The Official Google Blog (Sept. 26, 2008), http://googleblog.blogspot.com/2008/09/our-position-on-californias-no-on-8.html (opposing Prop 8).

[56] HRC, *Corporate Equality Index 2013: Rating American Workplaces on Lesbian, Gay, Bisexual and Transgender Equality in Corporate America*, 1 (2012) (also noting that "96% CEI-Rated Employee groups are sponsored by an Executive Champion" and "35% of those Executive Champions report being openly gay.").

G. Media Support for Gay and Lesbian Causes.

Shaping public opinion is the key to political power.[57] America's news media renders direct and concrete support for gay and lesbian political efforts, and such "elite support" has "great[] influence" on public policy.[58] In the last decade, the New York Times has run over 8,500 stories about gay rights – two stories every single day for the last ten years.[59] HRC brags that it is quoted every day in prominent newspapers and that editorial boards view HRC's positions as "common sense."[60]

Additionally, "[t]here are more gay and lesbian characters on network television this season [2012-2013] than ever before" – in fact, "31 regularly-appearing characters . . . identify as gay, lesbian, bisexual or transgender." [61] As GLAAD's Board recently noted, some voters do not know any gay or transgender people. Those voters bring the images of gays and lesbians they have met "on their favorite TV shows, while at the movies, or when sitting down to read the Sunday paper. . . . It's those images they bring with them to the ballot box come voting time."[62]

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[57] *See* John R. Zaller, *The Nature & Origins of Mass Opinions* (1992) (showing how opinions of media elites set public opinion).

[58] Donald P. Haider-Markel et al., *Minority Group Interests & Political Representation: Gay Elected Officials in the Policy Process*, 62 J. Pol. 568, 575 (2000) (showing that "elite support has greatest influence" on adoption of domestic partner benefits)

[59] This number was derived from the following search on Westlaw: "gay rights" & DA(aft 12-31-2002 & bef 01-02-2013) & SO(New York Times).

[60] HRC 2005 Annual Report, 20 (2005), http://www.hrc.org/files/assets/resources/AnnualReport_2005.pdf; HRC 2000 Annual Report, 3 (2000), http://www.hrc.org/files/assets/resources/AnnualReport_2000.pdf.

[61] Brian Stelter, *Group Finds More Gay and Lesbian Characters on Television*, New York Times, Oct. 5, 2012, http://mediadecoder.blogs.nytimes.com/2012/10/05/group-finds-more-gay-and-lesbian-characters-on-television/.

H. Religious Support for Gay and Lesbian Causes.

Gays and lesbians also have valuable allies in a growing number of religious organizations. "The myth that people of faith do not accept their LGBT brothers, sisters, neighbors and friends is simply untrue."[63] Many religious organizations have officially embraced same-sex partnerships.[64] A recent compilation of religious groups' official positions regarding same-sex marriage shows many religious organizations officially embracing homosexuality and same-sex partnership.[65]

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[62] GLAAD, *Images of Equality: 2011-2102 Performance Report, From the Board* 1 (2012), http://www.glaad.org/publications/performance-report-2012.

[63] *Id.* at 13.

[64] *Religious Groups' Official Positions on Same-Sex Marriage*, Pew Forum on Religion & Pub. Life (Dec. 7, 2012), http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Religious-Groups-Official-Positions-on-Same-Sex-Marriage.aspx. *See also* Chauncey, *supra* at 77-78 ("On the day same-sex marriage became legal in Massachusetts, the Unitarian Universalist Association, Reform Judaism, Reconstructionist Judaism, and the Metropolitan Community Church encouraged their clergy to officiate at such weddings, and clergy in the American Baptist Churches and United Church of Christ could choose to do so.").

Many individual adherents of religious faiths support same-sex marriages regardless of the official stance of their faith group. Equality California, a gay advocacy organization, acknowledges this valuable support, saying "[w]hile our opponents certainly invoke scripture and theology to justify their beliefs, there are many clergy and denominations that feel equally passionate that their faiths call them to stand up for marriage equality."[66]

CONCLUSION

When President Obama announced his support for same-sex marriage during a nationally-televised interview, he added that "people are going to have differing views on marriage and those views, even if we disagree strongly, should be respected."[67] That is really the crux of this case: whether differing viewpoints on an issue that is as critically important as the definition of marriage should be respected and debated as part of the democratic process, or whether the judiciary should cut off that debate and declare the traditional view of marriage constitutionally unacceptable.

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[65] *Religious Groups' Official Positions on Same-Sex Marriage, supra.*

[66] Equality Cal., *Winning Back Marriage Equality in California: Analysis and Plan,* 22 (2009), http://www.eqca.org/atf/cf/%7B34f258b3-8482-4943-91cb-08c4b0246a88%7D/EQCA-WINNING_BACK_MARRIAGE_EQUALITY.pdf.

[67] President Obama Supports Same-Sex Marriage, *supra.*

The political success of gays and lesbians "negates any claim" of political powerlessness. *Cleburne*, 437 U.S. at 445. Faithful application of this Court's precedents requires deference to the political process.

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January 29, 2013

AMICUS
CURIAE
BRIEF

Nos. 12-144, 12-307

In the
Supreme Court of the United States

DENNIS HOLLINGSWORTH, *ET AL.*, *Petitioners*
v.
KRISTIN M. PERRY, *ET AL.*, *Respondents.*

UNITED STATES OF AMERICA, *Petitioner*,
v.
EDITH SCHLAIN WINDSOR AND
BIPARTISAN LEGAL ADVISORY GROUP, *Respondents.*

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURTS OF APPEALS
FOR THE NINTH AND SECOND CIRCUITS

BRIEF OF CONSTITUTIONAL LAW SCHOLARS BRUCE ACKERMAN, ASH BHAGWAT, LEE BOLLINGER, ERWIN CHEMERINSKY, MICHAEL C. DORF, LEE EPSTEIN, BARRY FRIEDMAN, JOHN C. JEFFRIES, JR., LAWRENCE LESSIG, WILLIAM MARSHALL, FRANK MICHELMAN, JANE S. SCHACTER, SUZANNA SHERRY, GEOFFREY R. STONE, DAVID STRAUSS, LAURENCE TRIBE, AND WILLIAM VAN ALSTYNE AS *AMICI CURIAE* ADDRESSING THE MERITS AND SUPPORTING AFFIRMANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

THE CONSTITUTION REQUIRES HEIGHTENED JUDICIAL SCRUTINY OF LAWS THAT DISCRIMINATE AGAINST GAY AND LESBIAN PERSONS 5

- A. Gay Men And Lesbians Have Faced A Long History Of Discrimination 8
- B. Sexual Orientation Is Irrelevant To An Individual's Ability To "Contribute To Society" 13
- C. Gay Men And Lesbians Lack Sufficient Political Power To Protect Themselves Against Invidious Discrimination 16
- D. Sexual Orientation Is An "Immutable" Or "Defining" Characteristic 23
- E. Neither *Baker v. Nelson* Nor *Romer v. Evans* Nor *Lawrence* Forecloses Application Of Heightened Scrutiny 28

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

CASES

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 6, 7, 18

Baker v. Nelson,
409 U.S. 810 (1972) 5, 28

Baker v. Wade,
769 F.2d 289 (5th Cir. 1985), *cert. denied*,
478 U.S. 1022 (1986) 12

Ben-Shalom v. Marsh,
881 F.2d 454 (7th Cir. 1989), *cert. denied*,
494 U.S. 2004 (1990) 31

Boutilier v. INS,
387 U.S. 118 (1967) 11

Bowen v. Gilliard,
483 U.S. 587 (1987) 7, 24

Bowers v. Hardwick,
478 U.S. 186 (1986) 12

Buckley v. Valeo,
424 U.S. 1 (1976) 5

Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez,
130 S. Ct. 2971 (2010) 27

TABLE OF AUTHORITIES—Continued

Page(s)

City of Cleburne v. Cleburne Living Center, Inc.,
473 U.S. 432 (1985) 6, 7, 13, 15

City of New Orleans v. Dukes,
427 U.S. 297 (1976) 24

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 18, 32

Clark v. Jeter,
486 U.S. 456 (1988) 6

Conaway v. Deane,
932 A.2d 571 (Md. 2007) 14

Cook v. Gates,
528 F.3d 42 (1st Cir. 2008) 31

Craig v. Boren,
429 U.S. 190 (1976) 18

Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati,
860 F. Supp. 417 (S.D. Ohio 1994), *rev'd on other grounds*, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996)...14, 31

Fatin v. INS,
12 F.3d 1233 (3d Cir. 1993) 24

TABLE OF AUTHORITIES—Continued

Page(s)

Frontiero v. Richardson,
411 U.S. 677 (1973) 7, 13, 16, 18, 20, 24, 26, 29

Golinski v. United States Office of Personal Management,
824 F. Supp. 2d 968 (N.D. Cal.), *petition for cert. filed* (U.S. July 3, 2012) (No. 12-16).............9, 25

Graham v. Richardson,
403 U.S. 365 (1971) 6

Gregory v. Ashcroft,
501 U.S. 452 (1991) 14

Hernandez v. Robles,
855 N.E. 2d 1 (N.Y. 2006)...14

Hicks v. Miranda,
422 U.S. 332 (1975) 29

High Tech Gays v. Defense Industrial Security Clearance Office,
895 F.2d 563 (9th Cir. 1990) 27, 31

Howard v. Child Welfare Agency Review Board,
No. CV 1999-9881, 2004 WL 3154530 (Ark. Cir. Dec. 29, 2004), *aff'd*, 238 S.W.3d 1 (Ark. 2006) 11

Illinois State Board of Elections v. Socialist Workers Party,
440 U.S. 173 (1979) 28

TABLE OF AUTHORITIES—Continued

Page(s)

Jantz v. Muci,
759 F. Supp. 1543 (D. Kan. 1991), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 508 U.S. 952 (1993)....14

Johnson v. Johnson,
385 F.3d 503 (5th Cir. 2004)....31

Kerrigan v. Commissioner of Public Health,
957 A.2d 407 (Conn. 2008)....21, 25

Lalli v. Lalli,
439 U.S. 259 (1978)....13

Lawrence v. Texas,
539 U.S. 558 (2003)....5, 12, 27, 28, 29, 30, 32

Lofton v. Secretary of the Department of Children & Family Services,
358 F.3d 804 (11th Cir. 2004)....31

Loving v. Virginia,
388 U.S. 1 (1967)....4, 17, 23

Lyng v. Castillo,
477 U.S. 635 (1986)....7, 24

In re Marriage Cases,
183 P.3d 384 (Cal. 2008)....25

Massachusetts Board of Retirement v. Murgia,
427 U.S. 307 (1976)....7, 14

TABLE OF AUTHORITIES—Continued

Page(s)

Mathews v. Lucas,
427 U.S. 495 (1976) 25

Mississippi University for Women v. Hogan,
458 U.S. 718 (1982) 6, 29

Nyquist v. Mauclet,
432 U.S. 1 (1977) 7, 24

Opinion of the Justices,
525 A.2d 1095 (N.H. 1987) 11

Padula v. Webster,
822 F.2d 97 (D.C. Cir. 1987) 27, 31

Pedersen v. Office of Personal Management,
881 F. Supp. 2d 294 (D. Conn. 2012) 9, 19

Perry v. Brown,
671 F.3d 1052 (9th Cir. 2012) 31

Perry v. Schwarzenegger,
704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd*,
671 F.3d 1052 (9th Cir. 2012) 9

Plyler v. Doe,
457 U.S. 202 (1982) 6, 24

Price-Cornelison v. Brooks,
524 F.3d 1103 (10th Cir. 2008) 31

TABLE OF AUTHORITIES—Continued

Page(s)

Romer v. Evans,
517 U.S. 620 (1996) 29, 30

Rowland v. Mad River Local School District,
730 F.2d 444 (6th Cir. 1984), *cert. denied*,
470 U.S. 1009 (1985) 9

Rowland v. Mad River Local School District,
470 U.S. 1009 (1985) 21, 28

Scarbrough v. Morgan County Board of Education,
470 F.3d 250 (6th Cir. 2006) 31

Steffan v. Perry,
41 F.3d 677 (D.C. Cir. 1994) 24

Walmer v. Department of Defense,
52 F.3d 851 (10th Cir. 1995) 32

Watkins v. United States Army,
875 F.2d 699 (9th Cir. 1989), *cert. denied*,
498 U.S. 957 (1990) 14, 25

Weinberger v. Wiesenfeld,
420 U.S. 636 (1975) 5

Woodward v. United States,
871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*,
494 U.S. 1003 (1990) 31

TABLE OF AUTHORITIES—Continued

Page(s)

FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV, § 1 5

8 U.S.C. § 1182(a)(4) (1982) 11

10 U.S.C. § 654(b) (2006), *repealed by* Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3515 (2010) 10

Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874 (1917) 10

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Immigration and Nationality Act, amended October 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911 10

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INTEREST OF *AMICI CURIAE*

Amici are constitutional law scholars who teach and write in the field. *Amici* have studied, written scholarly commentary on, and have a common professional interest in one of the issues presented in these cases: Whether a classification based on sexual orientation triggers heightened scrutiny under this Court's equal protection jurisprudence.

Amici are the following scholars[1]:

Bruce Ackerman, Sterling Professor of Law and Political Science, Yale Law School;

Ashutosh Bhagwat, Professor of Law, University of California at Davis School of Law;

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[1] *Amici* appear in their individual capacities; institutional affiliations are listed here for identification purposes only. All parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

For decades, this Court has considered four factors in determining whether a law that discriminates against any particular group should be tested by heightened judicial scrutiny: (1) whether the group has experienced a history of invidious discrimination; (2) whether the defining characteristic of the group is relevant to one's ability to contribute to society; (3) whether the group can effectively protect itself against discrimination through the political process; and (4) whether an individual can, without sacrificing a core aspect of her identity, effectively opt-out of the group. Applying those factors, classifications based on sexual orientation clearly warrant heightened scrutiny.

1. It is beyond question that gay men and lesbians have suffered a history of purposeful discrimination, both private and legal. They have been ostracized, humiliated, prosecuted, denied both private and government employment, and denied even the right to form a family. Few groups in American history have experienced such persistent and pervasive discrimination.

2. A person's sexual orientation is irrelevant to her ability to contribute to society. Sexual orientation is not in any way a disability that renders an individual less capable of being a lawyer, doctor, policeman, parent, teacher, plumber, or judge. It is a classic example of a personal characteristic that has no legitimate bearing on one's competence, skill, or value as a human being.

3. Gay and lesbian individuals have limited ability to protect themselves through the political process against continued public and private discrimination.

As an initial matter, this Court's decisions do not support BLAG's suggestion that relative political power is a particularly weighty factor in the analysis. In any event, the limited political power of gay and lesbian persons weighs in favor of applying heightened scrutiny here. Although there have been some recent successes in a few jurisdictions in the struggle for equal rights for gay and lesbian individuals, attempts to secure federal and state antidiscrimination legislation often have failed, and many recent strides toward equality have been swiftly rolled back by aggressive ballot initiatives. The barriers to gay and lesbian persons achieving equal respect, equal dignity, and equal rights through the political process remain daunting, and private discrimination and hostility are still often both widespread and fierce.

Against the backdrop of the nation's history of discrimination against gay and lesbian persons, this Court's decisions teach that the limited and recent progress achieved by this group does not in any way preclude heightened scrutiny of laws that discriminate on the basis of sexual orientation. In *Loving v. Virginia*, this Court unanimously applied strict scrutiny to a law that prohibited interracial marriage, after observing that fourteen states had repealed their anti-miscegenation statutes in the fifteen years leading up to that decision. 388 U.S. 1, 6 n.6 (1967). The Court also extended heightened scrutiny to sex-based classifications at a time when Congress had recently enacted several statutory prohibitions on sex-based discrimination, including the Equal Rights Amendment of 1972. In the same vein, a few scattered victories in a handful of states do not preclude heightened scrutiny for laws that discriminate against gay and lesbian individuals today.

4. Gay and lesbian individuals share a common "immutable" characteristic, both because sexual orientation is fundamental to their identity, *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003), and because one's sexual orientation is not changeable "through conscious decision, therapeutic intervention or any other method." Pet. App. 231a.

Finally, there is no *stare decisis* impediment to applying heightened scrutiny to laws that discriminate against gay and lesbian individuals. Neither the summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972), nor the Court's more recent decisions, addressed the appropriate level of scrutiny to apply to laws that discriminate against gay and lesbian persons.

Accordingly, this Court should apply the traditional four-factor test and hold that heightened scrutiny applies to laws that discriminate on the basis of sexual orientation.

ARGUMENT

THE CONSTITUTION REQUIRES HEIGHTENED JUDICIAL SCRUTINY OF LAWS THAT DISCRIMINATE AGAINST GAY AND LESBIAN PERSONS

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws."[2] U.S. Const. amend. XIV, § 1.

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[2] The equal-protection component of the Fifth Amendment is identical to and coextensive with the Fourteenth Amendment's guarantee. *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal

Laws that distinguish among individuals in the distribution of benefits or burdens generally are presumed to be valid, and will be sustained, if they are "rationally related to a legitimate [government] interest." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). But that "general rule gives way" when the law in question classifies based on factors that "reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *Id.* "Legislation predicated on such prejudice is . . . incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). Accordingly, this Court has held that any law that classifies on the basis of such a characteristic must be tested by heightened judicial scrutiny in order to pass constitutional muster. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Clark v. Jeter*, 486 U.S. 456 (1988) (legitimacy); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (sex/gender).[3]

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protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

[3] A law that singles out such a class for disparate treatment must be narrowly tailored to serve a compelling government interest. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995). Laws that discriminate on the basis of sex are considered quasi-suspect and must be "substantially related to an

In determining whether heightened scrutiny is appropriate, the Court generally considers four factors: (1) whether the group has experienced a history of invidious discrimination, *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam); (2) whether the discrimination is based on "'stereotyped characteristics not truly indicative'" of the group's abilities, *Cleburne*, 473 U.S. at 441 (quoting *Murgia*, 427 U.S. at 313); (3) whether members of the group have "'obvious, immutable, or distinguishing characteristics that define them as a discrete group,'" *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (citation omitted); and (4) whether the group lacks the capacity adequately to protect itself in the political process, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

The Court has not insisted that all four factors be present in every instance. For example, in some cases the Court has applied heightened scrutiny despite a group's substantial political power or the ability of individuals to opt out of the class. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995) (holding that all racial classifications are inherently suspect, even though many racial groups exercise substantial political power); *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (resident aliens are a suspect class notwithstanding their ability to opt out of the class).[4]

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important governmental objective." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 721-22 (1982).

[4] *See also Cleburne*, 473 U.S. at 442 n.10 ("'[T]here's not much left of the immutability theory, is there?'") (quoting John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 150 (1980)); *id.* at 472 n.24 (Marshall, J., concurring in judgment in part and dissenting in part) ("The 'political powerlessness' of a group may be relevant, but that factor is neither necessary, as th

In general, however, these are the four factors the Court considers in deciding whether heightened scrutiny is appropriate.

Consideration of these four factors clearly establishes that laws that discriminate against gay men and lesbians must be subjected to heightened judicial scrutiny. Gay men and lesbians have long suffered a history of discrimination across all facets of life; sexual orientation has no bearing on an individual's ability to contribute to society; gay and lesbian individuals have historically faced significant obstacles to protecting themselves from discrimination through the democratic process; and sexual orientation is immutable or, at a minimum, is a defining characteristic that an individual ought not be compelled by law to change in order to avoid discrimination.

A. Gay Men And Lesbians Have Faced A Long History Of Discrimination

There can be no doubt that homosexuals historically have been, and continue to be, the target of purposeful and often grievously harmful discrimination because of their sexual orientation. For centuries, the prevailing attitude toward gay persons has been "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment." Richard A. Posner, *Sex and Reason* 291 (1992); *see also* Evan Gerstmann, *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal*

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gender cases demonstrate, nor sufficient, as the example of minors illustrates." (citation omitted)); *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973) (applying intermediate scrutiny to women while finding that they "do not constitute a small and powerless minority").

Protection 62 (1999) (cataloguing the "numerous legal disadvantages" suffered by gay men and lesbians "in twentieth-century America"). Gay men and lesbians have been denied employment, targeted for violence, publicly humiliated, and treated as perverts, sinners, and criminals.[5]

The long history of discrimination against gay men and lesbians in this country has been recounted at length by numerous historians, courts, other amici, and by the United States itself. *See, e.g.*, *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 314-15 (D. Conn. 2012); *Golinski v. United States Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985-86 (N.D. Cal.), *petition for cert. filed* (U.S. July 3, 2012) (No. 12-16); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 981-91 (N.D. Cal. 2010), *aff'd*, 671 F.3d 1052 (9th Cir. 2012); *see also* Amicus Br. of Organization of American Historians et al. It therefore suffices for present purposes to provide only a few of many possible examples of the historical discrimination against this group in almost every facet of American life.

One need only look to the federal government's own practices for examples of the widespread, government-sanctioned discrimination suffered by gay and lesbian persons. *See* Br. for the United States at 16, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (Nos. 12-2335, 12-2435), 2012 WL 3548007 ("The federal government has played a significant and regrettable role in the history of discrimination against gay and lesbian individuals.").

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[5] *See also Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) (stating that "homosexuals have historically been the object of pernicious and sustained hostility").

During World War II, for example, the military systematically attempted to screen out lesbians and gay men from the armed forces and—adding insult to injury—denied benefits to those who had served their nation. Nathaniel Frank, *Unfriendly Fire: How the Gay Ban Undermines the Military and Weakens America* 9-11 (2009). During the 1950s, President Eisenhower issued an executive order requiring the discharge of homosexual employees from all federal employment and mandating that all defense contractors and other private corporations with federal contracts ferret out and fire all homosexual employees.[6] The federal government's employment discrimination against gay men and lesbians continued until the late 1990s. *See* Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (June 2, 1998). As recently as 1993, the federal government enacted the "Don't Ask, Don't Tell" policy, which forced service members to choose between concealing their sexual orientation and being discharged from the service. That policy remained in effect until late 2010. 10 U.S.C. § 654(b) (2006), *repealed by* Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3515, 3516 (2010).

In the realm of immigration, from 1917 to 1990 Congress prohibited gay men and women from entering the country. *See* Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, 875 (1917) (requiring exclusion of "persons of constitutional psychopathic inferiority"); Immigration and Nationality Act, amended October 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (amending the Immigration and Nationality Act to add "sexual deviation" as a medical ground for denying entry into the United States); 8 U.S.C. § 1182(a)(4) (1982) (prohibiting individuals who acknowledged their homosexuality from entering this country); Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067-77 (1990) (finally eliminating "sexual deviants" from the list of excludable aliens).[7]

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[6] "At the height of the McCarthy witch-hunt, the [Department of State] fired more homosexuals than communists. In the 1950s and 1960s literally thousands of men and women were discharged or forced to resign from civilian positions in the federal government because they were suspected of being gay or lesbian." George Chauncey, *Why Marriage? The History Shaping Today's Debate Over Gay Equality* 6 (2004).

Gay and lesbian individuals have also faced legal discrimination in the domestic sphere. For example, state laws historically prohibited (and some still prohibit) gay men and lesbians (and same-sex couples) from serving as foster or adoptive parents. *See, e.g.*, Fla. Stat. § 63.042(3) (2003) ("No person eligible to adopt under this statute may adopt if that person is a homosexual."); Miss. Code Ann. § 93-17-3(2) (2000) (prohibiting "[a]doption by couples of the same gender"); Utah Code Ann. § 78-30-1(3)(b) (2006) (prohibiting "a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of [Utah]" from adopting through a public state agency); *see also Opinion of the Justices*, 525 A.2d 1095, 1098-1100 (N.H. 1987) (finding that legislature's proposal excluding homosexuals from foster care and adoption did not violate the equal protection clause of either the U.S. Constitution or the New Hampshire constitution); *Howard v. Child Welfare Agency Review Bd.*, No. CV 1999-9881, 2004 WL 3154530, at *10-12 (Ark. Cir. Dec. 29, 2004) (upholding law that forbids the placement of children in the foster care of homosexuals), *aff'd*, 238 S.W.3d 1 (Ark. 2006).

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[7] *See also Boutilier v. INS*, 387 U.S. 118 (1967); Jorge L. Carro, *From Constitutional Psychopathic Inferiority to AIDS: What is in the Future for Homosexual Aliens?*, 7 Yale L. & Pol'y Rev. 201, 208-15 (1989) (surveying the historical treatment of homosexuals under United States immigration laws).

Perhaps the most telling evidence of the animus and discrimination against gay men and lesbians is the legacy of widespread criminalization of sexual conduct between consenting adults of the same sex. *See Bowers v. Hardwick*, 478 U.S. 186, 192 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *see also Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) ("[T]he strong objection to homosexual conduct ... has prevailed in Western culture for the past seven centuries."), *cert. denied*, 478 U.S. 1022 (1986). Such laws, this Court has recognized, unlawfully "demean [the] existence" of gay and lesbian individuals. *Lawrence*, 539 U.S. at 578.

In a society in which homosexuality was excoriated as a heinous sin, the law branded it a serious crime, and the medical profession treated gay persons as diseased freaks of nature, individuals who suspected themselves of harboring homosexual desires were made to feel inferior and reviled. Gay men and lesbians attempted, often desperately, to hide their secret shame from family, friends, neighbors, and associates. The fear of discovery kept the secret lives of most gay men and lesbians invisible, even to one another. In short, gay men and lesbians have endured significant and longstanding discrimination in this country. Every court to have considered that question has come to the same conclusion.[8]

B. Sexual Orientation Is Irrelevant To An Individual's Ability To "Contribute To Society"

Another critical factor in the Court's heightened scrutiny analysis is whether the group in question is distinctively different from other groups in a way that "'frequently bears [a] relation to ability to perform or contribute to society.'" *Cleburne*, 473 U.S. at 440-41 (citation omitted); *see also Frontiero v. Richardson*, 411 U.S. 677, 686 (plurality op.) ("[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.").

In *Cleburne*, the Court ruled that heightened scrutiny was inappropriate for laws discriminating against people who are "mentally retarded," because such individuals "have a reduced ability to cope with and function in the everyday world." 473 U.S. at 442. The Court similarly held that heightened scrutiny was not appropriate in reviewing mandatory retirement laws because "ability generally declines with age."

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[8] That gay men and lesbians were not historically "disenfranchised" (BLAG Br. at 57) does not diminish this undeniable history of discrimination; the Court has never required a history of disenfranchisement to trigger heightened scrutiny. *See, e.g.*, *Lalli v. Lalli*, 439 U.S. 259, 264-66 (1978) (recognizing illegitimacy as a quasi-suspect class entitled to intermediate scrutiny even though citizens born out of wedlock have never been disenfranchised).

Murgia, 427 U.S. at 315; *see also Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991) ("It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age.").

As numerous courts, scholars, the American Psychiatric Association—and even the Proponents of Proposition 8—have recognized, homosexual orientation "'implies no impairment in judgment, stability, reliability or general social or vocational capabilities.'" *Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991) (quoting Resolution of the American Psychological Association (1975)), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 508 U.S. 952 (1993); *Watkins v. United States Army*, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring in the judgment) ("Sexual orientation plainly has no relevance to a person's 'ability to perform or contribute to society.'" (citation omitted)), *cert. denied*, 498 U.S. 957 (1990); Laurence H. Tribe, *American Constitutional Law* § 16-33 (2d ed. 1988) ("[H]omosexuality bears no relation at all to [an] individual's ability to contribute fully to society."); Am. Psychiatric Ass'n, *Position Statement On Homosexuality and Civil Rights*, 131 Am. J. Psychiatry 436, 497 (1974); *Perry* J.A. Exh. 121.[9]

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[9] *See also Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 437 (S.D. Ohio 1994) ("[S]exual orientation ... bears no relation whatsoever to an individual's ability to perform, or to participate in, or contribute to, society . . . ."), *rev'd on other grounds*, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996); *Conaway v. Deane*, 932 A.2d 571, 609 (Md. 2007) ("[G]ay . . . persons . . . have been subject to unique disabilities not truly indicative of their abilities to contribute meaningfully to society."); *Hernandez v. Robles*, 855 N.E. 2d 1, 28 (N.Y. 2006) (Kaye, C.J., dissenting) ("Obviously,

Indeed, gay men and lesbians can and do perform perfectly well as contributing members of society as lawyers, doctors, plumbers, soldiers, athletes, professors, judges, and parents—when they are permitted to do so. Thus, this Court's observation that race, gender, alienage, and national origin "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy," is equally applicable to gay men and women. *Cleburne*, 473 U.S. at 440.

Rather than dispute any of this, Proponents and BLAG change the subject. Twisting the Court's doctrine, they suggest that the critical inquiry is not whether sexual orientation frequently bears on "a person's ability to participate in or contribute to society," *Cleburne*, 473 U.S. at 440-41 (citation omitted), but "whether the group has 'distinguishing characteristics' relevant to the distinctions *actually drawn*" by the law at issue, BLAG Br. at 54 (emphasis added); *see also* Proponents Br. at 29 n.1 ("[T]his distinction reflects biological realities closely related to society's traditional interest in marriage."). Proceeding from this mistaken premise, they argue that "the relevant distinguishing characteristic of same-sex couples" is that they enter into "relationships that do not produce unplanned and unintended offspring." BLAG Br. at 54.

This reformulation of the Court's doctrine stands the heightened scrutiny principle on its head. Under this Court's equal protection doctrine, the applicable

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sexual orientation is irrelevant to one's ability to perform or contribute.").

level of scrutiny must be determined at the threshold, antecedent to and independent of whether any particular law that discriminates against the group might be deemed "reasonable." *See, e.g.*, *Cleburne*, 473 U.S. at 442-43, 447. This is fundamental to the very concept of heightened scrutiny under the Equal Protection Clause. As the court of appeals explained, whether the classification is related to the "distinctions actually drawn" in the law in question "bear[s] upon whether the law withstands scrutiny (the second step of analysis)," not on the question of what level of scrutiny is appropriate. United States *Windsor* Supp. App. 18a. Neither BLAG nor Proponents disputes that sexual orientation—like sex and other "recognized suspect criteria"—"bears no relation to [one's] ability to perform or contribute to society." *Frontiero*, 411 U.S. at 686 (plurality op.).[10]

C. Gay Men And Lesbians Lack Sufficient Political Power To Protect Themselves Against Invidious Discrimination

That gay and lesbian individuals as a group possess limited ability to protect themselves in the political process also weighs in favor of heightened scrutiny of laws that discriminate against such individuals.

1. Before turning to the substantial body of evidence establishing the political vulnerability of gay men and lesbians, it is useful first to examine the nature and extent of this Court's consideration of political power in the heightened scrutiny analysis. As

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[10] It is also bizarre to suggest that a group otherwise entitled to heightened scrutiny protection ought to be denied that status because its members are *less* likely to engage in irresponsible procreation.

this Court has repeatedly made clear, the fact that a group has *some* political influence does not in any way foreclose—or even weigh significantly against—the need for heightened scrutiny. To the contrary, the Court has in some cases invoked, and continues to invoke, heightened scrutiny to test the constitutionality of laws that discriminate against groups that possess significant political influence.[11]

African-Americans, for example, had made significant gains in political influence at the time of many of the Court's most important decisions applying strict scrutiny to racial classifications. In *Loving v. Virginia*, 388 U.S. 1, 6 n.6 (1967), for example, the Court observed that fourteen states had repealed their anti-miscegenation statutes in the fifteen years leading up to that decision. The Court nevertheless unanimously applied strict scrutiny to a law that discriminated against African-Americans.

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[11] While we recognize that the attainment of high political office by someone belonging to a particular group may have little if any correlation with the degree to which the group *qua* group enjoys political power, it is worth noting that racial minorities have served as President of the United States, Attorney General, Secretary of State, and held numerous other state and federal positions. The 113th Congress contains 44 African Americans, 38 Hispanic Americans, 12 Asian Americans, and 3 American Indians. *See* House Press Gallery, *Demographics*, http://housepressgallery.house.gov/member-data/demographics (last visited Feb. 27, 2013); United States Senate, *Ethnic Diversity in the Senate*, http://www.senate.gov/artandhistory/history/common/briefing/minority_senators.htm (last visited Feb. 27, 2013).

Women have served as Secretary of State, Attorney General, Speaker of the House, Secretary of Health and Human Services, and Secretary of Homeland Security, and have held numerous additional powerful state and federal positions. The 113th Congress contains 100 women, including 20 senators. *See* House Press Gallery, *supra*; United States Senate, *Women in the Senate*, http://www.senate.gov/artandhistory/history/common/briefing/women_senators.htm (last visited Feb. 27, 2013).

Women, too, had achieved substantial political successes by the time heightened scrutiny was first applied to sex-based classifications. The *Frontiero* plurality observed, for example, that "the position of women in America ha[d] improved markedly in recent decades." 411 U.S. at 685. Congress had recently enacted several statutory prohibitions on sex-based discrimination (including Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963), and both houses of Congress had garnered the supermajorities necessary to pass the Equal Rights Amendment. *Id.* at 687. The plurality nonetheless correctly concluded that heightened scrutiny should apply to laws that discriminate on the basis of sex, in view of the "long and unfortunate history of sex discrimination." *Id.* at 684.[12]

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[12] Moreover, the Court has applied heightened scrutiny even to classes that have historically been among the most politically powerful in the nation. *See Craig v. Boren*, 429 U.S. 190, 208-10 (1976) (men); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (whites); *Adarand*, 515 U.S. at 227-31 (same). The Court in these cases was fully aware of the substantial political power held by the groups that these cases protect. *See Craig*, 429 U.S. at 219 (Rehnquist, J., dissenting) ("There is no suggestion in the Court's opinion that males in this age group are in any way peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts."); *Croson*, 488 U.S. at 495 ("*Even were we to* accept a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process, heightened

2. In any event, there is little doubt that the consideration of limited political power weighs heavily in favor of heightened scrutiny of laws that discriminate against gay men and lesbians.

Indeed, gay men and lesbians have often failed in attempts to secure federal or state legislation to limit discrimination against them. Women and racial minorities, by contrast, have long enjoyed such protections. For example, to this day twenty-nine states have no laws prohibiting discrimination against gays and lesbians in employment, housing, or public accommodations, notwithstanding the history of discrimination discussed above. *Perry* J.A. 742-43 (Segura); *see also* Letter from United States Government Accountability Office to Hon. Tom Harkin et al., *Sexual Orientation and Gender Identity Employment Discrimination: Overview of State Statutes and Complaint Data* (Oct. 1, 2009), *available at* http://www.gao.gov/new.items/d10135r.pdf. Many states still forbid same-sex couples from adopting children, *Pedersen*, 881 F. Supp. 2d at 327-28, and still more prohibit same-sex couples from marrying. In the last two decades, more than two-thirds of ballot initiatives that proposed to enact (or prevent the repeal of) basic antidiscrimination protections for gay and lesbian individuals have failed. *See Perry* J.A. 741, 750.[13]

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scrutiny would still be appropriate in the circumstances of this case." (emphasis added)).

[13] *See* Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 Mich. L. Rev. 1363, 1393 (2011) ("It hardly follows that a group is politically 'powerful' because it has achieved some success in securing legal

Moreover, in some instances hard-fought gains in the battle for equal rights for gay men and lesbians have been rolled back by aggressive ballot initiatives. Indeed, voters have used initiatives or referenda to repeal or prohibit equal marriage rights for same-sex couples on thirty-three occasions in recent years. In short, "[t]here is no group in American society who has been targeted by ballot initiatives more than gays and lesbians." *Perry* J.A. 750 (Segura).

The prevalence of violence directed at gay and lesbian individuals is also a strong indicator of relative powerlessness. Anti-gay hate crimes increased dramatically between 2003 and 2008, and hate crimes targeting lesbian and gay individuals represent an increasingly large share of total hate crimes in the United States. *Perry* J.A. 471 (Segura). The threat of private discrimination and violence further undermines the ability of many gay and lesbian people to participate fully in the political process by encouraging them to stay "in the closet." Although recent increased acceptance in some (mostly urban) areas of the country has encouraged more gay and lesbian individuals to live openly, many remain personally and politically "invisible."[14]

Gay and lesbian individuals also remain "vastly under-represented in this Nation's decisionmaking councils." *Frontiero*, 411 U.S. at 686 n.17. There are only seven openly gay individuals currently serving in

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remedies against some of the formal and informal discrimination that has long burdened the group.").

[14] *See* Schacter, *supra*, at 1385-86 (describing Professor Segura's testimony in *Perry v. Schwarzenegger*).

Congress.[15] The Connecticut Supreme Court observed in 2008 that, of the more than half million people who then held political office at the local, state, and national levels in this country, only about 300 were openly gay. *See Kerrigan v. Commissioner of Pub. Health*, 957 A.2d 407, 446 (Conn. 2008).[16] No openly gay person has ever served in the United States Cabinet, or on any federal court of appeals. This stands in marked contrast to the relative successes of members of other groups who have been accorded the protection of heightened scrutiny under the Equal Protection Clause. Indeed, in light of the very small number of openly gay public officials in the United States today, it is reasonable to conclude that lesbians and gay men have only one-fiftieth the representation they would have in the halls of government if it were not for the past and present discrimination against them.[17]

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[15] David R. Sands, *113th Congress Mirrors Increasingly Diverse U.S.*, Wash. Times, Jan. 7, 2013, *available at* http://www.washingtontimes.com/news/2013/jan/7/113th-congress-mirrors-increasingly-diverse-us/#ixzz2KHEmHzJj.

[16] The ability to hide one's sexual orientation is a hindrance rather than an aid in securing rights. As Justice Brennan (joined by Justice Marshall) put it: "homosexuals constitute a significant and insular minority of this country's population. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena." *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting).

[17] Although the exact number of gay men and lesbians in the U.S. is unknown, a 2012 Gallup poll reported that 3.4% of Americans self-identify as lesbian, gay, bisexual, or transgender. Gary Gates & Frank Newport, Gallup Politics, *Special Report: 3.4% of U.S. Adults Identify as LGBT* (Oct. 18,

BLAG notes (at 51-53) that President Obama supports equal rights for gay and lesbian individuals. But the support of the president—who cannot himself change discriminatory federal or state laws—has never been considered by this Court as disqualifying from heightened scrutiny a group that has suffered a long history of discrimination. Although Presidents Nixon and Ford both supported the Equal Rights Amendment, the Court did not decline to extend heightened scrutiny to laws that discriminated against women in the 1970s. Similarly, although President Truman desegregated the military[18] and President Eisenhower supported the Civil Rights Act of 1957,[19] the Court did not hesitate to extend heightened scrutiny to laws that discriminated against African-Americans in the 1940s and 1950s.

BLAG's attempt to characterize the growing support for equal rights for gay and lesbian individuals in some jurisdictions as sufficient to justify rejecting heightened scrutiny here is wholly misguided. While there have been some recent successes in securing antidiscrimination legislation (and even marriage equality) in some parts of the nation, those very recent and patchwork results do not alter the conclusion that gay men and lesbians lack sufficient political clout to effectively protect themselves in the political process more generally. A modicum of political success in

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2012), http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx. But only .06% of public officials are openly gay. *Kerrigan*, 957 A.2d at 446.

[18] *See* Exec. Order No. 9981, 3 C.F.R. 722 (1943-1948).

[19] *See* Statement by the President on the Objectives of the Civil Rights Bill, 1957 Pub. Papers 545 (July 16, 1957) (urging passage of the proposed legislation).

select jurisdictions is insufficient to establish that a historically oppressed and subordinated group can adequately protect itself in the political process more generally. *See Loving*, 388 U.S. at 6; *see generally* Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 742 (1985) (arguing that the Court's focus should be on "systematic disadvantages that undermine our system's legitimacy"); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 145-70 (1980) (discussing how deep-seated prejudice can distort the political process).

The plain and simple fact is that the barriers to achieving equal respect, equal dignity, and equal rights through the political process remain daunting. This is especially evident at the state level, where a substantial majority of jurisdictions still fervently opposes equal rights for gay men and lesbians and where private discrimination is still often both widespread and fierce. Just as the repeal of anti-miscegenation laws in some states was insufficient to prevent the Court in *Loving* from employing heightened scrutiny to invalidate such laws in 1967, and just as laws prohibiting discrimination against women were insufficient to prevent the Court from employing heightened scrutiny to invalidate laws discriminating against women since the 1970s, so too are scattered victories in a handful of states an insufficient basis on which to reject heightened scrutiny for laws that discriminate against gay and lesbian individuals today.

D. Sexual Orientation Is An "Immutable" Or "Defining" Characteristic

In deciding whether heightened scrutiny is appropriate under the Equal Protection Clause, the Court has looked with particular suspicion upon laws that discriminate on the basis of "'immutable ... or distinguishing characteristics that define [persons] as a discrete group.'" *Gilliard*, 483 U.S. at 602 (quoting *Lyng*, 477 U.S. at 638). This consideration derives from the "basic concept of our system that legal burdens should bear some relationship to individual responsibility." *Frontiero*, 411 U.S. at 626; *cf. Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (Alito, J.) (characteristic is "'immutable'" when "'the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences'" (citation omitted)).

Accordingly, a law is more likely to receive heightened scrutiny if it discriminates against an individual based on a characteristic that she either cannot realistically change, or ought not be compelled to change because it is fundamental to her identity. *See, e.g.*, *Plyler*, 457 U.S. at 220 (noting that illegal alien children "have little control" over that status); *Nyquist*, 432 U.S. at 9 n.11 (treating resident aliens as a suspect class despite their ability to opt out of that class); *Steffan v. Perry*, 41 F.3d 677, 689 n.9 (D.C. Cir. 1994) (noting that a "[c]lassification[] based on ... religion, of course, would trigger strict scrutiny"); *see also City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (rational basis review applies "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage").[20]

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[20] This Court has on several occasions applied heightened scrutiny to laws that discriminate against a group whose defining characteristics are capable of alteration. These characteristics, moreover, need not manifest in the form of an "obvious badge"; they often may be disclosed or suppressed as a matter of

Sexual orientation clearly falls within this category of defining personal characteristics. As this Court has acknowledged, sexual orientation is so fundamental to a person's identity that one ought not be forced to choose between one's sexual orientation and one's rights as an individual—even if, as Proponents suppose, such a choice could be made. *See Lawrence*, 539 U.S. at 576-77 (recognizing that individual decisions by consenting adults concerning the intimacies of their physical relationships are "an integral part of human freedom").[21]

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preference. *See Mathews v. Lucas*, 427 U.S. 495, 505-06 (1976); *see also Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring in judgment) ("It is clear that by 'immutability' the [Supreme] Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed. People can frequently hide their national origin by changing their customs, their names, or their associations. . . . At a minimum, then, the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.").

[21] *See also, e.g., In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) ("Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."); *Kerrigan*, 957 A.2d at 438 ("In view of the central role that sexual orientation plays in a person's fundamental right to self-determination, we fully agree with the plaintiffs that their sexual orientation represents the kind of distinguishing characteristic that defines them as a discrete group for purposes of determining whether that group should be afforded heightened protection under the equal protection provisions of the state constitution."); *Golinski*, 824 F. Supp. 2d at

In any event, as the district court found in *Perry* on a full trial record, there is now broad medical and scientific consensus that sexual orientation *is* an immutable characteristic, in the very sense that Proponents would require. *See Perry* Pet. App. 231a ("No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation."); *see also* Gregory M. Herek, et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults* 7 Sex Res. Soc. Policy 176 (2010).[22]

Proponents' and BLAG's contrary arguments rest principally on a supposed distinction between "status"—a characteristic that defines a class—and "the propensity to engage in a certain kind of conduct." The Court has emphatically and correctly rejected attempts to draw a distinction between "status and

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987 ("[A] person's sexual orientation is so fundamental to one's identity that a person should not be required to abandon it.").

[22] Proponents argued below, and BLAG argues in this Court (at 55), that homosexuality is not "immutable" because some individuals claim to have experienced a change in their sexual orientation over the course of their lives. To the extent that such individuals report experiencing a passive change that was not in their control, that obviously is not relevant to the immutability inquiry, which is focused on whether an individual is "responsibl[e]" for the characteristic at issue. *Frontiero*, 411 U.S. at 626. But even if some small number of individuals report the ability to voluntarily "change," heightened scrutiny is still appropriate here, for at least two reasons. First, such claims are both rare and of questionable validity, as there is now broad medical and scientific consensus that one's sexual orientation (as distinct from one's sexual conduct) is largely unchangeable. Second, other characteristics that trigger heightened scrutiny (such as gender) can also, with great difficulty, be altered.

conduct" in defining the rights of "homosexual persons." *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2990 (2010) ("*CLS*") ("Our decisions have declined to distinguish between status and conduct in this context."); *Lawrence*, 539 U.S. at 575 ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." (emphasis added)); *see also id.* at 567 ("[I]t would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."); *id.* at 583 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons *as a class*." (emphasis added)). The lower court decisions on which Proponents and BLAG rely (most of which were decided before *Lawrence* overruled *Bowers*) are also grounded on the now-discredited theory that homosexual *behavior* is changeable and therefore homosexuality is not immutable. Those decisions do not survive *Lawrence* and *CLS*.[23]

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[23] *E.g.*, *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (sexual orientation is "not an immutable characteristic" because "[h]omosexuality ... is behavioral."). Somewhat ironically, other lower court decisions applying rational basis review *did* recognize the status/conduct problem; they relied on *Bowers* and reasoned that it would be "anomalous ... to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny." *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *see infra* at 28-29 & nn. 26-28.

E. Neither *Baker v. Nelson* Nor *Romer v. Evans* Nor *Lawrence* Forecloses Application Of Heightened Scrutiny

This case presents an issue of first impression. Though members of the Court have opined on the issue,[24] neither *Baker v. Nelson*, 409 U.S. 810 (1972) nor the Court's more recent decisions squarely addressed—much less resolved—the appropriate level of scrutiny to apply to laws that discriminate against gay and lesbian persons.

In *Baker*, a summary dismissal of an appeal from a state court decision holding that gay men do not have a federal constitutional right to marry, the appellants did not even make this argument, so it was not before the Court. *See* Appellant's Jurisdictional Statement 3, *Baker v. Nelson*, No. 71-1027 (S. Ct. filed Feb. 11, 1972) ("Questions Presented"); *see also Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) (summary disposition does not decide questions that "'merely lurk[ed] in the record'" (citation omitted)).

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[24] *See, e.g.*, *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in judgment) (finding a Texas law banning same-sex sodomy to "exhibit[] . . . a desire to harm" homosexuals as "a politically unpopular group," thus warranting "a more searching form of rational basis review . . . under the Equal Protection Clause"); *Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting from denial of certiorari) (describing homosexuals as "a significant," politically "powerless," "historically" scorned, and "insular minority," and observing that "[s]tate action taken against members of such groups based simply on their status as members of the group traditionally has been subject to strict, or at least heightened, scrutiny by this Court").

In any event, both the Court's interpretation of the Equal Protection Clause and legal, medical, cultural, and social attitudes towards sexual orientation have changed so profoundly since 1972 that the summary dismissal in *Baker* has little if any precedential effect today. *See Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (a summary dismissal is not binding if it has been undermined by subsequent "doctrinal developments"). Among other significant developments since *Baker*, the State may no longer "demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime." *Lawrence*, 539 U.S. at 578 (overruling *Bowers v. Hardwick*).[25]

The Court's more recent decisions in *Romer v. Evans* and *Lawrence* clearly do not foreclose the application of heightened scrutiny. Although the plaintiff-respondents in *Romer* argued for heightened scrutiny in the trial court, they did not make that argument in this Court. *See* 517 U.S. 620, 640 n.1 (1996) (Scalia, J., dissenting). Moreover, the Court's analysis in *Romer* hinged ultimately not on the identity of the affected class, but on the inadequate justification for the challenged law: "Moral disapproval of [a] group." *Lawrence*, 539 U.S. at 582 (citing *Romer*, 517 U.S. at 634-35). Because the law challenged in *Romer* failed even the most deferential measure of equal protection scrutiny, the Court found it unnecessary to consider the broader question.

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[25] In the forty years since *Baker* was decided, this Court has transformed both its equal protection jurisprudence generally, and its treatment of sexual orientation in particular. It is now well settled that discrimination on the basis of sex triggers heightened scrutiny. *Compare Baker*, Jurisdictional Statement 16 ("It is true that the inherently suspect test which this Court applied to classifications based upon race has not yet been extended to classifications based upon sex." (internal citations omitted)), *with Frontiero*, 411 U.S. at 688 (plurality) (concluding that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect" and therefore subject to heightened scrutiny); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (party who seeks to defend a statute that classifies individuals on the basis of sex "must carry the burden of showing an 'exceedingly persuasive justification' for the classification" (citation omitted)). The Court now acknowledges that sexual orientation is a self-identifying trait, and has held that the "classification of [homosexuals] undertaken for its own sake" must be struck down as lacking any legitimate basis. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

Similarly, although *Lawrence* expanded the substantive protections afforded to homosexuals, it too did not address the standard of review applicable to laws that discriminate against gay men and lesbians under the Equal Protection Clause. Instead, the Court in *Lawrence* resolved the issue before it by holding that the challenged law violated "the Due Process Clause of the Fourteenth Amendment." 539 U.S. at 564, 578-79. The Court therefore found it unnecessary to address the equal protection issue. *See id.* at 574-75 (noting that the equal protection argument is "tenable" but "conclud[ing] the instant case requires [the Court] to address whether *Bowers* itself has continuing validity").

BLAG emphasizes (at 13 & n.4, 28-29) the lower court decisions that have applied rational basis review to laws that discriminate on the basis of sexual orientation. Those decisions are unpersuasive. With the exception of the Second Circuit in *Windsor*, no federal court of appeals has analyzed the issue according to the Court's four-factor test since *Bowers* was overruled. Most of the decisions rely explicitly on *Bowers*—or on other circuit decisions that relied on *Bowers*.[26] And the post-*Lawrence* decisions (save *Windsor*, which held that heightened scrutiny was appropriate) expressly refrained from considering the factors,[27] or hewed to pre-*Lawrence* binding circuit precedent, awaiting further guidance from this Court.[28]

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[26] *See, e.g.*, *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("After *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm."), *cert. denied*, 494 U.S. 1003 (1990)); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class . . . ."), *cert. denied*, 494 U.S. 2004 (1990); *Equality Found. of Greater Cincinnati*, 54 F.3d at 266-67 & n.2 ("Since *Bowers*, every circuit court which has addressed the issue has decreed that homosexuals are entitled to no special constitutional protection, as either a suspect or a quasi-suspect class, because the conduct which places them in that class is not constitutionally protected."); *Padula*, 822 F.2d at 103 ("It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause.").

[27] *Cook v. Gates*, 528 F.3d 42, 51 (1st Cir. 2008); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) ("Moreover, all of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class." (citing, *inter alia*, *High Tech Gays*, 895 F.2d at 571 ("[B]ecause homosexual conduct can ... be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class."))).

[28] *See, e.g.*, *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006) (citing *Equality Found. of Greater Cincinnati*, 128 F.3d at 292-94); *Perry v. Brown*, 671 F.3d 1052, 1080 n.13 (9th Cir. 2012) (citing *High Tech Gays*, 895 F.2d at 574); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008)

* * * * *

"[T]he judiciary's role under the Equal Protection Clause is to protect 'discrete and insular minorities' from majoritarian prejudice or indifference." *Croson*, 488 U.S. at 495 (citation omitted). It is not seriously disputed that gay men and lesbians have experienced a history of purposeful discrimination on the basis of a characteristic that bears no relation to their ability to contribute to society. Gay men and lesbians also lack sufficient political power to protect themselves against continued discrimination. And sexual orientation is both fundamental to one's identity, *Lawrence*, 539 U.S. 576-77, and not changeable "through conscious decision, therapeutic intervention or any other method." *Perry* Pet. App. 231a. Laws that discriminate against gay and lesbian persons should therefore be tested by heightened judicial scrutiny.

(citing *Walmer v. Dep't of Defense*, 52 F.3d 851, 854 (10th Cir. 1995)).

CONCLUSION

For the foregoing reasons, this Court should hold that laws that classify individuals for disparate treatment on the basis of their sexual orientation trigger heightened scrutiny.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 12-307

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER (Jurisdictional Questions)

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QUESTION PRESENTED

Amici Curiae will address the following question:

Whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case.

TABLE OF CONTENTS

Page

INTERESTOF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT..2

ARGUMENT...5

The Case-Or-Controversy Requirement Is Satisfied When The United States Is A Party To An Action Challenging The Constitutionality Of A Federal Statute. 5

- A. Holding That The United States' Presence As A Party Is Not Sufficient To Satisfy Article III Would Produce Severe Adverse Practical Consequences..........8
  - 1. Option #1: If the President Were to Continue to Enforce The Statute In the Absence of a Court Order Barring Enforcement Against a Particular Party. 9
  - 2. Option #2: If the President Were to Order the Executive Branch to Cease Enforcing the Statute................................16
  - 3. Option #3: If the President Were to Advance a Limited Defense of the Statute's Constitutionality........................19
- B. This Court's Precedents Make Clear That A Constitutional Challenge Is Justiciable As Long As The United States Continues To Enforce The Statute In Question. 20
  - 1. Chadha is Dispositive of the Case-or-Controversy Question................................22

2. Concluding That the President's View That a Statute is Unconstitutional Vitiates This Court's Jurisdiction, Could in Some Contexts Deprive District Courts of the Power to Enter Injunctions Providing Relief. 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

Cases

Arizonans for Official English v. *Arizona*,
520 U.S. 43 (1997) 26

ASARCO Inc. v. *Kadish*,
490 U.S. 60 (1989) 21

Bob Jones University v. *United States*,
461 U.S. 574 (1983) 25

Buckley v. *Valeo*,
424 U.S. 1 (1976) 20

Camreta v. *Greene*,
131 S. Ct. 2020 (2011) 21

Cardinal Chemical Co. v. *Morton Int'l, Inc.*,
508 U.S. 83 (1993) 23, 25

Craig v. *Boren*,
429 U.S. 190 (1976) 23

Department of Health & Human Services,
682 F.3d 1 (1st Cir. 2012) 10

Dragovich v. *U.S. Dep't of the Treasury*,
764 F. Supp. 2d 117 (N.D. Cal. 2011) 13

Flast v. *Cohen*,
392 U.S. 83 (1968) 26

INS v. *Chadha*,
462 U.S. 919 (1983) .... *passim*

Los Angeles v. *Lyons*,
461 U.S. 95 (1983) 21

Marbury v. *Madison*,
5 U.S. (1 Cranch) 137 (1803) 17

Page(s)

Metro Broadcasting, Inc. v. *FCC*,
497 U.S. 547 (1990) 6

Morrison v. *Olson*,
487 U.S. 654 (1988) 6

Myers v. *United States*,
272 U.S. 52 (1926) 5

Oregon v. *Mitchell*,
400 U.S. 112 (1970) 20

Sierra Club v. *Morton*,
405 U.S. 727 (1972) 23, 26

United States v. *Johnson*,
319 U.S. 302 (1943) 26

United States v. *Lovett*,
328 U.S. 303 (1946) 6, 24

United States v. *Mendoza*,
464 U.S. 154 (1984) 11

Windsor v. *United States*,
833 F. Supp. 2d 394 (S.D.N.Y.) 23

Statutes and Constitutional Provisions

26 U.S.C.
§ 1(a)-(c) 11
§ 417 13

28 U.S.C.
§ 1252 .... 23, 25
§ 1254(1) 25
§ 530D(a)(1)(A)-(B) 5

TABLE OF AUTHORITIES—continued

Page(s)

42 U.S.C. § 402(f) & (i) 11

Act of Nov. 9, 1978, Pub. L. 95-624, § 13(a), 92 Stat. 3459, 3464 5

U.S. CONST. Art. II, § 1, cl. 8 5

U.S. CONST. Art. II, § 3, cl. 4 5

Other Authorities

Christopher N. May, *Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q. 865 (1994) 5, 18

Daniel J. Meltzer, *Lecture: Effective Defense of Congressional Acts*, 61 Duke L.J. 1183 (2012)....16

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Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. Rev. 381 (1986) 18

Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 Const. Comment. 455 (2000) 17

Letter from Paul Clement, Acting Solicitor Gen., U.S. Dep't of Justice, to Patricia Mack Bryant, Senate Legal Counsel, U.S. Senate (Dec. 23, 2004) 6

Page(s)

Michael B. Rappaport, *The Unconstitutionality of "Signing and Not-Enforcing,"* 16 W. & M. Bill Rts. J. 113 (2007) 18

Neal Devins & Saikrishna Prakash, *The Indefensible Duty To Defend*, 112 Colum. L. Rev. 507 (2012) 19

Press Release, Human Rights Campaign, Business Coalition Launches in Support of Respect for Marriage Act (Jan. 28, 2013) 14

Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073 (2001) 20

U.S. Census Bureau, *Census Bureau Releases Estimates of Same-Sex Married Couples* (Sept. 27, 2011) 11

White House Press Briefing by Counsel to the President Jack Quinn and Asst. Att'y Gen. Walter Dellinger (Feb. 9, 1996) 6

INTEREST OF THE *AMICI CURIAE*

Amici are professors of law who teach and write about constitutional law and in addition served in the Department of Justice at earlier points in their careers. They have substantial expertise in litigation regarding the constitutionality of federal statutes from both the academic and practical perspectives. Their legal expertise thus bears directly on the question posed by the Court regarding the effect upon the Court's jurisdiction of the Executive Branch's view that the Defense of Marriage Act is unconstitutional.[1] *Amici* are:

- Rebecca L. Brown, Newton Professor of Constitutional Law, University of Southern California Gould School of Law;
- Thomas W. Merrill, Charles Evans Hughes Professor of Law, Columbia Law School;
- David A. Strauss, Gerald Ratner Distinguished Service Professor of Law, University of Chicago Law School; and
- Amy Wax, Robert Mundheim Professor of Law, University of Pennsylvania Law School.[2]

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

[2] Institutional affiliations are provided for identification purposes only.

SUMMARY OF ARGUMENT

Amici do not necessarily agree regarding the appropriateness of the President's decision not to defend the constitutionality of the Defense of Marriage Act ("DOMA") or regarding the correct resolution of that constitutional question. They also may hold different views regarding the question posed by the Court regarding the standing of the Bipartisan Legal Advisory Group. But *amici* do all agree that where, as here, the President has directed the Executive Branch to continue to abide by a challenged statute in the absence of a contrary court order, the President's view that the statute is unconstitutional does not affect this Court's jurisdiction to address the merits of the constitutional question.

The Court-appointed *Amica*'s contrary position rests on her view that if the United States is sued in an action challenging the constitutionality of a federal law and agrees with the plaintiff that the statute is invalid, and the trial court so rules, then there is no continuing case or controversy by reason of any interest of the United States in obtaining a ruling from a higher court to resolve definitively the question of the statute's constitutionality. That novel and restrictive view of this Court's authority to resolve constitutional questions would impose new and very substantial burdens on private parties affected by a challenged law; on third parties obligated to take different actions depending on whether a challenged law is upheld; on the federal courts' dockets; and on the nation as a whole.

For example, review by a court of appeals or by this Court could be had only if a district court upheld the statute—the availability of a definitive decision regarding the statute's validity would therefore be completely unpredictable. In the absence of a definitive appellate determination, moreover, each private party adversely affected by the challenge statute likely would have to file his or her own claim, and each of those claims would have to be determined by the federal district courts—imposing significant litigation costs on those private parties, significant burdens on the federal judiciary, and significant costs on the federal government, which would be forced to litigate these cases and could face significant liability for attorneys' fees under applicable fee-shifting statutes.

The burdens produced by *Amica*'s approach would also extend to third parties whose obligations turn upon the validity of the federal law. Here, for example, employers' own tax obligations as well as their obligations with respect to employees under federal tax and pension laws turn on whether an employee is married for purposes of those federal statutes, which in turn depends on the validity of the DOMA. Employers will incur significant additional costs in administering these requirements if the rules applicable to same-sex married couples depend on whether each affected individual has obtained a final judicial determination in an action challenging the statute's constitutionality.

In the absence of a definitive ruling, moreover, the chain of litigation—and resulting burdens—would extend into the future when, as here, the affected class of private individuals continues to increase over time. Acceptance of *Amica*'s legal rule would thus produce very significant adverse practical consequences when a President forthrightly states his view that a statute is unconstitutional but takes the position that the final determination of the statute's validity should be made by the courts.

The other options available to a President—simply ordering the Executive Branch to stop enforcing the statute or concealing his view regarding the statute's validity and mounting only a limited defense of the statute in court—carry even more disturbing consequences. The former approach prevents individuals burdened by the challenged statute from obtaining a permanent determination of their rights: they would be unable to proceed in court notwithstanding the fact that a future President could conclude that the law is constitutional and seek to enforce it against them. And the latter approach would pose a significant threat to the adversary system as the President's concealed concerns about the constitutionality of the statute could compromise his defense of the statute.

There is no warrant for risking any of these adverse practical consequences—longstanding precedent, in particular this Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983)—makes clear that the Executive Branch's position in court regarding the constitutionality of a statute does not deprive a court of the power to address that legal question as long as the President has instructed the Executive Branch to comply with the statute in the absence of a court order requiring otherwise. This Court accordingly has jurisdiction to address the question regarding the constitutionality of DOMA presented in this case.

ARGUMENT

The Case-Or-Controversy Requirement Is Satisfied When The United States Is A Party To An Action Challenging The Constitutionality Of A Federal Statute.

The President's obligation to "preserve, protect and defend the Constitution of the United States," embodied in the oath of office specified in the Constitution (Art. II, § 1, cl. 8)—as well as his duty to "take Care that the Laws be faithfully executed" (Art. II, § 3, cl. 4)—can compel a President to determine that a statute so plainly violates the Constitution that he cannot in good faith defend its validity. Presidents have reached that conclusion with respect to federal statutes, albeit infrequently, throughout our history.[3]

Indeed, Congress expressly recognized this reality by enacting a statute requiring that it be informed when the President or his subordinates decline to enforce or to defend a federal statute because of the Executive Branch's view that the enactment is unconstitutional. 28 U.S.C. § 530D(a)(1)(A)-(B). See also Act of Nov. 9, 1978, Pub. L. 95-624, § 13(a), 92 Stat. 3459, 3464 (predecessor provision). Notifications to Congress have been provided with respect to 80 separate statutory provisions pursuant to this obligation.[4]

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[3] Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 Colum. L. Rev. 507, 514-19 (2012) (describing this history).

[4] *Id.* at 561; information obtained by counsel from the Office of Senate Legal Counsel.

In some circumstances, the Executive Branch has not complied with, or has declined to enforce, certain statutes on the ground that they are unconstitutional. See, *e.g.*, *Myers* v. *United States*, 272 U.S. 52 (1926); *Lear Siegler, Inc., Energy Prods. Div.* v. *Lehman*, 842 F.2d 1102 (9th Cir. 1988), withdrawn in part 893 F.2d 205 (9th Cir. 1990) (en banc).[5]

The Executive Branch also has—as here—continued to comply with certain statutes while taking the position in court that the measures violate the Constitution. See, *e.g.*, *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990) (preference for racial minorities seeking broadcasting licenses); *Morrison* v. *Olson*, 487 U.S. 654 (1988) (independent counsel); *INS* v. *Chadha*, 462 U.S. 919 (1983) (legislative veto); *United States* v. *Lovett*, 328 U.S. 303 (1946) (statute prohibiting payments to specified government officials).[6]

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[5] See also Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q. 865, 977 (1994) (between 1789 and 1981, Presidents refused to enforce provision they deemed unconstitutional in 20 instances); Letter from Paul Clement, Acting Solicitor Gen., U.S. Dep't of Justice, to Patricia Mack Bryant, Senate Legal Counsel, U.S. Senate (Dec. 23, 2004), *available at* http://tinyurl.com/co8hc2g (funding condition set by Congress requiring the Washington Metropolitan Area Transit Authority to reject an advertisement that promoted the legalization of marijuana).

[6] See also U.S. Br. on Jurisdictional Questions at 9 (listing cases): White House Press Briefing by Counsel to the President Jack Quinn and Asst. Att'y Gen. Walter Dellinger (Feb. 9, 1996), http://tinyurl.com/cj2sw9l (amendment to the 1996 military appropriations bill, which required the Department of Defense to dismiss from the military service members who were HIV positive).

This Court's resolution of the jurisdictional question that it has posed in this case therefore will have an impact far beyond the litigation regarding the particular statute challenged here. It will affect the options available to future Presidents confronted with other unconstitutional enactments, as well as the ability of private parties burdened by those statutes and third parties who bear consequential burdens from uncertainty regarding the statutes' validity to obtain relief from those burdens effectively and efficiently.

The court-appointed *Amica* contends that if the United States is sued in an action challenging the constitutionality of a federal law and agrees with the plaintiff that the statute is invalid, and the trial court so rules, then there is no continuing case or controversy by reason of any interest of the United States in obtaining a ruling from a higher court to resolve definitively the question of the statute's constitutionality. This restrictive view of this Court's authority to resolve constitutional questions is contrary to this Court's precedents and, if adopted by the Court, would have dramatic practical consequences, consequences that *Amica* does not address. By significantly reducing the ability of federal appellate courts, and in particular this Court, to decide the constitutionality of federal statutes, *Amica*'s proposed legal rule would impose new and very substantial burdens on private parties affected by a challenged law; on third parties obligated to take different actions depending on whether a challenged law is upheld; on the federal courts' dockets; and on the nation as a whole.

There is no reason to impose these burdens—*Amica*'s legal argument is foreclosed by this Court's decision in *Chadha*, and her attempts to distinguish that holding are unconvincing. This Court plainly has jurisdiction to adjudicate the constitutional challenge to DOMA presented here.

A. Holding That The United States' Presence As A Party Is Not Sufficient To Satisfy Article III Would Produce Severe Adverse Practical Consequences.

When a President is confronted with a federal law that he deems unconstitutional but that has not definitively been held unconstitutional by the courts, the President has three basic choices. First, he can direct the Executive Branch to continue to enforce the statute while advocating the statute's invalidity in judicial proceedings brought by third parties. Second, he can direct the Executive Branch not to enforce the statute. Third, he can direct the Executive Branch to enforce the statute but order the Department of Justice to present only a limited defense of the statute in court.

If *Amica*'s legal position were adopted, there would be numerous circumstances in which it simply would not be possible to obtain a definitive judicial determination of a federal statute's constitutionality when the Executive Branch takes the position that the statute is invalid. The resulting uncertainty and, possibly, need for the filing and adjudication of hundreds if not thousands of duplicative lawsuits, would impose significant burdens on parties injured by the unconstitutional statute; on the government, which would be forced to defend such actions; on the courts; and on numerous third parties. It also carries a substantial risk of reducing public confidence in the legitimacy of federal government actions.

1. *Option #1: If the President Were to Continue to Enforce The Statute In the Absence of a Court Order Barring Enforcement Against a Particular Party.*

Presidents in the past have often chosen to continue to enforce a statute they believe to be unconstitutional, leaving the courts—and ultimately this Court—to determine authoritatively the measure's validity. *Amica*'s legal theory would erect practically insuperable barriers to obtaining such a judicial determination and, as a result, impose significant new burdens on private parties adversely affected by the challenged statute.

First, whether or not the constitutionality of a statute could ever be addressed by an appellate court or by this Court would depend entirely on district courts' disposition of actions challenging the statute's validity. To the extent (as here) that district courts found the statute unconstitutional, further review would be precluded under *Amica*'s approach. Only if a district court upheld the statute would a court of appeals have the power to address the constitutional issue, and only if a court of appeals upheld the statute could the question be addressed by this Court.

Availability of review by this Court—and a conclusive decision regarding the constitutional issue—would therefore be unpredictable, depending entirely upon how the lower courts happened to decide the issue. Indeed, the more clearly unconstitutional the federal law, and the more likely the lower courts would be to hold the measure invalid, the more remote the ability to obtain a definitive determination from this Court.[7]

Second, the necessary consequence of this legal rule, therefore, will be to force each private party adversely affected by an unconstitutional statute to file his or her own claim seeking an order barring application of that law. While a district court decision upholding the statute could be reviewed by a court of appeals—the only situation in which a decision on the constitutional question by a federal appeals court or this Court would be permitted under *Amica*'s view of the law—there is no reason to believe that situation would actually occur. Indeed, it has not occurred in any of the numerous lawsuits challenging the Defense of Marriage Act.[8]

This case-by-case process will impose significant litigation costs on these private parties. And it will delay vindication of their constitutional rights—and subject them to extended uncertainty in, for example, their planning for financial and health contingencies—while numerous district courts are forced to address the same constitutional issue without guidance from higher courts.[9]

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[7] It is possible that invalidating a federal law could inflict an injury on private parties sufficient to confer standing to defend that statute's constitutionality. But in most cases, as here, that will not be true because invalidation of the statute impacts only government spending or operations and therefore imposes no cognizable injury on private parties.

[8] Under *Amica*'s view of the law, both the Second Circuit in this case and the First Circuit in *Massachusetts* v. *U.S. Department of Health & Human Services*, 682 F.3d 1 (1st Cir. 2012), *petition for cert. filed*, No. 12-97 (July 20, 2012), lacked jurisdiction, because in both cases the district courts ruled in the plaintiffs' favor and the President announced his determination that the statute is unconstitutional prior to both appellate decisions.

Here, for example, Census Bureau data indicates that in 2010 there were more than 130,000 same-sex married couples. U.S. Census Bureau, *Census Bureau Releases Estimates of Same-Sex Married Couples* (Sept. 27, 2011), http://tinyurl.com/43qu56t . That number is much greater today because a number of States—New York, Maryland, Washington, and Maine—have in the last two years changed their laws to recognize same-sex marriage.

DOMA's impact is extremely broad, moreover, affecting the application of more than one thousand provisions of federal law that turn upon whether an individual is married. See U.S. Gen. Accounting Office, Report No. GAO-04-353R, Defense of Marriage Act: Update to Prior Report 1 (2004), http://tinyurl.com/cajc6n9 (identifying 1138 statutory provisions in the U.S. Code in which marital status is a factor in determining or receiving benefits, rights, and privileges). For example, each taxpayer who could not file jointly with her wife, see 26 U.S.C. § 1(a)-(c), or each surviving same-sex spouse seeking Social Security benefits, see, *e.g.*, 42 U.S.C. § 402(f) & (i), would have to file a separate lawsuit to gain relief.

Indeed, a single individual or married couple might well be required to file multiple lawsuits because distinct timing, administrative exhaustion, or jurisdictional requirements may apply to claims seeking relief with respect to different federal statutes. Here, for example, Ms. Windsor has separate tax refund and social security benefit claims and has not yet received the administrative determination with respect to the latter claim that is a prerequisite for obtaining judicial review. Windsor Juris. Br. 5-6.[10]

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[9] A claimant cannot invoke a prior decision to which she is not a party to estop the government from relitigating a constitutional issue in a subsequent case. *United States* v. *Mendoza*, 464 U.S. 154 (1984).

Third, this multiplication of litigation across the district courts will impose significant burdens on the federal government. These include not only the cost of litigating the issue in potentially thousands or tens of thousands of cases, but also the risk of paying the attorneys' fees incurred by the numerous plaintiffs in these actions. The Equal Access to Justice Act, 28 U.S.C. § 2412 (b)-(d), generally provides, among other things, for the payment of a prevailing party's attorneys' fees and other expenses "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust" (*id.* § 2412(d)(1)(A)). The United States could face significant liability for attorneys' fees after a number of district courts hold a statute unconstitutional—and no prospect of avoiding future fees, because of the likely inability to obtain a conclusive judicial determination regarding the law's validity that would end the litigation.

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[10] Class actions might be feasible in some circumstances, but in many situations the requirements for class certification may not be satisfied—here, for example, different issues may be presented by the application of DOMA in the context of different federal statutory determinations that turn upon marriage. In addition, the government has an institutional interest in opposing unjustified class certification of challenges to federal statutes, and it has opposed class certification in some of the cases challenging DOMA. See Defendants' Opposition to Plaintiff's Motion for Class Certification, *Aranas* v. *Napolitano*, No. 8:12-cv-1137-CBM (AJWx) (C.D. Cal., Sept. 19, 2012).

Fourth, case-by-case adjudication of the applicability of a challenged federal statute—and the resulting uncertainty and lack of uniformity (between those married individuals who have obtained a final judicial order and those who have not)—will also impose substantial burdens on third parties whose actions turn upon whether or not the federal law applies.

Here, for example, an employer's ability to obtain favorable tax treatment with respect to employee benefits depends on compliance with federal standards, which may turn on whether the employee is "married" under federal law. See, *e.g.*, *Dragovich* v. *U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178, 1181 (N.D. Cal. 2011) (California, for instance, "cannot allow same-sex spouses to participate in its long-term care plan if it wishes to qualify for favorable [federal] tax treatment * * * [it has] no choice but to follow federal tax law."). And employers have different obligations with respect to retirement plans if the employee is married within the meaning of federal law. See, *e.g.*, 26 U.S.C. § 417 (spousal consent required for certain elections with respect to retirement plans). Employers will incur significant additional cost in administering these requirements if the rule applicable to each employee in a same-sex marriage must be determined individually, depending on whether he or she has obtained a final judicial determination in an action challenging the statute's constitutionality.[11]

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[11] Moreover, many companies wish to provide the equal benefits to all married couples. See Press Release, Human Rights Cam-

Federal grantees face similar burdens and uncertainty. Massachusetts, for instance, instituted an action challenging DOMA out of concern that federal agencies would revoke federal funding for programs it administered cooperatively with the federal government because Massachusetts was not complying with the federal definition of marriage. See *Massachusetts* v. *U.S. Dep't of Health & Human Serv.*, 682 F.3d 1, 7 (1st Cir. 2012) ("By combining the income of individuals in same-sex marriages, Massachusetts' Medicaid program is noncompliant with DOMA, and the Department of Health and Human Services, through its Centers for Medicare and Medicaid Services, has discretion to rescind Medicaid funding to noncomplying states. Burying a veteran with his or her same-sex spouse removes federal 'veterans' cemetery' status and gives the Department of Veterans' Affairs discretion to recapture all federal funding for the cemetery.").

As a result of the litigation in the district court, Massachusetts has obtained a judgment (currently stayed) that orders the relevant federal agencies to recognize same-sex marriages in Massachusetts as it relates to certain tax, social security, and other claims. 682 F.3d at 7, 17. But, under *Amica*'s proposed rule, every federal grantee would have to go through the same legal process in order to resolve the issue.

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paign, Business Coalition Launches in Support of Respect for Marriage Act, http://tinyurl.com/ctothpj (Jan. 28, 2013). Those businesses will be required to maintain multiple benefits systems—one for same-sex couples who have not obtained legal relief and another for those who have obtained a final judicial determination.

Fifth, in the absence of a definitive ruling that a statute is unconstitutional, the chain of litigation would stretch indefinitely into the future when, as here, the federal law affects a class of private parties that is not fixed at the time of the statute's enactment, but instead will increase over time.

Every new same-sex married couple would be obliged to file a lawsuit challenging the application of DOMA with respect to federal laws that applied to them. And as the couple sought benefits under, or was subject to the burdens of, new federal laws whose applicability turns on marital status, they would be required to bring still more lawsuits.

Sixth, this Court has long recognized the significance of the Judiciary's authority to invalidate federal statutes on constitutional grounds and has consistently granted review where a lower court has invalidated a congressional enactment. *Amica*'s conception of Article III would have the bizarre effect of confining such determinations to the lower courts and, in cases where a district court agrees with the government's submission that a statute is unconstitutional, making it impossible for this Court to address the constitutional question.

In sum, by creating a legal regime that will make the availability of a definitive ruling on a law's unconstitutionality completely uncertain, *Amica*'s standard imposes new and substantial burdens on private parties and the government when the President forthrightly states his view regarding a measure's unconstitutionality but takes the position that the final determination regarding that question should be made by the courts. That result is particularly disturbing for two reasons: judicial determination of the validity of a statute best comports with our constitutional values, and the other options available to the President carry very significant adverse consequences, including significant damage to constitutional values.

2. *Option #2: If the President Were to Order the Executive Branch to Cease Enforcing the Statute.*

To avoid these adverse consequences, a President could choose instead to direct the Executive Branch to stop complying with any federal statute that the President believes to be clearly unconstitutional. That approach, however, carries different but equally damaging practical consequences.

First, individuals burdened by the challenged statute would not be able to obtain a permanent determination of their rights. The President's position would eliminate the need to obtain a court order, and at least under *Amica*'s view, the President's issuance of a non-enforcement directive certainly would preclude an affected private party from obtaining judicial relief.

But the President himself or any future President could reverse the non-enforcement directive. See, *e.g.*, Daniel J. Meltzer, *Lecture: Effective Defense of Congressional Acts*, 61 Duke L.J. 1183, 1228 (2012) (observing that a new administration may come into office with "sharply different views about the appropriate occasions for, and the appropriate theories underlying, such [non-enforcement] decisions"). As a result, an individual could never be certain that she was protected against the adverse consequences that would result from application of the challenged statute. That uncertainty, and the very significant unfairness that would occur in the event of a change in position, present very serious practical obstacles to a President's use of this approach.

Second, important considerations of institutional competence and accountability weigh against forcing the President to issue a non-enforcement order whenever he believes a statute to be clearly unconstitutional.

To begin with, in our system of government, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). "[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle [is] a permanent and indispensable feature of our constitutional system." *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958).

Indeed, the Judiciary's adherence to precedent allows it to settle constitutional issues more permanently than the political branches. Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 Const. Comment. 455, 477 (2000). It settles those issues in a framework of "established and constraining procedures" not present in any other branch; for example, it must publish written opinions and cannot select its own agenda. *Ibid.* And it stands apart from the political process. *Id.* at 476.

Forcing the President to make these determinations on his own would limit the Judiciary's role, depriving the institution best suited to deciding constitutional questions of the ability to resolve them.

Repeated use by Presidents of non-enforcement directives—because of the absence of any alternative—would also raise significant questions about the legitimacy of such presidential determinations. See Dawn E. Johnsen, *Presidential Non-Enforcement of*

Constitutionally Objectionable Statutes, Law & Contemp. Probs. 7, 12 (Winter/Spring 2000) (persistent presidential non-enforcement could "grossly distort the constitutionally preferred means" by which the President executes his constitutional responsibilities). Political opponents could argue that the President was using non-enforcement on constitutional grounds in lieu of politically-unsustainable vetoes, for example.

Third, a Congress frustrated by a President's unilateral non-enforcement of statutes would try to use other means to pressure the President to change his position, such as refusing to enact legislation favored by the President or refusing to appropriate funds for some or all of the Executive Branch. But those actions would inflict collateral damage upon Americans protected by the government programs at issue. Congress therefore might conclude that impeachment—for failing to faithfully execute the laws—is the only means available to protect its constitutional prerogatives.[12] By creating a legal regime in which unilateral presidential action may be the only viable means to achieve uniformity and avoid unacceptable litigation burdens—but in which the courts are sidelined—*Amica*'s approach is likely to lead to significantly increased inter-Branch friction, which in turn will further undermine the legitimacy of constitutional decisionmaking.

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[12] Indeed, some scholars have questioned the constitutionality of this practice. See, *e.g.*, Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. Rev. 381, 383 (1986); Christopher N. May, *Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q. 865, 869 (1994); Michael B. Rappaport, *The Unconstitutionality of "Signing and Not-Enforcing,"* 16 W. & M. Bill Rts. J. 113, 122 (2007).

3. *Option #3: If the President Were to Advance a Limited Defense of the Statute's Constitutionality.*

Faced with these two unacceptable choices, a President could well be tempted to withhold his views regarding a law's unconstitutionality, and instead instruct the Attorney General to tailor the law's legal defense as much as possible to the President's views of the relevant constitutional principles—but retaining the "bottom line" that the statute is constitutional in order to obtain a definitive judicial determination regarding the measure's validity. That option too carries adverse practical consequences.

Most significantly, our adversary system is founded on the principle that a party will vigorously argue the position that it espouses. If the President has concluded that a law is unconstitutional, but the Department of Justice nevertheless defends the law's constitutionality in order to secure a definitive judicial decision regarding that issue, it "can hardly be expected that [the Department] will take [this] pretended view with enthusiasm." Peter L. Strauss, *The President and Choices Not To Enforce*, Law & Contemp. Probs. 107, 119-120 (Winter/Spring 2000) (suggesting that a feigned defense makes the President "a party, in effect, to a friendly suit"); see also Neal Devins & Saikrishna Prakash, *The Indefensible Duty To Defend*, 112 Colum. L. Rev. 507, 572 (2012) ("[A] law's proponents are more likely to vigorously defend the statute than is the Solicitor General, who, in the course of a tepid defense of a law, might admit its constitutional infirmities.").

Indeed, other attempts by the United States to hedge positions regarding constitutional issues have not been particularly successful. See Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1081 (2001) (describing the "odd position" of the Solicitor General in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), and the situation in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), both cases in which the Executive Branch presented the Court with conflicting opinions about the constitutionality of the law at issue).

Because this approach would undermine a key attribute of the adversary process, its adoption by a President would raise significant practical concerns.

* * *

In sum, if *Amica*'s view of the law were accepted by this Court, it would in a large category of cases effectively eliminate the ability of the Executive Branch, and adversely affected parties as well, to obtain a the fair, efficient, and definitive resolution of constitutional challenges to federal laws.[13]

B. This Court's Precedents Make Clear That A Constitutional Challenge Is Justiciable As Long As The United States Continues To Enforce The Statute In Question.

The adverse practical consequences that would result from *Amica*'s legal principle, severe as they are, are not sufficient to establish this Court's jurisdiction. That depends on satisfying the requirements of Article III. But longstanding precedent makes clear that the Executive Branch's position in court regarding the constitutionality of a statute does not deprive a court of the power to address that legal question. As long as the President has instructed the Executive Branch to comply with the statute in the absence of a court order directing the contrary, the matter is justiciable.

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[13] *Amici* take no position on the standing of the Bipartisan Legal Advisory Group, but note that even if such standing were recognized it is not at all certain that Congress would choose to intervene to defend the constitutionality of federal statutes in every case in which the President determines a law to be plainly unconstitutional. Upholding congressional standing therefore would not protect against the adverse consequences of adopting *Amica*'s proposed legal rule.

This Court has identified two essential elements of Article III's case-or-controversy requirement: the party seeking "to invoke the authority of a federal court" must have "standing," *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 624 (1989), and the parties must be "adverse," *id.* at 619; see *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028 (2011) (A "case or controversy" exists where the "party invoking the Court's authority" satisfies standing and where the parties have "an ongoing interest in the dispute, so that the case features 'that concrete adverseness which sharpens presentation of the issues.'" (quoting *Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983))). The Executive Branch's agreement that the lower court's decision should be affirmed does not affect either standing or adverseness. A case or controversy, and therefore jurisdiction, plainly exists.

If the Court were to hold otherwise in this case, that determination could raise serious questions about even the ability of a district court to issue an injunction in a case challenging a statute that the President has determined to be unconstitutional. That result is clearly unacceptable.

1. **Chadha** ***is Dispositive of the Case-or-Controversy Question.***

This Court faced a very similar question regarding the case-or-controversy requirement in *INS* v. *Chadha*, *supra*. The Court's holding that it had jurisdiction there requires rejection of *Amica*'s position here.

The question in *Chadha* was the validity of a deportation order that was based on the exercise by the House of Representatives of its statutory authority to overturn through a one-house "veto" a decision of the Attorney General to allow a deportable alien to remain in the United States. Chadha sought review of the order in the Ninth Circuit, where both he and the INS argued that the statute authorizing a congressional "veto" was unconstitutional. The court of appeals agreed and "directed the Attorney General 'to cease and desist from taking any steps to deport this alien based upon the resolution enacted by the House of Representatives.'" 462 U.S. at 928 (citation omitted).

This Court held that it had jurisdiction over the INS's appeal of that determination, notwithstanding the INS's agreement that the legislative veto was unconstitutional:

> [T]he INS's agreement with Chadha's position does not alter the fact that the INS would have deported Chadha absent the Court of Appeals' judgment. We agree with the Court of Appeals that "Chadha has asserted a concrete controversy, and our decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold

> [the challenged statute], the INS will execute its order and deport him."

Id. at 939-40.

Here, the agreement between the United States and Ms. Windsor regarding the statute's unconstitutionality—the very same agreement that was present in *Chadha*—similarly does not deprive this Court of jurisdiction. If the Court rules for Ms. Windsor, DOMA will not be enforced, and she will receive the tax refund payment ordered by the district court. If the Court upholds the statute, the United States will comply with DOMA and she will not receive the tax payment. As in *Chadha*, therefore, the requisite case or controversy is present.[14]

Indeed, the case for finding a case or controversy is, if anything, stronger here because the order under review requires the United States to pay money. *Windsor* v. *United States*, 833 F. Supp. 2d 394, 406 (S.D.N.Y.) (requiring the United States to pay more than $350,000 to Ms. Windsor, plus interest), *aff'd*, 699 F.3d 169 (2d Cir. 2012). Economic damage is the paradigmatic injury-in-fact. See *Craig* v. *Boren*, 429 U.S. 190, 194 (1976) ("This Court repeatedly has recognized that such [economic] injuries establish the threshold [standing] requirements of a 'case or controversy' mandated by Art[icle] III."); *Sierra Club* v.

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[14] *Amica* argues that *Chadha* addressed only this Court's appellate jurisdiction under 28 U.S.C. § 1252, but the Court separately and specifically addressed the Article III question. 462 U.S. at 939-40; compare *id.* at 931 (addressing Section 1252 issue); see also *Cardinal Chemical Co.* v. *Morton Int'l, Inc.*, 508 U.S. 83, 88 n.9 (1993) (noting that *Chadha* "[found] Art[icle] III adverseness even though the two parties agreed on the unconstitutionality of the [statute] that was subject of that case").

Morton, 405 U.S. 727, 733 (1972) ("[P]alpable economic injuries have long been recognized as sufficient to lay the basis for standing.").

If the decision below is reversed by this Court, the United States will not pay this sum. And if the decision is affirmed, the amount will be paid from the Treasury. The resolution of this case will therefore plainly affect the judicially cognizable interests of the United States. Accord *United States* v. *Lovett*, 328 U.S. at 318 (where the plaintiffs had obtained a money judgment against the government in the lower court by successfully challenging the constitutionality of a statute, this Court granted the government's certiorari petition and affirmed the lower court's judgment notwithstanding the agreement between the plaintiffs and the government that the statute was unconstitutional).

The injury to the United States from the obligation to pay money does not evaporate simply because the United States and Ms. Windsor both espouse legal arguments that, if accepted, will require the United States to pay Ms. Windsor—just as the agreement between Chadha and the United States did not vitiate the Article III controversy in that case. In both situations, the injury—the invalidation of the deportation order issued by a federal agency and the order directing payment of money that the United States otherwise would not pay—stems from the order of the court of appeals under review. That injury would be eliminated by reversal of the lower court order by this Court; in consequence, there is a sufficient controversy to establish jurisdiction.

Indeed, as this Court has consistently held, the fact that the parties before it agree regarding the proper resolution of the case does not preclude finding a controversy sufficient to satisfy Article III. See *Chadha*, 462 U.S. at 940 n.12 (explaining the Court's jurisdiction to decide *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), by stating that "[e]ven though the Government largely agreed with the opposing party on the merits of the controversy, we found an adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party" unless this Court held the law unconstitutional); *Cardinal Chem. Co.*, 508 U.S. at 88 n.9; *id.* at 104 (Scalia, J., concurring) ("I agree with the Court that the parties' total agreement as to disposition of this case poses no constitutional barrier to its resolution.").

Finally, the Court in *Chadha* also rejected the argument that prudential concerns weighed against upholding jurisdiction. 462 U.S. at 940. The same conclusion applies here, both because of the presence of BLAG before the Court defending the challenged statute's constitutionality, see *ibid.*, and because of the significant adverse consequences that would result from a determination that prudential concerns preclude adjudication by this Court of the merits of the constitutional question.[15]

---

[15] As in *Chadha*, the statutory standard for seeking review in this Court—here, 28 U.S.C. § 1254(1)—is satisfied for the reasons discussed in the text. See 462 U.S. at 930 (discussing parallel requirements of former 28 U.S.C. § 1252).

2. *Concluding That the President's View That a Statute is Unconstitutional Vitiates This Court's Jurisdiction, Could in Some Contexts Deprive District Courts of the Power to Enter Injunctions Providing Relief.*

If this Court were to hold that the President's view of a statute's unconstitutionality deprives this Court of jurisdiction to determine the statute's validity, the reasoning underlying that determination could be invoked to argue that district courts might not necessarily have the power to enter injunctions in cases in which the President has concluded that a statute is unconstitutional.

If the presence of the United States is not sufficient to establish a case or controversy in this Court, despite its obligation to pay money, that presumably would be because the Court accepts *Amica*'s position that the parties' agreement on the law, and on the proper outcome of the case, makes the suit collusive or feigned. *Cf. Flast* v. *Cohen*, 392 U.S. 83, 100 (1968) ("[T]he standing requirement is closely related to, although more general than, the rule that federal courts will not entertain friendly suits or those which are feigned or collusive in nature." (citations omitted)).

But the prohibition against "friendly" suits applies in the district courts as well. *Sierra Club*, 405 U.S. at 732 n.3. See also *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997) ("[A]bsent 'a genuine adversary issue between * * * parties,' [a] federal court 'may not safely proceed to judgment.'" (omission in original) (quoting *United States* v. *Johnson*, 319 U.S. 302, 304 (1943) (per curiam))).

To avoid the contention that a similar defect precludes district court jurisdiction, the President could be obligated to demonstrate that he lacks the power to direct the Executive Branch not to comply with the challenged statute, and therefore judicial action is required. While that might be true here—Ms. Windsor suggests that the Constitution and the Anti-Deficiency Act might prevent the President from unilaterally directing the payment of federal funds (Windsor Juris. Br. 33-34)—it may not be true with respect to noncompliance with other unconstitutional laws.

In the absence of such a showing, it could be argued that a President's insistence on a court order—notwithstanding his ability to implement unilaterally his determination regarding the statute's unconstitutionality—would not be sufficient to establish the district court's jurisdiction. After all, *Amica*'s argument here is that the President's ability to comply with the district court injunction, combined with his agreement that entry of an injunction is proper, eliminates jurisdiction. In each case, the President's view of the underlying legal merits is the same and the Article III prerequisites are either satisfied or not by the President's own discretionary determination that a court adjudication of the constitutional issue is necessary and appropriate.

Acceptance of *Amica*'s argument could therefore force the courts to adjudicate a variety of difficult questions regarding the scope of Executive Branch authority. *Amica*'s position also could open the door to arguments that all courts are precluded from adjudicating a constitutional challenge when the President agrees that the statute is unconstitutional. As this Court observed in *Chadha*, however, "it would be a curious result if, in the administration of justice, a person could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments asserted by the individual." *Chadha*, 462 U.S. at 939.

The Court should reject *Amica*'s argument and preserve access to federal courts for resolution of constitutional challenges to federal statutes.

CONCLUSION

The Court should hold that it has jurisdiction to address the question regarding the constitutionality of the Defense of Marriage Act presented in this case.

Respectfully submitted.

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AND
BRIEFS

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No. 12-307

In The
Supreme Court of the United States

UNITED STATES,
Petitioner,
v.
EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR COURT-APPOINTED *AMICA CURIAE* ADDRESSING JURISDICTION

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QUESTIONS PRESENTED

I. Whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.

II. Whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

INTERESTS OF THE *AMICA CURIAE* 1

PROCEDURAL BACKGROUND 2

SUMMARY OF ARGUMENT 6

I. BLAG LACKS ARTICLE III STANDING 7

- A. BLAG's Generalized Claim of Injury Is Insufficient for Article III Standing As No Special Congressional Prerogatives Are At Stake 8
- B. One House Lacks Standing to Assert an Injury to Congress 15
- C. BLAG Was Not Authorized to Represent the Views of the House 17
- D. Separation of Powers Concerns Counsel Against Extending *Chadha* To Uphold BLAG's Standing 20

II. THE EXECUTIVE BRANCH'S AGREEMENT WITH THE DECISION BELOW THAT DOMA IS UNCONSTITUTIONAL DEPRIVES THIS COURT OF JURISDICTION 23

- A. *Chadha* Does Not Support This Court's Jurisdiction Here 24
- B. The United States' Effort to Obtain Review of a Decision With Which it Agrees Presents No Case Or Controversy 28

C. Even if Article III Injury Were Found, Prudential Standing Considerations Confirm *This* Court's Lack of Jurisdiction. ...33

D. The Prevailing Party Rule Bars Appellate Review 38

CONCLUSION 40

TABLE OF AUTHORITIES

CASES:

Allen v. Wright,
468 U.S. 737 (1984) 8, 33

Alliance to End Repression v. Chicago,
820 F.2d 873 (7th Cir. 1987) 30, 32

Already LLC v. Nike, Inc.,
__ S. Ct. __, 2013 WL 85300 (Jan. 9, 2013) 19

Alvarez v. Smith,
558 U.S. 87 (2009) 19

Arizonans for Official English v. Arizona,
520 U.S 43 (1997) 11, 16

ASARCO Inc. v. Kadish,
490 U.S. 605 (1989) .... *passim*

Bob Jones Univ. v. United States,
461 U.S. 574 (1983) 28

Bowsher v. Synar,
478 U.S. 714 (1986) 21

Buckley v. Valeo,
424 U.S. 1 (1976) 7, 13, 20, 21

Camreta v. Greene,
131 S. Ct. 2020 (2011) .... *passim*

Chadha v. INS,
634 F.2d 408 (9th Cir. 1980) 27

Cheng Fan Kwok v. INS,
392 U.S. 206 (1968) 10, 11

Clinton v. New York,
524 U.S. 417 (1989) 12

Coleman v. Miller,
307 U.S. 433 (1939) 12

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 22

Dames & Moore v. Regan,
453 U.S. 654 (1981) 16

Deposit Guar. Nat'l Bank v. Roper,
445 U.S. 326 (1980) 38, 39, 40

Diamond v. Charles,
476 U.S. 54 (1986) 32

Dickerson v. United States,
530 U.S. 428 (2000) 25

Director, OWCP v. Perini N. River Assocs.,
459 U.S. 297 (1983) 25, 26

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 33, 37

FEC v. Akins,
524 U.S. 11 (1998) 35

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,
528 U.S. 167 (2000) 20

Glidden Co. v. Zdanok,
370 U.S. 530 (1962) 26

Grupo Dataflux v. Atlas Global Grp.,
541 U.S. 567 (2004) 19

GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.,
445 U.S. 375 (1980) 31

Gunn v. University Comm. to End War,
399 U.S. 383 (1970) 39

Heckler v. Edwards,
465 U.S. 870 (1984) 15, 36, 37

Hohn v. United States,
524 U.S. 236 (1998) 33

INS v. Chadha,
462 U.S. 919 (1983) .... *passim*

Karcher v. May,
484 U.S. 72 (1987) 11

Keene Corp. v. United States,
508 U.S. 200 (1993) 19

Lewis v. Casey,
518 U.S. 343 (1996) 25

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 7, 8, 15, 19

McGrain v. Daugherty,
273 U.S. 135 (1927) 13

Metro Broad., Inc. v. FCC,
497 U.S. 547 (1990) 25

Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.,
501 U.S. 252 (1991) 20

Mollan v. Torrance,
22 U.S. (1 Wheat.) 537 (1824) 19

Moore v. Charlotte-Mecklenburg Bd. of Educ.,
402 U.S. 47 (1971) 31

Morrison v. Olson,
487 U.S. 654 (1988) 14

Muskrat v. United States,
219 U.S. 346 (1911) 23, 28, 29

Myers v. United States,
272 U.S. 52 (1926) 11

New York Tel. Co. v. Maltbie,
291 U.S. 645 (1934) 39

Powell v. McCormack,
395 U.S. 486 (1969) 9

Princeton Univ. v. Schmid,
455 U.S. 100 (1982) 29, 30, 32

Raines v. Bird,
521 U.S. 811 (1997) ....*passim*

Reed v. County Comm'rs of Del. Co., Pa.,
277 U.S. 376 (1928) 17, 19

Ruotolo v. Ruotolo,
572 F.2d 336 (1st Cir. 1978) 30

United States v. Alaska S.S. Co.,
253 U.S. 113 (1920) 32

United States v. Johnson,
319 U.S. 302 (1943) 23

United States v. Lovett,
328 U.S. 303 (1946) 10, 11

United States v. Providence Journal Co.,
485 U.S. 693 (1988) 24

United States v. Richardson,
418 U.S. 166 (1974) 8, 35

United States v. Smith,
286 U.S. 6 (1932) 11, 17

Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.,
454 U.S. 464 (1982) 9, 34

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 16, 17

CONSTITUTION AND STATUTES:

U.S. CONST. Art. I, § 1 16

Defense of Marriage Act of 1996, Pub. L. No.
104-199, 110 Stat. 2419 2

1 U.S.C.
- § 7 4

2 U.S.C.
- § 130f 18
- § 288b 18
- § 288e 18

28 U.S.C.
- § 516 24
- § 518 24
- § 530D(b)(2) 18
- § 1252 (1982) 36, 40
- § 1254 .... *passim*
- § 1291 .... 36, 39
- § 2403 .... 3, 18, 19

Pub. L. No. 100-352, § 1, 102 Stat. 662 (1988) 36

Pub. L. No. 249, 78th Cong., 2nd Sess., 58 Stat.
113 (1944) 18

RULES:

Fed. R. Civ. P.
    24(a)(1) 3
    24(a)(2) 3
    24(b)(1)(A) 3

OTHER AUTHORITIES:

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H.R. Res. 386, 78th Cong., 1st Sess., 89 CONG. REC. 10882 (1943) 18

H.R. Res. 49, 97th Cong., 1st Sess. 127 CONG. REC. 1304 (1981) 17

H.R. Res. 5, 113th Cong., 1st Sess., 159 CONG. REC. H8 (2013) 5

H.R. Rule II.8, 112th Cong. (rev. 2011) 17

Roberts Jr., John G., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993) 14

S. Res. 40, 97th Cong., 1st Sess., 127 CONG. REC. 1032 (1981) 17

In The
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FOR THE SECOND CIRCUIT

BRIEF FOR COURT-APPOINTED *AMICA CURIAE* ADDRESSING JURISDICTION

INTERESTS OF THE *AMICA CURIAE*

This brief is submitted in response to the Court's order of December 11, 2012, appointing counsel as *amica curiae* to brief and argue "in support of the positions that the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case, and that the Bipartisan Legal Advisory Group of the United States House of

Representatives lacks Article III standing in this case."

PROCEDURAL BACKGROUND

1. In November 2010, Edith Windsor, as executor of the estate of Thea Clara Spyer, sued the United States in district court, seeking a tax refund of $363,053. JA149, 173. That amount represents the additional federal estate tax paid because the Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419 (1996), forbade recognition of Windsor's marriage to another woman and thus denied her the marital exemption to the federal estate tax. Windsor argued that DOMA is unconstitutional. JA170-172.

Three months later, the Attorney General notified Congress that he and "the President *** have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional." JA185. The notification stated that the Executive Branch would continue to enforce DOMA, "consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality." JA192.

Following the Attorney General's notification, the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") voted 3-2 to intervene in the litigation to defend the constitutionality of

DOMA. JA195, 196 n.1. As its title suggests, BLAG is an "[a]dvisory" body, that is to be "consult[ed]" by the Speaker of the House, who gives "direction" to the General Counsel of the House, according to Rule II.8 of the Rules of the U.S. House of Representatives during all periods of this litigation. *Id.*

When BLAG moved to intervene in district court, the Department of Justice ("DOJ"), on behalf of the United States, argued that although BLAG lacked Article III standing, it was "unnecessary for BLAG to have an independent basis for standing" because the Executive Branch's role "ensures the continuing existence of a justiciable case or controversy." JA207-208. DOJ urged that BLAG's intervention be limited to "present[ing] arguments," leaving it to DOJ to "file appropriate motions, purely as a procedural matter, to ensure that" the court could consider arguments "on both sides of the constitutional issue" and would have "jurisdiction to enter judgment." *Id.*

The court rejected BLAG's argument that it was entitled to intervene as of right under Federal Rule of Civil Procedure 24(a)(1) and (b)(1)(A), ruling that BLAG was not the "United States," which may intervene as of right under 28 U.S.C. § 2403, and "there is no statute explicitly authorizing intervention by the House (or any subgroup or representative thereof) to defend the constitutionality of a statute." JA222 & n.2. The court then allowed BLAG to intervene as of right (and "as a full party") under Rule 24(a)(2), because "BLAG has a cognizable interest in defending the enforceability of statutes the House has passed when the President declines to enforce them" and had Article III standing. JA223, 226-227.

The district court subsequently granted summary judgment for Windsor, holding that Section 3 of DOMA, 1 U.S.C. § 7, was unconstitutional and awarding her $363,053. JA115.

2. The United States, represented by the DOJ, noticed an appeal. JA524. BLAG also noticed an appeal, JA522, and moved to dismiss DOJ's appeal for lack of appellate standing because the United States "prevailed below." JA527. DOJ opposed, arguing that "[b]ecause that judgment prevents the Executive Branch from taking enforcement action it would otherwise take, it is aggrieved by the judgment and has standing to appeal." JA533. Prior to the Second Circuit's decision, Windsor and the United States separately petitioned for certiorari before judgment.

On October 18, 2012, the court of appeals denied BLAG's motion to dismiss and affirmed the district court. U.S. Supp. Br. App. at 3a. As relevant here, the Second Circuit explained: "Notwithstanding the withdrawal of its advocacy, the United States continues to enforce Section 3 of DOMA, which is indeed why Windsor does not have her money. The constitutionality of the statute will have a considerable impact on many operations of the United States." *Id.* at 4a (citing *INS v. Chadha*, 462 U.S. 919, 931 (1983)).

3. On October 26, 2012 the United States filed a supplemental brief advising this Court of the

Second Circuit's decision and suggesting that the Court "now consider the present petition as one for certiorari after judgment and, if it were to grant the petition, review the judgment of the court of appeals." U.S. Supp. Br. at 7. Respondent Windsor asked the Court to grant the United States' petition, Windsor Supp. Br. at 1, while BLAG opposed the request, arguing that certiorari should instead be granted in another case presenting the issue. BLAG Supp. Br. at 2.

On December 7, 2012, this Court granted the United States' petition for writ of certiorari before judgment on the question of DOMA's constitutionality, and added the two jurisdictional questions, which *amica* was later invited to brief and argue.

4. On December 28, 2012, BLAG filed a petition for writ of certiorari from the Second Circuit decision. And on January 3, 2013, the House of Representatives adopted a resolution "authoriz[ing]" the 113th Congress' BLAG "to act as successor in interest" to the 112th Congress' BLAG in "civil actions" in which BLAG had intervened during the 112th Congress to defend the constitutionality of DOMA Section 3, including this case. H.R. Res. 5, 113th Cong., §4(a)(1), 1st Sess., 159 CONG. REC. H8 (2013). The resolution further states that BLAG "continues to speak for, and articulate the institutional position of, the House in all litigation matters in which it appears, including in *Windsor v. United States*."

SUMMARY OF ARGUMENT

I. BLAG lacks Article III standing. Congress itself would lack standing to defend the constitutionality of laws that do not concern its own specific prerogatives; the interest here in assuring that the law is enforced is a generalized one, insufficient for Article III injury. It is the Executive Branch, not Congress, that is obligated to "take Care" that laws are enforced. Moreover, any injury that might arise from nondefense of a law would be to the whole Congress, which one House cannot alone assert. In *INS v. Chadha*, 462 U.S. 919 (1983), a special legislative prerogative under the Line Item Veto Act was asserted *and* both houses intervened. *Chadha* should not be extended here, especially given *Raines v Byrd*, 521 U.S. 811 (1997). Finally, BLAG lacked authority to speak for the House at relevant times.

II. The United States' agreement with the courts below (and with Windsor) deprives this Court of jurisdiction, because the United States suffers no injury sufficient to invoke Article III jurisdiction. An interest in obtaining a ruling from a higher court does not create standing. Even if the United States' claim of "aggrievement" were sufficient for Article III, prudential concerns involving the Executive Branch's assertion of the generalized interests of others should also preclude this Court from recognizing its standing. The jurisdictional statutes, which have changed since *Chadha*, reinforce the need to respect prudential limitations, if not in the court of appeals at least in this Court. Finally, the United States is a prevailing party, not within the exception of *Camreta* *v. Greene*, 131 S. Ct. 2020 (2011), and thus cannot appeal.

I. BLAG LACKS ARTICLE III STANDING.

As this Court explained in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the "doctrine of standing" is central to "setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III ***. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III," *id.* at 560.

Article III's standing requirements enforce and are reinforced by the Constitution's separation-of-powers principles. The separation of law-making from law-execution is a distinctive feature of our Constitution. And as part of this structural separation, this Court has held that the Constitution bars Congress from vesting itself with the power to appoint officers charged with executing federal laws, including through litigation, *Buckley v. Valeo*, 424 U.S. 1, 138-140 (1976). These general principles frame the congressional standing analysis.

BLAG lacks standing for at least three reasons. First, BLAG has suffered no injury to a legally cognizable interest beyond the diffuse, generalized interests of all citizens that duly enacted and constitutional laws be enforced; no special prerogatives of BLAG, the House or Congress are threatened. Second, if there were any distinct legislative injury arising from the Executive Branch's refusal to defend the constitutionality of this statute, that injury would afflict the Congress *as a whole*. A single house (or part thereof) does not have standing to assert that interest, and the Senate has not intervened. Third, BLAG is not the House, but an "[a]dvisory" body that lacked authority to represent the House when it moved to intervene, noticed its appeal to the Second Circuit, and petitioned this Court for certiorari.

A. BLAG's Generalized Claim of Injury Is Insufficient for Article III Standing As No Special Congressional Prerogatives Are At Stake

An irreducible component of Article III standing is a "concrete," "personal injury," "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751, 756 (1984). Yet BLAG asserts only a generalized interest in seeing statutes that Congress enacted implemented, an interest that is widely shared by the people at large. BLAG asserts no judicially cognizable, concrete injury to itself, to the House of Representatives or to Congress. In *Lujan*, 504 U.S. at 575-576, the Court underscored that "injury amounting only to the alleged violation of a right to have the Government act in accordance with law was not judicially cognizable." This Court has repeatedly recognized that such a generalized interest is insufficient to confer standing. See, e.g., *United States v. Richardson*, 418 U.S. 166, 176-177 (1974).

"[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 483 (1982).

Members of Congress are not exempt from constitutional requirements of standing. They too must show a "personal stake," a "particularized" injury, that is "legally and judicially cognizable," to bring suit in federal courts. *Raines v. Byrd*, 521 U.S. 811, 819 (1997). Because the generalized interest in the constitutionality of its statutes does not confer standing on Congress or its members, this Court's caselaw has upheld legislative standing only in situations where there is a concrete threat to the institutional prerogatives of the legislature or to the personal rights of its members, as in *Powell v. McCormack*, 395 U.S. 486 (1969), where a member-elect alleged that he was wronged when the House refused to seat him. Otherwise, neither legislators nor Congress nor its Houses – or their subparts – have standing.

In *Chadha*, this Court held that Congress was a proper party to defend the constitutionality of a statute that the Executive Branch would not defend.[1]

---

[1] Although it did not use the word "standing," *Chadha*'s (admittedly not crystalline) discussion repeatedly referred to Congress as a proper party and stated that its presence assured "concrete adverseness." *See* 462 U.S. at 930 n. 5; 939-940. *Cf. Raines*, 521 U.S. at 818 ("The standing inquiry focuses on whether the plaintiff is the proper party[.]").

Under the statute at issue, each House had authority to disallow decisions made by the INS under the law – known as the one-house veto. *See* 462 U.S. at 925. When the House of Representatives voted to invalidate the INS's decision to suspend Chadha's deportation, Chadha sought review, arguing that the legislative veto was unconstitutional. *Id.* at 928. When the Executive Branch declined to defend the constitutionality of this veto, the Houses of Congress defended the law, first as *amici* and, after the Ninth Circuit decision, as intervenors. *Id.* at 928, 930 n.5.

Accordingly, unlike this case, in *Chadha* the legal injury asserted by the intervening Houses went well beyond a generic, broadly held interest in the constitutionality of laws for their own sake. Instead, *Chadha* involved Congress's effort to defend distinct, statutorily created powers of the Houses of Congress that were specifically, concretely and uniquely tied to the provisions of the particular statute the constitutionality of which was at issue.

Overbroad language in *Chadha,* however, suggested that congressional standing was more general and well-settled. *See* 462 U.S. at 940 ("We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."). But the two cases the Court cites in support of this proposition—*United States v. Lovett*, 328 U.S. 303 (1946) and *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968)—do not sustain it.

In *Lovett*, Congress appeared, not as a party or intervenor that requires standing, but "*as amicus curiae*." 328 U.S. at 304 ("John C. Gall argued the cause for the Congress of the United States, *as amicus curiae*[.]") (emphasis added).[2] *Cheng Fan Kwok* is even less relevant, because it involved *no* congressional entity at all. Rather, because the parties both disagreed with the judgment below, the Court appointed an attorney, William H. Dempsey, not identified as having any connection to Congress, to defend that judgment as an *amicus*. *See* 392 U.S. at 210 n.9.[3]

In another line of cases, the Court has indicated that *state* legislatures or their officers may have standing to defend the constitutionality of state laws, depending on state law. *See, e.g.*, *Karcher v. May*, 484 U.S. 72, 81-82 (1987); *Arizonans for Official English v. Arizona*, 520 U.S 43, 65 (1997). But because federal separation-of-powers requirements do not necessarily apply to the organization of state governments, judicially cognizable injuries for congressional and state legislators may differ.

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[2] In *Lovett*, the United States certiorari petition noted that DOJ had "been requested by the Special Counsel appointed by the subcommittee of the House Committee on Appropriations to file this petition," and stated its agreement that "the questions presented are worthy of review on certiorari." U.S. Pet. for Writ of Cert. at 9, 328 U.S. 303 (No. 809).

[3] In *United States v. Smith*, 286 U.S. 6, 29-30 (1932), the Attorney General authorized the Senate to bring an action, in the name of the United States; that case too involved a special legislative prerogative – the asserted power of the Senate to withdraw confirmation of an executive branch officer who had already received his commission. In *Myers v. United States*, 272 U.S. 52 (1926), which also involved a claimed congressional prerogative, a member of the Senate was appointed only "as a friend of the Court," *id.* at 176, to argue in support of the constitutionality of a federal statute that the Executive Branch argued was unconstitutional.

Nor does *Coleman v. Miller*, 307 U.S. 433 (1939), support BLAG's standing here. Not only did *Coleman* involve state legislators, but there was a special legislative prerogative at stake: voting on proposed constitutional amendments. State senators challenged whether the Lieutenant Governor, who cast a tie-breaking vote on whether to ratify a proposed amendment, was part of the legislature for purposes of U.S. Const. Art. V. *Id.* at 438, 441.

By contrast, in *Raines* this Court held that individual members of Congress lacked Article III standing to challenge the constitutionality of the Line Item Veto Act, which authorized the President to cancel piecemeal, and effectively repeal, the provisions of duly enacted laws. *Raines*, 521 U.S. at 815, 826; *see Clinton v. New York*, 524 U.S. 417, 438 (1989). Members of Congress claimed that the grant of this power to the President undermined the effectiveness of their votes. *Raines*, 521 U.S. at 825. The Court held, however, that this "abstract dilution of institutional legislative power" did not confer standing, unlike the concrete claim of flat-out "vote nullification at issue in *Coleman*." *Raines*, 521 U.S. at 826. Emphasizing that claims of legislative standing must be carefully scrutinized, the Court explained that to find standing there "would require a drastic extension," *id.*, of *Coleman*. No such extension was warranted, however, because of the "vast difference between the level of vote nullification" in *Coleman*, and the "wholly abstract and widely dispersed" claim of institutional injury alleged in *Raines*. *Id.* at 823, 826, 829.

BLAG's claim of injury arising from the constitutional challenge to DOMA and the prospect of its invalidation as unconstitutional likewise falls short of Article III's particularized injury requirement. In neither *Raines* nor here is there the kind of specific, concrete threat to any distinct legislative prerogative – whether it be the right of a state legislature to vote on constitutional amendments, or the power of the congressional houses to exercise a legislative veto – that past cases indicate could sustain legislative standing.[4]

When the Executive Branch declines to defend a law it has enforced, members of Congress suffer no distinct, judicially cognizable injury. Their votes are not nullified and the statute stands as enacted. BLAG seeks only to vindicate a "widely dispersed" interest – shared by citizens and legislators alike–in the constitutionality of a federal law.

The Court in *Raines* stressed the importance of a properly constrained approach to legislative standing, because of more general concerns about "decid[ing] whether an action taken by one of the other two branches of the Federal Government was unconstitutional," and the "historical experience" of how inter-branch conflicts at the federal level were handled. *See* 521 U.S. at 819-820, 826-829. That Congress expressly authorized its members to file lawsuits challenging the Act's constitutionality could not override basic Article III principles governing legislative standing. *Id.* at 815-816, 820 n.3. Here, too, whatever authorization BLAG may have obtained cannot overcome Article III standing barriers for lack of cognizable injury. [5]

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[4] Congress has powers of investigation relating to its lawmaking functions, *see Buckley*, 424 U.S. at 137, that may lead it to become involved in litigation, *e.g.*, to enforce subpoenas. *Cf. McGrain v. Daugherty*, 273 U.S. 135 (1927) (upholding congressional power to compel production of information germane to its legislative functions). No such congressional power is involved here.

The Constitution provides Congress with many mechanisms to express disagreement with Executive non-defense decisions. In addition to Congress and its members appearing as *amici*, Congress may hold oversight hearings, or withhold confirmations or appropriations. *See* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1229 (1993); *cf. Morrison v. Olson*, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) (noting that Congress can use powers, like impeachment, if it disagrees with Executive enforcement decisions).

But it is the Executive Branch that is charged to "take Care that the Laws" are faithfully executed. Executive Branch decisions not to defend a law based on determinations of its unconstitutionality can function to promote a working constitutional system. Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 913-914, 928-929 (1990); *see also*

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[5] In *Raines*, the Court attached some significance to the fact that plaintiffs, though authorized to sue individually, had "not been authorized to represent their respective Houses ***," *id.* at 829. But as argued below, BLAG did not have authorization to speak for the House, at least before January 2013.

Heckler v. Edwards, 465 U.S. 870, 873 n.2 (1984) (noting DOJ decision to stop enforcing a sex-based Social Security rule after concluding that it "could not be defended under the standards announced by [the] Court"). To allow standing based on an "undifferentiated public interest in executive officers' compliance with the law *** is to *** transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." *Lujan*, 504 U.S. at 577. Except where constitutional or statutory prerogatives of Congress or its Houses are threatened, Congress, its members and its bodies lack standing to litigate the constitutionality of the laws Congress enacts.

B. One House Lacks Standing to Assert an Injury to Congress

Even if it were possible to state a judicially cognizable legislative injury from Executive failure to defend a statute involving no special legislative prerogative, any legislative interest in the constitutionality of Acts of Congress would belong to the entire Congress, not just one house. Accordingly, *both* houses would have to assert that injury by moving to intervene. *Chadha,* for example, referred to the congressional intervenors as "Congress": "[F]rom the time of Congress' formal intervention, *** the concrete adverseness is beyond doubt. Congress is both a proper party to defend the constitutionality of § 244(c)(2) and a proper petitioner under 28 U.S.C. § 1254(1)." *Chadha*, 462 U.S. at 939; *see also id.* at 929 ("Both Houses of Congress contend ***") (footnote omitted); *cf. id* at 930 n.5 ("The Senate and House authorized intervention in this case. *** Both Houses are therefore proper 'parties'[.]"). And in *Arizonans for Official English*, this Court described *Chadha* as holding that "Congress [was] a proper party to defend [a] measure's validity *where both Houses, by resolution, had authorized intervention in the lawsuit*." 520 U.S. 43, 65 n.20 (1997) (emphasis added).

Where one house declines to participate (as the Senate did here), Congress has not spoken, much less asserted any injury that this Court would be able to determine. It is, after all "a Congress" that is "vested" by the Constitution with "all legislative Powers herein granted." U.S. CONST. Art. I, § 1. As "Congress" consists of "a Senate and House of Representatives," *id.*, there can be no judicially cognizable injury to Congress absent both houses' action (except perhaps where a chamber-specific prerogative of one house is at issue).

To hold otherwise would make congressional interventions far more likely anytime the Executive declines to defend (or one House disagrees with how a law is being implemented), thereby increasing the risks of federal courts being called on to mediate what might be partisan disagreements between elected public officials. Permitting one-house standing to defend the constitutionality of any federal law is thus inconsistent with this Court's repeated concern for the properly limited role of the courts: "the Framers 'did not make the judiciary the overseer of our government.'" *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981) (quoting *Youngstown Sheet &*

Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring)).

C. BLAG Was Not Authorized to Represent the Views of the House

BLAG lacked power to act even for one house of Congress. BLAG is not the House of Representatives; it is an "[a]dvisory" body, established by the internal rules of the House of Representatives. H.R. Rule II.8, 112th Cong. (2011). BLAG's purpose is to be "consult[ed]" by the Speaker, who provides "direction" to the "function[ing]" of the General Counsel of the House, who in turn "provid[es] legal assistance and representation *to the House*." *Id.* (emphasis added). These words invest BLAG with no authority to intervene as a party in any litigation, including this case when BLAG intervened in the courts below or even when BLAG filed its own certiorari petition. *See Reed v. County Comm'rs of Del. Co., Pa.*, 277 U.S. 376 (1928) (finding Senate resolutions insufficient to authorize Senate committee's resort to courts).[6]

The absence of authorization contrasts with *Chadha*, where both houses of Congress enacted resolutions authorizing intervention, and both houses intervened. *See* H.R. Res. 49, 97th Cong., 1st Sess., 127 CONG. REC. 1304 (1981); S. Res. 40, 97th Cong., 1st Sess., 127 CONG. REC. 1032 (1981). Likewise, in

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[6] Although each house has constitutional authority to make its own rules, where the rights of those outside a house – like Windsor or the Executive – are at stake, the interpretation of those rules becomes a matter for judicial determination. *See Smith*, 286 U.S. at 33.

Lovett (where Congress appeared only as an *amicus*), the House passed a resolution authorizing a special subcommittee "to appoint counsel to represent the United States" in defending the statute, H.R. Res. 386, 78th Cong., 1st Sess., 89 Cong Rec. 10882 (1943), and the two houses *together* enacted legislation concerning the terms of government employment of counsel appointed pursuant to the House resolution, Pub. L. No. 249, 78th Cong., 58 Stat. 113 (1944).

Moreover, while legislation clearly authorizes the Senate to intervene in litigation,[7] no comparable legislation authorizes such action by the House. Nor was there any vote or resolution by the House as a whole during the pendency of this litigation in the lower courts. Even if the Court were prepared to recognize Article III injury to Congress from Executive nondefense of a law, at least as a prudential matter, *see Raines*, 521 U.S. at 820 n.3; *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989), it should not do so without clear legislative authorization.[8]

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[7] *See* 2 U.S.C. § 288b (titled "Requirements for authorizing representation activity"); 2 U.S.C. § 288b(c) (authorizing intervention or appearance as amicus "only when directed to do so by a resolution adopted by the Senate").

[8] The statute establishing the House General Counsel's Office, 2 U.S.C. § 130f, does not authorize the House to intervene but instead authorizes the entry of appearances notwithstanding local bar rules on attorney admission. And while 28 U.S.C. §530D(b)(2) requires the Attorney General to notify the Houses of Congress when the Justice Department decides not to defend the constitutionality of a federal statute so as to facilitate intervention, it does not of itself authorize intervention, in the way that 2 U.S.C § 288e does for the Senate and 28 U.S.C.

The authority that BLAG relied on in the lower courts, *see* JA196 n.1 (a House rule authorizing BLAG to be "consult[ed]" by the Speaker) falls far short of the authority this Court held *insufficient* in *Reed*. There, two detailed Senate resolutions authorizing an investigative committee to subpoena records (like ballots), did not empower committee members to go to court to compel production of documents relating to the election under investigation. 277 U.S. at 386-389.

The post hoc effort to authorize BLAG, by a House resolution adopted on January 3, 2013, cannot retroactively cure this defect. Without contemporaneous authority, it is difficult to determine whether the House was aggrieved at all at the time of BLAG's intervention, appeal, and petition to this Court. As this Court has emphasized, "an 'actual controversy' must exist," both "'*at the time the complaint is filed*,'" and "through 'all stages' of the litigation." *Already LLC v. Nike, Inc.*, __ S. Ct. __, 2013 WL 85300, at *4 (Jan. 9, 2013) (emphasis added) (quoting *Alvarez v. Smith*, 558 U.S. 87, 92 (2009)). Federal courts' jurisdiction ordinarily is determined by the facts at the time the suit is filed, *see Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824); *Grupo Dataflux v. Atlas Global Grp.*, 541 U.S. 567, 570-71 (2004); *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993). That general principle applies to the requirement of standing. See *Lujan*, 504 U.S.

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§ 2403 does for the United States. Unlike the Senate, the House is not a continuing body, and statutory authorization for intervention might be thought especially important.

at 569 n.4 (plurality opinion); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000) (referring to the need for standing at the time the lawsuit is filed).

The critical inquiry is thus whether BLAG had authority to litigate for the House at the outset of its intervention. It did not – nor at the time of appeal to the court of appeals or petition to this Court. The House cannot evade the requirements of standing at the outset and retroactively create jurisdiction in the Article III courts "nunc pro tunc."

D. Separation of Powers Concerns Counsel Against Extending *Chadha* To Uphold BLAG's Standing

To recognize BLAG's standing risks undermining the basic constitutional structure separating law-making from law-execution, while increasing judicial power, as courts are asked to mediate inter-Branch disputes over what the Constitution or laws require. BLAG's intervention cannot be easily reconciled with the propositions that executive acts must be done by or under the supervision of those properly appointed to serve *outside* of Congress, while law-making must be done in accord with bicameralism and presentment. *See Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991).

In *Buckley*, this Court held that Federal Election Commission members appointed by members of Congress could not perform the functions of "Officers of the United States," including specifically conducting litigation "in the courts of the United States for vindicating public rights." 424 U.S. at 140.[9] Rejecting the argument that the FEC's litigation functions were ancillary to Congress' power to regulate elections, the Court declared: "A lawsuit is the ultimate remedy for a breach of the law, *and it is to the President, and not to the Congress*, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Id.* at 138 (emphasis added). Under Article II of the Constitution, "[s]uch functions may be discharged only by persons who are 'Officers of the United States'" appointed in accordance with the Appointments Clause, which does not provide for congressional appointment. *Id.* at 140.

Thus, "the Legislative Branch may not exercise executive authority by retaining the power to appoint those who will execute its laws," *Buckley*, 424 U.S. at 119. Instead, "[o]nce Congress makes its choice in enacting legislation, *its participation ends*. Congress can thereafter control the execution of its enactment only indirectly – by passing new legislation." *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986) (emphasis added, citations omitted). Congress may, of course, establish offices, *outside* of Congress, with independent litigating authority to enforce and defend federal law, as in *Morrison*, *supra*. But Congress may not seek to retain for itself such executive functions.

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[9] The FEC's powers included the power "to initiate ***, *defend*, or appeal any civil action***." *Buckley*, 424 U.S. at 166 (emphasis added).

In *Chadha,* this Court emphasized that, when a house of Congress acts, it presumptively acts in a legislative capacity, that is, with "the purpose and effect of altering the legal rights, duties, and relations of persons *** outside the Legislative Branch." 462 U.S. at 952. If BLAG's intervention was a legislative act, it was plainly not done through the bicameralism and presentment procedure required for such acts. If, on the other hand, BLAG's action was not a "legislative" act, it is hard to square with *Chadha*'s observation that, "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action." *Id.* at 955.[10]

The question of standing is deeply connected to the "tripartite" structure of our constitutional government. *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 341 (2006) (quotation marks and citations omitted). Absent injury to special congressional prerogatives, this structure counsels that legislative standing should not be expanded beyond the circumstances of *Chadha.*

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[10] *See also id.* (noting four instances in which the Constitution authorizes one house to act alone). Participating in litigation as a party is not among them. *See also* note 4 above.

II. THE EXECUTIVE BRANCH'S AGREEMENT WITH THE DECISION BELOW THAT DOMA IS UNCONSTITUTIONAL DEPRIVES THIS COURT OF JURISDICTION

The district court plainly had jurisdiction over Windsor's lawsuit. Although the Executive Branch came to agree with her that DOMA is unconstitutional, its refusal to pay Windsor the estate tax refund injured her and assured a genuine "case-or-controversy" in the district court. Once that court's judgment was entered, on the United States' constitutional view, Windsor should have been paid. Instead, DOJ filed a notice of appeal. Now in the position of "the party attempting to invoke the federal judicial power," *ASARCO,* 490 U.S. at 618, the United States had no Article III injury to present.

Article III's case-or-controversy limits apply at every stage of the litigation, and to litigation with the United States. "'No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies,'" *Raines*, 521 U.S. at 818 (citation omitted). Although the United States' distinctively governmental interests may afford standing in circumstances denied private parties, it cannot ask Article III courts to resolve disputes unless they meet the case-or-controversy criteria. *See Muskrat v. United States*, 219 U.S. 346, 356 (1911); *see also United States v. Johnson*, 319 U.S. 302, 304-305 (1943).

Represented by the Executive Branch (as Article II's "take Care" clause contemplates), and through the Justice Department (as Congress by statute provided, 28 U.S.C. §§ 516, 518; *see United States v. Providence Journal Co.*, 485 U.S. 693 (1988), the United States agrees that the statute blocking Windsor's refund is an unconstitutional denial of her rights; it agrees with the decision below that Windsor merits a refund. The United States thus offers no concrete injury to its legal interests from that judgment sufficient to invoke the jurisdiction of this Court.

This Court thus lacks jurisdiction. First, because the United States agrees with *both* Windsor and the court below, its appeal fails to present a "case or controversy" within the meaning of Article III. Second, even if the Executive Branch's enforcement of the statute met core Article III requirements for standing and adverseness, prudential considerations support a finding of nonjusticiability, at least with respect to this Court's jurisdiction. Finally, ordinary rules of appellate jurisdiction preclude appeals by prevailing parties, like the United States, which obtained below the very result it sought. And no prior case compels a different conclusion.

A. *Chadha* Does Not Support This Court's Jurisdiction Here

To support its claim of Article III injury, the United States has relied on *Chadha*'s conclusion that the INS was "aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take." 462 U.S. at 930; *see, e.g.*, JA535-

536. *Chadha* and *Lovett* are the only prior cases known to counsel in which this Court exercised jurisdiction to decide the constitutionality of a federal statute that the Executive refused to defend, where that Branch appealed from a lower court judgment with which it agreed.[11] In both cases, the Executive enforced a statute (while arguing for its unconstitutionality), resulting in injury to individuals who then brought constitutional challenges to court. Neither case supports this Court's jurisdiction here.

In *Lovett* the Court did not address any question of justiciability relating to the parties. "[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (citations omitted).[12] *Lovett* also largely predates modern Article III case-or-controversy jurisprudence, an additional reason that its exercise of jurisdiction cannot resolve the issue here. Moreover, in *Lovett*, unlike *Chadha* or here, this Court was the first Article III court seized of the constitutional question, because the Court of Claims at the time was not considered an Article III court.

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[11] In cases such as *Myers*, *Buckley*, *Metro Broadcasting, Inc. v. FCC.*, 497 U.S. 547 (1990), and *Dickerson v. United States*, 530 U.S. 428 (2000), the United States was *not* the appealing party invoking this Court's jurisdiction. In *Morrison*, the Independent Counsel sought review of an adverse judgment. In *Smith*, it was the Senate, acting in the name of the United States, that appealed; its position was adverse to both Smith and the judgment below.

[12] Even when a series of cases entertain jurisdiction without addressing the question, the Court may find jurisdiction absent when that issue is joined. *See Director, OWCP v. Perini N. River Assocs.*, 459 U.S. 297, 303 n.11 (1983).

See Glidden Co. v. Zdanok, 370 U.S. 530, 531-532 (1962) (Harlan, J.).

Chadha requires more analysis. In responding to arguments that the United States was not a proper party to appeal, the Court spoke only in statutory terms. *See* 462 U.S. at 930-931 & n.6. It was "for purposes of deciding whether the INS is 'any party' within the grant of [mandatory] appellate jurisdiction in [now-repealed 28 U.S.C.] § 1252" that the Court found the INS "sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take." *Id.* at 930. This Court repeatedly emphasized that it was construing Section 1252. *See id.* at 930-931 ("Congress intended that this Court take notice of cases that meet the technical prerequisites of § 1252 ***."). It was for purposes of "the agency's status as an *aggrieved party under § 1252*" that the outcome was not "altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional." *Id.* at 931 (emphasis added). In discussing this statutory issue, the Court carefully avoided addressing the INS's Article III standing,[13] noting the presence of the congressional intervenors providing adversity. *See id.* at 931 n.6.

Later, the Court considered the House's argument that the case in the Ninth Circuit was "not a genuine controversy" because Chadha and the INS agreed on the unconstitutionality of the one-House veto. *Chadha*, 462 U.S. at 939; *see* Br. of U.S. House of Reps. at 46-47; Reply Br. of U.S. House of Reps. at 13. The Ninth Circuit had rejected as "untenable" the prospect "that all agencies could insulate unconstitutional orders and procedures from appellate review simply by agreeing that what they did was unconstitutional." *Chadha v. INS*, 634 F.2d 408, 420 (9th Cir. 1980) (Kennedy, J.). This Court agreed: "it would be a curious result if *** a person could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments asserted by the individual." *Chadha*, 462 U.S. at 939. Referring to the period before intervention (which occurred after judgment in the Court of Appeals),[14] the Court held, "there was adequate Art. III adverseness even though the only parties were the INS and Chadha ***. [T]he INS's agreement with Chadha's position does not alter the fact that the INS would have deported Chadha absent the Court of Appeals' judgment." *Id.*

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[13] *Cf. Perini N. River Assocs.*, 459 U.S. 297 at 304 ("[Even if a party] has statutory authority to seek review in this Court, [it] may not have Art. III standing ***.").

This aspect of the Court's holding sustained the justiciability of the case in the Ninth Circuit, where Chadha, who stood to be deported, and not the INS, was the party invoking the court's jurisdiction. Thus, the Court wrote, we "agree with the Court of Appeals that 'Chadha has asserted a concrete controversy, and our decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold § 244(c)(2), the INS will execute its order and deport him.'" *Chadha*, 462 U.S. at 939-940 (internal citations omitted).[15]

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[14] *Chadha* distinguished the periods before and after intervention by the Houses of Congress. 462 U.S. at 939 (stating that from the time of Congress' formal intervention, "the concrete adverseness is beyond doubt").

What the Court in *Chadha* did *not* decide is whether the INS had Article III standing to appeal from the Ninth Circuit to this Court or whether, without the intervenors, a sufficient case or controversy would have been present on appeal to this Court.[16] *Chadha* is therefore not dispositive of the justiciability of the United States' petition here.

B. The United States' Effort to Obtain Review of a Decision With Which it Agrees Presents No Case Or Controversy

The United States, though nominally a defendant below and a petitioner here, is in fact in agreement with *both* Windsor and the court below.[17]

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[15] While the last quoted statement might be read to refer not just to jurisdiction in the Ninth Circuit, but also to this Court's own jurisdiction, that reading is difficult to reconcile with the Court's unwillingness to reach the INS's Article III standing earlier in its opinion. *See id.* at 931 n.6. If so read, it would be dictum, in light of the Court's view of the effect of the intervenors' participation. *See id.* at 939.

[16] *Chadha*, at 940 n.12, also analogized the case-or-controversy issue to that presented in *Bob Jones University v. United States*, 461 U.S. 574 (1983). There, however, it was the University that sought review in this Court (like Chadha had in the Ninth Circuit); no question of appellate standing was present. Moreover, the United States, while largely agreeing with the University, was continuing to enforce the challenged regulations pursuant to a court order. *See* 461 U.S. at 585 n.9.

[17] In *Muskrat*, this Court rejected a specific jurisdiction conferred by Congress to resolve disagreement over the constitutionality of certain federal statutes where the decision

Its only real interest here is in obtaining a precedent from a higher court. This interest, by the party "attempting to invoke the federal judicial power," *ASARCO*, 490 U.S. at 618, is insufficient for Article III.

Princeton University v. Schmid, 455 U.S. 100 (1982) (per curiam), is instructive. Appellee Schmid was convicted of criminal trespass for leafleting in violation of University regulations. The New Jersey Supreme Court (after inviting Princeton's intervention) reversed the conviction, concluding that university regulations violated the state constitution. Princeton sought review in this Court, arguing that the state court's decision violated the University's First Amendment rights. *See id.* at 101-102. The State joined in seeking review in this Court, but declined to argue either for or against the judgment of its state court; it asserted only an interest in knowing whether the state's right-of-access law was constitutional. *See id.* at 102; *see also* Br. of Appellant State of New Jersey at 4 (No. 80-1576), 1981 WL 390035.

This Court dismissed the State's appeal for want of jurisdiction, explaining:

> *[I]f the State were the sole appellant and its jurisdictional statement simply asked for*

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would resolve only an abstract question. *See* 219 U.S. at 348-351, 360-62 (describing statute's effort to obtain a judicial opinion without disposing of parties' adverse claims to property). In this case, even more than in *Muskrat*, "[i]t is true the United States is made a defendant to this action, but it has no interest adverse to the claimants." *Id.* at 361.

> *review and declined to take a position on the merits, we would have dismissed the appeal for want of a case or controversy.* We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us."

Schmid, 455 U.S. at 102 (emphasis added). If, in *Schmid*, the Court lacked jurisdiction over an appeal where the State had suffered an adverse judgment below and noticed an appeal, but did not argue against the judgment, then the Court equally lacks jurisdiction here, where the United States obtained the very judgment it sought below, noticed an appeal, but continues to argue the court below was correct.[18]

The United States' desire for this Court, rather than a lower court, to have the final word is not a sufficient stake for an Article III case or controversy. "No matter how desirable it may be to have a constitutional question settled, the resolution must await the concrete controversy, for only then does the judge have an adequate justification for giving an opinion." *Alliance to End Repression v. Chicago*, 820 F.2d 873, 876 (7th Cir. 1987); *see Ruotolo v. Ruotolo*, 572 F.2d 336, 338 (1st Cir. 1978) (notwithstanding the government's "strong interest in obtaining a ruling *** the desirability of an advisory opinion is not a substitute for justiciability").[19]

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[18] *Schmid* is not on all fours with this case. For one thing, the Court found Princeton's appeal moot, because Princeton had adopted new and less restrictive regulations for outside leafleting. *See* 455 U.S. at 103. But this and other differences do not detract from the force of its analysis of jurisdiction over the State's appeal.

Because the United States obtained the judgment it argued for below, *see* JA488, no "injury" to the United States was "caused" by that judgment, nor could this Court's overturning of that judgment provide "redress" – indeed, the United States seeks affirmance of that judgment. "[T]here is no Art. III case or controversy when the parties desire 'precisely the same result,'" *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 383 (1980) (quoting *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48 (1971) (per curiam)).[20] In *Moore* the parties were in agreement on the result they sought – "a holding that the anti-busing statute is constitutional," which led this Court to hold that "[t]here is, therefore, no case or controversy within the meaning of Art. III of the Constitution." 402 U.S. at 47-48. In *Moore*, the parties both disagreed with the judgment below; here the parties both *agree* with the judgment below, affording even less controversy for review.

Although the judgment for Windsor imposes a financial cost on the government, it is one the United

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[19] Government "confession of error" is quite distinct. Typically, the party injured by a lower court ruling invokes appellate jurisdiction and that injury remains until the judgment is overturned. Where the government confesses error, the parties seek to *undo* a judgment; here, the government *agrees* with the judgment below – and wants this Court also to agree.

[20] In *GTE* the Court found that adversity remained because the government believed itself constrained by another court's order from complying with plaintiffs' FOIA request. *See* 445 U.S. at 383.

States agrees it is obligated to pay. It did not have to appeal: "Government counsel who becomes convinced that the other side deserves to prevail can settle a case before judgment or, if the government is seeking review, withdraw the appeal or other petition." Richard H. Fallon Jr., *et al.*, HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM 99 (6th ed. 2009). Even "the existence of monetary stakes is not enough to keep a suit alive, if the underlying question has been settled or does not concern the litigants." *Alliance to End Repression*, 820 F.2d at 876.

The filing of a notice of appeal or petition for certiorari cannot foist jurisdiction on Article III courts, overcoming the lack of adversity between the United States and Windsor, the lack of injury to the United States, and the parties' agreement with the lower court's resolution of the "underlying question" of this lawsuit.[21] However important that question is, and however great the public interest in its decision, federal courts can only decide it in the context of a real case or controversy. *See, e.g.*, *Raines*, 521 U.S. at 818; *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920).

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[21] In *Diamond v. Charles*, 476 U.S. 54, 62-64 (1986), Illinois' apparent acquiescence in a decision invalidating a state statute by not filing its own notice of appeal was found to deprive the Court of a case or controversy, even though Illinois' stated interests in having the intervenor-appellant defend its statute were adverse to appellee. Illinois' filing of a notice of appeal was a *necessary* condition for appellate standing – but, as *Schmid* implies, not a *sufficient* condition. *See Schmid*, 455 U.S. at 102; *cf. ASARCO*, 490 U.S. at 634-635 (Rehnquist, C.J., concurring in part and dissenting in part) (distinguishing necessary from sufficient conditions for federal jurisdiction).

C. Even if Article III Injury Were Found, Prudential Standing Considerations Confirm *This* Court's Lack of Jurisdiction.[22]

In addition to the core elements of standing, the Court has recognized prudential principles, like "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen*, 468 U.S. at 751. In applying these prudential limits to define the "outer dimensions" of standing "subject to the control of Congress," *ASARCO*, 490 U.S. at 613, the Court has also recognized the relevance for standing of other jurisdictional rules in a "variety of contexts." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 13 n.5 (2004) (noting abstention doctrine and case concerning diversity jurisdiction).

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[22] Counsel was invited to argue that the government's agreement "with the court below" deprives this Court of jurisdiction. The Court granted a petition for certiorari before judgment, but *after* the Court of Appeals had decided, leaving arguably ambiguous the Question's reference to "court below." Accordingly, counsel advances arguments both that any government appeal from the District Court is barred, and that even if the Second Circuit had jurisdiction, the petition to this Court is barred. (If there were no "[c]ase[] in" the Second Circuit, this Court would lack jurisdiction under 28 U.S.C. § 1254 (2006). *Cf. Hohn v. United States*, 524 U.S. 236, 241-42 (1998) (finding a "case in" the court of appeals, with "adversity as well as the other requisite qualities of a 'case'").

The United States has claimed to be "aggrieved" because the District Court's judgment will prevent it from enforcing DOMA. Even if this Court were to agree that, by virtue of the Executive Branch's decision to enforce but not defend DOMA, the United States has a sufficient stake to satisfy core Article III requirements, "prudential principles that bear on *** standing," *Valley Forge*, 454 U.S. at 474, suggest that jurisdiction in this Court fails. The President having determined that the statute is unconstitutional, the Executive Branch can be understood no longer to have legally cognizable interests in enforcing that law. Instead, it can be understood to be seeking to vindicate the interests of others (analogous to "third parties"), such as the enacting Congress, and where those interests are widely shared, "generalized grievances."

Prudential concerns are compounded when this Court is asked to decide on the constitutionality of actions of the co-equal Branches. When issues are litigated in the lower courts, the Article III judiciary as a whole has not taken a final position in opposition to the Congress or the President; it is possible that different lower courts may reach divergent results. Should a challenger to DOMA *lose* in the courts below and seek review in this Court, a clearly justiciable case could then be presented. To decide the issue in this case, however, would press beyond the boundaries of appellate standing. Although prudential objections may be overridden by clear legislation, in this case the governing jurisdictional statutes provide no basis for ignoring prudential principles.

Where the Executive adopts a posture of enforcing but not defending the constitutionality of a statute, it may do so out of regard for Congress, to allow the constitutionally independent Judiciary to adjudge Congress' presumed view that the statute it passed was constitutional. But once an Article III court has given judgment for the plaintiff, agreeing with the Executive on the constitutional question, further pursuit of appellate rulings cannot ordinarily be justified by the Executive's concern for the interests of the enacting legislature. Such interests in the continued validity and enforcement of a statute, which the Executive believes is unconstitutional, are more like claims of "harm to the 'common concern for obedience to law'" that this Court has described as too generalized to support standing. *FEC v. Akins*, 524 U.S. 11, 23 (1998) (citation omitted). Once the judgment was entered for Windsor, there was no longer a necessity – in terms of protecting the constitutional rights of individuals,[23] or having an independent court decide – for the Article III judiciary to speak further where the United States also agrees with the judgment.

It might be argued, nonetheless, that there are prudential reasons favoring the exercise of jurisdiction by the courts of appeals to obtain a ruling with *stare decisis* effect within the circuit. In cases involving the constitutionality of federal legislation, there are benefits—to the court system, the litigants and the government—in allowing a regional court of appeals to review district court decisions, thereby obviating the need for repetitive litigation of the same question. Congress' decision to make appellate jurisdiction over final district court judgments mandatory, 28 U.S.C. § 1291 (2006), reflects the view that lower court judgments should be appealable as of right. Thus, it may be argued, the absence of conflict between the United States and Windsor should not, at least on prudential grounds, defeat the jurisdiction of the court of appeals.

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[23] *Cf. Richardson*, 418 U.S. at 192 (Powell, J., concurring) (noting the importance of jurisdiction to protect "the constitutional rights and liberties of individual citizens and minority groups").

But that reasoning has no application to review by this Court. The Court's jurisdiction to review decisions like this one is now discretionary. *See* 28 U.S.C. § 1254(1) (2006). By contrast, at the time of *Chadha*, jurisdiction over the Ninth Circuit's judgment was mandatory, under 28 U.S.C § 1252 (1982). Section 1252 manifested Congress' judgment that whenever a lower court struck down the constitutionality of a federal statute in an action to which the United States or its agencies were a party, the case warranted Supreme Court review: such cases were "a category of important cases that the Court is not free to ignore"; they presented "the need for certainty and uniformity *** when an Act may have been declared unconstitutional"; and "the 'decision on the constitutional question may affect the public at large *** [because of the nation's] duty to all the citizens of securing to them their common rights.'" *Edwards*, 465 U.S. at 881-883 (footnotes and citation omitted).

In 1988 Congress repealed Section 1252, making review discretionary with this Court. Pub. L. No. 100-352, § 1, 102 Stat. 662 (1988). *Cf. Edwards*, 465 U.S. at 881-883 (stating that the section's "concerns" about the Court's deciding a "category of important cases" and about "certainty and uniformity" "are not implicated in cases in which the Government concedes statutory unconstitutionality by its decision not to appeal"). In this case, although the United States did appeal, it not only conceded but vigorously argued for unconstitutionality. With Congress' repeal of mandatory jurisdiction, the permissive grant of jurisdiction found in 28 U.S.C. § 1254 weighs in favor of hewing to prudential limits on the exercise of jurisdiction where the United States seeks review of a judgment it actively sought in the lower courts. *Cf. Newdow,* 542 U.S. at 12-13 & n.5 (discussing domestic relations exception to federal jurisdiction as bearing on prudential standing)

Where an Article III court has discretionary jurisdiction, and the United States agrees with the other party and with the judgment below, but wants that higher court to decide the question, prudential standing considerations ordinarily militate against justiciability. In *Camreta*, however, this Court suggested that it may be *more* justified for this Court, than for a court of appeals, to review a judgment in favor of public official defendants at their behest, given the binding effects of circuit precedent. 131 S. Ct. at 2033 & n.7. But in that case the public officials were truly aggrieved by the decision below, because (though they were immunized from damages in that case) they disagreed with the lower court's constitutional judgment that, if left untouched, barred their taking actions in their work that they considered constitutional. *Id.* at 2029-2030. Here, by contrast, given the United States' agreement with the constitutional reasoning of the courts below, it suffers no comparable harm from unreviewed lower court decisions.

A decision that, for prudential reasons, the United States lacks standing in this Court, would not necessarily preclude DOMA's constitutionality from coming before this Court. If a lower court upholds the statute, the party challenging the statute would have standing to invoke the appellate jurisdiction of this Court for review. Awaiting such a case is consistent with this Court's role in providing a sober second look, after time and reflection in the lower courts, on important constitutional issues. If all the courts of appeals were in agreement that the statute is unconstitutional, the necessity for decision by this Court would be greatly diminished, because a uniform rule would have been achieved without its intervention and the broader public functions of judicial review adequately served. As long as the dispute can be resolved in an Article III court, an independent judiciary can protect individual rights, without entertaining appeals by a party who agrees with the judgment below.

D. The Prevailing Party Rule Bars Appellate Review

"Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it," *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980) (citations omitted).

This ordinary rule applies both under 28 U.S.C. § 1291 and 28 U.S.C.§ 1254(1). Although not required by the certiorari statute, *see Camreta*, 131 S. Ct. at 2028, in both this Court and in the courts of appeals, this "rule[] of 'federal appellate practice,'" *id.* at 2029 (quoting *Deposit Guar.*, 445 U.S. at 333), ordinarily bars the exercise of jurisdiction at the behest of a party who has "receive[d] all that he has sought." *Deposit Guar.*, 445 U.S. at 333.[24]

Application of this rule does not depend solely on which party the judgment was nominally entered against. *See, e.g.*, *Camreta*, 131 S. Ct. at 2028-2030. Although here the judgment was entered against the United States, the United States was, in an important sense, a "prevailing" party: indeed, the United States did not simply refuse to defend the statute but actively sought the judgment that was entered. *See, e.g.*, JA488 (United States arguing that the District Court should "grant Plaintiff's motion for summary judgment"). The United States obtained what it had asked the court below to provide; it was in this sense a prevailing party. Unlike the officials allowed to appeal from a favorable judgment in *Camreta*, the United States faces no adverse collateral consequences from lower court conclusions with which it disagreed, because the United States here agrees with the conclusions below.

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[24] *Camreta* described the rule against prevailing party appeals as one of "practice and prudence," 131 S Ct at 2030, citing in direct support cases that appear to treat the rule as jurisdictionally constraining in character. *See Gunn v. University Comm. to End War*, 399 U.S. 383, 390 n.5 (1970) ("Even if the opinion *** of the District Court could be considered a denial of an injunction ***, the appellants could not appeal from an order in their favor."); *New York Tel. Co. v. Maltbie*, 291 U.S. 645, 646 (1934) ("Appellant, having obtained this relief, is not entitled to prosecute an appeal from the decree in its favor ***."). *Camreta* should thus be understood as creating an exception to an ordinary rule of federal jurisdiction barring appeals by prevailing parties, rather than as treating that long-established "rule" as entirely one of judicial discretion.

Absent the special purposes underlying the former Section 1252,[25] or the special circumstances of *Camreta*, more common-sense standards for determining who is a prevailing party should be utilized. Under those standards, the United States cannot appeal to this Court.

CONCLUSION

For the foregoing reasons the government's agreement with the Court below that the statute is unconstitutional deprives this Court of jurisdiction, and BLAG lacks Article III standing.

Respectfully submitted.

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January 24, 2013

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[25] *Chadha* noted the rule of *Deposit Guaranty* in discussing the question of statutory jurisdiction under Section 1252, *see* 462 U.S. at 930, but did not apply it, in light of its interpretation of now-repealed statute Section 1252. *See* Part II.A, *supra*.

AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
FILED
JAN 28 2013
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No. 12-307

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR

AND

BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF REVERSAL ON THE MERITS

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QUESTIONS PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

TABLE OF CONTENTS

Pages

Questions Presented i

Table of Contents ii

Table of Authorities.. iii

Interest of *Amicus Curiae* 1

Statement of the Case 2

Statement of Facts 7

Summary of Argument.. 8

Argument.. 9

I. This Case Concerns Not Only the Fate of DOMA But Also the Fate of Marriage in All States 9

- A. Windsor's Legal Reasoning Applies Equally to All State Marriage Laws 11
- B. As a Practical Matter, Rejecting DOMA Would Spread Same-Sex Marriage Nationwide.. 15
- C. DOMA Falls Within Federal Power and Outside the Tenth Amendment 18

II. *Baker* Remains Binding on Lower Courts, and This Court Should Affirm *Baker* 22

- A. No Post-*Baker* Decision Undermines *Baker* as the Controlling Authority........................ 24
- B. The Constitution Is Deferential to the People's and States' Reserved Powers........ 25
- C. This Court Should Affirm *Baker* under Any Level of Scrutiny.. 27
  - 1. DOMA Has a Rational Basis 29
  - 2. DOMA Has a Hyper-Rational Basis..... 30
  - 3. DOMA Meets Intermediate Scrutiny ... 32

Conclusion 34

TABLE OF AUTHORITIES

Pages

Cases

Adams v. Howerton, 486 F.Supp. 1119 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982) 5

Agostini v. Felton, 521 U.S. 203 (1997) 24-25

Altria Group, Inc. v. Good, 555 U.S. 70 (2008) 27

Ankenbrandt v. Richards, 504 U.S. 689 (1992) 18

Arkansas Game and Fish Comm'n v. U.S., 133 S.Ct. 511 (2012) 14

Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (Minn. 1971) 5

Baker v. Nelson, 409 U.S. 810 (1972) 5-8, 22-25, 27

Barbier v. Connolly, 113 U.S. 27 (1884) 31-32

Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668 (1996) 12

Bolling v. Sharpe, 347 U.S. 497 (1954) 11

Bowers v. Hardwick, 478 U.S. 186 (1986) 26

Boyle v. United Tech. Corp., 487 U.S. 500 (1988) 20

Buckley v. Am. Constitutional Law Foundation, Inc., 525 U.S. 182 (1999) 14

Buckley v. Valeo, 424 U.S. 1 (1976) 11

Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006) 5

City of Boerne v. Flores, 521 U.S. 507 (1997) 25

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 30-31

Collins v. City of Harker Heights, Tex.,
503 U.S. 115 (1992) 10

Dandridge v. Williams,
397 U.S. 471 (1970) 32

Diaz v. Brewer,
656 F.3d 1008 (9th Cir. 2011) 12

Dragovich v. U.S. Dept. of Treasury,
872 F.Supp.2d 944 (N.D. Cal. 2012) 6

Dred Scott v. Sandford,
60 U.S. (19 How.) 393 (1857) 4-5, 7, 13, 21

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) 20

Egelhoff v. Egelhoff, 532 U.S. 141 (2001) 19

Elisa B. v. Superior Court,
37 Cal.4th 108 (Cal. 2005) 17

Empire Healthchoice Assur., Inc. v. McVeigh,
547 U.S. 677 (2006) 19

F.C.C. v. Beach Communications, Inc.,
508 U.S. 307 (1993) 29

Flemming v. Nestor, 363 U.S. 603 (1960) 21-22

Gill v. OPM, 699 F.Supp.2d 374 (D. Mass. 2010), *aff'd sub nom Massachusetts v. U.S. Dept. of Health & Human Serv.*, 682 F.3d 1 (2012), *petition for cert. pending sub nom Bipartisan Legal Advisory Group of the United States House of Representatives v. Gill*,
Nos. 12-13, 12-15, 12-97 (U.S.) 6

Golinski v. U.S. Office of Personnel Management,
824 F.Supp.2d 968 (N.D. Cal. 2012) 6

Heckler v. Mathews, 465 U.S. 728 (1984) 33

Heller v. Doe, 509 U.S. 312 (1993) 29

Hicks v. Miranda, 422 U.S. 332 (1975) 22

In re Burrus, 136 U.S. 586 (1890) 18

In re M.C.,
195 Cal.App.4th 197 (Cal. Ct. App. 2011) 17

In re Marriage of J.B. and H.B.,
326 S.W.3d 654 (Tex. Ct. App. 2010) 16

In re Nicholas H., 28 Cal.4th 56 (Cal. 2002) 17

Jackson v. Abercrombie, __ F.Supp.2d __, 2012
WL 3255201 (D.Haw. 2012) 6-7

Jenness v. Fortson, 403 U.S. 431 (1971) 28

Johnson v. Robison, 415 U.S. 361 (1974) 28

Kadrmas v. Dickinson Public Schools,
487 U.S. 450 (1988) 29

Kern v. Taney,
11 Pa. D.&C 5th 558 (Pa. Com. Pl. 2010) 16

Lawrence v. Texas,
539 U.S. 558 (2003) 10, 12, 14, 24, 26, 34

Lehnhausen v. Lake Shore Auto Parts Co.,
410 U.S. 356 (1973) 29

Lofton v. Sec'y of Dept. of Children & Family Services, 358 F.3d 804 (11th Cir. 2004) 21, 30

Loving v. Virginia, 388 U.S. 1 (1967) 28, 33

Mandel v. Bradley, 432 U.S. 173 (1977) 22

Massachusetts v. U.S. Dept. of Health & Human Serv., 682 F.3d 1 (2012), *petition for cert. pending sub nom Bipartisan Legal Advisory Group of the United States House of Representatives v. Gill*,
Nos. 12-13, 12-15, 12-97 (U.S.) 27, 30

Miller-Jenkins v. Miller-Jenkins,
180 Vt. 441, 459 (Vt. 2006) 16

Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456 (1981) 29

Moore v. Sims, 442 U.S. 415 (1979) 27

Nat'l Org. for Women, Inc. v. Idaho,
459 U.S. 809 (1982) 6

New York Central R.R. Co. v. White,
243 U.S. 188 (1917) 20

New York v. U.S., 505 U.S. 144 (1992) 18

Nordlinger v. Hahn, 505 U.S. 1 (1992) 29

Office of Personnel Management v. Richmond,
496 U.S. 414 (1990) 20

Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007) 11

Pedersen v. Office of Personnel Management, __ F.Supp.2d __, 2012 WL 3113883 (D. Conn. 2012) 6

Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *on writ of cert. sub nom Hollingsworth v. Perry*, No. 12-144 (U.S.) 12, 27

Perry v. Schwarzenegger, 702 F.Supp.2d 1132 (N.D. Cal. 2010), *aff'd sub nom Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *on writ of cert. sub nom Hollingsworth v. Perry*, No. 12-144 (U.S.) 6

Printz v. U.S., 521 U.S. 898 (1997) 18

Reed v. Reed, 404 U.S. 71 (1971) 28, 32

Reynolds v. U.S., 98 U.S. 145 (1879) 19

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) ... 26

Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) ... 28

Securities Industry Ass'n v. Bd. of Governors of Fed'l Reserve Sys., 468 U.S. 137 (1984) ... 25-26

Sevcik v. Sandoval, __ F.Supp.2d __, 2012 WL 5989662 (D.Nev. 2012) ... 7

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) ... 27

Turner v. Safley, 482 U.S. 78 (1987) ... 27

U.S. Dept. of Agric. v. Moreno, 413 U.S. 528 (1973) ... 30-31

U.S. v. Kimbell Foods, Inc., 440 U.S. 715 (1979) ... 19

U.S. v. Virginia, 518 U.S. 515 (1996) ... 32

Vance v. Bradley, 440 U.S. 93 (1979) ... 32

Washington v. Glucksberg, 521 U.S. 702 (1997) ... 4, 10, 13, 25

Williams v. Florida, 399 U.S. 78 (1970) ... 14

Wilson v. Ake, 354 F.Supp.2d 1298 (M.D. Fla. 2005) ... 5

Windsor v. U.S., 833 F.Supp.2d 394 (S.D.N.Y.), *aff'd* 699 F.3d 169 (2d Cir. 2012), *on writ of cert.*, No. 12-307 (U.S.) ... 6

Wyeth v. Levine, 555 U.S. 555 (2009) ... 26

Statutes

U.S. CONST. art. IV, §1 ... 2

U.S. CONST. amend. V ... 2, 4, 7, 9, 11, 21, 27

U.S. CONST. amend. V, cl. 4 ... 10-11, 25

U.S. CONST. amend. X 8, 10, 18

U.S. CONST. amend. XIII 4

U.S. CONST. amend. XIV 2, 4, 10-11, 26, 32

U.S. CONST. amend. XIV, §1, cl. 4 11

1 U.S.C. §7 .... 2, 7-9, 11-12, 15, 17-18

28 U.S.C. §1738C 2, 8-9, 11-12, 17

Northwest Ordinance, 1 Stat. 51 (1789) 19

Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) .... *passim*

28 U.S.C. §1257(2) (1988) 5

CAL. FAMILY CODE §7611(a) 16

Legislative History

Equal Rights Amendment, H.J.Res. 208, 86 Stat. 1523 (1972) 5-7

H.R.Rep. No. 104-664 (1996), *reprinted at* 1996 U.S.C.C.A.N. 2905 .... 3, 26

Rules, Regulations and Orders

S. Ct. Rule 37.6 1

Other Authorities

Baker v. Nelson, No. 71-1027, Jurisdictional Statement (Oct. Term 1972). 22-23

4 WILLIAM BLACKSTONE, COMMENTARIES *215 26

Abraham Lincoln, Speech on the *Dred Scott* Decision (June 26, 1857), *in* 1 ABRAHAM LINCOLN, COMPLETE WORKS, COMPRISING HIS SPEECHES, LETTERS, STATE PAPERS, AND MISCELLANEOUS WRITINGS (John G. Nicolay & John Hay eds. 1907) 13

Abraham Lincoln, Cooper Union Address (Feb. 27, 1860), *in* 1 ABRAHAM LINCOLN, COMPLETE

WORKS, COMPRISING HIS SPEECHES, LETTERS, STATE PAPERS, AND MISCELLANEOUS WRITINGS (John G. Nicolay & John Hay eds. 1907) 5, 13

Charles A. Murray, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 (1984) 10-11

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding, Eagle Forum has consistently defended traditional American values, including traditional marriage, defined as the union of husband and wife. In furtherance of that interest, Eagle Forum has participated as *amicus curiae* in various appellate proceedings on same-sex marriage. In addition, Eagle Forum's founder, Phyllis Schlafly, was a leader in the movement against the Equal Rights Amendment in the 1970s and 1980s, and the history of that effort has a direct bearing on the issues that the plaintiff here attempts to import into the Fifth Amendment (and thus the coextensive Fourteenth Amendment). For all the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

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[1] *Amicus* files this brief with the consent by all parties; the federal parties lodged blanket letters of consent with the Clerk, and *amicus* has lodged Ms. Windsor's written consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

STATEMENT OF THE CASE

This litigation asks this Court to decide whether the federal Constitution requires state and federal governments to treat same-sex relationships the same as traditional husband-wife marriage. The Court's answer will resolve several important questions beyond the fate of §3 of the federal Defense of Marriage Act ("DOMA"), 1 U.S.C. §7, that the plaintiff, Edith Windsor, challenges here. This Court's decision also will determine the fate of §2 of DOMA, 28 U.S.C. §1738C, which implements congressional authority under the Full Faith and Credit Clause to address the full faith and credit that the states owe to same-sex marriages from other states. U.S. CONST. art. IV, §1 ("Congress may by general laws prescribe the manner in which [State acts] shall be proved, and the effect thereof"). Finally, this Court's decision will determine the fate of state laws in the forty-one states that recognize and privilege sex-based relationships, such as those between husband and wife, mother and child, or father and child.

In 1996, Congress saw this juncture approaching, initially from a state-law challenge in Hawaii. Congress premised DOMA on four governmental interests: (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources. H.R.Rep. No. 104-664, at 12 (1996), *reprinted at* 1996 U.S.C.C.A.N. 2905, 2916. With regard to the first interest, Congress tied the interest in husband-wife marriage to procreation and childrearing:

> At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a *deep and abiding interest in encouraging responsible procreation and child-rearing*. Simply put, government has an interest in marriage because it has an interest in children.

Id. at 13, *reprinted at* 1996 U.S.C.C.A.N. at 2917 (emphasis added). With respect to the third interest (*i.e.*, state sovereignty and democratic self-governance), Congress sought both to avert judges' "re-defin[ing] the scope of federal legislation, as well as legislation throughout the other forty-nine states" by declaring a state-law right to marry and "to take steps to protect the right of the people, acting through their state legislatures, to retain democratic control over the manner in which the States will define the institution of marriage." *Id.* at 17-18, *reprinted at* 1996 U.S.C.C.A.N. at 2921-22. Congress enacted DOMA with broad bipartisan support in the House and the Senate, and President Clinton signed it. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

One hundred and fifty five years ago, this Court unfortunately held that a property right created only by Missouri law was nonetheless entitled to federal constitutional recognition and protection in every state. *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857), *abrogated by* U.S. CONST. amend XIII, XIV.[2] As a result, no state or territory could enforce its own laws prohibiting slavery. As Abraham Lincoln recognized, the pro-slavery arguments at the time focused on narrow complaints by the Slave States, but nonetheless sought at bottom to compel Free States to recognize slavery:

> I am also aware they have not, as yet, in terms, demanded the overthrow of our Free-State Constitutions.... [W]hen all these other sayings shall have been silenced, the overthrow of these Constitutions will be demanded, and nothing be left to resist the demand. It is nothing to the contrary, that they do not demand the whole of this just now. Demanding what they do, *and for the reason they do,* they can voluntarily stop nowhere short of this consummation. Holding, as they do, that slavery is morally

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[2] As this Court recognized in *Washington v. Glucksberg,* 521 U.S. 702, 758-59 (1997), *Dred Scott* invalidated the Missouri Compromise based on a Fifth Amendment argument on property rights.

> right, and socially elevating, they cannot cease to demand a full national recognition of it, as a legal right, and a social blessing.

Abraham Lincoln, Cooper Union Address (Feb. 27, 1860), *in* 1 ABRAHAM LINCOLN, COMPLETE WORKS, COMPRISING HIS SPEECHES, LETTERS, STATE PAPERS, AND MISCELLANEOUS WRITINGS at 612 (John G. Nicolay & John Hay eds. 1907) (emphasis added). Ironically, DOMA's opponents now rely on the very Civil War Amendments that overturned *Dred Scott* to seek to compel the United States and forty-one other states to recognize the same-sex marriage regimes of a few states.

Forty years ago, *Baker v. Nelson,* 409 U.S. 810 (1972), presented this Court with essentially the same question presented here – namely, whether the federal Constitution provides a right to same-sex marriage – which the Court emphatically answered in the negative by dismissing "for want of a substantial federal question" a mandatory appeal under former 28 U.S.C. §1257(2) (1988) from the Minnesota Supreme Court's decision in *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 (Minn. 1971). In the intervening years, similar claims were routinely dismissed by federal courts under *Baker.*[3]

Thirty years ago, this Nation finally rejected the Equal Rights Amendment, H.J.Res. 208, 86 Stat. 1523 (1972) ("ERA"), which proposed to add language to the Constitution that *might* have provided a basis for the claims here. *Nat'l Org. for Women, Inc. v. Idaho,* 459 U.S. 809 (1982) (ERA's extended ratification period expired in 1982). Moreover, the American people rejected the ERA in large part because of a well-founded fear that ERA would lead to the very result demanded by Windsor here. *Amicus* Eagle Forum respectfully submits that the fate of the ERA – the only constitutional text that *might* have supported Windsor's claim – compels this Court to reject her claim.

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[3] *See Citizens for Equal Protection v. Bruning,* 455 F.3d 859, 870-71 (8th Cir. 2006); *Wilson v. Ake,* 354 F.Supp.2d 1298, 1304-05 (M.D. Fla. 2005); *Adams v. Howerton,* 486 F.Supp. 1119, 1122 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982).

There matters stood until two federal district courts upheld claims similar to those rejected in *Baker,* giving remarkably short shrift to this Court's definitive ruling.[4] One of those cases, *Perry,* is presently before this Court in No. 12-144. Perhaps sensing a shift in political – if not legal – momentum, four other federal district courts recently upheld similar claims, and others have been docketed.[5] One of those four cases is before the Court in this case.

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[4] *Perry v. Schwarzenegger,* 702 F.Supp.2d 1132 (N.D. Cal. 2010), *aff'd sub nom Perry v. Brown,* 671 F.3d 1052, 1082 (9th Cir. 2012), *on writ of cert. sub nom Hollingsworth v. Perry,* No. 12-144 (U.S.); *Gill v. OPM,* 699 F.Supp.2d 374 (D. Mass. 2010), *aff'd sub nom Massachusetts v. U.S. Dept. of Health & Human Serv.,* 682 F.3d 1, 8 (2012), *petition for cert. pending sub nom Bipartisan Legal Advisory Group of the United States House of Representatives v. Gill,* Nos. 12-13, 12-15, 12-97 (U.S.).

[5] *Windsor v. U.S.,* 833 F.Supp.2d 394, 399 (S.D.N.Y.), *aff'd* 699 F.3d 169, 176 (2d Cir. 2012), *on writ of cert.,* No. 12-307 (U.S.); *Dragovich v. U.S. Dept. of Treasury,* 872 F.Supp.2d 944, 951-53 (N.D. Cal. 2012); *Golinski v. U.S. Office of Personnel Management,* 824 F.Supp.2d 968, 983 (N.D. Cal. 2012); *Pedersen v. Office of Personnel Management,* __ F.Supp.2d __, 2012 WL 3113883, 10-11 (D. Conn. 2012); *but see Jackson v. Abercrombie,* __ F.Supp.2d __, 2012 WL 3255201, 1 (D.Haw.

Against this backdrop, *amicus* Eagle Forum respectfully asks this Court to heed President Lincoln's and history's rejection of *Dred Scott*, as well as the American People's rejection of the ERA by affirming the rule of law that was necessarily decided in *Baker*. That rule requires reversal of the decisions below and dismissal of similar claims pending in this and other federal courts for failure to state a claim on which relief can be granted.

STATEMENT OF FACTS

The facts related to the parties' circumstances are not in dispute. *Amicus* Eagle Forum adopts the facts as stated in the brief filed by the Bipartisan Legal Advisory Group of the United States House of Representatives (hereinafter, the "House"). House Br. at 14-15. In summary, in 2007, Windsor and her same-sex partner travelled to and were married in Ontario, Canada, when their state of domicile (New York) did not recognize same-sex marriages. The partner died in 2009, when New York had not yet formally recognized same-sex marriage. As the sole beneficiary in her partner's will, Windsor paid approximately $360,000 more in federal taxes than she would have paid if federal law recognized her Canadian marriage. Windsor now seeks to recover the additional taxes paid on the theory that New York would have recognized the marriage at the time her partner died and that DOMA §3 violates the Equal Protection component of the Fifth Amendment.

2012) (relying on *Baker* to uphold husband-wife marriage in Hawaii); *Sevcik v. Sandoval*, __ F.Supp.2d __, 2012 WL 5989662, 5 (D.Nev. 2012) (same in Nevada).

SUMMARY OF ARGUMENT

Congress's main purpose in enacting §3 was the same as its purpose in enacting §2 – namely to protect each state's marriage laws by isolating any redefinition of marriage to only the particular state or states that voluntarily chose it, thereby preventing one state's redefinition of marriage from being exported to other states against their will. As such, this case involves not just DOMA §3, but also DOMA §2; not just federal law, but also state law; not just Ms. Windsor's tax treatment, but all of the legal incidents, rights, privileges, duties, obligations, and immunities of all married people in every state.

History and logic both reveal that the arguably narrow focus of Windsor's claims – a federal tax refund under DOMA §3 – does not narrow the issues that this Court will resolve. Instead, both because the same legal reasoning applies equally to DOMA §2 and state marriage laws (Section I.A, *infra*) and because the practical weight of federal recognition will destabilize state marriage laws as a practical matter (Section I.B, *infra*), ruling for Windsor here will mandate same-sex marriage nationwide. DOMA §3 does not seek to overturn the state-law aspects of state-law marriage; as such, contrary to the claims of advocates for same-sex marriage, that section falls well within the power of Congress to adopt for federal policy and purposes and thus is permissible under the Tenth Amendment (Section I.C, *infra*).

With respect to requiring same-sex marriage under Equal Protection principles, *Baker* already has rejected that, which the lower courts must follow until this Court overturns it (Section II.A, *infra*). In deciding whether to create new rights under the Constitution, this Court should act deferentially to the states and the People who adopted the Constitution, analogously to the presumption against preemption in disputes between federal and state laws. Here, for example, the states who adopted the Fifth Amendment – on which Windsor bases her suit – criminalized sodomy, which strongly suggests that those states did not intend to mandate same-sex marriage on the Federal Government and states (Section II.B, *infra*). In any event, DOMA's husband-wife definition of marriage survives scrutiny under Equal Protection review (Section II.C, *infra*).

ARGUMENT

I. THIS CASE CONCERNS NOT ONLY THE FATE OF DOMA BUT ALSO THE FATE OF MARRIAGE IN ALL STATES

This litigation presents the exceedingly important issues not only of overturning an Act of Congress, but also of overturning the laws of the forty-one states with husband-wife definitions of marriage. First, as a legal matter, any rule of federal constitutional law that compels overturning DOMA §3's federal marriage definition necessarily also compels overturning DOMA §2 and any husband-wife definitions of marriage under state law. Second, even if that result did not flow as a matter of constitutional law, the mere *fact* of federal recognition of same-sex marriage would quickly make it impossible for any state to enforce its own marriage laws.

Particularly where the claimed right was in no way conveyed by the People to the Judiciary to dispense,[6] such rights belong in the political arena:

> people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts – and may legislate accordingly.

Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting). Indeed, this "Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). "[E]xtending constitutional protection to an asserted right or liberty interest" requires "the utmost care ... lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Although congressional social engineering often proves disastrous even for the intended beneficiaries, *see generally*, Charles A. Murray,

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[6] Sodomy was a criminal offense in the thirteen states that first ratified the Bill of Rights and all but five of the thirty-seven states that first ratified the Fourteenth Amendment. *Bowers v. Hardwick*, 478 U.S. 186, 192-94 & nn.5-6 (1986), *rev'd on other grounds*, *Lawrence*, 539 U.S. at 578. Rather than convey to this Court the power to compel the states to allow same-sex marriage, the People reserved that power to the states. U.S. CONST. amend. X.

LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 (1984), the judiciary is even less suited for that task. *Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701, 766 (2007) ("[w]e are not social engineers") (Thomas, J., concurring). This Court should decline the invitation to impose a brave new world of family law on this Nation.

A. Windsor's Legal Reasoning Applies Equally to All State Marriage Laws

If accepted by this Court with respect to DOMA §3 and federal recognition of same-sex marriages, the reasoning pressed by Windsor and relied on by the Second Circuit also will undermine DOMA §2 and any state laws that limit marriage to husband-wife marriage. This case is *not,* therefore, limited to federal recognition of valid state-law marriages.

Windsor's Equal-Protection arguments, together with the equivalent principles of the Fourteenth Amendment for the states,[7] would ensure that overturning DOMA §3 would quickly spread same-sex marriage to all fifty states. Specifically, if this Court were to hold that DOMA §3 has no rational basis (or otherwise violates Equal Protection), that same holding would apply to every other husband-wife definition of marriage because those definitions all rely on the same core principle that legislatures may rationally view husband-wife marriage to support responsible procreation and childrearing. *See, e.g., Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011) (rational basis lacking for Arizona's denying state-employee benefits to same-sex unmarried couples); *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (rational basis lacking for California's husband-wife definition of marriage). Unless legislatures – here, the federal Congress – rationally may encourage husband-wife marriage, not only DOMA §3 but also DOMA §2 and the laws of forty-one states will fall.

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[7] The Fifth Amendment Due Process Clause's equal-protection component is equivalent to the Fourteenth Amendment's Equal Protection Clause. *Buckley v. Valeo,* 424 U.S. 1, 93 (1976); *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954). Any decision under the Fifth Amendment applies equally to the states under the Fourteenth Amendment, and vice versa.

As Justice Scalia explained, the same arguments used to attack anti-sodomy laws arguably apply to husband-wife marriage laws. *Lawrence*, 539 U.S. at 601-05 (Scalia, J., dissenting). To ensure its legitimacy as an arbiter – not author – of our laws, this Court must extricate itself from this slippery slope:

> But the Court then found itself on the fabled slippery slope that Justice Holmes's aphorism about history and logic warned about: one logical proposition detached from history leads to another, until the Court produces a result that bears no resemblance to the America that we know.

Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 695-96 (1996) (Scalia, J., dissenting). As President Lincoln explained, the issue hinges not only on the current demands against federal regulation of slavery in the federal territories but also on the reasons used to make those demands: "they can voluntarily stop nowhere short" of "demand[ing] the overthrow of our Free-State Constitutions." Lincoln, Cooper Union Address, *supra*. Nor is it incongruous to raise *Dred Scott* here.

In his criticism of *Dred Scott* and the Democrats' support of that decision, Lincoln and the Republicans relied on – and Judge Douglas and the Democrats avoided – the precise issue of federal regulation of marriage:

> But in all this, it is very plain the Judge evades the only question the Republicans have ever pressed upon the Democracy in regard to Utah. That question the Judge well knows to be this: "If the people of Utah shall peacefully form a State Constitution tolerating polygamy, will the Democracy admit them into the Union?" There is nothing in the United States Constitution or law against polygamy; and why is it not a part of the Judge's "sacred right of self-government" for that people to have it, or rather to keep it, if they choose?

Lincoln, Speech on the *Dred Scott* Decision (June 26, 1857), *in* 1 ABRAHAM LINCOLN, COMPLETE WORKS at 226-27. No less than the pro-slavery advocates of the 1850s, the same-sex marriage advocates of our time seek to impose their views not only on the Federal Government but also on every state in the Union.

Given "[t]he tendency of a principle to expand itself to the limit of its logic," *Glucksberg,* 521 U.S. at 733 n.23 (*quoting* Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS 51 (1932)), this Court must tread cautiously and describe carefully when expounding substantive Due-Process rights outside the "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Id.* at 720-21. *Amicus* Eagle Forum respectfully submits that the Justices of this Court should heed President Lincoln and Justices Cardozo and Scalia if any Justice believes that this Court can hold for Windsor here without at the same time overturning the husband-wife marriage laws of forty-one states.

To be sure, "[t]he sky d[oes] not fall after" every step down a slippery slope, and a "modest [further descent might] augur[] no deluge." *Arkansas Game and Fish Comm'n v. U.S.*, 133 S.Ct. 511, 521 (2012). Indeed, "[j]udges and lawyers live on the slippery slope of analogies," knowing that "they are not supposed to ski it to the bottom." *Buckley v. Am. Constitutional Law Foundation, Inc.*, 525 U.S. 182, 195 n.16 (1999) (*quoting* Robert H. Bork, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 169 (1990)); *Williams v. Florida*, 399 U.S. 78, 92 n.28 (1970) (the slippery-slope argument "suffers somewhat as soon as one recognizes that he can get off ... before he reaches the bottom"). Thus, the *Lawrence* majority and Justice O'Connor opined that that decision did not force the recognition of same-sex marriage. *Lawrence,* 539 U.S. at 578 (majority); *id.* at 585 (O'Connor, J., concurring in the judgment). Giving the *Lawrence* majority its due, in the words of the *Williams* Court, it is time to get off the slopes for any Justice who wishes to preserve the right of sovereign states to maintain a husband-wife definition of marriage.

B. As a Practical Matter, Rejecting DOMA Would Spread Same-Sex Marriage Nationwide

Although Windsor and her allies often seek to minimize the issues at stake in challenging DOMA §3, the impact of the Second Circuit's decision – and of any decision by this Court to affirm that decision – simply is not limited to Windsor's tax liability or even a relatively few couples in New York and a few other states. The question of whom society allows to marry does not affect only the wedding couple.

Even without the direct force of law, federal employees with federally recognized, same-sex marriages from a few states will spread across the Nation when they are re-posted, transferred, or simply move. They will take with them not only their federal recognition, but also various property rights such as pensions, as well as child-custody issues. When they move to states that do not recognize same-sex marriages, they will raise countless substantive and procedural issues, as well as the sheer weight of practical problems that the differing legal regimes will present.

These issues posed by same-sex couples will arise when federally regulated persons such as federal employees and contractors either (a) move from one of the few same-sex marriage states to a state with a husband-wife definition of marriage, or (b) visit same-sex marriage jurisdictions (like Windsor here) while domiciled in states with a husband-wife definition of marriage. The latter category will require still further litigation to determine DOMA's application to such "destination marriages" by nondomiciliaries. Whenever federal law recognizes a marriage that state law does not, the conflicts that the differing regimes pose will be magnified.

With respect to children and custody, states that do not recognize same-sex parents or adoptions will necessarily run up against barriers when federal employees and contractors raise federally recognized custody-related issues in state custody disputes. As such, the persons and entities affected by this Court's decision will include not only the married adults and the states but also the extended family members. *See, e.g., In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 670 (Tex. Ct. App. 2010) (denying state-court jurisdiction for same-sex divorce proceedings in state that does not recognize same-sex marriage); *Kern v. Taney,* 11 Pa. D.&C 5th 558, 576 (Pa. Com. Pl. 2010) (same); *Miller-Jenkins v. Miller-Jenkins,* 180 Vt. 441, 459 (Vt. 2006) (custody dispute between biological mother and former same-sex partner to a civil union).

States have developed family law to seek – as imperfectly as they can – the best interests of both society and family members. For example, a common presumption for a child born within a marriage is that the husband is the father. *See, e.g.,* CAL. FAMILY CODE §7611(a) ("man is presumed to be the natural father of a child if ... he and the child's natural mother are or have been married to each other and the child is born during the marriage"). Although these presumptions typically are plausible even when not true, society has fashioned them to maximize children's chances of being raised in a nuclear family.[8]

Same-sex marriage wrests these presumptions from their moorings. For example, the California appellate courts could not resolve the dueling presumptions between a presumed (and biological) father versus a female presumed-parent (and divorcing spouse), after the biological mother was imprisoned for the attempted murder of the allegedly abusive same-sex spouse, who lived with the child for only three weeks. *In re M.C.*, 195 Cal.App.4th 197, 222-23 (Cal. Ct. App. 2011). States that voluntarily adopt same-sex marriage agree to struggle through these necessary revisions to family law and the implications for all involved, including the children, fathers outside a same-sex marriage, and grandparents. This Court should neither federalize these issues nor thrust them on states that do not adopt them voluntarily.

Together with its companion clause in DOMA §2, DOMA §3 seeks to prevent the same-sex marriage experiments in a few states from impinging on the sovereignty of the forty-plus other states by imposing these burdens on states that do not undertake them voluntarily.

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[8] California has applied these presumptions outside of marriage to include male or female non-biological presumed parents when no other parent had a competing claim. *In re Nicholas H.*, 28 Cal.4th 56, 62-63 (Cal. 2002) (father); *Elisa B. v. Superior Court*, 37 Cal.4th 108, 120 (Cal. 2005) (mother).

C. DOMA Falls Within Federal Power and Outside the Tenth Amendment

DOMA's opponents argue that federalism gives the Federal Government no role in family law, but DOMA does not attempt to set family law in the states that have adopted same-sex marriage. DOMA merely sets federal law for federal purposes and protects that states that wish to keep their husband-wife marriage laws from having same-sex marriage imposed on them by a handful of states. The federalism argument turns federalism on its head by trying to compel Federal Government and the several states to comply with one state's law.

To be sure, Congress heretofore *generally* has relied on state-law definitions of marriage for federal-law purposes. Indeed, "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States." *In re Burrus,* 136 U.S. 586, 593-94 (1890); *Ankenbrandt v. Richards,* 504 U.S. 689, 703 (1992) ("the domestic relations exception ... divests the federal courts of power to issue divorce, alimony, and child custody decrees"). These general propositions cannot carry the weight that Windsor and her allies would place on them because DOMA §3 in no way undoes the family laws of a same-sex marriage state *in that state,* as would be required to violate the Tenth Amendment. *See, e.g., Printz v. U.S.,* 521 U.S. 898, 935 (1997); *New York v. U.S.,* 505 U.S. 144, 188 (1992). Instead, DOMA §3 defines marriage for *federal* purposes.

Moreover, it is simply wrong to argue that the Federal Government *always* has deferred to state or territorial family law. The First Congress adopted and President Washington signed the Northwest Ordinance, 1 Stat. 51 (1789), which adopted English common law (including a husband-wife definition of marriage) for the Northwest Territories. Under President Lincoln, the Federal Government criminalized bigamy, which this Court upheld in *Reynolds v. U.S.*, 98 U.S. 145 (1879). More recently, numerous federal benefit programs, such as Social Security and the Employee Retirement Income Security Act, retain rights in divorced spouses after state law has terminated the marriage and *preempt* inconsistent state rules in the interest of national uniformity. *See, e.g., Egelhoff v. Egelhoff*, 532 U.S. 141, 147-48 (2001). Thus, where federal interests are implicated, Congress has readily acted in the zone of family law generally and marriage law particularly.

Indeed, this type of sporadic federal involvement is typical of federal programs: "Controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules." *U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-28 (1979). Indeed, "[t]he prudent course ... is often to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 691-92 (2006) (internal quotation omitted). This Court should place no value on the relative inaction of prior Congresses, now that

Congress has reached its "different accommodation" in DOMA.[9]

While it is true that the Federal Government *generally* looked to state law to determine the validity of a marriage, a "person has no property, no vested interest, in any rule of the common law," [and t]he Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) (internal quotations and citations omitted); *New York Central R.R. Co. v. White,* 243 U.S. 188, 198 (1917). Moreover, because equitable estoppel principles do not apply to the Federal Government, *Office of Personnel Management v. Richmond,* 496 U.S. 414, 420-24 (1990), Windsor certainly cannot estop the Federal Government to continue its prior degree of relative inaction vis-à-vis a federal definition of marriage. Now that Congress has acted with federal law for federal programs, this Court cannot credibly order the *Federal* Government to follow *state* law.

In any event, DOMA opponents' federalism argument refutes itself. Individual states – here, New York – cannot impose their experiment in same-sex marriage on all states nationwide. And yet that is precisely what would happen when same-sex couples married in New York move or travel to a state that does not recognize their marriage. Such couples will inevitably assert that the federal recognition they received in New York must follow them to their new state of residence, so that the same-sex couples would retain their status "even if they had been carried [to a state that did not recognize same-sex marriage] ... with the intention of becoming a permanent resident." *Dred Scott,* 60 U.S. (19 How.) at 452. Federalism – and the state sovereignty inherent in it – does not allow one state to impose its views on either the Nation as a whole or the several states. To the extent that DOMA holds otherwise, the anti-DOMA argument would go, "an act of Congress which deprives a citizen of the United States of his [rights] merely because he came himself ... into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law." *Dred Scott,* 60 U.S. (19 How.) at 450. The Fifth Amendment does not support so broad a power on states to impose their will nationwide.

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[9] Notwithstanding the typical resort to state law to provide undefined terms in federal programs, "[f]ederal law typically controls when [as here] the Federal Government is a party to a suit." *Boyle v. United Tech. Corp.*, 487 U.S. 500, 519 (1988).

Although *amicus* Eagle Forum respectfully submits that government policies that favor husband-wife marriage reflect "the accumulated wisdom of several millennia of human experience," *Lofton v. Sec'y of Dept. of Children & Family Services,* 358 F.3d 804, 820 (11th Cir. 2004), the question is not whether the Justices of this Court agree. Rather, the question is one of power within our federalist system between the states and the Federal Government and also under the Separation of Powers between the Judiciary and Congress:

> Whether wisdom or unwisdom resides in the scheme of benefits set forth in [the

> Social Security Act], it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here as often is with power, not with wisdom.

Flemming v. Nestor, 363 U.S. 603, 611 (1960) (*quoting Helvering v. Davis,* 301 U.S. 619, 644 (1937)). It is well within the federal power and the congressional power to favor traditional husband-wife marriage in government programs and taxes.

II. *BAKER* REMAINS BINDING ON LOWER COURTS, AND THIS COURT SHOULD AFFIRM *BAKER*

In *Baker,* this Court considered and rejected the concept that the federal Constitution included a federal right to same-sex marriage. The *Baker* plaintiffs sought the same rights, duties, and benefits that Minnesota conveyed to husband-wife marriages, and this Court dismissed the case for want of a substantial federal question. *Baker,* 409 U.S. at 810.

Because it resolved *Baker* summarily and dismissed for want of a substantial federal question, this Court – and any lower courts confronted with a same-sex marriage claim – must review the jurisdictional statement filed in the Supreme Court and any other relevant aid to construction in order to ascertain what issues *Baker* "presented and necessarily decided." *Mandel v. Bradley,* 432 U.S. 173, 176 (1977); *Hicks v. Miranda,* 422 U.S. 332, 344-45 (1975) ("lower courts are bound by summary decision by this Court 'until such time as the Court informs [them] that [they] are not'") (*quoting Doe v.*

Hodgson, 478 F.2d 537, 539 (2d Cir. 1973)). The *Baker* jurisdictional statement plainly presented, *Baker v. Nelson*, No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972), and *Baker* thus plainly decided, the question whether denying same-sex marriage violates the Constitution's equal-protection guarantees that Windsor here asserts, as well as the due-process and privacy claims that the *Baker* plaintiffs asserted.

To support their claim, the *Baker* plaintiffs appealed to the same constitutional principles – namely, equal protection, due process, and also privacy – that Windsor asserts. *Baker* therefore necessarily decided that there is no basis under federal equal protection or due process analysis to support any claim that a same-sex relationship deserves the same recognition, rights or benefits as husband-wife marriage. Moreover, as indicated in Section I.A, supra, these broad constitutional principles are the same in *Baker* (application for a state marriage license) as here (recognition of state-law marriages).

Given that *Baker* is controlling and on point for same-sex marriage issues, the lower federal courts have an obligation to follow that authority:

> "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini, 521 U.S. at 237 (*quoting Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), alteration in *Agostini*).

A. No Post-*Baker* Decision Undermines *Baker* as the Controlling Authority

Although no Supreme Court decision undermines *Baker* sufficiently for the lower courts to reject its holding, Windsor claims that *Lawrence* and *Romer* render *Baker* non-controlling. *Lawrence* expressly disavows that result:

> The present case ... does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

Lawrence, 539 U.S. at 578. As such, the suggestion that *Lawrence* undermines *Baker* cannot be squared with *Lawrence* itself, much less *Baker* and *Agostini*. Moreover, there is an obvious difference between criminalizing consensual and private adult behavior and requiring public and societal recognition, including monetary benefits from the federal fisc.

Similarly, the *Romer* majority found Colorado's Amendment 2 unconstitutional for broadly limiting the *political* rights to petition government that homosexuals – *as individuals* – theretofore had shared with all citizens under the federal and state constitutions. *Romer*, 517 U.S. at 632-33. Guaranteeing political rights to everyone under *Romer* in no way even correlates with how the Constitution lacks a constitutional right to same-sex marriage under *Baker*. As such, *Baker* remains good law that this Court can and should affirm.

The Second Circuit panel majority did not even attempt to dispute the holding of *Baker* under the rational-basis test, surrendering that position to Judge Straub's dissent. Instead, the panel majority posits that the advent of intermediate scrutiny for *other* classes of plaintiffs somehow undermines Baker for *this* class of plaintiffs. *Amicus* Eagle Forum respectfully submits that this represents the very type of "some other line of decisions" that "appears" to nullify "a precedent of this Court has direct application" to *this* case, which *Agostini* directs the lower courts to follow.

B. The Constitution Is Deferential to the People's and States' Reserved Powers

While the "power to interpret the Constitution ... remains in the Judiciary," *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997), the Constitution is not a blank check that a majority of this Court can wield to remake this Nation wholly devoid of the states' and the People's intent in generally worded provisions. The Court already has recognized the limits posed on using the Due Process Clause to legislate beyond "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 720-21. When faced with statutory text, the Court readily recognizes its role as arbiter, not author, of our laws:

> Had Congress intended so fundamental a distinction, it would have expressed that intent clearly in the statutory language or the legislative history. It did not do so, however, and it is not this Court's function to sit as a super-legislature and create

> statutory distinctions where none were intended.

Securities Industry Ass'n v. Bd. of Governors of Fed'l Reserve Sys., 468 U.S. 137, 153 (1984) (interior quotations omitted). Similarly, when refereeing disputes between the Federal Government and the sovereign states, this Court does not presume federal preemption "unless that was the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added), "because respect for the States as independent sovereigns in our federal system leads [federal courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (internal quotations omitted); *cf.* H.R.Rep. No. 104-664, at 16, *reprinted at* 1996 U.S.C.C.A.N. at 2920 ("what is most troubling in a representative democracy is the tendency of the courts to involve themselves far beyond any plausible constitutionally-assigned or authorized role"). *Amicus* Eagle Forum respectfully submits that the same respect – as well as respect for the People – requires solicitude in interpreting the Constitution.

Here, sodomy was a criminal offense in the original thirteen states that ratified the Bill of Rights and all but five of the thirty-seven states that first ratified the Fourteenth Amendment. *Bowers v. Hardwick*, 478 U.S. 186, 192-94 & nn.5-6 (1986), *rev'd on other grounds*, *Lawrence v. Texas*, 539 U.S. 558 (2003); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *215 (describing the common-law crime). It is simply not conceivable that those states understood Equal Protection to *require* the states and the Federal Government to recognize same-sex marriage, most particularly under the Fifth Amendment that applies to the Federal Government.

Given that "[f]amily relations are a traditional area of state concern," *Moore v. Sims*, 442 U.S. 415, 435 (1979), *amicus* Eagle Forum respectfully submits that this Court should interpret the Constitution to allow states to retain their own definitions of marriage: "When the text ... is susceptible of more than one plausible reading," this Court should "ordinarily accept the reading that disfavors" overturning the intent of those who enacted that text. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (interior quotations omitted). Mandating same-sex marriage on the Federal Government and nationwide in the states surely is not compelled by anything that this Nation ever intentionally adopted.

C. This Court Should Affirm *Baker* under Any Level of Scrutiny

The recent appellate decisions weigh same-sex marriage under a variety of standards of review, *Perry*, 671 F.3d at 1089 (rational basis); *Massachusetts*, 682 F.3d at 10-11 (heightened rational basis); *Windsor*, 699 F.3d at 185-88 (intermediate scrutiny), but none of these would enable this Court to uphold the Second Circuit here.[10]

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[10] Strict scrutiny does not apply because same-sex marriage is not a fundamental right. Although husband-wife marriage unquestionably is a fundamental right under the federal Constitution, *Turner v. Safley*, 482 U.S. 78, 95 (1987) ("decision to marry is a fundamental right"); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental"), the federal Constitution has

Before addressing the rival levels of scrutiny here, *amicus* Eagle Forum first posits that the obvious differences between same-sex and opposite-sex couples with respect to procreation means that the two are different, not the same. Of course, "an individual's right to equal protection of the laws does not deny ... the power to treat different classes of persons in different ways." *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974) (interior quotations omitted, alteration in original); *cf. Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike"). Such classifications "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *accord Reed v. Reed*, 404 U.S. 71, 75-76 (1971). Here, society's interest in husband-wife families that raise their biological children – the most stable basis for propagating society – provides the required linkage. While opposite-sex unmarried couples and same-sex married couples may resent society's preferences, they cannot deny them.

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never recognized the unrestricted right to marry *anyone*. Instead, the fundamental right recognized by this Court applies only to marriages between one man and one woman: "Marriage is one of the basic civil rights of man, fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Unlike opposite-sex marriage, same-sex relationships are not fundamental to the existence and survival of the human race.

1. DOMA Has a Rational Basis

A successful rational-basis plaintiff must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the state plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (internal quotations omitted); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462-63 (1988). It is enough, for example, that Congress "rationally may have been considered [it] to be true" that marriage has benefits for responsible procreation and childrearing. *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992). Because "a legislative choice" like DOMA "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data," *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *Heller v. Doe*, 509 U.S. 312, 320 (1993), Windsor cannot prevail by marshaling "impressive supporting evidence ... [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose but must instead negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981) (emphasis in original). Unfortunately for Windsor, the data simply do not exist to negative the procreation and childrearing rationale for traditional husband-wife marriage. And yet those data are Windsor's burden to produce.

The fact that New York law may recognize other potential legal arrangements does not undermine the rationality of believing that children raised in a marriage by their biological mother and father may have advantages over children raised under other arrangements:

> Although social theorists ... have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model.

Lofton, 358 F.3d at 820. Although the typical rational-basis plaintiff has a difficult evidentiary burden, Windsor here faces an *impossible* burden. We are at least a generation away from the longitudinal studies that could purport to compare the relative contributions of same-sex versus opposite-sex marriages to the welfare of society. While Eagle Forum submits that Windsor and her allies *never* will be able to negative the value of traditional husband-wife families for childrearing, she cannot prevail when the data *required by her theory of the case* do not yet exist.

2. DOMA Has a Hyper-Rational Basis

After recognizing that the rational-basis test applies, *Massachusetts,* 682 F.3d at 10-11, then adopted a heightened form of rational-basis review under the perceived authority of *U.S. Dept. of Agric. v. Moreno,* 413 U.S. 528 (1973), and *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432 (1985). To the extent that these cases establish a heightened rational-basis form of review, that review has no application here. Both *Moreno* and *Cleburne Living Center* involved as-applied challenges by plaintiffs who were "collateral damage" to laws that could validly apply to their intended targets.

In *Moreno*, the Court reviewed amended criteria for food-stamp eligibility that excluded households of unrelated people – something Congress enacted to avoid supporting "hippie communes" – but which the Court found to deny equal protection to the poor. 413 U.S. at 537-38. The *Moreno* holding says nothing against denying benefits to the law's actual targets: namely, educated young adults, with access to family money, who had simply "tuned out" for a lark, and – even worse – who could remain eligible for food stamps by altering their living arrangements. *Id.*

In *Cleburne Living Center*, the Court recognized four then-current, IQ-based classifications of mental retardation and upheld an as-applied challenge to a zoning ordinance by a group home consisting of residents in only the upper two classifications, who had none of the potential dangers associated with patients in the lower classifications. 473 U.S. at 442 n.9, 449. Again, the *Cleburne Living Center* holding says nothing against requiring zoning approval for the ordinance's appropriate targets: namely, institutions that would serve special-needs patients.

To the extent that *Moreno* and *Cleburne Living Center* establish a heightened level of review, that review is available only to those collaterally impacted by a valid form of government regulation, not to those who represent the precise distinction that the regulation appropriately sought to advance:

> Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a

> public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

Barbier v. Connolly, 113 U.S. 27, 31-32 (1884); *Reed*, 404 U.S. at 75-76 ("the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways") (*citing Barbier*). Here, Windsor challenges not DOMA's collateral impacts, but DOMA's constitutionally valid primary goals.

3. DOMA Meets Intermediate Scrutiny

To meet intermediate scrutiny, discrimination must achieve "important governmental objectives," with the "discriminatory means... substantially related to [achieving such] objectives." *U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (interior quotations omitted). The panel-majority concedes the former but disputes the latter in a single paragraph by arguing that DOMA does not favor husband-wife marriages in any way and thus cannot relate to achieving the favoring of such marriages.[11]

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[11] One straw-man argument used against the procreation-childrearing rationales is that allowing infertile opposite-sex couples to marry somehow disproves that those rationales motivate society to favor husband-wife marriage. Without strict scrutiny and its mandate for narrow tailoring to government interests, however, a classification does not violate Equal Protection simply because it is "not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). "Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this perfection is by no means required." *Vance v. Bradley*,

With all due respect to the panel majority, the slender reed on which they seek to overturn an institution "fundamental to our very existence and survival," *Loving,* 388 U.S. at 12, is breathtaking. The entire intellectual point of this litigation and the myriad companion cases is that society must treat same-sex marriages in the favored way that society treats husband-wife marriage.[12] The very existence of Windsor's claim recognizes favorable treatment that society confers upon husband-wife marriages, which Windsor seeks to eliminate:

> [W]hen the right invoked is that of equal treatment, the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.

Heckler v. Mathews, 465 U.S. 728, 740 (1984) (emphasis in original, interior quotations omitted). Of course, taking away favorable treatment can occur by elevating Windsor's treatment or lowering husband-wife marriages' treatment. But taxation and other federal benefits are, in essence, a zero-sum game. If everyone's benefits go up, the value of the

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440 U.S. 93, 108 (1979) (interior quotations omitted). In any event, some couples marry with the intent not to have children or with the mistaken belief they are infertile, yet later do have children. Moreover, even childless marriages reinforce the family unit, which reinforces husband-wife marriage's procreation and childrearing rationales.

[12] Perhaps this litigation's focus on $360,000 in a deceased partners' estate robs this case of the vitality inherent in the issues presented.

dollar (and of the benefits) comes down. Favorable treatment is what society has conferred on husband-wife marriages, and this litigation provides clear evidence that the benefit is substantially related to the conceded governmental interest in favoring and encouraging husband-wife marriage.

CONCLUSION

The Court should reverse the lower courts' decisions and remand with instructions to dismiss this litigation for failure to state a claim on which relief can be granted.

January 29, 2013

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CURIAE
BRIEF

No. 12-307

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE EMPIRE STATE PRIDE AGENDA, EQUALITY CALIFORNIA, EQUAL RIGHTS WASHINGTON, ONE IOWA, EQUALITY MARYLAND, VERMONT FREEDOM TO MARRY, MASSEQUALITY, NEW HAMPSHIRE FREEDOM TO MARRY COALITION AND EQUALITYMAINE AS *AMICI CURIAE* ON THE JURISDICTIONAL QUESTIONS IN SUPPORT OF RESPONDENT EDITH SCHLAIN WINDSOR

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Experiences Of Married Same-Sex Couples Under DOMA Highlight Important Prudential Considerations That Strongly Favor The Court Resolving DOMA's Constitutionality On This Appeal. 5

  A. Jo Ann Whitehead: A Massachusetts Educator Excluded From Social Security's Spousal Protections Because Of DOMA. 8

  B. Nancy Gill: A United States Postal Employee Unable To Add Her Lawful Spouse To Her "Family" Health Plan Under The Federal Employees Health Benefits Program. 12

  C. Charlie Morgan: A Recently Deceased Service Member Forced To Spend The Last Years Of Her Life Fighting For Military Benefits Needed To Provide Financial Stability For Her Family. 16

Page

D. Mary Ritchie: A State Police Officer Forced To Pay Significantly Higher Federal Taxes Because Of DOMA. 19

E. Adi Lavy: A U.S. Citizen Facing Separation From Her Non-Citizen Spouse While She Receives Critical Medical Care Only Available In The United States. 23

F. Jerry Passaro: A Connecticut Widower Unfairly Denied His Deceased Husband's Pension Annuity Because Of DOMA. 26

G. Michael Dragovich: A California State Employee Prevented From Enrolling His Husband In The Long-Term Care Insurance Program Offered To California Public Employees And Their Families. 30

H. Lynda DeForge: A Federal Public Employee Denied Leave To Provide Care For Her Seriously Ill Spouse And To Tend To Her Own Serious Health Concerns. 32

II. Executive Branch "Non-Enforcement" Of DOMA Is No Substitute For Conclusive Judicial Resolution Of DOMA's Constitutionality. 35

CONCLUSION 39

TABLE OF AUTHORITIES

Page(s)

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5 U.S.C. § 8901(5) 12

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INTEREST OF *AMICI CURIAE*[1]

Empire State Pride Agenda ("ESPA") is New York's statewide lesbian, gay, bisexual and transgender ("LGBT") civil rights and advocacy group. ESPA is committed to winning equality and justice for LGBT New Yorkers and their families. ESPA has been involved with advancing legislation securing equitable rights for all New Yorkers, and was a driving force behind New York State's enactment of marriage equality in 2011. ESPA also has participated as *amicus curiae* in litigation involving marriage equality.

Equality California is a state-wide advocacy group protecting the needs and interests of same-sex couples and their children in California, and is the largest LGBT advocacy organization in California. Equality California frequently participates in litigation in support of the rights of LGBT persons, including as an *amicus curiae* in *Perry v. Brown*, 10-16696 (9th Cir. 2011).

Equal Rights Washington ("ERW") is Washington's largest state-wide LGBT advocacy and community outreach organization. Its mission is to ensure and promote dignity, safety and equality for all LGBT Washingtonians. ERW played a significant role in securing passage of Washington's LGBT anti-discrimination bill in 2006 and Washington's domestic partner law in 2007, as well as expansions thereto in 2008 and 2009.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No persons other than *Amici* or their counsel made a monetary contribution to this brief's preparation or submission.

One Iowa is the largest LGBT rights group in Iowa. Its mission is to support full equality for LGBT individuals living throughout Iowa through grassroots efforts and education.

Equality Maryland is the largest LGBT rights group in Maryland. Equality Maryland helped introduce and was instrumental in obtaining passage of the Maryland Civil Marriage Protection Act in 2012. Equality Maryland also has participated as *amicus curiae* in litigation in support of marriage equality.

Vermont Freedom to Marry ("VFM") serves as a resource for same-sex marriage in Vermont and related financial and tax issues, family and child custody concerns, and more. Through its task force, VFM has advocated for and participated in litigation involving marriage equality.

MassEquality was founded in 2001 to promote and protect marriage equality in Massachusetts, the first state to end marriage discrimination. MassEquality today is the leading statewide grassroots organization in Massachusetts working to ensure that everyone across Massachusetts can thrive without discrimination and oppression based on sexual orientation, gender identity, or gender expression. MassEquality works to achieve full equality for the LGBT community in all spheres of society through advocacy in the legislative and executive branches and through public education.

New Hampshire Freedom to Marry Coalition is a non-profit organization dedicated to protecting marriage for gay and lesbian families in New Hampshire.

EqualityMaine is the oldest and largest organization in Maine that advocates for LGBT rights and equality. EqualityMaine has participated as *amicus curiae* in litigation in support of marriage equality and was one of the primary supporters of the push to recognize same-sex marriage in Maine.

As a result of their involvement in successful marriage equality advocacy in their States, *Amici* are well aware that marriages of same-sex couples are disregarded by the federal government for all purposes where marital status is a factor. As organizers and advocates in the LGBT communities in states with legal regimes under which gay couples may marry, *Amici* also have a unique perspective on the substantial emotional and financial burdens that the Defense of Marriage Act ("DOMA") imposes in the daily lives of legally married same-sex couples and their families. The constitutional questions presented in this appeal will directly affect *Amici*'s members, supporters and the communities that *Amici* serve.

SUMMARY OF ARGUMENT

Amici agree with Respondent Edith Windsor, for the reasons set forth in her brief on the jurisdictional questions, that the United States' appeal presents a "case or controversy" for the purpose of Article III jurisdiction. *Amici* respectfully urge the Court to exercise that jurisdiction in order to remedy the significant and daily injury that DOMA causes tens of thousands of married same-sex couples by disqualifying them from a wide range of rights and benefits that federal law affords opposite-sex marriages.

Court-appointed *Amica Curiae* suggests that, as a prudential matter, the Court should defer resolution of the question of DOMA's constitutionality to allow for more "time and reflection in the lower courts". *Amica* Br. 38. This brief responds to that suggestion. As demonstrated by the real life experiences of married same-sex couples described below, *Amica*'s proposed approach would perpetuate the substantial inequalities and harms DOMA causes in the daily lives of tens of thousands of couples. It would subject a fundamental aspect of people's lives—their marriage—to continued uncertainty. And it would inevitably result in repeated litigation and other disputes in the lower courts and administrative agencies regarding precisely the same issues. While this would impose substantial burdens on the affected couples, who would need to present and pursue these disputes again and again, it would not likely result in any additional information of material utility to this Court in deciding the important constitutional question presented by Windsor's case. (*Infra* Part I.)

Moreover, as the brief of Respondent Windsor explains, DOMA is not the type of law that can be neutralized by unilateral Executive Branch action or inaction. Thus, even if the Executive Branch were to cease enforcing DOMA, the law would continue to cause great harm to thousands of individuals, and compel costly litigation. The experiences recounted below help illustrate this point. (*Infra* Part II.)

ARGUMENT

I. The Experiences Of Married Same-Sex Couples Under DOMA Highlight Important Prudential Considerations That Strongly Favor The Court Resolving DOMA's Constitutionality On This Appeal.

Prudential considerations weigh strongly in favor of the Court resolving the question of DOMA's constitutionality now, rather than leaving that question to be decided on a case-by-case basis by the lower courts, as *Amica* suggests. *Amica*'s arguments to the contrary overlook the practical realities of the situation.

As the real-life experiences of married same-sex couples described below illustrate, the harms that DOMA causes married same-sex couples by automatically disqualifying them from more than 1,000 federal marital rights and benefits are extensive and target many of the most fundamental concerns of the American family.[2] DOMA subjects tens of thousands of married same-sex couples and their families to such injury on a daily basis.[3] *Amica*'s proposed approach of letting the issue percolate further in the lower courts would have two adverse consequences that strongly militate in favor of this Court's exercising its jurisdiction to decide this matter now.

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[2] U.S. Gen. Accounting Office, GAO-04-353R, *Defense of Marriage Act, Update to Prior Report* 1 (Jan. 23, 2004), *available at* http://www.gao.gov/new.items/d04353r.pdf. The rights that DOMA unfairly withholds from same-sex couples include many military benefits, tax credits and exemptions, family-based immigration rights, rights that federal law secures surviving spouses, medical benefits and many other core components of the social safety net. *See* OutServe-SLDN, *Freedom to Serve, The Definitive Guide to LGBT Military*

First, only a very small fraction of the Nation's same-sex couples have to date challenged the denial of benefits through administrative proceedings and the lower courts. If the Court adopts *Amica*'s suggestion, many more will need to do so. Litigation and administrative proceedings would be the only avenue for these couples to attain the benefits DOMA currently denies them—resulting in further proceedings before the lower courts and administrative agencies, which will draw in not just federal agencies but also the many state and private

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Service 25-26 (July 27, 2011), *available at* http://sldn.3cdn.net/5d4dd958a62981cff8_ v5m6bw1gx.pdf; Blake Ellis, *Same-sex couples could see tax windfalls*, CNNMoney (Nov. 14, 2012), *available at* http://money.cnn.com/2012/11/14/pf/taxes/doma-same-sex-couples/index.html; Immigration Policy Center, *Immigration and the Defense of Marriage Act (DOMA): A Q&A Fact Check* (Aug. 18, 2011), *available at* http://www.immigrationpolicy.org/just-facts/immigration-and-defense-marriage-act-doma-qa-fact-check.

[3] M.V. Lee Badgett & Jody L. Herman, *Patterns of Relationship Recognition by Same-Sex Couples in the United States* 5-6 (The Williams Institute, 2011) (indicating that there are at least 100,000 legally married same-sex couples living in the United States), *available at* http://williamsinstitute.law.ucla.edu/headlines/latest-data-married-registered-same-sex-couples.

entities responsible for administering federally regulated benefits. As BLAG has suggested in prior briefing, such continued litigation would impose significant costs on the federal taxpayer.[4] And to what end does *Amica* propose imposing such burdens? The Court already has available multiple lower court decisions, many years of experience since the enactment of DOMA and extensive scholarship and *amicus* briefing. The incremental benefit from allowing this issue to continue being addressed in the lower courts would be minimal.

The real life experiences described below also illustrate the fundamental unfairness of requiring married same-sex couples to be forced to litigate in order to obtain benefits available to married opposite-sex couples. Litigation is a costly and time-consuming process, particularly when it involves the denial of federally regulated benefits that must first be challenged through administrative proceedings, as is the case with many of the benefits that DOMA withholds. Moreover, many married same-sex couples lack the resources or sophistication to pursue such judicial or administrative proceedings. Unless this Court resolves the constitutional questions presented in this case, those couples will suffer from DOMA's denial of benefits by default.

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[4] *See* Intervenor-Defendant's Reply to Plaintiffs' Opposition to Motion to Stay Proceedings at 6, *Pedersen v. Office of Personnel Mgmt.*, No. 10-01750 (D. Conn. June 29, 2012).

A. Jo Ann Whitehead: A Massachusetts Educator Excluded From Social Security's Spousal Protections Because Of DOMA.

The Social Security Act provides important protections designed to assist workers and their spouses in retirement or in the event of the worker's disability or death. In retirement, Social Security allows a lower-earning or non-earning spouse to increase his or her benefit by up to one half of the higher-earning spouse's retirement benefit.[5] In the event of the death of a higher-earning spouse, Social Security provides a lower-earning spouse his or her spouse's higher benefit.[6] And in the event a worker becomes disabled, Social Security entitles his or her spouse to receive up to half the disabled worker's benefit.[7]

DOMA automatically disqualifies legally married same-sex couples from these important protections, depriving them of a critical source of financial assistance at a time when it is most needed, and despite their having paid into the system just like married opposite-sex couples. The experience of Bette Jo Green and Jo Ann Whitehead illustrates the significant toll that this automatic disqualification takes on married same-sex couples and the lengths to which they must go to challenge the denial of these benefits.

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[5] *See* 42 U.S.C. § 402(b), (c).

[6] *See* 42 U.S.C. § 402(e), (f). Surviving spouses also are eligible for a lump sum death benefit. *Id.* § 402(i).

[7] *See* 42 U.S.C. § 402(b), (c).

Bette Jo, 70, retired in 2008 from a 35-year career as a labor and delivery nurse at a large Boston-area hospital.[8] Bette Jo's wife, Jo Ann, also 70, is a Community Garden Educator with a non-profit group in the Boston area.[9] Bette Jo and Jo Ann met in college in 1960, have been in a committed relationship for over 30 years, and were legally married under the laws of Massachusetts in 2004.[10] Both women have survived recent, serious battles with cancer.[11] In February 2008, both Jo Ann and Bette Jo applied for and began receiving Social Security benefits based on their respective earnings records.[12] Because Bette Jo had higher lifetime earnings than Jo Ann, Jo Ann applied for the Social Security spousal benefit based on Bette Jo's earnings record.[13] Not only would this benefit have allowed Jo Ann to receive a higher monthly benefit, it also would have allowed Jo Ann to delay her retirement age for purposes of Social Security based on her own earnings record, which could potentially increase her benefit amount later on.[14]

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[8] Second Am. Compl. ¶ 331, *Gill v. Office of Personnel Mgmt.*, No. 09-10309 (D. Mass. May 25, 2010) ("Gill Compl.").

[9] *Id.* ¶ 332.

[10] *Id.* ¶¶ 333-35, 339.

[11] *Id.* ¶ 337.

[12] *Id.* ¶ 340.

[13] *Id.* ¶ 343.

However, Jo Ann's application was denied by the Social Security Administration ("SSA"), which provided a letter, dated April 2008, stating that "[s]ince the Defense of Marriage Act prohibits SSA from finding you[] and the insured were married for benefit purposes, you are not eligible for Spouse's Benefits".[15] Jo Ann thereafter filed a timely Request for Reconsideration in May 2008, in which she noted that she had been legally married under Massachusetts law since 2004.[16] The SSA did not respond to Jo Ann's Request for Reconsideration until January 2009, when it issued a written denial which again cited DOMA as the reason it could not recognize Jo Ann's marriage to Bette Jo for benefit purposes.[17] In February 2009, Jo Ann went to her local SSA office, in Roxbury, MA, to make a written request for an Expedited Appeals Process ("EAP"), a more direct path to district court adjudication of a Social Security claim that is available following an initial and reconsidered determination where the only factor preventing a favorable determination is a provision in the law the applicant believes is unconstitutional.[18] In May 2009, Jo Ann received several unsigned copies of an EAP agreement to sign which stated that the reconsidered determination rendered by the SSA was final for purposes of judicial review.[19] After the Initial Complaint was filed in district court in 2009, judgment was entered in Jo Ann's favor in July 2010.

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[14] *Id.* ¶¶ 343-44.

[15] *Id.* ¶¶ 345-49.

[16] *Id.* ¶ 346.

[17] *Id.* ¶¶ 347-49.

[18] *Id.* ¶ 350; *see also* 20 C.F.R. § 416.1424.

Thus, altogether Jo Ann waited over two years before potentially becoming eligible to receive the benefits she sought, even with avoidance of the Social Security hearing that would have been necessary absent the EAP agreement.[20] During that period of time, Bette Jo and Jo Ann have been denied an important income boost that is afforded to similarly situated opposite-sex couples and that could have made a meaningful difference for two retirees on a fixed income.[21] Moreover, because Jo Ann was unable to qualify for the spousal benefit, she lost the ability to delay her own retirement age, which could have increased her benefit.[22] And Jo Ann was unfairly forced to spend time and money filing paperwork with the SSA and filing a complaint to seek benefits for which opposite-sex spouses qualify automatically.

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[19] Gill Compl. ¶ 352.

[20] *See* 42 U.S.C. § 405. The Plaintiffs in *Gill* won on appeal in the First Circuit, but that judgment has been stayed and they have not yet received any of the benefits for which they have been fighting.

[21] Gill Compl. ¶¶ 355-56.

[22] *Id.* ¶ 344.

B. Nancy Gill: A United States Postal Employee Unable To Add Her Lawful Spouse To Her "Family" Health Plan Under The Federal Employees Health Benefits Program.

One of the key financial benefits of marriage is the ability to obtain affordable health coverage through a spouse's employer-sponsored health plan. DOMA denies this important benefit to married same-sex spouses, requiring them to spend significantly more to acquire health coverage for their loved ones than identically qualified opposite-sex spouses.

For current and retired employees of the federal government who are married to a spouse of the same sex, DOMA makes it significantly more expensive to obtain quality health insurance by precluding them from enrolling their spouses in the Federal Employees Health Benefits ("FEHB") Program, which the federal government makes available to all federal employees, retirees and their survivors and family members, including "the spouse of an employee or annuitant".[23] DOMA also prevents federal employees with same-sex spouses from obtaining a number of other employer-sponsored benefits that are available to employees with opposite-sex spouses, such as vision care and coverage under a flexible spending account.[24]

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[23] *See* 5 U.S.C. § 8901(5).

[24] In the private sector, DOMA discourages employers from contributing to the cost of spousal health benefits for

Nancy Gill is one of the many federal employees who, because of DOMA, has been compelled to buy expensive private health insurance for a same-sex spouse, and forego several other employment related benefits, despite the availability of "family" benefit plans through FEHB.

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employees with spouses of the same sex by requiring employers that do to pay additional payroll taxes on such contributions, which, because of DOMA, are considered taxable income to the employee. *See* M.V. Lee Badgett, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits* 5-7, Center for American Progress & The Williams Institute (2007), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-UnequalTaxesOnEqualBenefits-Dec-2007.pdf. As a consequence, although a growing number of employers have been willing to take on the cost of extending benefits to their employees' same-sex spouses, many employers do not. In addition, employees with same-sex spouses fortunate enough to work for an employer that offers them spousal benefits typically must pay significantly more in taxes than similarly situated employees with opposite-sex spouses—according to one study, on average over $1,000 annually in federal taxes. *See* David Badash, *Top 10 Ways DOMA Affects Same-Sex Couples* (The Williams Institute, July 2011), *available at* http://williamsinstitute.law.ucla.edu/press/top-10-ways-doma-affects-same-sex-couples. Some employers recently have implemented "gross up" policies that account for the income tax burden of employer contributions to domestic partner coverage by reimbursing the employee for that extra cost. *See* Tara Siegel Bernard, *A Progress Report on Gay Employee Health Benefits*, N.Y. Times (Feb. 14, 2013), *available at* http://bucks.blogs.nytimes.com/2010/12/14/a-progress-report-on-gay-employee-health-benefits. However, the employee may still end up with additional liability because the "gross up" can put the employee in a higher tax bracket. Moreover, these burdens on employers provide an economic disincentive to hire married gay people in the first place.

Nancy, an employee of the United States Postal Service, and her wife Marcelle Letourneau, a transcriptionist at a nursing services provider, have been in a committed relationship since 1980 and were married under Massachusetts law in May 2004.[25] As a federal employee, Nancy is eligible for FEHB and has been enrolled in FEHB's "Self and Family" Plan since the birth of her and Marcelle's first child in 1993.[26] Today, the FEHB plan provides affordable, quality health insurance, as well as vision care and other important benefits, to three out of the four members of Nancy's nuclear family—herself and her and Marcelle's two children.[27] However, because of DOMA, Nancy is unable to obtain coverage under FEHB for Marcelle.

That harsh reality was news to Nancy when, in May 2004, she first attempted to enroll Marcelle in the plan by submitting a standard form to her employer listing Marcelle and their children as her family members.[28] Up to that point, Nancy naturally assumed that, because Massachusetts recognized Marcelle as her lawful spouse, she would be able to obtain coverage for Marcelle under her family plan just as her other legally married co-workers are able to do for their spouses. Yet shortly thereafter, and much to her and Marcelle's surprise, Nancy received a letter from the United States Postal Service advising her she was ineligible for spousal benefit coverage because of DOMA.[29] Seeking only the same rights as her co-workers married to spouses of the opposite sex, Nancy filed a complaint with the Equal Employment Opportunity Commission ("EEOC") challenging Marcelle's exclusion from FEHB.[30] One month later, in July 2004, Nancy's complaint was dismissed on the ground that discrimination based on sexual orientation "is not actionable under EEOC Regulations".[31] Nancy later attempted to enroll Marcelle in the FEHB family vision and flexible spending programs as well but again was denied coverage because of DOMA.[32]

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[25] Gill Compl. ¶¶ 67-72.

[26] *Id.* ¶¶ 74-75.

[27] *Id.* ¶ 75.

[28] *Id.* ¶¶ 78-83.

Like many other married couples raising children together, money is an ever-present concern for Nancy and Marcelle. But DOMA has forced the couple to spend several thousand dollars, and counting, on private insurance for Marcelle since the day they were legally married, and that is on top of the $800 that they spend annually for the FEHB family plan that would automatically cover Marcelle if she or Nancy were of the opposite sex.[33] It is a significant financial burden, and one that countless legally married same-sex couples are forced to endure under DOMA.

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[29] *Id.* ¶ 81.

[30] *Id.* ¶¶ 84-88.

[31] *Id.* ¶ 89.

[32] *Id.* ¶¶ 91-102.

[33] *See* Maria Papadopoulos, *Bridgewater women begin legal challenge against federal marriage law* (May 11, 2010), *available at* http://www.enterprisenews.com/news/cops_and_courts/x1773730805/Bridgewater-women-begin-legal-challenge-against-federal-marriage-law?zc_p=0.

C. Charlie Morgan: A Recently Deceased Service Member Forced To Spend The Last Years Of Her Life Fighting For Military Benefits Needed To Provide Financial Stability For Her Family.

Military service members who have same-sex spouses courageously defend this nation against threats worldwide on a daily basis. DOMA unfairly discriminates against them by denying them and their spouses the same benefits afforded to service members who are married to spouses of the opposite sex, which are designed to help military families deal with the substantial sacrifices they are asked to make in service to their country.[34]

The experiences of Charlie and Karen Morgan epitomize DOMA's unfairness, its destructive impact on married same-sex military couples, and the need for immediate resolution of the statute's constitutionality. Charlie, who recently passed away, was a decorated service member. She served in the Army and, more recently, as a Chief Warrant Officer in the New Hampshire National Guard.[35] Charlie and Karen were in a committed relationship for over 15 years, have a five-year-old daughter, and were married in 2011 pursuant to the laws of New Hampshire.[36]

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[34] For example, opposite-sex spouses of active service members are eligible for healthcare coverage through the TRICARE program. In the event of a service member's death, surviving opposite-sex spouses may receive a one-time non-taxable $100,000 death gratuity. Surviving opposite-sex spouses of retired service members may also receive 55% of the deceased service member's retirement pay. Opposite-sex spouses of veterans are also eligible for death benefits, disability benefits, educational assistance and job counseling. *See* GLAD, *How DOMA Hurts Americans: A Summary of the GAO Reports on Section 3 of the Federal Defense of Marriage Act*, *available at* http://www.glad.org/doma/how-doma-hurts-americans.

Before her death, Charlie was the sole income-earner in the family, while Karen has been a full-time mother.[37] Like many military families, life for the Morgans has had its difficult moments, such as when, in 2005, Charlie was given less than 24 hours notice to deploy for three weeks to the Gulf Coast in response to Hurricane Katrina.[38] Unlike opposite-sex military spouses, Karen had the extra burden of wondering whether anyone would know to contact her if anything happened to Charlie, given that she was essentially invisible to the military because of Don't Ask, Don't Tell ("DADT").[39] Even though DADT has since been repealed, Karen and Charlie still were never treated equally by the military because of DOMA. As a result, Karen has no medical benefits of her own.[40] To complicate matters further, in 2008, Charlie was diagnosed with breast cancer and underwent chemotherapy, radiation and a double mastectomy.[41] The treatment subdued the cancer for a time. However, upon returning from a deployment in Kuwait, Qatar and Iraq in August 2011, Charlie's cancer returned, this time in a form that her doctors determined was metastatic and effectively incurable.[42] Given that diagnosis, Charlie opted to stop treatment so that she and Karen could take their daughter to Disney World, visit family and get the most out of their final months together.[43] Then, in February 2013, Charlie tragically lost her battle with cancer.[44]

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[35] Decl. Re Statement of Material Facts L.R. 56.1 Of CW2 Charlie Morgan ¶¶ 2-4, *McLaughlin v. Panetta*, No. 11-11905 (D. Mass. Nov. 21, 2011) ("Morgan Decl.").

[36] *Id.* ¶ 5; *see also* David Small, *Opposing DOMA: One Couple in the Fight for Life*, OutServe Magazine (May 2012), *available at* http://outservemag.com/2012/05/opposing-doma.

[37] Morgan Decl. ¶ 9.

[38] Small, *Opposing DOMA*, *supra* note 36.

[39] *Id.*

Now, Karen finds herself in a difficult position that opposite-sex military couples simply do not have to face. Despite Charlie's heroic service to our country, her wife Karen, now a widow, will not receive the important military benefits, including a $100,000 non-taxable death gratuity, that she needs to support herself and her daughter and that she would be entitled to if she or Charlie were of the opposite sex.[45]

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[40] Morgan Decl. ¶ 9.

[41] *Id.*

[42] Small, *Opposing DOMA*, *supra* note 36.

[43] Andrea Stone, *Soldier dies of breast cancer, but her widow won't get benefits*, Wash. Post (Feb. 10, 2013), *available at* http://www.washingtonpost.com/blogs/she-the-people/wp/2013/02/10/soldier-dies-of-breast-cancer-but-her-widow-wont-get-benefits.

[44] *Id.*

D. Mary Ritchie: A State Police Officer Forced To Pay Significantly Higher Federal Taxes Because Of DOMA.

The federal tax code is designed, in part, to recognize the reality that individuals who are legally married operate as a single economic unit and should therefore be accorded certain benefits unavailable to unmarried individuals.[46] Married couples may file their federal tax returns jointly, which often results in a lower tax liability than if each individual were required to file their taxes separately.[47] Married couples may also pool deductions on their returns, which can allow them, for example, to meet the required threshold for a federal tax deduction for uncompensated medical expenses.[48] Spouses also have an unlimited ability to make gifts and transfer property to one another without incurring taxes, and may deduct the amount of the fair market value of any property passing from a deceased spouse from that spouse's gross estate tax.[49] None of these protections, however, are available to same-sex spouses. Because DOMA precludes the federal government from recognizing the lawful marriages of these committed couples, they cannot file their taxes jointly (and thus cannot combine their deductions), are taxed on property transfers that opposite-sex couples are able to make tax-free, and cannot access various other deductions and credits that the federal tax code makes available to married couples.[50]

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[45] *See supra* note 34 (noting military benefits that DOMA denies same-sex spouses). Despite the Defense Department's recent decision to extend some benefits to married same-sex couples, DOMA still bars same-sex military spouses from the majority of spousal military benefits. For example, spouses of gay and lesbian service members cannot be designated as primary next of kin, and thus are not notified directly in the event that a service member spouse is injured or killed. Such was the indignity faced by Tracy Johnson, a staff sergeant in the North Carolina National Guard whose spouse, Donna, was killed in Afghanistan recently. Tracy learned about Donna's death not through a casualty officer, which would have happened if she or Donna were male, but rather through her in-laws after reading a news item about an attack near where Donna was stationed and after not having received her regular morning phone call from Donna. Adding to the indignity Tracy and others like her have suffered is the fact that same-sex military spouses are ineligible for the travel allowance surviving military spouses are provided to attend burial ceremonies. *See* Tracy Johnson, *A law that adds to gay military widows grief*, Wash. Post (Feb. 10, 2013), *available at* http://articles.washingtonpost.com/2013-02-10/opinions/37026203_1_widows-donna-military-rule; *see also* 37 U.S.C. § 411(f).

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[46] *See* Patricia Cain, *DOMA and the Internal Revenue Code*, 84 Chi.-Kent L. Rev. 481, 503 (2009-2010).

[47] M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 Drake L. Rev. 1081, 1089-90 (2010).

[48] 26 U.S.C. §§ 213, 6013.

[49] 26 U.S.C. §§ 1041, 2056(a).

[50] DOMA also causes additional complexities and costs in tax preparation for same-sex spouses with children. Only a spouse who is legally recognized as a parent may claim child related deductions and credits, but if the spouse who pays child

The life of Mary Ritchie and Kathleen ("Kathy") Bush highlights the significant burdens suffered by married same-sex couples because DOMA prevents the federal tax code from treating them as single economic units. Mary and Kathy have been in a committed relationship for over 20 years, have two sons, and were legally married under Massachusetts law in May 2004, immediately after marriage became available in the state.[51] Mary is a Detective Lieutenant with the Massachusetts State Police, where she has been employed since 1988.[52] Kathy worked for the New England Journal of Medicine for 15 years until the couple's first child was born, when she stopped working to care for their children. The financial strains associated with keeping a family of four healthy and fed can be significant, and Mary and Kathy's family must deal with the added burden of Mary's job, which can place her in unpredictably dangerous situations. DOMA only further complicates matters by increasing the amount of

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related expenses is not legally recognized as the parent, these deductions are not available to the couple. Further, if both parents can claim these deductions, they must determine who should claim them to obtain the most favorable tax treatment, which often requires expensive professional advice. *See* Medical Advancement Project, Family Equality Council & Center for Am. Progress, *Unequal Taxation & Undue Burdens for LGBT Families* 5, 8-14, 18 (2012), *available at* http://www.lgbtmap.org/file/unequal-taxation-undue-burdens-for-lgbt-families.pdf.

[51] Joint Aff. of Mary Ritchie and Kathleen Bush ¶¶ 1-2, 6, *Gill v. Office of Personnel Mgmt.*, No. 09-10309 (D. Mass. Nov. 17, 2009) ("Ritchie-Bush Aff.").

[52] *Id.* ¶ 4.

federal tax the couple is required to pay. Because DOMA prohibits the Government from recognizing their marriage, Mary, the only income-earner in the family, claims Kathy (along with their two children) as a dependent on her tax return, which is fundamentally degrading in itself.[53] As a result, since 2004 the couple have paid over $19,000 more in federal income taxes than they would have paid if they had been permitted to file jointly.[54] Mary and Kathy's attempts to recoup these additional taxes through the filing of amended returns changing the filing status to "Married Filing Jointly", based on the fact that they are legally married, have been unsuccessful because of DOMA.[55] For example, the IRS's denial of their amended return was accompanied by a letter stating that "[c]urrent federal law does not recognize same sex marriage even if legally constituted by a sovereign state".[56]

In addition to Mary and Kathy's increased tax liability, DOMA has thwarted their efforts to save for retirement. Because Kathy does not earn any income, and given the demands of Mary's job, the couple explored the possibility of having Mary contribute a portion of her income to an Individual Retirement Account ("IRA") on Kathy's behalf.[57] However, a prerequisite for opening such an account is the ability of the employee and his or her spouse to file their federal income taxes jointly. Because Mary and Kathy cannot file their federal taxes jointly, Mary cannot take the allowable tax deduction for any contribution to Kathy's IRA, thus frustrating the very purpose of having a spousal IRA and preventing the couple from taking steps to ensure their family's financial stability in the future.

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[53] *Id.* ¶ 11.

[54] *Id.* ¶ 19

[55] *Id.* ¶¶ 12-19.

[56] *Id.* ¶ 17. Numerous other married same-sex couples have likewise been required to pay more taxes each year than similarly situated married heterosexual couples. For example, Brad Kleinerman and Flint Gehre, who reside in Connecticut with their three sons, have been together for over 20 years and were married under Connecticut law in 2009, paid an extra $8,000 in federal taxes in 2010 because DOMA prevents them from filing jointly. *See* GLAD, *Bradley Kleinerman & James "Flint" Gehre*, *available at* http://www.glad.org/doma/plaintiffs-pedersen/bradley-kleinerman-james-flint-gehre.

E. Adi Lavy: A U.S. Citizen Facing Separation From Her Non-Citizen Spouse While She Receives Critical Medical Care Only Available In The United States.

According to a recent analysis of Census data, over 79,000 same-sex couples in the United States include either a non-U.S. citizen or a citizen who has been naturalized.[58] Although the federal immigration statutory scheme is designed, in part, to preserve and maintain familial contact,[59] DOMA works to force bi-national married same-sex couples to live in constant fear of separation by preventing federal recognition of their lawful marriages.

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[57] Ritchie-Bush Aff. ¶¶ 20-21.

[58] Craig J. Konnoth & Gary J. Gates, *Same-Sex Couples & Immigration in the United States* 3 (The Williams Institute, Nov. 2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Konnoth-Binational-Report-Nov-2011.pdf.

The need for immediate resolution of DOMA's constitutionality is illustrated by the experiences of Adi Lavy, a United States citizen, and her wife, Tzila Levy, who is Israeli. Adi, 34, and Tzila, 33, met in 2010 at a Purim party in Tel Aviv, where Lavy, a filmmaker, was working on a film.[60] The two had an instant connection, fell in love, and were legally married under New York law in October 2012, with a ceremony on the Williamsburg Bridge in Brooklyn.[61]

While the couple were together in Israel, Adi, who has kidney disease and is on a New York waiting list for a donor, was told by her doctors that her condition was worsening and that she should return to the United States for treatment.[62] Today, the couple reside together in New York, but Tzila's tourist visa recently has expired and Adi's petition to sponsor Tzila for a green card is pending.[63] Typically, a U.S. citizen such as Adi who marries a non-citizen may sponsor his or her spouse for a green card through a more expeditious process than would otherwise be available; such applications are not subject to the quota system or any waiting lists or priority dates.[64] Further, a non-citizen spouse of a United States citizen who has been admitted for permanent residence is eligible for U.S. citizenship after only three years, as opposed to five years for other lawful permanent residents.[65] However, because DOMA prevents USCIS from recognizing same-sex couples' lawful marriages, Adi and Tzila, and many similarly situated married same-sex couples, face the very real prospect of having to choose between separating or remaining together in the United States illegally, which could have serious negative consequences as well.[66] It is a tragic choice, and one that they would not have to face if Adi or Tzila were of the opposite sex.[67] A conclusive resolution of DOMA's constitutionality by the Court would aid Adi and Tzila, and many other couples facing this critical and imminent predicament, one that no legally married couple should have to face.

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[59] *See* 136 Cong. Rec. H8631 (daily ed. Oct. 2, 1990) (statement of Rep. McGrath) ("Family unification is the cornerstone of immigration to the United States. Prolonging the separation of spouses from each other . . is inconsistent with the principles on which this nation was founded.").

[60] *See* Erica Pearson, *Newlywed Lesbians From Brooklyn Hope Feds Decide On Green-Card Bid After Supreme Court Weighs In On DOMA*, N.Y. Daily News (Dec. 12, 2012), *available at* http://www.nydailynews.com/new-york/lesbian-couple-waiting-doma-decision-article-1.1218693.

[61] *Id.*

[62] *Id.*

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[63] *Id.*

[64] U.S. Citizenship and Immigration Services, *Green Card for an Immediate Relative of a U.S. Citizen*, *available at* http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=9c8aa6c515083210VgnVCM100000082ca60aRCRD&vgnextchannel=9c8aa6c515083210VgnVCM100000082ca60aRCRD (last visited Feb. 26, 2013).

[65] U.S. Citizenship and Immigration Services, *Naturalization for Spouses of U.S. Citizens*, *available at* http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=a0ffa3ac86aa3210VgnVCM100000b92ca60aRCRD&vgnextchannel=a0ffa3ac86aa3210VgnVCM100000b92ca60aRCRD (last visited Feb. 26, 2013). Some estimates put the number of married same-sex couples in situations similar to Adi and Tzila at approximately 36,000. *See* Pamela Constable, *Federal Marriage Law May Force Deportation Of Many Immigrant Gay Spouses*, Wash. Post (Dec. 29, 2012), *available at* http://articles.washingtonpost.com/2012-12-29/local/36071393_1_gay-spouses-binational-gay-couples-doma.

F. Jerry Passaro: A Connecticut Widower Unfairly Denied His Deceased Husband's Pension Annuity Because Of DOMA.

DOMA operates to deny married same-sex couples important retirement benefits that federal law requires most private pension and health plans to make available to their participants' spouses. For example, under the Employee Retirement Income Security Act ("ERISA"), defined benefit or money purchase pension plans are required to offer opposite-sex surviving spouses of plan participants a Qualified Pre-Retirement Survivor Annuity ("QPSA")—generally a 50% annuity for the life of the surviving spouse—unless the spouse affirmatively waives the right to receive it.[68] DOMA blocks this default protection for surviving spouses of the same sex.

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[66] Relatedly, immigrant workers who are admitted to the United States through sponsorship by an employer may enter the country with their spouses. 8 U.S.C. §§ 1101(a)(15)(H), 1153(b)-(d). However, DOMA denies these workers the right to enter with a same-sex spouse, even if the worker's marriage is lawfully recognized in his or her country of origin and the state in the United States where the immigrant will be working.

[67] Although a temporary visa could serve as a potential stop-gap solution in certain situations, foreign nationals seeking temporary visas must often demonstrate to immigration officials that they have no intent to remain permanently in the United States, a presumption for many temporary visas. 8 U.S.C. §§ 1101(a)(15), 1184(b). A foreign national married to a U.S. citizen of the same sex faces a cruel catch-22: his marriage does not pave a path to permanent residence and, at the same time, is very likely to prevent him from proving that he does not intend to stay permanently in the United States, making it exceedingly difficult for him to obtain a temporary visa.

Gerald ("Jerry") Passaro is one of the many surviving spouses that has suffered as a result of DOMA's discriminatory impact on the federal rules and regulations governing private retirement plans.[69] Jerry lost his husband, Thomas ("Tom") Buckholz, to lymphoma in January 2009.[70] They had been in a committed relationship for over 13 years and were legally married under Connecticut law in November 2008.[71] Prior to his passing, Tom sought to ensure that Jerry, who is disabled and receives a monthly Social Security check, would be taken care of after he was gone.[72] He did this by attempting to leave Jerry his only significant asset—the pension he had built up as a chemist at Bayer Pharmaceutical, in which he was fully vested.[73] Tom named Jerry as his beneficiary under his pension, which is administered by Vanguard, and received assurances that Jerry would receive the pension upon Tom's death.[74]

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[68] 29 U.S.C. § 1055(e); 26 U.S.C. § 417. Under ERISA, defined plans must also offer opposite-sex spouses a Qualified Joint and Survivor Annuity ("QJSA"), which provides an annuity benefit to a retiree during his or her lifetime, then continues the benefit as an annuity paid to the surviving spouse in the amount of at least 50% and not more than 100% of what the retiree received. 29 U.S.C. § 1055(d). Additionally, an opposite-sex spouse may defer the payment of death benefits, as well as any associated taxes, from a decedent's plan until the spouse reaches age 70 and a half. 26 U.S.C. § 401(a)(9).

[69] *See generally* GLAD, *The Plaintiffs: Pedersen v. O.P.M., Jerry Passaro, available at* http://www.glad.org/doma/plaintiffs-pedersen/jerry-passaro.

[70] First Am. Compl. ¶ 91, *Pedersen v. Office of Personnel Mgmt*, No. 10-01750 (D. Conn. Jan. 14, 2011) ("Pedersen Compl.")

Following Tom's death, Jerry submitted the required paperwork in order to receive the pension that Tom had left him.[75] After a month with no response, he contacted Bayer and was informed that, because he is a man and was "not legally married" to Tom under federal law, Bayer would not be paying on Tom's pension.[76] After formally requesting that he be paid the survivor benefits, Jerry received a letter from Vanguard advising him that no benefits were going to be payable to him under the Bayer Plan because of DOMA.[77] The letter explained that, as a consequence of DOMA, "a pension plan cannot be required to recognize a same-sex spouse even if same-sex marriages are permitted under state law".[78] Jerry submitted an appeal of the denial of his request to the Bayer ERISA Review Committee. Citing DOMA, the Committee upheld the denial.[79]

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[71] *Id.* ¶ 92.

[72] *See* Aff. of Gerald V. Passaro II ¶ 25, *Pedersen v. Office of Personnel Mgmt.*, No. 10-01750 (D. Conn. July 15, 2011) ("Passaro Aff.").

[73] *Id.*; Pedersen Compl. ¶¶ 94-95.

[74] Pedersen Compl. ¶¶ 97, 101. Under the terms of the plan, which ERISA governs, when a participant such as Tom is vested and has a nonforfeitable right to benefits under the plan, and, like Tom, dies prior to his annuity start date, the participant's surviving "spouse"—as defined by federal law—is entitled a QPSA. *Id.* ¶ 111.

[75] GLAD, *The Plaintiffs: Pedersen v. O.P.M., Jerry Passaro, available at* http://www.glad.org/doma/plaintiffs-pedersen/jerry-passaro.

Compounding Jerry's injury is the fact that DOMA will prevent him from collecting the Social Security death benefits to which he would have been entitled if Tom had been of the opposite sex.[80] Because DOMA has made him automatically ineligible for these important benefits, Jerry is having difficulty meeting expenses and paying property taxes on the house he shared with Tom.[81]

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[76] *Id.*; Pedersen Compl. ¶ 98.

[77] Pedersen Compl. ¶¶ 100-01.

[78] *See* Exh. C to Passaro Aff. (Dkt. No. 65-3); Pedersen Compl. ¶ 101.

[79] Pedersen Compl. ¶¶ 104, 107.

[80] *Id.* ¶¶ 115-16, 129.

[81] GLAD, *The Plaintiffs: Pedersen v. O.P.M., Jerry Passaro*, *available at* http://www.glad.org/doma/plaintiffs-pedersen/jerry-passaro; *see also* Passaro Aff. ¶ 32.

G. Michael Dragovich: A California State Employee Prevented From Enrolling His Husband In The Long-Term Care Insurance Program Offered To California Public Employees And Their Families.

Michael Dragovich and Michael ("Mike") Gaitley are another married same-sex couple who have suffered from the discriminatory effects of DOMA, specifically through DOMA's impact on state pension and health plans. Michael, a registered nurse and nurse coordinator at the University of California, San Francisco ("UCSF") Medical Center, and Mike, an attorney with the Legal Aid Society-Employment Center, met in 1979 when both were working as flight attendants.[82] They have been in a committed relationship for over 30 years, and were legally married under California law in June 2008.[83] Because Michael is a California state employee, he is entitled to purchase long-term health care coverage under the California Public Employees' Retirement System ("CalPERS") Long-Term Care Program for himself and his "family members".[84] Michael applied for and received coverage under the program for himself in 1997.[85]

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[82] Second Am. Compl. ¶¶ 19-20, *Dragovich v. U.S. Dep't of Treasury*, No. 10-01564 (N.D. Cal. Sept. 7, 2011) ("Dragovich Compl."); Decl. of Pl. Michael Dragovich in Supp. of Pls.' Mot. For Class Certification ¶ 3, *Dragovich v. U.S. Dep't of Treasury*, No. 10-01564 (N.D. Cal. Apr. 14, 2011) ("Dragovich Decl.").

[83] Dragovich Compl. ¶ 50.

[84] *Id.* ¶ 10.

Following their marriage in 2008, Michael was eager to acquire the same coverage for Mike, and promptly contacted a CalPERS program representative by phone to request an application.[86] The representative informed Michael that same-sex spouses are ineligible to apply for enrollment in the program because of federal law.[87] Following that conversation, Michael's attorney wrote a letter to CalPERS on Michael's behalf, objecting to the exclusion of same-sex spouses from long-term care coverage.[88] The response from CalPERS's assistant chief counsel explained that, because of DOMA, "enrollment of a same-sex spouse into the [Long-Term Care Program] would . . . make the plan non-compliant with IRC provisions based on DOMA and jeopardize the plan's tax-qualified status".[89] In this way, DOMA has prevented Michael, and numerous state employees like him, from securing spousal coverage under a plan designed to make it possible for state employees to affordably protect themselves and their families in the event of chronic injury or debilitating illness.[90]

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[85] *Id.* ¶ 19.

[86] *Id.* ¶ 59.

[87] *Id.*

[88] *Id.* ¶ 60.

[89] *Id.*

H. Lynda DeForge: A Federal Public Employee Denied Leave To Provide Care For Her Seriously Ill Spouse And To Tend To Her Own Serious Health Concerns.

DOMA unfairly denies working same-sex spouses the same flexibility in providing care for their spouses that similarly situated opposite sex spouses are afforded under the Family and Medical Leave Act ("FMLA").[91] The FMLA provides twelve work weeks of unpaid leave in any 12-month period to employees whose spouses suffer from a "serious health condition" in order to assist working spouses with balancing family and work commitments.[92] However, because of DOMA, the FMLA does not require employers to provide this benefit to employees married to a spouse of the same sex, and many do not.[93] As a result, DOMA works to create serious dilemmas when two same-sex partners both face serious health concerns.

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[90] Same-sex couples in other states have been similarly deprived of rights afforded to opposite-sex spouses by state pension and health plans. For example, New Hampshire public employees who have accrued over 30 years of service, as well as their spouses, are entitled to receive a medical cost subsidy through the state's retirement plan. However, New Hampshire's retirement plan does not extend this medical cost subsidy to same-sex spouses because, as a result of DOMA, they are not covered individuals under the Internal Revenue Code. Thus the retirement plan could risk its tax-qualified status if it were to extend this benefit to same-sex spouses. Pedersen Compl. ¶¶ 176-199.

[91] *See* Respect for Marriage Act: Hearing on S. 598 Before the S. Comm. on the Judiciary, 112th Cong. (2011) (written statement of The Williams Institute), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Meryer-Gates-Hunter-Pizer-Sears-Testimony-DOMA-Jul-2011.pdf.

The situation faced by Raquel Ardin and Lynda DeForge illustrates the pain that DOMA causes working same-sex spouses by excluding them from the FMLA's protections. Raquel and Lynda have been in a committed relationship for over 30 years after meeting while both served in the United States Navy, and were legally married in 2009 under the laws of Vermont.[94] Raquel, 57, was medically discharged from the Navy in 1978 after fracturing and dislocating her neck while abroad in service and undergoing two neck fusion surgeries.[95] Following her discharge, Raquel was employed by the United States Postal Service in Vermont, but was forced into disability retirement in 2005 due to degenerative arthritis in her neck, which, according to the

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[92] 29 U.S.C. § 2612(a)(1)(C).

[93] According to one 2011 analysis, 296 Fortune 500 Companies did not offer FMLA-equivalent benefits to employees with same-sex spouses. *See* Human Rights Campaign, *Family and Medical Leave Act: FMLA-Equivalent Benefit for LGBT Workers*, *available at* http://www.hrc.org/resources/entry/family-and-medical-leave-act-fmla-equivalent-benefit-for-lgbt-workers (last visited Feb. 26, 2013).

[94] Pedersen Compl. ¶¶ 132-33, 135.

[95] *Id.* ¶¶ 135-36.

Department of Veterans Affairs, rendered her "unemployable".[96]

Since 2005, Raquel's required course of treatment has consisted of quarterly injections into her neck, three on each side of her spinal cord, to address immobility, spasms and pain caused by her arthritis and the scar tissue from her surgeries. The injections she receives are painful and require bandaging of her neck due to bleeding.[97] The closest VA facility where Raquel's injections can be administered is in Newington, CT, about a two-and-a-half-hour drive from the home she shares with Lynda.[98] The nature of Raquel's disability and the pain she experiences before and after her treatments make it impossible for Raquel to drive herself to or from her appointments. Therefore, the responsibility falls on Lynda to ensure that Raquel receives the treatment that she critically needs.[99]

Prior to her retirement in late 2012, Lynda worked for the United States Postal Service in Vermont and, as a federal employee, was eligible under the FMLA to receive unpaid leave to care for a "spouse" with a serious health condition.[100] Thus, if Raquel, Lynda's lawful spouse, were male, Lynda would have been approved to take FMLA leave.

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[96] *Id.* ¶¶ 136, 138, 143.

[97] *Id.* ¶ 147.

[98] *Id.* ¶ 148.

[99] *Id.* ¶¶ 148-49.

[100] *Id.* ¶ 150.

However, because of DOMA, Lynda's application for FMLA leave to care for Raquel—one day every three months to transport Raquel to and from her appointments—was denied.[101] Since that denial, Raquel has undergone a series of surgeries which required Lynda to use a significant amount of her accumulated vacation time in order to care for Raquel.[102] As a consequence, prior to her retirement, Lynda had little vacation time left to tend to her own serious health concerns. For example, Lynda was scheduled to have knee surgery in the spring of 2011; however, Lynda postponed this surgery to accrue more vacation time so as to ensure that she would be paid for all or most of the fourteen weeks that she likely will need to recover from the surgery.[103] Lynda's vacation time was simply not sufficient to assure that proper attention was paid to both Lynda's and Raquel's health needs. Such dilemmas are precisely what the FMLA was designed to help workers avoid. Raquel and Lynda's situation thus poignantly illustrates how DOMA impairs the ability of spouses to care for each other and for themselves.

II. Executive Branch "Non-Enforcement" Of DOMA Is No Substitute For Conclusive Judicial Resolution Of DOMA's Constitutionality.

Any suggestion that the Executive Branch could avert the negative consequences of *Amica*'s proposed

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[101] *Id.* ¶¶ 152-55.

[102] *Id.* ¶¶ 156-57.

[103] *Id.* ¶ 161.

"lower court" approach by ceasing to enforce DOMA is misguided. Even if the Executive Branch wanted to and could choose no longer to enforce DOMA, a proposition that is far from well-established,[104] married same-sex couples and surviving spouses would still be forced to turn to the lower courts and administrative agencies in significant numbers to seek relief from DOMA's harmful effects.

First, many of the rights and benefits affected by DOMA are administered by private parties over whom the Executive Branch does not hold the same power of direction as it holds over its own agencies and departments. Thus, executive non-enforcement would not help individuals in situations similar to Jerry Passaro, who was denied the Bayer Plan annuity earned by his now deceased husband Tom and that, per ERISA, he would be automatically entitled to upon reaching age 55, were he or Tom of the opposite sex.[105]

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[104] *See* Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q. 865 (1994) (arguing that executive non-enforcement of unconstitutional statutes will very rarely, if ever, be constitutionally defensible). As Respondent Windsor's brief on the jurisdictional questions notes, the Appropriations Clause and the Anti-Deficiency Act also may operate to prevent federal agencies from extending to married same-sex couples the benefits that DOMA denies them. *See* Brief On The Jurisdictional Questions For Respondent Edith Schlain Windsor at 33-34.

[105] *Supra* pp. 26-29; *see also* Jennifer Staman, Congressional Research Service, *Same-Sex Marriage and Employee Benefit Plans: Legal Considerations* (Sept. 12, 2011).

Second, and more fundamentally, Executive Branch non-enforcement of DOMA could never provide the conclusive resolution of the law's constitutionality that is required for married same-sex couples to realize the full range of protections that federal law affords married opposite-sex couples. For opposite-sex couples, a legal marriage provides reasonable certainty that, regardless of what the future holds, a body of rights, benefits and safety nets will be available to them as they plan their futures and live their lives together. Married same-sex couples will never have that same degree of certainty so long as DOMA is on the books as good law—regardless of whether the Executive Branch currently is enforcing it—since a mere shift in the political winds could cause DOMA to swoop back into their lives and take those protections away.[106] As a consequence, a couple like Bette Jo Green and Jo Ann Whitehead—cancer survivors who, as discussed above, are unsure whether Bette Jo will be able to afford the home they now share without the Social Security survivor's benefits that, but for DOMA, she would be entitled to should Jo Ann die first—may be forced to make significant cut-backs or even sell their home now because they cannot know whether or not DOMA will be enforced when the time comes that those benefits will be needed.[107]

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[106] There have been occasions, historically, where an enacted law has been rendered dormant through non-enforcement by one administration, only to be resuscitated by a successor administration. *See* May, *supra* note 104, at 964-65 (discussing the Carter administration's decision not to enforce § 399 of the Public Telecommunications Act of 1978, which barred public radio and television shows from editorializing, because the administration believed that the provision violated the First Amendment, and the Reagan administration's subsequent decision to enforce the ban). There have also been instances where an administration has declined to defend the constitutionality of a statute or provisions thereof and a successor administration has reversed course and defended the statute. *See* Letter from Andrew Fois, Assistant Att'y Gen., to Hon. Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary 6-7 (Mar. 22, 1996), *available at* http://volokh.com/wp/wp-content/uploads/2011/02/DOJ1996.pdf.

That uncertainty also likely will prevent private sector employers and state-managed pension plans from extending federally regulated spousal benefits to employees married to a spouse of the same sex. For example, as discussed above, many private sector employers will not extend spousal health coverage to employees with spouses of the same sex because, as a result of DOMA, the contributions would be considered taxable income and result in increased payroll tax liability for the employer.[108] But even if the Executive Branch could assure private sector employers that they would not now be assessed additional taxes for contributing to the cost of same-sex spousal coverage, the fact that DOMA is still good law and the prospect that a successor administration would resume its enforcement likely would convince those employers to continue to exclude their employees' same-sex spouses from coverage, in order to avoid the complications and costs that would result from having to revoke spousal coverage at a later point in time. For similar reasons, Executive Branch non-enforcement of

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[107] *See supra* pp. 8-11.

[108] *See supra* note 24.

DOMA likely would not prompt state-administered pension funds to extend long-term care insurance to public employees, like Michael Dragovich,[109] with spouses of the same sex—even if the current administration could assure state-managed plans that they would not lose their tax-qualified status for covering their employees' same-sex spouses now, the fact that a successor administration could swiftly renew enforcing DOMA likely would convince such plans to continue to exclude same-sex spouses from coverage.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to exercise its jurisdiction in order to conclusively resolve the question of DOMA's constitutionality.

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[109] *Supra* pp. 30-32.

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UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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TABLE OF CONTENTS

Page

Statement of Interest of Amici 1

Summary of the Argument 1

ARGUMENT 4

I. Procreation is Not an Essential Element of Marriage 4

A. The Ability or Desire to Procreate Has Never Been the Defining Feature of or a Prerequisite for a Valid Marriage 4

B. The Constitutional Rights to Marry and to Procreate Are Distinct and Independent 8

C. Marriage Serves Multiple Purposes, the Majority of Which Are Not Related to Children. 11

II. The Federal Government Has Not Sought to Promote Biological Parenthood Over Other Forms of Parenthood 16

A. State and Federal Laws Do Not Privilege or Prefer Biological Parentage 17

B. The Federal Government Seeks to Provide Stability for All Families—Regardless of Their Biological Connection 25

III. This Court Has Rejected Differential Treatment of Children Based on the Circumstances of Their Birth 29

IV. DOMA Undermines Child Welfare Interests 31

A. DOMA Has No Rational Connection to the Asserted Goal of Encouraging Heterosexuals to Have Children Within Marriage 31

B. BLAG's Claim That Opposite-Sex Couples Are Better Parents Than Married Same-Sex Couples Lacks Any Footing in Reality 33

C. DOMA Undermines the Well-Being of Children. 34

CONCLUSION 36

APPENDIX:

Full list of *amici*, including their institutional affiliations 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Astrue v. *Capato ex rel. B.N.C.*,
132 S. Ct. 2021 (2012)....................................18, 19

Beck v. *Beck*,
256 So.2d 420 (Ala. 1971). 5

Carey v. *Population Servs., Int'l*,
431 U.S. 678 (1977)..9

Chatterjee v. *King*,
280 P.3d 283 (N.M. 2012) 24

City of Cleburne v. *Cleburne Living Ctr.*,
473 U.S. 432 (1985)..34

Eisenstadt v. *Baird*,
405 U.S. 438 (1972)....................................8, 9, 11

Feynman v. *Feynman*,
4 N.Y.S.2d 787 (N.Y. Sup. Ct. 1983) 7

Franklin v. *Franklin*,
28 N.E. 681 (Mass. 1891)..5

Goodridge v. *Dep't of Pub. Health*,
798 N.E.2d 941 (Mass. 2003)........................11, 35

Griswold v. *Connecticut*,
381 U.S. 479 (1965)...9, 11

Heller v. *Doe*,
509 U.S. 312 (1993)..1, 36

In re G.S.R.,
72 Cal. Reptr. 3d. 398 (Cal. Ct. App. 2008) 24

In re Marriage Cases,
183 P.3d 384 (Cal. 2008)........................5, 6, 35, 36

In re Marriage of Burnside,
777 S.W.2d 660 (Mo. Ct. App. 1989) 5

In re Marriage of Buzzanza,
61 Cal. App. 4th 1410 (Cal. Ct. App. 1998)........19

Jackson v. *Abercrombie*,
No. 11-00734, 2012 U.S. Dist. LEXIS 111376 (D. Haw. Aug. 8, 2012)..........................15

Jarzem v. *Bierhaus*,
415 So. 2d 88 (Fla. Dist. Ct. App. 1982)...............7

Lapides v. *Lapides*,
171 N.E. 911 (N.Y. 1930).......................................6

Laura WW v. *Peter WW*,
856 N.Y.S.2d 258 (N.Y. App. Div. 2008) 19

Lawrence v. *Texas*,
539 U.S. 558 (2003)..5, 10

Lehr v. *Robertson*,
463 U.S. 248 (1983)..22, 23

Levy v. *Louisiana*,
391 U.S. 68 (1968)...30

Martin v. *Otis*,
124 N.E. 294 (Mass. 1919).....................................7

Massachusetts v. *U.S. Dep't of Health & Human Servs.*,
682 F.3d 1 (1st Cir. 2012) 31, 32

Michael H. v. *Gerald D.*,
491 U.S. 110 (1989)..........................18, 20, 21, 22

Mitchell v. *Mitchell*,
11 A.2d 898 (Me. 1940) 5

Pedersen v. *Office of Personnel Mgmt.*,
881 F. Supp. 2d 294 (D. Conn. 2012) 31, 32, 34

Perry v. *Brown*,
671 F.3d 1052 (9th Cir. 2012) 32

Quilloin v. Walcott,
434 U.S. 246 (1978) 22

Romer v. *Evans*,
517 U.S. 620 (1996) 36

Santosky v. *Kramer*,
455 U.S. 745 (1982) 23, 24

Smith v. *Org. of Foster Families for Equal. & Reform*,
431 U.S. 816 (1977) 23, 24

Trammel v. *United States*,
445 U.S. 40 (1980) 14

Turner v. *Safley*,
482 U.S. 78 (1987) 9

U.S. Dep't of Agric. v. *Moreno*,
413 U.S. 528 (1973) 33

Weber v. *Aetna Cas. & Surety Co.*,
406 U.S. 164 (1972) 30

Windsor v. *United States*,
699 F.3d 169 (2d Cir. 2012) 21, 32, 33

Zablocki v. *Redhail*,
434 U.S. 374 (1978) 10

STATUTES, RULES AND REGULATIONS

5 U.S.C. § 3110 14
5 U.S.C. § 8441 20
5 U.S.C. § 9001 20
8 U.S.C. § 1101 18
8 U.S.C. § 1154 13
10 U.S.C. § 1072 20
11 U.S.C. § 302 14
18 U.S.C. § 208 14
26 U.S.C. § 23 .... 26, 27
26 U.S.C. § 36C 27
26 U.S.C. § 137 27
26 U.S.C. § 151 27
26 U.S.C. § 152 .... 20, 27
26 U.S.C. § 401 14
26 U.S.C. § 414 14
26 U.S.C. § 1041 14
26 U.S.C. § 2056 15
26 U.S.C. § 6013 14
28 U.S.C. § 1738A 29
28 U.S.C. § 1738B 29
29 U.S.C. § 1056 14
29 U.S.C. § 2612 13
37 U.S.C. § 401 20

38 U.S.C. § 101 20

38 U.S.C. § 1115 14

38 U.S.C. § 1311 14

42 U.S.C. § 402 14

42 U.S.C. § 416 ....18, 20

42 U.S.C. § 654 28

42 U.S.C. § 670 26

Adoption and Safe Families Act of 1997,
Pub. L. No. 105-89, H.R. 867 26

ALA. R. EVID. 504 13

CAL. CIV. CODE § 682 12

CAL. FAM. CODE § 7613 19

CAL. WELF. & INST. CODE § 361 24

Deadbeat Parents Punishment Act of 1998,
18 U.S.C. § 228 29

Defense of Marriage Act Section 3,
1 U.S.C. § 7 ....*passim*

Family Medical Leave Act,
29 U.S.C § 2612 13

Family Support Act of 1988,
Pub. L. No. 100-485, 102 Stat. 2343 28

FED. R. EVID. 501 14

HAW. R. EVID. 505 13

HAW. REV. STAT. § 88-85 12

HAW. REV. STAT. § 235-5.5 13

IOWA CODE § 422.9 13

Iowa Code § 597.14 12

Iowa Code § 633.211 12

Iowa Code § 633.212 12

I.R.C. § 2056 13

Ky. Rev. Stat. Ann. § 311.631 12

Md. Code Ann. Health-Gen. § 13-2301 6

Minn. Stat. § 65B.43(5) 13

Multiethnic Placement Act of 1994,
42 U.S.C. § 1996 26

N.Y. Dom. Rel. Law § 7 8

N.Y. Dom. Rel. Law § 73 19

N.Y. Dom. Rel. Law § 170 8

N.Y. Est. Powers & Trusts Law § 5-3.1 12

N.Y. Est. Powers & Trusts Law § 9-1.3 6

N.Y. Ins. Law § 3221 13

N.Y. Ret. & Soc. Sec. Law § 162 12

N.Y. Tax Law § 952 13

N.Y. Workers Comp. Law § 16 12

N.Y. Workers Comp. Law § 33 12

Personal Responsibility and Work Opportunity Reconciliation Act of 1996,
Pub. L. No. 104-193, 110 Stat. 2105 28

Treas. Reg. § 1.106-1 35

Unif. Parentage Act § 4 23

Unif. Parentage Act § 5 24

Unif. Parentage Act § 102 cmt. 19

UNIF. PARENTAGE ACT § 201 19

VA. CODE ANN. § 54.1-2986 12

WASH. REV. CODE § 560.60.060 13

WIS. STAT. ANN. § 765.03 6

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ADOPTION LAW & PRACTICE,
(J.H. Hollinger ed., 1988 & Supp. 2011) 20

Linda S. Anderson,
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June Carbone & Naomi Cahn,
Marriage, Parentage, and Child Support, 45 FAM. L.Q. 219 (2011) 18

CTRS. FOR DISEASE CONTROL AND PREVENTION,
2009 ASSISTED REPRODUCTIVE TECHNOLOGY REPORT (2009) 25

CTRS. FOR DISEASE CONTROL AND PREVENTION,
DIVORCE RATES BY STATE: 1990, 1995, AND 1999–2011 32

CTRS. FOR DISEASE CONTROL AND PREVENTION,
MARRIAGE RATES BY STATE: 1990, 1995, AND 1999–2011 31

CTRS. FOR DISEASE CONTROL AND PREVENTION,
USE OF CONTRACEPTION IN THE UNITED STATES: 1982-2008 (2009) 11

Homer H. Clark, Jr.,
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Memorandum from the Deputy Assistant Att'y Gen. on Whether the Defense of Marriage Act Precludes the Non-Biological Child of a Member of a Vermont Civil Union from Qualifying for Child's Insurance Benefits Under the Social Security Act
(Oct. 17, 2007) 18

JANEMARIE MULVEY,
CONG. RESEARCH SERV., TAX BENEFITS FOR HEALTH INSURANCE AND EXPENSES: OVERVIEW OF CURRENT LAW (2011) 35

ROBERT S. TAFT & LEONARD G. FLORESCUE, TAX ASPECTS OF DIVORCE AND SEPARATION (2012) 12

Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS. L. REV. 129 (2008) 12

U.S. PUB. HEALTH SERV.,
VITAL STATISTICS RATES IN THE UNITED STATES 1900-1940 (1947) 27

STATEMENT OF INTEREST OF AMICI[1]

Amici, professors of family and child welfare law, submit this brief in support of Appellee Edith Schlain Windsor and in support of affirmance of the judgment below.[2] This brief seeks to provide the Court with a more complete understanding of the history of law and policy with respect to the relationship between marriage and procreation. We explain that the purported justifications for the Defense of Marriage Act ("DOMA"), section 3, asserted by the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG") and its amici that pertain to procreation, childrearing, and child welfare lack a "footing in the realities" of the law, policy, history, or logic of marriage and do not provide a rational basis for DOMA. *Heller* v. *Doe*, 509 U.S. 312, 321 (1993). We also demonstrate how DOMA undermines and is inconsistent with other federal and state laws and policy regarding families and childrearing.

SUMMARY OF THE ARGUMENT

The essence of BLAG's argument in support of DOMA's constitutionality is that the federal government may exclude same-sex couples who are lawfully married under state law from all federal marital benefits, protections and responsibilities because the "core purpose and defining characteristic" of marriage is "to deal with the inherently procreative nature of the male-female relationship." (Brief of the Bipartisan Legal Advisory Group ("BLAG Br.") 45; *see id.* at 10–11.) Specifically, BLAG contends that DOMA's purposes include promoting "responsible procreation and childrearing" by opposite-sex couples by encouraging such couples to raise their biological children in a stable setting. (*Id.* at 11.) According to BLAG, the federal government's core interest in extending marital benefits is to support families that consist of, or potentially could consist of, children and their married biological parents.

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[1] This brief is filed with the written consent of Petitioner and Respondents. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored any portion of this brief, nor did any person or entity other than the amici curiae make any monetary contribution to the preparation or submission of this brief.

[2] A full list of *amici*, including their institutional affiliations, is set forth in the Appendix to this brief.

As the Second Circuit correctly held, and as amici here explain, BLAG's asserted justifications cannot sustain the constitutionality of DOMA's categorical exclusion of married same-sex couples from all federal marital benefits, protections and responsibilities.[3] First, amici show that the States' interest in regulating marriage, and the federal government's interest in supporting marital families, have never been conditioned on a couple's ability or willingness to procreate. Although procreation often occurs within marriage, it is not a prerequisite to marriage. In addition, this Court has made clear that the fundamental constitutional rights to marry and to procreate are distinct and independent. Moreover, there is no singular purpose of marriage; marriage serves multiple purposes.

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[3] While amici agree that the Second Circuit correctly applied heightened-scrutiny analysis to the sexual orientation classification in DOMA, amici believe that DOMA is unconstitutional under any standard of review.

Second, amici show that there is no legal basis for the assertion that federal law favors *biological* parentage over the well-considered decisions of many married couples—both opposite-sex and same-sex—to adopt children or conceive children through assisted reproduction. Federal law and policy reflect a deep commitment to the welfare of *all* children, whether or not they are raised by their biological parents. In fact, this Court has made clear that the Equal Protection Clause prohibits the disparate treatment of children based on the circumstances of their birth. In sum, BLAG's claim that the "core purpose and defining characteristic" of marriage is to link marriage and unassisted procreation (*id.* at 45), lacks footings in law and policy. DOMA, therefore, fails even under the lowest level of constitutional scrutiny.

Finally, as family and child welfare law professors, amici share the government's commitment to promoting the welfare of children and encouraging parents to be responsible for their children's well-being. Amici agree that marriage can benefit children by providing support and stability to their families. However, DOMA hinders rather than furthers any federal interest in child welfare because its effect is to *deny* hundreds of important rights and protections to a class of married parents and, by extension, their children. DOMA does not change the legal status of any opposite-sex couples or their children, expand their federal protections, or offer any additional inducements to heterosexuals to engage in "responsible" procreation or childrearing. DOMA's sole effect is to harm married same-sex couples and their children, while leaving opposite-sex couples (and their children) untouched. Therefore, there is no rational relationship between DOMA and furthering the welfare of families consisting of children and their biological parents. DOMA's effect is contrary to any legitimate federal concerns about child welfare.

ARGUMENT

I. Procreation is Not an Essential Element of Marriage.

BLAG broadly claims that adhering to a traditional definition of marriage is rational because "opposite-sex relationships have a unique tendency to produce unplanned and unintended offspring," which makes it appropriate not to "extend the benefit of marriage" to relationships that do not accidentally procreate. (BLAG Br. 45.) This assertion is not supported by the history or law of marriage.

A. The Ability or Desire to Procreate Has Never Been the Defining Feature of or a Prerequisite for a Valid Marriage.

Neither sexual intimacy nor the willingness or ability of a married couple to biologically procreate has ever been a prerequisite for a valid marriage under state law.

For example, states did not and do not require spouses to consummate their marriage. Once the parties fulfilled the statutory requirements for solemnization and licensing, they were married, regardless of whether they shared any form of sexual intimacy. *See, e.g.*, *Mitchell* v. *Mitchell*, 11 A.2d 898, 906 (Me. 1940) ("[C]oition is unnecessary in the case of a ceremonial marriage.") (internal citation omitted); *Franklin* v. *Franklin*, 28 N.E. 681, 682 (Mass. 1891) ("[C]onsummation of a marriage by coitus is not necessary to its validity."); *In re Marriage of Burnside*, 777 S.W.2d 660, 663 (Mo. Ct. App. 1989) (consummation unnecessary to validate marriage); *Beck* v. *Beck*, 246 So. 2d 420, 428–29 (Ala. 1971) (sexual activity is not essential for valid common law marriage).

Similarly, as the legislative history of DOMA admits, no state has ever required prospective spouses to agree to procreate, to remain open to procreation, or even to be able to procreate, to marry. H.R. Rep. No. 104-664, at 14 (1996), *reprinted in* U.S.C.C.A.N. 2905, 2919 ("[S]ociety permits heterosexual couples to marry regardless of whether they intend or are even able to have children."); *see also, e.g.*, *Lawrence* v. *Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) ("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.") (internal citation omitted); *In re Marriage Cases*, 183 P.3d 384, 431 (Cal. 2008) ("[M]en and women who desire to raise children with a loved one in a recognized family but who are physically unable to conceive a child with their loved one never have been excluded from the right to marry.").

Likewise, infertility[4] is not a basis for invalidating a marriage. *See, e.g., In re Marriage Cases*, 183 P.3d at 431 n.48 ("[N]o case has suggested that an inability to have children—when disclosed to a prospective partner—would constitute a basis for denying a marriage license or nullifying a marriage"); *Lapides* v. *Lapides*, 171 N.E. 911, 913 (N.Y. 1930) ("The inability to bear children is not such a physical incapacity as justifies an annulment."). Some states expressly presume female infertility after a certain age, *see, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(e)(1) (women over age 55 presumed infertile); MD. CODE ANN. HEALTH-GEN. § 13-2301 (defining "women of childbearing age" as women between 15 and 45 years old), but this does not disqualify such women from marrying or enjoying federal marital protections. Indeed, some states permit certain classes of people to marry only if they *cannot* procreate. *See, e.g.*, WIS. STAT. ANN. § 765.03(a) (first cousins can marry only if "the female has attained the age of 55 years or where either party . . . submits an affidavit signed by a physician stating that either party is permanently sterile.")

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[4] Data from 2002 show that approximately seven million women and four million men suffer from infertility. Michael L. Eisenberg M.D. *et al.*, *Predictors of not Pursuing Infertility Treatment After an Infertility Diagnosis: Examination of a Prospective U.S. Cohort*, 94 FERTILITY & STERILITY 2369, 2369 (2010). Approximately two to three million couples are infertile. ENCYC. OF CONTEMP. AM. SOC. ISSUES 1182 (Michael Shally-Jensen ed., 2011).

Annulments related to infertility or procreation generally are granted only when there has been a misrepresentation about the spouse's fertility or desire to procreate. *See, e.g.*, *Jarzem* v. *Bierhaus*, 415 So. 2d 88, 90 (Fla. Dist. Ct. App. 1982) ("[I]f the wife's claim for annulment or divorce had been based upon the fact that the husband was impotent, it would have been unavailing if she had knowledge of such fact before the marriage."); *Feynman* v. *Feynman*, 4 N.Y.S.2d 787, 787–88 (N.Y. Sup. Ct. 1938) (granting annulment where man kept silent when woman discussed children before marriage, consummated marriage, but later admitted he "hated children" and "never intended to live" with wife); *cf. Martin* v. *Otis*, 124 N.E. 294, 296 (Mass. 1919) (marriage not induced by fraud where woman disclosed physical incapacity).[5]

State divorce and annulment laws similarly reflect the principle that the right to marry is not dependent upon the ability to procreate. "Fault-based" divorce and annulment laws traditionally focused on the failure of the *spousal relationship*, listing as grounds for divorce abandonment, cruel and inhuman treatment, imprisonment, and adultery.[6] More recent "no-fault" divorce laws, now enacted in every state, are even more explicit that the basis for the divorce is the failure of the spousal relationship.[7]

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[5] While someone who is deceived about a spouse's ability to have sexual relations in some states may *choose* to end the marriage, the state does not void a marriage for this reason. *See, e.g.*, *Martin*, 124 N.E. at 296 (impotence renders a marriage voidable by the disappointed party, but not void). If the marriage is acceptable to the spouses without sexual relations, state mar[illegible] laws have upheld that choice.

The lack of a procreation-based foundation for valid marriage or divorce under state law renders implausible BLAG's contention that the core purpose of marriage has been to encourage and protect families with biological children.

B. The Constitutional Rights to Marry and to Procreate Are Distinct and Independent.

The fundamental rights to marry and to procreate are distinct. "If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as a decision whether to bear or beget a child." *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) (emphasis in original). Accordingly, individuals possess a fundamental right to choose whether or not to procreate that is not dependent on their marital status. *See Carey* v. *Population Servs., Int'l*, 431 U.S. 678, 687 (1977) ("[T]he constitutional protection of individual autonomy in matters of childbearing is not dependent" on marital status); *Griswold* v. *Connecticut*, 381 U.S. 479, 485–86 (1965) (married couples have the right to use contraception, thereby avoiding procreation); *Eisenstadt*, 405 U.S. at 453 (married and unmarried persons have the same right to contraception).

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[6] *See, e.g.*, N.Y. DOM. REL. LAW §§ 7, 170(1)–(6); 2 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §§ 14.1–14.8, at 1–53 (2d ed. 1988).

[7] No-fault divorces are granted upon a finding that "the relationship between husband and wife has broken down irretrievably." N.Y. DOM. REL. LAW § 170(7); *see also* Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1676 n.41, 1704 (2011).

This Court has also made clear that individuals cannot be excluded from the right to marry simply because they are unable to engage in procreation. *Turner* v. *Safley*, 482 U.S. 78 (1987), struck down a Missouri regulation under which approval of a prison inmate's marriage was generally given only when a pregnancy or the birth of an out-of-wedlock child was involved. *Id.* at 82, 96–97. The Court recognized that incarcerated prisoners—even those with no right to conjugal visits, and thus no opportunity to procreate—have a fundamental right to marry, because many "important attributes of marriage remain, . . . after taking into account the limitations of prison life." *Id.* at 95. The Court explained that marriage has multiple purposes unrelated to procreation, *e.g.*, "the expression of emotional support and public commitment," "exercise of religious faith," "expression of personal dedication," and "the receipt of government benefits." *Id.* at 95–96. Even under the deferential standard applicable to prison regulations, these remaining non-procreative elements of marriage were held to be "sufficient to form a constitutionally protected marital relationship in the prison context." *Id.* at 96.

BLAG reduces the purpose of marriage to no more than society's response to "the biological fact that opposite-sex relationships have a unique tendency to produce unplanned and unintended offspring." (BLAG Br. 45.) But as Justice Kennedy noted in *Lawrence*, "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." 539 U.S. at 567. BLAG's narrow understanding of the purpose of marriage demeans the depth and significance of the marital relationship.

This Court has also rejected attempts to prevent "irresponsible procreators" from marrying. Marriage is a fundamental right for all individuals, regardless of their procreative abilities or choices. *See Zablocki* v. *Redhail*, 434 U.S. 374, 386 (1978) ("[T]he decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing and family relationships"). In *Zablocki*, Wisconsin sought to deny the right to marry to parents the state considered to be irresponsible because they had failed to pay child support. 434 U.S. at 375. In holding that conditioning marriage on a person's parenting conduct was an unconstitutional infringement of the right to marry, the Court distinguished between the right to marry and the separate rights of "procreation, childbirth, child rearing, and family relationships." *Id.* at 386, 388–89.

Finally, BLAG's assertion that opposite-sex relationships are "inherently procreative" (BLAG Br. 45), ignores not only the fact that many heterosexual couples are infertile[8] but also the widespread availability of contraception in the wake of *Griswold* and *Eisenstadt*. By 2008, "[c]ontraceptive use in the United States [was] virtually universal among women of reproductive age," with 99% of sexually active women having used contraception, and between 70 and 80% of married or cohabiting women of childbearing age currently using contraceptives.[9]

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[8] *See* note 4, *supra*.

C. Marriage Serves Multiple Purposes, the Majority of Which Are Not Related to Children.

While states regulate entry into the marital relationship, both state and federal law provide numerous benefits and assign numerous responsibilities to married couples in recognition of the multiple purposes that marriage serves. "[T]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death." *Goodridge* v. *Dep't of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003) (listing statutes affected by marital status under Massachusetts law). *See also generally* Amicus Brief of American Historical Association.

The vast majority of these state and federal marital benefits enable the spouses to protect and foster their personal and financial relationship to one another. Under state law, married couples receive many protections and benefits and assume mutual responsibilities pertaining, for instance, to health care decisions,[10] workers' compensation and pension benefits,[11] property ownership,[12] spousal support,[13] inheritance,[14] taxation,[15] insurance coverage,[16] and testimonial privileges.[17]

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[9] CTRS. FOR DISEASE CONTROL AND PREVENTION, USE OF CONTRACEPTION IN THE UNITED STATES: 1982-2008, 7, 25 & tbl. 8 (2009).

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[10] *See, e.g.*, KY. REV. STAT. ANN. § 311.631(1) (spouse may make health-care decisions for incapacitated spouse); VA. CODE ANN. § 54.1-2986(A) (same).

[11] *See, e.g.*, HAW. REV. STAT. § 88-85(a) (accidental death benefit of government employee payable to surviving spouse); N.Y. WORKERS COMP. LAW §§ 16, 33 (workers' compensation death benefits to surviving spouse); N.Y. RET. & SOC. SEC. LAW § 162 (certain widows entitled to supplemental pension payments).

[12] *See, e.g.*, CAL. CIV. CODE § 682 (married persons may own community property); LEONARD GABINET, TAX ASPECTS OF MARITAL DISSOLUTION §§ 3:6–3:10 (2d ed. 2005) (summarizing spousal property rights in various states); ROBERT S. TAFT & LEONARD G. FLORESCUE, TAX ASPECTS OF DIVORCE AND SEPARATION § 2.02 (updated 2012) (discussing state rules governing rights and liabilities of marriage, including property rights).

[13] *See, e.g.*, 1 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 6.1, at 251–52 (2d ed. 1988) (spouses owe duty to support each other); IOWA CODE § 597.14 (family and educational expenses chargeable to both spouses).

[14] *See, e.g.*, IOWA CODE §§ 633.211–12 (surviving spouse has priority claim when spouse dies intestate); N.Y. EST. POWERS & TRUSTS LAW § 5-3.1 (excluding certain property from estate, for benefit of surviving spouse and children); Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 160 (2008) ("With the exception of Georgia, every American state limits the ability of a testator to disinherit a surviving spouse.").

[15] *See, e.g.*, IOWA CODE § 422.9 (1) (standard deduction for spouses filing jointly, surviving spouse, or head of household); N.Y. TAX LAW § 952 & I.R.C. § 2056 (together, reducing New

In the more than 1,000 references to marriage under federal law, Congress likewise recognizes the diverse purposes of marriage, most of which have nothing to do with the ability or willingness to bring children into a family. Numerous federal legal protections assume and protect the mutual loyalty of spouses and their emotional interdependence. Under the Family and Medical Leave Act, qualified workers in a covered workplace may take a leave to care for a seriously ill spouse. 29 U.S.C. § 2612(a)(1)(C) & (D). When a U.S. citizen becomes engaged to and marries a foreign national, he or she may petition for an "immediate relative" visa for the non-citizen spouse to enable the couple to remain together. 8 U.S.C. § 1154(a)(1)(A)(i), (b), (c). And, the Federal Rules of Evidence recognize the common-law rule that spouses cannot be compelled to testify against one another, furthering "the important public interest in marital harmony." *Trammel* v. *United States*, 445 U.S. 40, 53 (1980); *see also* FED. R. EVID. 501, advisory committee's note.

Many other federal laws promote the economic interdependence of a married couple. These include

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York estate tax imposed where property passes from decedent to his or her surviving spouse); HAW. REV. STAT. § 235-5.5 (establishing deduction for spouses filing joint tax return).

[16] *See, e.g.*, MINN. STAT. § 65B.43(5) (defining "insured" to include a spouse under no-fault automobile insurance law); N.Y. INS. LAW § 3221(e)(7) (spouse has right to convert group medical insurance policy to individual policy upon death or divorce of insured spouse).

[17] *See, e.g.*, ALA. R. EVID. 504(b); HAW. R. EVID. 505; WASH. REV. CODE § 560.60.060.

the ability to file income taxes under the "married" status, 26 U.S.C. § 6013, the ability to file a joint bankruptcy case, 11 U.S.C. § 302(a), Social Security spousal and surviving spouse benefits, 42 U.S.C. § 402(b)–(c),(e)–(f), increased veterans' disability payments upon marriage, 38 U.S.C. § 1115, and death benefits for a surviving spouse, 38 U.S.C. § 1311. Spouses can transfer assets to each other during marriage or at divorce without incurring added tax burdens. 26 U.S.C. § 1041. At divorce, courts may issue a Qualified Domestic Relations Order to divide otherwise non-divisible retirement assets. 29 U.S.C. § 1056(d)(1); 26 U.S.C. §§ 401(a)(13)(B), 414(p). Conflict of interest rules prohibit public officials from using their positions to promote their spouse's professional or financial interests. 5 U.S.C. § 3110; 18 U.S.C. § 208.

These and most of the other more than 1,000 federal marital rights and obligations do not relate in any way to procreation or childrearing.[18] Moreover, as described in more detail below, the marital benefits provisions that *do* relate to children and childrearing are not dependent upon a biological parent-child relationship. Indeed, some of these provisions explicitly encourage the formation of parent-child relationships in the absence of a biological connection.

BLAG's brief conspicuously fails to explain how denying Appellee access to the marital protection at issue in this case—the spousal exemption from the federal estate tax, 26 U.S.C. § 2056(a)—promotes any interest relating to procreation or children. Clearly, no deceased spouse can engage in unassisted procreation, and surviving spouses receive this exemption regardless of whether they had ever raised, or were raising children when their spouses died.

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[18] For a full overview, *see* GEN. ACCOUNTING OFFICE REPORT GAO-04-353R, DEFENSE OF MARRIAGE ACT - UPDATE TO PRIOR REPORT (2004).

In sum, there is no historical or legal justification to support BLAG's claim that the "core purpose and defining characteristic" of marriage is to link marriage and unassisted procreation. (BLAG Br. 45.)[19] While marriage is a relationship in which unassisted procreation often occurs, many married couples use assisted reproduction and adoption to bring children into their families. Others marry when they are beyond childbearing age; others are childless by choice or for other reasons. Amici do not claim that procreation and marriage never go hand in hand, but BLAG's position that the core purpose of marriage is procreation diminishes the institution of marriage and ignores its myriad other purposes, including its traditional protections of the mutual love of two individuals and their exclusive commitment to each other.

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[19] A Hawaii district court recently upheld Hawaii's marriage ban based on the claim that the core purpose of marriage is to further the State's alleged interest in responsible procreation. *Jackson* v. *Abercrombie*, No. 11-00734, 2012 U.S. Dist. LEXIS 111376 (D. Haw. Aug. 8, 2012). As detailed herein, however, procreation—responsible or not—is not and never has been an essential element of marriage, and the reasoning of the *Jackson* court lacks a footing in law or reality. Moreover, because DOMA does not provide anything to heterosexual couples—the only thing it does is deny protections to married same-sex couples—DOMA has no possible or plausible impact on their decisions concerning procreation and marriage.

II. The Federal Government Has Not Sought to Promote Biological Parenthood Over Other Forms of Parenthood.

BLAG contends that denying federal marital protections to married same-sex couples rationally promotes the federal government's alleged goal of promoting children's welfare by encouraging two biological parents to raise their own children. (*See, e.g.*, BLAG Br. 11 ("Congress sought to encourage the raising of such children by both their biological parents in a stable family structure.").) This alleged preference for biological parenting is the keystone of BLAG's effort to explain DOMA's unequal treatment of married same-sex and opposite-sex couples.

But federal law and policy do not support this purported preference. First, state parentage law—from which federal law draws—does not prefer or privilege biology over all other factors. Moreover, this Court repeatedly has upheld States' decisions not to privilege biology over other bases for establishing parentage.

In seeking support for its claims from this Court's prior decisions, BLAG incorrectly conflates legal parentage and biological parentage. Federal and state laws, and decisions of this Court, have protected and continue to protect *legally recognized* parents and their childrearing decisions from undue interference by the government or private parties. What BLAG fails to acknowledge is that this protection from undue interference applies to all legal parents—biological and non-biological.

Contrary to BLAG's claims, federal law and decisions of this Court recognize, support and encourage legal recognition of parent-child relationships between children and adults who are not biologically related. Further, this Court has made clear that laws may not discriminate against children based on the circumstances of their birth.

A. State and Federal Laws Do Not Privilege or Prefer Biological Parentage.

While amici agree that security and stability for children are vital interests, BLAG treats the federal government's interest in supporting marriage as a secure and stable setting for raising children as being equivalent to a purported interest in privileging the families of two *biologically* related parents and their children. (*See* BLAG Br. 48 ("Therefore, when government offers special encouragement and support for relationships that can result in mothers and fathers jointly raising their biological children, it rationally furthers its legitimate interest in promoting this type of family structure in a way that extending similar regulation to other relationships would not").) This emphasis on biological parenting is not consistent with federal or state laws or policies affecting marriage, parentage, or child welfare.

Federal law generally references and incorporates state family and parentage law.[20] As this Court unanimously explained in *Astrue* v. *Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2030 (2012), "a biological parent is not necessarily a child's parent under [state] law."

For example, all 50 states presume that a husband is a child's legal parent. *See, e.g.*, June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 220 (2011) ("All states continue to recognize at least a rebuttable presumption that a child born within marriage is the child of the husband, and many limit the circumstances in which it can be rebutted." (footnotes omitted)). And this Court has held that a state may conclude that a husband is a child's father even over the objection of the child's involved biological father. *Michael H.* v. *Gerald D.*, 491 U.S. 110, 131–32 (1989).

In addition to the traditional presumption of parentage based on marriage, there are many other circumstances under which a person who is not genetically related to a child may be the child's legal parent under state law. For example, "[state] laws directly addressing use of today's assisted reproduction technology do not make biological parentage a universally determinative criterion." *Astrue*, 132 S. Ct. at 2030. Most states confer legal parentage on spouses who use assisted reproduction with genetic material provided by others.[21] Additionally, both the original and the revised Uniform Parentage Act ("UPA") recognize multiple bases for establishing legal parentage independent of a biological or genetic connection between parent and child, or a parent's marital status. Rather, parentage can depend on some combination of an individual's intent to parent and his or her actual performance of parental responsibilities. UNIF. PARENTAGE ACT § 102, cmt., § 201 (amended 2002).[22]

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[20] *See, e.g.*, 42 U.S.C. § 416(h)(2)(A) (Social Security Act looks to state law to determine whether individual is a "child" of the insured wage-earner); 8 U.S.C. § 1101(b)(1)(C) ("a child legitimated under the law of the child's residence or domicile" included within definition of "child" for purposes of immigration and nationality law); *see also* Memorandum from the Deputy Assistant Att'y Gen. on Whether the Defense of Marriage Act Precludes the Non-Biological Child of a Member of a Vermont Civil Union from Qualifying for Child's Insurance Benefits Under the Social Security Act (Oct. 17, 2007) (DOMA does not prevent the non-biological child of a partner in a Vermont Civil Union from receiving child's insurance benefits).

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[21] "[T]he establishment of fatherhood and the consequent duty to support when a husband consents to the artificial insemination of his wife is one of the well-established rules in family law." *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 286 (Cal. Ct. App. 1998); *see also, e.g.*, CAL. FAM. CODE § 7613(a); N.Y. DOM. REL. LAW § 73; *Laura WW* v. *Peter WW*, 856 N.Y.S.2d 258 (N.Y. App. Div. 2008). *See also generally* Linda S. Anderson, *Adding Players to the Game: Parentage Determinations When Assisted Reproductive Technology Is Used to Create Families*, 62 ARK. L. REV. 29, 34–35 (2009); Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples*, 39 FAM. L. Q. 683 (2005); Courtney G. Joslin, *Protecting Children (?): Marriage, Gender and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010).

[22] The UPA has "four separate definitions of 'father' to account for the permutations of a man who may be so classified." UNIF. PARENTAGE ACT § 102, cmt. (amended 2002).

Another means for establishing legal parentage between a child and an individual who is not biologically related to the child is, of course, adoption. Every state has laws facilitating adoption by individuals who are not a child's biological parents. *See* ADOPTION LAW & PRACTICE, at ch. 1 (J.H. Hollinger ed. 1988 & Supp. 2011).[23] Adoptive parents have all of the same rights and obligations as any other legal parent, including biological legal parents. *Id.* at ch. 1. Not only are adopted children eligible for many federal benefits,[24] the federal government also actively ***supports*** adoption and assisted reproduction through a variety of laws, policies and spending measures that directly contradict BLAG's claim that the federal government favors biological parentage.

Thus, under state law there are a range of circumstances under which a biological parent may not be recognized as a child's legal parent. BLAG's contrary description is misleading and incorrect. For example, BLAG argues that "when both biological parents want to raise their child, the law has long recognized a distinct preference for the child to be raised by those biological parents." (BLAG Br. 47).[25] In addition to being an inaccurate description of state parentage law, this Court on numerous occasions has upheld States' decisions *not* to privilege biology over all other factors. This Court has stressed the importance to children of established and stable parent-child relationships, even when those relationships are not premised on biology.

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[23] No state bars lesbian or gay individuals from adopting children. COURTNEY G. JOSLIN & SHANNON P. MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 2:10, at 1 (2012).

[24] *See, e.g.*, 42 U.S.C. § 416(e) (Social Security benefits); 5 U.S.C. § 8441(4) (federal employee survivor annuities); 5 U.S.C. § 9001(5)(C) (federal employee insurance benefits); 26 U.S.C. § 152(f)(1) (income tax); 38 U.S.C. § 101(4)(A) (veteran survivor benefits); 37 U.S.C. § 401(b) (military pay and allowances); 10 U.S.C. § 1072(6)(B) (military medical and dental care); Courtney G. Joslin, ***Marriage, Biology, and Federal Benefits***, 98 IOWA L. REV. (forthcoming 2013), ***available at*** http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2181517.

For example, in *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989) (plurality opinion), the Court upheld against a biological father's challenge California's presumption that a husband is the legal parent of a child born to his wife. California's solicitude for the integrity of the mother's existing marriage was so strong that it was permissible for the state to deny the involved biological father standing even to have his parentage adjudicated.[26] *Id.* at 114, 129–31. In other words, this Court affirmed the state's decision to allow the marital relationship to trump the relationship between the child and her biological father.

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[25] Notably, although BLAG's entire argument hinges on this proposition, it has no direct support for it. (*See* BLAG Br. 47 (relying exclusively on one *cf.* citation).) Opinions accepting BLAG's arguments have relied upon inaccurate descriptions of the law in this area. *See, e.g.*, *Windsor* v. *United States*, 699 F.3d 169, 207 (2d Cir. 2012) (Straub, J., dissenting) (citing *Michael H.* for the proposition that "biological family units are afforded additional protections under our nation's laws").

A more accurate description of the relevance of biology to legal parentage can be found in the Brief for Guardian Ad Litem, as Representative of Respondent Baby Girl at 34–36, in *Adoptive Couple* v. *Baby Girl*, No. 12-399 (Feb. 19, 2013) (explaining that a child's biological parent is not necessarily the child's legal parent).

The *Michael H.* case is far from the only one in which this Court rejected a biological parent's claim of entitlement to parental rights. For example, *Quilloin* v. *Walcott*, 434 U.S. 246, 255 (1978), held that a biological father who had not sought custody of his child was not entitled to block the proposed adoption of the child by the custodial mother's spouse, particularly because the adoption would "give full recognition to a family unit already in existence, a result desired by all concerned" except the biological father. *Id.*

In *Lehr* v. *Robertson*, 463 U.S. 248, 262 (1983), this Court held that, at least in some circumstances, it is permissible for a State to deny biological fathers even the right to be heard in an adoption action that would sever any potential parental rights. As this Court explained, "the mere existence of a biological link does not merit . . . constitutional protection." *Id.* Biological fatherhood provides a man the opportunity to "develop a relationship with his offspring," but if he fails to "accept some measure of responsibility for the child's future," he is not entitled to exercise parental rights. *Id.*

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[26] At the time, the relevant statute did not even permit the biological father standing to bring a parentage action. *Michael H.*, 491 U.S. at 113 ("Under California law, a child born to a married woman living with her husband is presumed to be a child of the marriage. The presumption of legitimacy may be rebutted only by the husband or wife, and then only in limited circumstances.").

In fact, rather than emphasizing biology over all other factors, the decisions of this Court repeatedly have recognized the importance of familial relationships that derive from "the intimacy of daily association." *Lehr*, 463 U.S. at 261 (quoting *Smith* v. *Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977)).

BLAG incorrectly claims that *Santosky* v. *Kramer*, 455 U.S. 745 (1982), and *Smith*, 431 U.S. at 816, support its assertion that there is a preference in favor of biological parenthood. Neither case, however, involved or considered whether biological parents are preferable to other legal parents. Instead, both cases illustrate this Court's longstanding concern for the rights of a child's legal parents against unwarranted government intrusion; the fact that in both cases the parents who were facing a potentially permanent separation from their children were biological parents was not material to this Court's analysis.

Santosky addressed the standard of proof that must be applied to terminate parental rights. While this Court did use the phrases "natural parent" and "natural child," 455 U.S. at 747–48, these phrases are terms of art that can refer to "legal parents" and "legal children." It is common to use the terms in this way. For example, the original Uniform Parentage Act uses the term "natural" to refer to any legal parent who is not an adoptive parent. *See*, *e.g.*, UNIF. PARENTAGE ACT § 4 (1973) (providing that one means of establishing that one is a "natural father" is by demonstrating that one has held out the child as one's "natural child"); *id.* § 5 (providing that a husband will be considered a child's "natural father" if he consented to his wife's insemination).[27] Notably, the holding in *Santosky* applies equally to all legal parents, regardless of their biological connection or lack thereof to the child. To terminate a *legal parent's* rights, a state must prove that the parent is "unfit" by at least clear and convincing evidence. *See, e.g., In re G.S.R.*, 72 Cal. Rptr. 3d 398, 400 (Cal. Ct. App. 2008); CAL. WELF. & INST. CODE § 361 ("clear and convincing evidence" is required for the court to find child should be removed from physical custody of parents or guardian).

Similarly, in *Smith*, the Court used the phrase "natural parent" as a term of art to refer to the class of legal biological parents in that case who had not had their parental rights terminated. 431 U.S. at 827. In *Smith*, a class of foster parents sued to challenge the procedures that allowed the State to remove children from their foster homes.[28] This Court noted that the State had created the foster parent system to respond to situations where

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[27] *See also Chatterjee v. King*, 280 P.3d 283, 293 (N.M. 2012) ("'[N]atural' and 'biological' are not synonymous terms as used in the New Mexico UPA.").

[28] As this Court noted in *Smith*, foster parents are in a decidedly different position from legal parents—biological or not. From the outset, foster parents partner with the state to temporarily care for children with the understanding that the children will hopefully be returned to their "natural," that is legal, parents. 431 U.S. at 823–24.

"natural parents" are having difficulty caring for their children without the assistance of State child welfare agencies. *Id.* at 824–25. But, of course, the foster parent system is available whenever any legal parents—*biological*, *adoptive* or *presumptive*—cannot adequately care for their children.

B. The Federal Government Seeks to Provide Stability for All Families—Regardless of Their Biological Connection.

While it is true that the federal government seeks to provide stability for families, there is no basis for any claim that the federal government specially promotes or protects families with biological children. To the contrary, federal law seeks to help parents—biological and non-biological—care for their children.

Many married opposite-sex couples use adoption and assisted reproduction to have children, and they, as well as married opposite-sex couples with no children, have access to federal marital protections.[29] Federal laws and policies care about children who are created, not about how they are created.

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[29] 60,190 infants were born with the use of assisted reproduction technology in 2009. CTRS. FOR DISEASE CONTROL AND PREVENTION, 2009 ASSISTED REPRODUCTIVE TECHNOLOGY REPORT 3 (2009). In 2010, more than 1.5 million children lived with adoptive parents. DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, C2010BR-14, HOUSEHOLDS AND FAMILIES: 2010, 2 (Apr. 2012), http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf.

Myriad federal programs provide benefits to children. As explained above, these federal programs draw upon state determinations of parentage that are not necessarily based on a biological relationship between parent and child. In addition, when these federal programs explicitly define "child," they routinely include and extend benefits to adopted children.[30]

The federal government also actively *supports* adoption and assisted reproduction through a variety of laws, policies and spending measures. *See, e.g.*, 42 U.S.C. § 670 (foster care and adoption assistance); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, H.R. 867 (codified in scattered sections of 42 U.S.C.) (imposing timelines on states for moving children from foster care to adoption); Multiethnic Placement Act of 1994, Pub. L. No. 103-382, H.R. 6 (codified in scattered sections of 42 U.S.C.) (prohibiting states from delaying or denying adoptive placements on the basis of race, color or national origin). Federal benefits extend to children of married and unmarried couples who adopt. The federal tax code promotes adoption and assisted reproduction, including by creating subsidies for adoptive parents of children with special needs, tax credits for adoption-related expenses, and exclusions for employer-paid adoption expenses; by allowing the costs of *in vitro* fertilization to be deducted from income; and by defining an adopted child or a child conceived using assisted reproduction as dependents for purposes of the dependency exemptions. *See* 26

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[30] *See* note 24, *supra*.

U.S.C. § 23 (formerly 26 U.S.C. § 36C); 26 U.S.C. §§ 137, 151–152; INTERNAL REV. SERV., PUBL'N. 502: MEDICAL AND DENTAL EXPENSES 8 (2012). The federal government extends these adoption benefits to the children of same-sex couples. It strains credulity to argue that the federal government disfavors these parent-child relationships.

The federal government also has affirmatively sought to extend critical protections to another group of non-biological children: stepchildren. Throughout the history of our country, many children were raised in families with only one biological parent, including when that parent remarried following divorce or the death of a spouse.[31] A review of federal programs reveals a long-standing concern about protecting these children and their families. *See, e.g.*, Mary Ann Mason & David W. Simon, *The Ambiguous Stepparent: Federal Legislation in Search of a Model*, 29 FAM. L.Q. 445, 446 (1995) ("[M]ost federal programs assume that residential stepparents support their stepchildren and that these children are eligible for benefits"); Joslin, *supra* note 24.

In addition to explicitly including adopted children and stepchildren, federal programs that benefit children generally also use state family and parentage law as a means of establishing eligibility.[32] And, as described above, under state law, a person may be considered the "child" of a biologically unrelated adult. Federal law generally applies the same rules, protections, and obligations regardless of whether the parent-child relationship is based on a biological connection.

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[31] Historically, the death of a parent was not uncommon. For example, between 1915 and 1933, there were more than 6 maternal deaths for every 1000 births—a significant risk when many women had multiple children. *See* U.S. PUB. HEALTH SERV., VITAL STATISTICS, RATES IN THE UNITED STATES 1900–1940, 620 & tbl. 36 (1947). In 1900, men aged 25–44 died at a rate of roughly 1% per year. *See id.* at 161 & tbl. 5.

For example, federal law establishes guidelines setting child support amounts, and requires the states to adopt several mechanisms to improve the enforcement of child support obligations, including wage garnishment and license revocation. *See, e.g.*, Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified in scattered sections of 42 U.S.C.); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C.); Deadbeat Parents Punishment Act of 1998, 18 U.S.C. § 228. Here, as in many other areas, federal law does not define who is a parent, but rather requires states to establish systems to determine parentage and enforce child support obligations. 42 U.S.C. § 654. These federal guidelines and enforcement requirements apply in all child support cases, regardless of whether the children have a biological connection to their parents.

Other federal laws help ensure stability in child custody and support decisions by mandating interstate recognition and enforcement of state custody and support orders. Like the laws described above, the protections of these statutes are not limited to biologically related parents and children. *See, e.g.*, 28 U.S.C. § 1738A(b) (under Parental Kidnapping Protection Act, "child" defined as "a person under the age of eighteen"; "contestant" defined as "a person, including a parent or grandparent, who claims a right to custody or visitation of a child"); 28 U.S.C. § 1738B(b) (under Full Faith and Credit for Child Support Orders Act, "'contestant' means— (A) a person (including a parent) who— (i) claims a right to receive child support; (ii) is a party to a proceeding that may result in the issuance of a child support order; or (iii) is under a child support order. . . ."). These statutes, like most federal statutes, accept and incorporate each state's own parentage determinations.

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[32] *See* note 20, *supra*.

BLAG erroneously claims that the federal government provides marital benefits to protect and encourage the formation of families of opposite-sex adults and their children created through unassisted biological procreation. (BLAG Br. 21.) Federal law and policy demonstrate a commitment to protect the stability and security of all families, whether or not children and their parents are biologically connected. DOMA is a glaring exception to federal law's longstanding recognition that all children are equally deserving of stability and support.

III. This Court Has Rejected Differential Treatment of Children Based on the Circumstances of Their Birth.

BLAG claims that the government has an interest in treating families that consist of, or potentially could consist of, children and their married biological parents better than other families. This implicitly suggests that it is legitimate to treat children born to married biological parents more favorably than other children.

Yet, what BLAG suggests is a legitimate interest is directly counter to a series of cases holding that the equal protection clause does not permit disparate treatment of children based on the circumstances of their birth. As the Court explained in *Weber* v. *Aetna Casualty & Surety Company*:

> [I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. . . . [N]o child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

406 U.S. 164, 175 (1972).

Denying the children of same-sex married couples federal legal protections in an attempt to influence the future reproductive behavior of heterosexual adults is impermissible. Just as it is "invidious to discriminate" against illegitimate children raised by an unwed mother, *Levy* v. *Louisiana*, 391 U.S. 68, 72 (1968), it is equally impermissible to deny children access to federal benefits and protections because of the circumstances of their birth to, or adoption by, married same-sex couples. This kind of discrimination cannot survive equal protection review.

IV. DOMA Undermines Child Welfare Interests.

A. DOMA Has No Rational Connection to the Asserted Goal of Encouraging Heterosexuals to Have Children Within Marriage.

BLAG argues that DOMA furthers the government's interest in encouraging opposite-sex couples who can accidentally procreate to marry. (BLAG Br. 21, 44–47.) Recognizing the marriages of same-sex couples, it is argued, would undermine this interest. Assuming *arguendo* that this is a permissible government interest, the Second Circuit (and other courts) correctly recognized that excluding married same-sex couples from all federal marital protections and responsibilities does nothing to further that interest. *See, e.g.*, *Windsor*, 699 F.3d at 187–88; *Massachusetts* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 14–15 (1st Cir. 2012); *Pedersen* v. *Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 338–39 (D. Conn. 2012). As a preliminary matter, the same-sex spouses who are being denied federal marital benefits are *already married*; DOMA does not invalidate their marriages or prevent additional same-sex couples from marrying or raising children.[33] Thus, it is utterly implausible to think that denying these validly married couples federal benefits in any way affects the decisions of opposite-sex couples to marry or procreate. Any imagined impact on opposite-sex couples from seeing married same-sex couples around them has already occurred.

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[33] In Massachusetts, where same-sex couples began marrying in 2003, marriage rates have remained consistent, starting at 5.6% in 2003, peaking at 6.5% in 2004, and ending at 5.5% in 2011. CTRS. FOR DISEASE CONTROL AND PREVENTION, MARRIAGE RATES BY STATE: 1990, 1995, AND 1999–2011,

Moreover, DOMA does not create new substantive rights or protections for already-married opposite-sex couples, or provide any incentive to opposite-sex couples to marry. The myriad federal protections enjoyed by married opposite-sex couples existed before DOMA was enacted and are unchanged by DOMA. Any asserted or implied connection between withholding federal legal rights from married same-sex couples and an increased likelihood that heterosexual couples who have accidentally procreated will marry is illogical and unfounded. *See Windsor*, 699 F.3d at 188 n.6; *Perry* v. *Brown*, 671 F.3d 1052, 1089 (9th Cir. 2012); *Massachusetts*, 682 F.3d at 14–15; *Pedersen*, 881 F. Supp. 2d at 339.

As the First Circuit has held, there is no "demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening . . . heterosexual marriage." *Massachusetts*, 682 F.3d at 15. DOMA was not

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http://www.cdc.gov/nchs/data/dvs/marriage_rates_90_95_99-11.pdf. Massachusetts also had the third-lowest divorce rate among the states in 2011. CTS. FOR DISEASE CONTROL AND PREVENTION, DIVORCE RATES BY STATE: 1990, 1995, AND 1999–2011, http://www.cdc.gov/nchs/data/dvs/divorce_rates_90_95_99-11.pdf.

aimed at influencing the behavior of heterosexual couples, and "does not affect in any way" the incentives they face. *Windsor*, 699 F.3d at 188. DOMA was intended to deny same-sex married couples recognition of their marriages and the protections that would follow for them and their families. BLAG's argument that DOMA promotes responsible procreation by heterosexuals is a charade that must be rejected.

B. BLAG's Claim That Opposite-Sex Couples Are Better Parents Than Married Same-Sex Couples Lacks Any Footing in Reality.

BLAG claims that "common sense" provides a sufficient basis for the federal government, through DOMA, to favor married opposite-sex parents over married same-sex parents. (BLAG Br. 48; *see id.* at 47.) But even under rational basis review, "wholly unsubstantiated assumptions" are an insufficient basis upon which to sustain a law. *E.g.*, *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 535–36 (1973).

The scientific consensus resulting from decades of peer-reviewed social science, psychological, and child development research shows that children raised by same-sex couples fare as well as children raised by opposite-sex couples. (*See* Br. for the United States 41–42; *see generally* Joint Appendix ("JA"), Michael Lamb Aff. ("Lamb Aff.") 314–335 (research demonstrating comparable parenting methods among same-sex and opposite-sex couples).) The factors predicting healthy child and adolescent adjustment do not turn on the gender of the parents. It is the relationship of the parents to one another, their mutual commitment to their child's well-being and the social and economic resources available to the family that are determinative of the child's well-being. (*See generally* Lamb Aff.)

Thus, any connection between supporting optimal childrearing and excluding married same-sex couples from federal marital protections is "so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

C. DOMA Undermines the Well-Being of Children.

In the end, it is irrational, puzzling and sad that BLAG points to the protection of children to support DOMA's constitutionality. "DOMA is inimical to its stated purpose of protecting children." *Pedersen*, 881 F. Supp. 2d at 338. DOMA does not provide a single protection for a single child, but undermines the vital federal interest in the welfare of *all* children by depriving the children of married same-sex couples of "governmental services and benefits desirable, if not necessary, to their physical and emotional wellbeing and development." *Id.* All children, whether conceived intentionally or accidentally, through unassisted biological procreation or through other means, can benefit from federal recognition of their parents' marriages and the supports that come with it.[34] BLAG's arguments simply lack any connection to reality.

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[34] *See* Brief for Petitioner at 37, *Hollingsworth* v. *Perry*, No. 12-144 (Jan. 22, 2013) (noting the "undisputed truth that

DOMA affects the children of same-sex marriages by limiting resources that would be available to their families if their parents' marriages were recognized, such as spousal health insurance benefits and pension protections. *See id.* at 338–39. For example, because of DOMA, a same-sex married couple may have to pay thousands of additional dollars in taxes if one spouse receives health insurance benefits through the other spouse's employment.[35] This is money that is no longer available to cover other family expenses. DOMA also makes it more complicated for these children to receive benefits under federal law.

Finally, DOMA hurts children of married same-sex couples by sending the message that their families are inferior. (*See* JA, Anne Peplau Aff. 253–77 (DOMA perpetuates stigma against same-sex couples).)

Withholding federal marital protections from married same-sex couples "will not make children of opposite-sex marriages more secure." *Goodridge*, 798 N.E.2d at 964; *see In re Marriage Cases*, 183 P.3d at 433. To the contrary, denying federal marital protections to married same-sex couples will "prevent children of same-sex couples from enjoying the immeasurable advantages that flow" from marriage. *Goodridge*, 798 N.E.2d at 964. As the

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children suffer when procreation and childrearing take place outside of stable family units.").

[35] Treas. Reg. § 1.106-1; *see also* JANEMARIE MULVEY, CONG. RESEARCH SERV., TAX BENEFITS FOR HEALTH INSURANCE AND EXPENSES: OVERVIEW OF CURRENT LAW 1 (2011).

California Supreme Court indicated in *In re Marriage Cases*, "a stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children . . . who are being raised by same-sex couples as for those children being raised by opposite-sex couples." 183 P.3d at 433. In 2010, approximately 115,000 same-sex couples (44,000 of which were married) reported having one or more children. *See* DAPHNE LOFQUIST, U.S. CENSUS BUREAU, ACSBR/10-03, SAME SEX COUPLE HOUSEHOLDS: AMERICAN COMMUNITY SURVEY BRIEFS 2–3 (Sept. 2011).

Because the procreation and childrearing interests invoked by BLAG have no "footing in the realities of the subject addressed by the legislation," *Heller*, 509 U.S. at 321, and are not plausibly furthered by the exclusion of same-sex married couples from existing federal marital protections, DOMA "seems inexplicable by anything other than animus towards the class it affects." *Romer* v. *Evans*, 517 U.S. 620, 632 (1996).

CONCLUSION

BLAG attempts to justify DOMA by singling out the one intrinsic difference between married same-sex and many opposite-sex couples—the possibility of unassisted biological procreation—and claiming that the essential purpose of marriage rests on that difference. Amici have shown that this argument is contradicted by history, law, policy and logic. Moreover, DOMA does not promote responsible procreation or optimal childrearing by opposite-sex couples because DOMA changes nothing for them or their children. Instead, DOMA undermines the government's compelling interest in the welfare of all children by categorically excluding a class of married parents and their children from the important protections Congress provides other married couples and their children. Amici submit that DOMA is not rationally related to any legitimate governmental interest concerning procreation or child welfare, and ask this Court to affirm the ruling below.

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APPENDIX

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

Nos. 12-144, 12-307

[illegible]

In The
Supreme Court of the United States

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DENNIS HOLLINGSWORTH, et al.,

Petitioners,

v.

KRISTIN M. PERRY, et al.,

Respondents.

UNITED STATES,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
and BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,

Respondents.

◆

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth And Second Circuits

◆

BRIEF OF AMICI CURIAE FAMILY EQUALITY COUNCIL; COLAGE; OUR FAMILY COALITION; GAY, LESBIAN, AND STRAIGHT EDUCATION NETWORK; THE CENTER ON CHILDREN AND FAMILIES; THE CHILD RIGHTS PROJECT; AND SARAH GOGIN IN SUPPORT OF RESPONDENTS PERRY, STIER, KATAMI, ZARRILLO, CITY AND COUNTY OF SAN FRANCISCO, AND EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ADDRESSING THE MERITS AND SUPPORTING AFFIRMANCE

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TABLE OF CONTENTS

Page

INTRODUCTION 1

INTEREST OF AMICI CURIAE 5

SUMMARY OF ARGUMENT 7

ARGUMENT 10

I. SAME-SEX-PARENTED FAMILIES ARE SUCCESSFULLY AND "RESPONSIBLY CREATING AND NURTURING THE NEXT GENERATION" 10

II. BOTH PROPOSITION 8 AND DOMA STIGMATIZE AND DE-LEGITIMIZE SAME-SEX-PARENTED FAMILIES IN THE EYES OF THE LAW AND SOCIETY 23

III. PROPOSITION 8 AND DOMA ALSO HARM LGBT YOUTH BY INFORMING THEM THAT THEIR GOVERNMENT CONSIDERS THEM, AND ANY COMMITTED RELATIONSHIPS THEY MAY FORM AS ADULTS, TO BE INHERENTLY INFERIOR TO THOSE OF THEIR HETEROSEXUAL PEERS 32

CONCLUSION 36

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

An Act To End Discrimination in Civil Marriage and Affirm Religious Freedom: Hearing on LD 1020 Before Me. Joint Comm. on the Judiciary (Apr. 22, 2009) (statement of Gabriella do Amaral) 34

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Page

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Page

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Page

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Page

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INTRODUCTION[1]

> *[T]he whole idea of same-sex marriage in the United States and everywhere, I think it's affected me because my friends are talking about it, too. It's interesting to hear their opinions on it . . . it's interesting hearing what they have to say because some people I thought, you know, they're cool with my family. But then when it comes to same-sex marriage, they have a different opinion. They're like, "I don't think they should get married. I think things are fine the way they are now." But they don't realize that they're talking about* **my** *family, too.*

Sarah Gogin, then 16, in *In My Shoes: Stories of Youth with LGBT Parents*[2]

> *My life is pretty typical for an eighth grader: I play football and baseball for my school, I'm an honor student, I like girls, and I enjoy hanging out with my friends. My mom and*

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[1] Written consent to the filing of this brief has been granted by all parties and filed with the Clerk of the Court. No counsel for a party authored this brief, in whole or in part, and no person other than amici curiae, their members, and their counsel made any monetary contribution to fund the preparation or submission of this brief.

[2] IN MY SHOES: STORIES OF YOUTH WITH LGBT PARENTS (Jen Gilomen & COLAGE 2005) at 3:49-4:25 ("IN MY SHOES"), *available at* http://www.colage.org/inmyshoes/. Many of the materials cited in this brief, including video clips of testimony at legislative hearings, have been compiled on the Family Equality Council web site at http://www.familyequality.org/scotusbrief.

> *her partner, Michelle, have been a family, along with my two brothers and I, for five years. I want to talk today about how kids all over the state are affected by the current limitations on marriage. I want you to understand that denying gays and lesbians their right to marry doesn't just affect adults.*

Samuel Putnam-Ripley, then 14, testifying before Maine Joint Committee on Judiciary[3]

The voices of children raised by same-sex parents – those who live every day within the family structure at the heart of these lawsuits – are too often unheard in the debates about same-sex couples and marriage. Their stories are too often missing from discussions of "traditional" families or "family values," and their personal experiences too often discounted as irrelevant. Although those who oppose marriage for same-sex couples frequently make assumptions about the quality of the children's family lives, the children themselves are rarely asked to explain what they actually experience.

This habitual omission is unfortunate because these children are uniquely qualified to speak about how their families look, feel, and function and how the availability – or unavailability – of marriage as an option for their parents colors their daily lives. These children are also among those persons most directly affected by both the Defense of Marriage Act (DOMA) and Proposition 8.

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[3] *An Act To End Discrimination in Civil Marriage and Affirm Religious Freedom*: *Hearing on LD 1020 Before Me. Joint Comm. on the Judiciary* (Apr. 22, 2009) (statement of Samuel Putnam-Ripley), *available at* http://www.youtube.com/watch?v=pT1Bd8MXyqo&feature=related.

The voices of lesbian, gay, bisexual, and transgender (LGBT) youth are also too frequently disregarded in these debates. The laws banning marriage for same-sex couples or limiting federal recognition of such marriages leave these young people to question their own dignity and self-worth. This stigmatization has a profoundly negative impact on their self-esteem, sense of purpose, and well-being that threatens to burden them for the rest of their lives.

This brief presents the voices of these children.

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INTEREST OF AMICI CURIAE

Amici curiae are organizations dedicated to promoting equality among our country's diverse families (with a special focus on working with the children of lesbian, gay, bisexual, and transgender parents), organizations advocating for the interests of LGBT youth, and a young woman who was herself raised by two fathers. Each of the organizational amici has heard from its constituents that, despite myths to the contrary, their families are typical American families, with the same joys and challenges as other American families. Yet these families must also overcome official governmental opprobrium in the form of laws that stigmatize and de-legitimize their family relationships on a legal, social, and psychological level. Amici curiae share these stories in this brief.[4]

Sarah Gogin was raised in California by her two fathers, who adopted her when she was a baby and who continue to play a critical role in her life. Sarah graduated from Loyola Marymount University, *cum laude*, with a B.A. in Communications Studies and has a master's degree from the University of San Francisco in organizational development. Now 24, Sarah works on the administrative staff of a Bay Area hospital's cardiovascular surgery department. Sarah's fathers, who have been in a committed relationship for over forty years, were married in 2008, before the passage of Proposition 8. Sarah's story appears in the documentary project *In My Shoes: Stories of Youth with LGBT Parents*, which can be seen at www.colage.org/inmyshoes.

Family Equality Council (Family Equality) is a community of parents and children, grandparents and grandchildren that reaches across the country, connecting, supporting, and representing LGBT parents and their children. Family Equality works extensively with the children of LGBT parents, including through its Outspoken Generation program, which empowers young adults with LGBT parents to speak out about their families, share their own stories and become advocates for family equality. Family Equality submits this brief on behalf of all of the young people with whom it has worked.

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[4] Many of the statements included in this brief were made as testimony before various public bodies or in published literature. Others are drawn from the personal knowledge of the amici and their constituents.

COLAGE is the only national youth-driven network of people with a lesbian, gay, bisexual, transgender, or queer parent. COLAGE approaches its work with the understanding that living in a world that discriminates against and treats these families differently can be isolating and challenging for children. COLAGE, which was founded in 1990, has 10 active chapters and nearly 20,000 supporters nationwide. Based on its direct experience in working with thousands of lesbian, gay, bisexual, transgender, and queer parents over the past 20 years, COLAGE can attest to the critical importance for children of having their parents' relationships recognized and respected on every level – socially, institutionally, politically, and legally.

Our Family Coalition (OFC) is at the forefront of work with LGBT-headed families in California. OFC promotes the equality and well-being of LGBT families with children, and fosters community leadership in advocacy efforts that promote social justice. OFC is the nation's largest regional organization for families with LGBT parents, directly serving more than 3,500 people each year. At the core of OFC's work is supporting children to feel safe and affirmed in their families. Given its extensive first-hand knowledge of the experiences of children of same-sex parents, OFC offers a unique window into the impact of marriage equality on the healthy development of children and families.

The **Gay, Lesbian & Straight Education Network (GLSEN)** strives to assure that each member of every school community is valued and respected regardless of sexual orientation or gender identity/expression. GLSEN educates teachers, students and the public at large about the damaging effects of homophobia and heterosexism with the goal of developing school climates where difference is valued for the positive contribution it makes in creating a more vibrant and diverse community. GLSEN recognizes that children of LGBT parents are vulnerable to bullying and harassment based on their family structure and that any threats to that family structure make the ability to attain an education even more of a challenge for those children.

The mission of the **Center on Children and Families (CCF)** at the University of Florida Fredric G. Levin College of Law in Gainesville, Florida is to promote the highest quality teaching, research and advocacy for children and their families. CCF has appeared as *amicus* in this Court and other courts in numerous cases of interest to lesbian, gay, bisexual, transgender, and questioning children and families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry.

The Child Rights Project (CRP) is a project of Emory Law School engaging faculty and students in researching and writing friend of the court briefs in cases of importance to children and youth. CRP's mission is to advocate for marginalized children whose voices might otherwise not be heard. They include lesbian, gay, bisexual, transgender, and questioning youth, children in foster care, homeless youth, minority youth, and children with disabilities. Its aim is to highlight for the judiciary and the public the often unanticipated impact of court decisions on children and youth.

◆

SUMMARY OF ARGUMENT

The Proponents[5] of the limitations at issue in the two cases before the Court assert a governmental interest relating to children. In *Hollingsworth*, Proponents assert that marriage licenses can be denied to same-sex couples as a logical consequence of the fact that male-female couples have procreative abilities, while same-sex couples do not have the capacity for "responsible procreation and childrearing in the same way." *Hollingsworth v. Perry*, Pet'r Br. at 13. In *Windsor*, the Proponents claim that married same-sex couples should be denied legal protections available to other married persons because those protections are the way "government offers special encouragement and support for relationships that can result in mothers and fathers jointly raising their biological children." *Windsor v. United States*, BLAG Br. at 48.

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[5] The Petitioners in *Hollingsworth v. Perry* and Respondent Bipartisan Legal Advisory Group of the United States House of Representatives in *United States v. Windsor* are referred to collectively herein as the "Proponents."

These arguments treat the children of same-sex parents as, at best, invisible, and, at worst, non-existent. In fact, six million Americans have at least one parent who have identified as lesbian, gay, or bisexual.[6] And because nearly 20% of the 650,000 same-sex couples living in the U.S. are currently raising children,[7] there are approximately a quarter of a million children who are currently being raised in same-sex-parented families. Same-sex-parented families live in every state and reside in 93% of all U.S. counties.[8] These numbers are likely to increase: research shows that growing numbers of LGBT people – more than one-third of lesbians and 57% of gay men – aspire to become parents.[9] Amici curiae

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[6] Gary J. Gates, *LGBT Parenting in the United States*, Williams Institute (2013), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf

[7] Gary J. Gates and Abigail M. Cooke, *United States Census Snapshot: 2010*, Williams Institute, UCLA School of Law, at 3 (Sept. 2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf.

[8] R. Bradley Sears, Gary J. Gates and William B. Rubenstein, *Same-Sex Couples and Same-Sex Couples Raising Children in the United States: Data from Census 2000*, Williams Institute, UCLA School of Law (2005).

[9] Gary J. Gates, *et al.*, *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, Williams Institute and

(Continued on following page)

represent these children of same-sex-parented families and believe that the issues before the Court cannot be properly understood without considering their first-hand accounts.

As these children attest, their family relationships are "traditional" family relationships, no different than anybody else's and no less deserving of the marital protections afforded to families headed by opposite-sex couples.

Indeed, the Proponents' efforts to deny marital protections to same-sex couples foster the exact opposite of the Proponents' professed goal. Proposition 8 and DOMA serve to stigmatize and delegitimize hundreds of thousands of families, withholding from them the "recognition, encouragement, and support" that Proponents insist promote "stable, enduring relationships" in furtherance of "society's vital interests in responsible procreation and childrearing." *Hollingsworth*, Pet'r Br. at 36.

The harms caused by these laws extend also to LGBT youth. By denying same-sex couples the right to marry or the ability to enjoy the full benefits of their legal marriage, Proposition 8 and DOMA undermine the proffered governmental interest in "educating, socializing, and preparing . . . future citizens to become productive participants in civil

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Urban Institute (2007), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-Macomber-Chambers-Final-Adoption-Report-Mar-2007.pdf.

society." *Hollingsworth*, Pet'r Br. at 37 (quotation and citation omitted). The denial of marriage rights forces LGBT youth to "tragically question their own self-worth and their rightful place in a society that fails to recognize their basic human dignity,"[10] and Proponents' actions discourage LGBT youth from aspiring to the "close, interdependent, and permanent relationships" that the Proponents insist benefit "children, as well as society at large." *Windsor*, BLAG Br. at 45.

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ARGUMENT

I. SAME-SEX-PARENTED FAMILIES ARE SUCCESSFULLY AND "RESPONSIBLY CREATING AND NURTURING THE NEXT GENERATION"[11]

> *As a young kid, I didn't understand that some folks might think of my family as something different or out of the ordinary. I never kept my family a secret. To me, families come in many different shapes and sizes. And mine, different by some standards but similar in most ways, was just another one of those. My parents – my two moms – go to work every*

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[10] Anthony Michael Kreis, *Is Marriage Equality Inevitable*, HUFFPOST GAY VOICES, Sept. 13, 2012, 6:22PM, at 1, http://www.huffingtonpost.com/anthony-michael-kreis/is-marriage-equality-inev_b_1876010.html (last visited Feb. 26, 2013).

[11] *Hollingsworth*, Pet'r Br. at 8.

> *day, like other parents. They cook dinner and mow the yard. They take care of the house. Volunteer in the community. Pay their bills. Do the thousands of little things that keep a household running. And they love me, unconditionally. But it didn't take me long to realize that my mom and her partner didn't have the same rights as other people. They are treated differently by the law and can't do many of the things that other families take for granted.*

Brian Arsenault, college student, writing in *Portland Press Herald*[12]

As Brian Arsenault writes, "families come in many different shapes and sizes." Some families are distinguished by the number of children, by the age ranges of the children and the parents, by the family's religion, or the activities they enjoy doing together. Some children, regardless of their parents' sexual orientation, come from divorced or blended families. And some children have LGBT parents living in committed and loving same-sex relationships. In both same-sex and opposite-sex-parented families, the parents may have married, joined through civil unions or commitment ceremonies, or chosen not to seek any governmental or ceremonial recognition of their relationship. However, only for same-sex-parented families has a state constitution been amended to take away the right of two parents to marry. And only for married same-sex couples has the United States Congress deemed the parents unmarried for all purposes under federal law.

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[12] Brian Arsenault, Op-Ed, *Maine Voices: Young man's wish for his moms on Mothers Day: the right to marry. Families come in different shapes and sizes, but what matters is the love they show each other*, PORTLAND PRESS HERALD (May 11, 2012), *available at* http://www.pressherald.com/opinion/young-mans-wish-for-his-moms-on-mothers-day-the-right-to-marry_2012-05-11.html.

Amici, and the children of LGBT parents whom amici represent, dispute the notion that a family can only be "traditional" if it has one male and one female parent. A family is not defined as "traditional" by its family portrait. Rather, it is defined by its everyday experiences, the "thousands of little things that keep a household running."[13] In this essential way, families with same-sex parents are as "traditional" as any others, sharing the joys, values, and concerns that countless families experience. The testimonials from the children raised in such families are offered in this brief to prove that very point.

Indeed, families in which LGBT parents are raising children are neither an oddity nor a rarity. As explained above, approximately a quarter of a million children are currently being raised by same-sex parents.

When amici talk to these children, they hear the same theme over and over again: their families are typical American families. Their moms and dads are raising their children to love their country, stand up for their friends, treat others the way they would like to be treated, and tell the truth. They care about the same things all parents do – hugs and homework, bedtime and bath time. They want bright, secure, and hopeful futures for their children.

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[13] Brian Arsenault, Op-Ed, *supra* note 12.

As Malina Simard-Halm, a student raised by two gay dads, explained to amicus Family Equality, "The truth is my family really is not that different than everyone else's. We watch movies together, play board games, my dad cooks for me, and my other dad drops us off at school."[14] Or, in the words of 14-year-old McKinley Quinn BarbouRoske, "We are a normal family of four – well, as normal as any family with a teenage girl and an elementary school girl can be, which at some times isn't much for anyone."[15] Nine-year-old Austin Covey echoed these sentiments: "Marriage is about family and my dads take the best care of me and my brother. My family is no different than any other family. We go to the movies, they take me to my sports practice, play games, and make the holidays, especially Christmas, awesome."[16]

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[14] Statement from Malina Simard-Halm to Family Equality Council (Jan. 29, 2013) (on file with Family Equality Council) ("Malina Simard-Halm").

[15] Statement from McKinley Quinn BarbouRoske to Family Equality Council (Feb. 1, 2013) (on file with Family Equality Council) ("McKinley Quinn BarbouRoske").

[16] Statement from Austin Covey to Our Family Coalition (Feb. 5, 2013) (on file with Our Family Coalition).

Amicus Sarah Gogin, now 24, describes growing up with her two dads:

> I was the multiracial daughter being raised by two Catholic Jesuit psychologists. This was a therapy session waiting to happen. But ultimately, my childhood was like any other. Plaid skirts and Peter Pan collars itched from K through 8 at St. Gabriel's school, where I participated in the Academic Decathlon, winter and spring performances, and athletic teams including soccer, volleyball, basketball, and baseball. Kevin, aka Pop (Papa, Pa, Poppy, Popsicle), became the first male president of the Mother's Board and Dan, aka Dad (just Dad), became assistant soccer coach and one of the key members of the Athletic Board. Needless to say, my family made moves and made ourselves known.
>
> Following in the footsteps of my fathers and their fathers before them, I became the fourth generation McPherson Gogin to attend St. Ignatius College Preparatory. Again, my high school experience was like many other hormonal teen girls' high school experiences. It sucked. Acne, hormones, boys, college, SATs, musicals, proms, sporting tournaments. You name it; I went through it – with my dads' support every step of the way.

As Sarah, then a high school student, said in the documentary project *In My Shoes: Stories of Youth With LGBT Parents,* she appreciated the fact that –

unlike many of her friends' families – she and her fathers regularly took time to eat and talk together: "[W]e sit down together. We eat dinner together. And we talk."[17]

Zach Wahls, a University of Iowa engineering student who was raised by two moms, described his family to the Iowa House of Representatives in 2011: "I guess the point is our family really isn't so different from any other Iowa family. You know, when I'm home we go to church together, we eat dinner, we go on vacations. But, you know, we have our hard times too, we get in fights."[18]

Gabrielle Benham, then a high school student, similarly described her home life to the Vermont Senate Judiciary Committee:

> I live in a home with two women who love each other very much. I call them my mothers. There is nothing wrong with the way they live or the way they raise their children. I have proof of this. I've seen it in the morning when my mothers are trying to get the three of us out the door for school. I've also

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[17] IN MY SHOES, *supra* note 2, at 3:20-3:27.

[18] *Hearing on HJR 6 Before the Iowa House of Representatives* (Jan. 31, 2011) (statement of Zach Wahls), *available at* http://www.familyequality.org/equal_family_blog/2011/02/04/1001/abc_news_son_of_iowa_lesbians_fights_gay_marriage_ban ("Zach Wahls").

> seen it when they work together at our bakery and café as a family.[19]

The ordinary nature of the lives of families headed by same-sex parents is often something of a revelation for those without first-hand experience. As then-seventeen-year-old Marina Gatto explained, "My friends . . . would meet my moms and . . . say, 'Wow, you guys are just like my family. You know, you have dinner, you take your dog out for walks.' There are just really not a whole lot of differences."[20]

The families of Brian, Malina, McKinley, Austin, Sarah, Zach, Gabrielle, Marina, and thousands of other young people are successfully fulfilling the mission of "responsibly creating and nurturing the next generation" that the *Hollingsworth* Petitioners insist is at the heart of marriage. *Hollingsworth*, Pet'r. Br. at 8. Belying the assertion that marriage must be confined to opposite-sex couples in order to "promot[e] an optimal social structure for educating, socializing, and preparing [our] future citizens to become productive participants in society," *Hollingsworth,* Pet'r Br. at 37, the children raised in same-sex-parented households are thriving as "productive participants in society."

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[19] *An Act to Protect Religious Freedom and Promote Equality in Civil Marriage: Hearing on S. 115 Before the Vt. Sen. Judiciary Comm., section on Children and Families* (Mar. 19, 2009) (statement of Gabrielle Benham).

[20] IN MY SHOES, *supra* note 2, at 25:00-25:21.

As Zach Wahls told the Iowa House of Representatives:

> Being a student at the University of Iowa, the topic of same-sex marriage comes up quite frequently in classroom discussions. The question always comes down to, well, "Can gays even raise kids?" The conversation gets quiet for a moment because most people don't really have any answer.
>
> And then I raise my hand and say, "Actually, I was raised by a gay couple, and I'm doing pretty well." I scored in the 99th percentile on the ACT. I'm actually an Eagle Scout. I own and operate my own small business. If I was your son, Mr. Chairman, I believe I'd make you very proud. I'm not really so different from any of your children. My family really isn't so different from yours.[21]

Twelve-year-old Matthew Lannon told the Rhode Island House Judiciary Committee that "having gay parents has changed [his] life for the better," that he is "more aware," "much more accepting," and "more sensitive to differences in the world."[22] McKinley Quinn BarbouRoske explained that her mothers "make sure we know the importance of community service. They make sure we can try new things. They support our interests. [They] have gone to every single one of my music concerts and my sister's sport games without exception."[23]

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[21] Zach Wahls, *supra* note 18.

[22] *Hearing on H 5015 Sub. A Before the R.I. House Jud. Comm.* (Jan. 15, 2013) (statement of Matthew Lannon), *available at* http://www.youtube.com/watch?v=Y9Fmm9z5o9g.

Sarah Gogin credits her fathers with her present-day success:

> Not only have my dads physically and financially supported me throughout my childhood, but they also have supported me emotionally, spiritually, and mentally as I have transitioned into adulthood. For over forty years, my dads have been living proof that true love does exist and that perseverance through adversity helps to define who we are. They have taught me to stay true to myself, to change for no one, and to be the best *me* that I can be.

Importantly, LGBT parents model positive and committed relationships, not just positive same-sex relationships. As Ella Robinson said of the relationship between her father, Bishop Gene Robinson, and his partner:

> Their relationship, which started when I was 7 years old, was such an important example of what a loving, committed relationship should look like that I never thought to question it. I never knew to be embarrassed if someone looked at our family differently, or to worry if my friend coming to my Dad's

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[23] McKinley Quinn BarbouRoske, *supra* note 15.

> with me for the weekend would be uncomfortable. I just knew we'd have fun, watch the Golden Girls and play some board games (competitively).[24]

And as Brian Arsenault wrote in his editorial to the *Portland Press Herald*:

> My moms have been together for a long time, through thick and thin, and they've made it through the good times and the bad times together, as a team. They have shown me and the world what a lasting, loving relationship can look like. And when I think of my own wedding someday, should I be lucky enough to find a girl I want to spend the rest of my life with, I can't imagine two better role models to base a family around than my moms.[25]

The experiences of these individuals are consistent with social science findings: children of same-sex parents fare equally well academically, psychologically, and socially as the children of opposite-sex parents. Research has shown that LGBT parents of young children are active and involved in their children's education, a factor which results in better academic achievement for children.[26] A study by amicus GLSEN revealed that LGBT parents were more likely to attend their children's parent-teacher conferences and volunteer in the schools than a national sample of parents.[27] Nearly all of the LGBT parents surveyed (94%) reported attending parent-teacher conferences, as compared to 77% of the national sample of parents.

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[24] Ella Robinson, *How and Why I Am Outspoken*, Family Equality Council Family Room Blog (June 19, 2012), http://www.familyequality.org/equal_family_blog/2012/06/19/1292/how_and_why_i_am_outspoken (last visited Feb. 22, 2013).

[25] Brian Arsenault, Op-Ed, *supra* note 12.

The same study showed that LGBT parents were also more likely to stay involved in their children's schooling as the children progressed through the educational system, with 89% of LGBT parents attending a high school parent-teacher conference or back-to-school night as compared to 56% of the parents in the national sample.[28] LGBT parents also reported a higher level of communication with their children's school than the national sample regarding their child's future education, their child's school program, information on doing schoolwork at home, their child's positive or negative behavior at school, and about doing volunteer work at school.[29]

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[26] *Involved, Invisible, Ignored: The Experiences of Lesbian, Gay, Bisexual and Transgender Parents and Their Children in our Nation's K-12 Schools*, Gay, Lesbian and Straight Education Network (2008) at 25, *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1104-1.pdf.

[27] *Involved, Invisible, Ignored*, *supra* note 26, at 27.

[28] *Involved, Invisible, Ignored*, *supra* note 26, at 27-28.

[29] *Involved, Invisible, Ignored*, *supra* note 26, at 28-32.

Decades of social science research confirms that children of LGBT parents have similar levels of psychological adjustment and are no more likely than their peers raised by heterosexual parents to report behavioral issues.[30] Several studies have even suggested that children raised by LGBT families are better adjusted psychologically than their peers.[31]

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[30] Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment*, APPLIED DEVELOPMENTAL SCIENCE, 16:2, 98-111, 104 (2012) ("[N]umerous studies of children and adolescents raised by same-sex parents conducted over the past 25 years by respected researchers and published in peer-reviewed academic journals conclude that they are as successful psychologically, emotionally, and socially as children and adolescents raised by heterosexual parents."); *see also* Ian Rivers, V. Paul Poteat and Nathalie Noret, *Victimization, Social Support, and Psychological Functioning Among Children of Same-Sex and Opposite-Sex Couples in the United Kingdom*, DEVELOPMENTAL PSYCHOLOGY, 1:127-134 (2008); Stephen Erich, Patrick Leung and Peter Kindle, *A Comparative Analysis of Adoptive Family Functioning with Gay, Lesbian, and Heterosexual Parents and Their Children*, JOURNAL OF GLBT FAMILY STUDIES, 1:43-60 (2005); Jennifer L. Wainright, Stephen T. Russell and Charlotte J. Patterson, *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents*, CHILD DEVELOPMENT, 75:1886-1898 (2004); Fiona MacCallum and Susan Golombok, *Children Raised in Fatherless Families From Infancy: A Follow-Up of Children of Lesbian and Single Heterosexual Mothers at Early Adolescence*, JOURNAL OF CHILD PSYCHOLOGY AND PSYCHIATRY, 8:1407-1419 (2004).

[31] Henny M.W. Bos, Frank van Balen and Dymph van den Boom, *Child Adjustment and Parenting in Planned Lesbian-Parent Families*, AMERICAN JOURNAL OF ORTHOPSYCHIATRY, 77:38-48 (2007); Richard W. Chan *et al.*, *Division of Labor Among*

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All of the leading national child welfare and social service organizations agree that children raised by lesbian, gay, and bisexual parents are just as happy, healthy, and well-adjusted as children raised by opposite-sex parents. The American Academy of Child and Adolescent Psychiatry, American Academy of Pediatrics, American Psychiatric Association, American Psychological Association, Child Welfare League of America, and National Association of Social Workers all have published organizational statements confirming that lesbian, gay, and bisexual people make excellent parents who raise developmentally healthy children.[32]

Lesbian and Heterosexual Parents: Associations with Children's Adjustment, JOURNAL OF FAMILY PSYCHOLOGY, 12:402-419 (1998).

[32] American Academy of Child and Adolescent Psychiatry, *Gay, Lesbian, Bisexual, or Transgender Parents Policy Statement* (revised and approved 2009), http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement (last visited Feb. 22, 2013); American Academy of Pediatrics, *Policy Statement: Coparent or Second Parent Adoption by Same Sex Couples*, PEDIATRICS, 109(2):339-340 (2002), reaffirmed May 2009; American Psychiatric Association, *Position Statement on Adoption and Co-parenting of Children by Same-sex Couples* (2002), http://www.psychiatry.org/advocacy--newsroom/position-statements (last visited Feb. 22, 2013); American Psychological Association, *Sexual Orientation, Parents, & Children* (2004), http://www.apa.org/about/policy/parenting.aspx (last visited Feb. 22, 2013); Child Welfare League of America, *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults*, http://www.cwla.org/programs/culture/glbtqposition.htm (last visited Feb. 22, 2013); SOCIAL WORK SPEAKS: NATIONAL ASSOCIATION OF SOCIAL WORKERS POLICY STATEMENTS (2003-2006), 146-150, *available at*

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The state's interest in "providing status and stability to the environment in which children are raised," *Hollingsworth* Pet'r Br. at 36 (citation and quotation omitted), applies to all families raising children and not just those headed by opposite-sex couples.

II. BOTH PROPOSITION 8 AND DOMA STIGMATIZE AND DE-LEGITIMIZE SAME-SEX-PARENTED FAMILIES IN THE EYES OF THE LAW AND SOCIETY

I worry about my little sisters and the lingering doubt in their minds about how legitimate their family is compared to their friends' families. It's a corrosive feeling of doubt. They really struggle with it.

"Honoring All Maine Families" (2009)[33]

My parents do not need marriage to affirm their love for one another. Even without marriage, we are as close and loving as any other family. However, the simple notion that one type of family deserves more concessions than another stigmatizes families like mine. I

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http://www.socialworkers.org/pressroom/features/policy%20statements/146-153%20Foster.pdf.

[33] *Honoring All Maine Families: Gay and Lesbian Partners and their Children and Parents Speak About Marriage*, Center for the Prevention of Hate Violence (Apr. 2009) ("*Honoring All Maine Families*") at 4, *available at* http://www.preventinghate.org/wp-content/uploads/2011/03/Honoring-All-Maine-Families-2009.pdf.

> *know that we are not inferior, simply extraordinary.*
>
> Malina Simard-Halm, as told to Family Equality[34]

Although the Proponents claim an interest in stabilizing the American family structure, the elimination of marriage for same-sex couples in California and the refusal to recognize validly married couples on the federal level have the exact opposite effect. Placing an official stamp of governmental opprobrium on the relationships of same-sex parents instead serves to stigmatize and de-legitimize the relationships and, as a result, the children themselves. Indeed, the major challenge most same-sex-parented families must surmount is nothing inherent in their family structure, but rather the societal and governmental disapproval that both Proposition 8 and DOMA represent and perpetuate.

The petitioners in *Hollingsworth* disclaim any intent to stigmatize or demean same-sex-parented families. They write that "providing special recognition to one class of individuals does not demean others who are not similarly situated with respect to the central purpose of the recognition. It is simply not stigmatizing for the law to treat different things differently, or to call different things by different names." *Hollingsworth*, Pet'r Br. at 63.

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[34] Malina Simard-Halm, *supra* note 14.

But this rationalization is simply not reflective of what the children of same-sex parents actually experience; they are in fact very much demeaned and stigmatized by being "treated differently." Their feelings of stigmatization, inferiority, and illegitimacy are very real.

Indeed, these feelings of stigmatization, inferiority, and de-legitimization are common themes heard by the amici who work every day with children raised by same-sex parents. As the former program director of amicus COLAGE told the New Jersey Civil Union Review Commission, many children with whom she has worked have had their peers "question[] the validity of their families because their parents aren't able to get married."[35] This in turn can lead children to have insecurity about their parents' relationship, including the fear that "somebody is going to come and break up their family."[36]

To the children with whom the amici work, marriage inequality is an insult, but even more, it makes them feel as if the government deems the relationship, the entire family, and the children themselves as inferior, as "lesser citizens."[37] It sends the message that their families are "not legitimate" and "not welcome."[38] It creates an insecurity – a "corrosive feeling of doubt" – in their perceived stability of their family.[39] It fosters confusion because "my family doesn't mean to other people what it means to me."[40] In one example relayed to Family Equality, the young son of two gay men was compelled to ask, "Dad, are we a family?" after overhearing hospital staff say that his one father was not able to sign his other father's medical paperwork because they were "not family."[41]

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[35] *Transcript of Hearing on Civil Union Act Before N.J. Civil Union Review Comm'n* at 38 (Apr. 16, 2008) (statement of Meredith Fenton) ("Fenton Testimony"), *available at* http://www.nj.gov/oag/dcr/downloads/Transcript%20CURC-and-Public-Hearing-04162008.pdf.

[36] Fenton Testimony, *supra* note 35, at 76:4-5.

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[37] "I feel like a lesser citizen because my parents' love and commitment to each other isn't considered 'legal' by the United States government." Statement from Kira Findling to Family Equality Council (Jan. 29, 2013) (on file with Family Equality Council).

[38] *Honoring All Maine Families*, *supra* note 33, at 5.

[39] *Honoring All Maine Families*, *supra* note 33, at 4.

[40] "I consider my mom's partner my stepmom. But society does not. My school doesn't. My doctor doesn't. Sometimes my friend's parents don't either. So that leaves me in a strange position. My family doesn't mean to other people what it means to me. I am stuck saying 'my mom's partner' or 'my mom's girlfriend,' when, really, I should have the right to call her 'my stepmom.'" *An Act To End Discrimination in Civil Marriage and Affirm Religious Freedom: Hearing on LD 1020 Before Me. Joint Comm. on the Judiciary* (Apr. 22, 2009) (statement of Samuel Putnam-Ripley), *available at* http://www.youtube.com/watch?v=pT1Bd8MXyqo&feature=related.

Moreover, these children feel "cheated" by marriage inequality.[42] As one child of same-sex parents told amicus Family Equality:

> It really hurts me that my family isn't recognized by the government, it makes me feel like we aren't seen as a family, which makes me feel insecure. It's not fair to my parents, who love each other just as much as straight couples.[43]

As 18-year-old Maggie Franks told OFC:

> My moms have been together for 22 years, and I could not have asked for better, more supportive parents. Both DOMA and Prop 8 essentially sentence my parents' relationship to second class status, not only making our family feel less worthy than others, but denying us rights that are enjoyed by other families headed by straight parents.[44]

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[41] "*Jeff, Josh, and Andrew*," Family Stories, Family Equality Council, http://www.familyequality.org/get_informed/family_stories/ (last visited Feb. 22, 2013).

[42] Statement from Ella Robinson to Family Equality Council (Jan. 29, 2013) ("Ella Robinson Statement").

[43] Statement from Elizabeth Byrnes-Mandelbaum to Family Equality Council (Jan. 29, 2013) (on file with Family Equality Council).

[44] Statement from Maggie Franks to Our Family Coalition (Feb. 3, 2013) (on file with Our Family Coalition).

Ten-year-old Kasey Nicholson-McFadden told New Jersey legislators that this was his experience, as well. For Kasey, the absence of marriage as an option for his parents led him to question the legitimacy of his family: "It doesn't bother me to tell kids my parents are gay. It ***does*** bother me to say they aren't married. It makes me feel that our family is less than a family."[45]

This stigmatization is exacerbated by the fact that to these children the distinctions these laws make simply are nonsensical in relation to what the children have themselves experienced. As Ella Robinson said:

> How can they tell me that my family doesn't count? That the relationship between my two dads that I have not only learned from and cherished, but also reaped the benefits of, isn't acknowledged on the federal level? That the love they share isn't deserving of the same protection and laws that a man and a woman receive?[46]

To one young woman, whose mothers have been together for almost thirty years, the repeated governmental efforts to place an official stamp of "differentness" on same-sex marriage sparked strong feelings of injustice and betrayal. She described to Family Equality how formerly she "never cared about the issue of marriage" because she "couldn't have asked for a happier, healthier, more loving family and there was nothing that anyone could do to change that." But the efforts to limit full recognition of marriage to opposite-sex couples "felt like a slap in the face":

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[45] Sarah Wildman, *Children Speak for Same-Sex Marriage*, N.Y. TIMES (Jan. 20, 2010), at E0, *available at* http://www.nytimes.com/2010/01/21/fashion/21kids.html?pagewanted=all&_r=0.

[46] Ella Robinson Statement, *supra* note 42.

> How could the free society that raised me and taught me everything that I know, now deny me my other foundation, a family that is recognized and protected as such? It felt like a slap in the face from my country. I had never asked for validation, but blatant exclusion hurts.[47]

Social science research confirms that what these individual children are experiencing is typical of what many children of same-sex-parents feel. As Dr. Judith Glassgold, a licensed psychologist, testified before the New Jersey Civil Union Review Commission, the feeling that their parents' relationship is deemed "inherently different and potentially inferior to heterosexual relationships," and that their parents are "inherently less deserving than heterosexual couples of society's full recognition," psychologically burdens the children of same-sex parents.[48]

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[47] Statement from Tsipora Prochovnick to Our Family Coalition (Feb. 5, 2013) (on file with Our Family Coalition).

[48] *Transcript of Hearing on Civil Union Act Before N.J. Civil Union Review Comm'n* at 45 (Apr. 16, 2008) (statement of Dr. Judith Glassgold), *available at* http://www.nj.gov/oag/dcr/

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The stigma and feelings of illegitimacy, anger and unfairness that these children perceive are well-founded, particularly when the practical effects of DOMA are considered. Since the law's passage, the federal government has singled out married same-sex couples for exclusion from the tax incentives built into the tax code. Same-sex couples cannot file joint federal tax returns or maximize dependency exemptions, child tax credits, children and dependent care credits, and education deductions and therefore carry a heavier tax burden than their opposite-sex counterparts. They often have to split their children between two different tax returns in order to gain any tax relief.[49] Moreover, because of DOMA, if an employer offers health insurance coverage to same-sex partners or to the children of same-sex partners, both the employer and the employee are taxed on the benefit. Additionally, same-sex headed families are not accurately counted when determining eligibility for safety-net programs such as Medicaid or Children's Health Insurance Program (CHIP), which provide free or low-cost health insurance to low-income children; Supplemental Social Security Income (SSI), which provides assistance to children who are blind

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downloads/Transcript%20CURC-and-Public-Hearing-04162008.pdf.

[49] *Unequal Taxation and Unique Burdens for LGBT Families Report*, Movement Advancement Project, Family Equality Council, and Center for American Progress (Apr. 2012) at 5, *available at* http://www.lgbtmap.org/file/unequal-taxation-undue-burdens-for-lgbt-families.pdf.

or disabled; and Temporary Assistance for Needy Families (TANF), which provides monetary assistance to help with food, clothing, housing, and other basic needs. This inaccurate counting of same-sex headed families can unfairly deny children with same-sex parents assistance that would be granted to children with married, opposite-sex parents.[50]

Both DOMA and Proposition 8 are hurtful to the youth whom amici represent and create an insecurity among them about their families. The lived reality of individual amici and other children of same-sex-parented families is that measures like Proposition 8 and DOMA have stigmatizing and de-legitimizing effects.[51]

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[50] *Issue Brief: How DOMA Harms Children*, Movement Advancement Project, Family Equality Council, and Center for American Progress (Nov. 2011), *available at* http://action.familyequality.org/site/DocServer/issue-brief-how-doma-harms-children.pdf?docID=2781; *All Children Matter: How Legal and Social Inequalities Hurt LGBT Families*, Family Equality Council, Movement Advancement Project, Center for American Progress (Oct. 2011) at 51-60, 62-72, *available at* http://www.americanprogress.org/wp-content/uploads/issues/2011/10/pdf/all_children_matter.pdf.

[51] In contrast, the legalization of marriage for same-sex couples can have a profound de-stigmatizing effect. A 2004 *New York Times* article profiled several children whose same-sex parents had recently been permitted to marry. One 13-year-old noted the difference in people's reactions to her parents' relationships: "Before it was 'Oh, your parents are just partners' . . . Now they're spouses. So it's a bigger way of thinking about them." Patricia Leigh Brown, *For Children of Gays, Marriage Brings Joy*, N.Y. TIMES (Mar. 19, 2004), at A1. Indeed, the

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III. PROPOSITION 8 AND DOMA ALSO HARM LGBT YOUTH BY INFORMING THEM THAT THEIR GOVERNMENT CONSIDERS THEM, AND ANY COMMITTED RELATIONSHIPS THEY MAY FORM AS ADULTS, TO BE INHERENTLY INFERIOR TO THOSE OF THEIR HETEROSEXUAL PEERS

> *It is exhausting to have the same goals and aspirations as everyone else and yet be denied many of them, simply because of the gender of who I want to share them with. Like many other Americans, I dream of finding the love of my life and raising a family with them, passing on many of the values that my parents taught me when I was young. Yet this dream is currently denied to me on many levels, simply because my spouse and I would be the same sex. Despite many claims to the contrary by vocal opponents of marriage equality, I don't want to destroy or alter American society and values; I want to take part in them too.*
>
> Matthew Pagnotti, college student[52]

DOMA and Proposition 8 also hurt another group of young people – LGBT youth. These young people's

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Hollingsworth petitioners' own expert conceded at trial that marriage equality would benefit the children of same-sex couples. *Hollingsworth*, App. to Pet'r Br. at 157a.

[52] Kathryn Brightbill, Brian W. Kaufman, Margaret Riley, and Nick Vargo, LGBT Youth/Young Adult Survey, EMORY CHILD RIGHTS PROJECT (on file with amicus Child Rights Project) (compiled Jan. 29, 2013) ("Child Rights Project Survey").

perceptions of their futures are powerfully influenced by what the government tells them about the validity of the committed relationships they hope to form as adults. By officially sanctioning their exclusion from marriage and placing existing marriages of same-sex couples in the singular position of being "not marriages" for federal law, these measures exacerbate feelings of hopelessness about the future and perpetual "different-ness" that many LGBT youth already feel and discourage them from aspiring to full participation in civic life.

Limiting marriage to heterosexual couples and treating marriages between same-sex couples as invalid undermines the self-worth of LGBT youth and impinges their development in relation to their peers. It is an influence that is deeply felt and experienced, but one that has not received recognition or the proper attention it deserves.

As one young woman wrote in the context of New Jersey's marriage equality initiative:

> Although gay and lesbian youth aren't going to marry any time soon, most plan to in the future. It is a dream for many young people to grow up, marry the person they love, and perhaps raise children with that person. And yet, that dream cannot be fulfilled in today's New Jersey, if the person you love is of the same gender as you. For many LGBT youth, the worry that they cannot live a fulfilling, happy life is one that causes much despair. By refusing young people the opportunity to

> commit themselves to someone with whom they want to share the rest of their life, New Jersey would only encourage that fear and despair.[53]

Another young woman expressed similar feelings in testimony before the Maine Legislature's Judiciary Committee:

> I feel happiness and sadness and I feel love, yet there are stipulations for marriage based on my love, while my heterosexual friends enjoy the benefits of marriage rights. My love is equal and it should be acknowledged equally. When it isn't, it impacts how I feel as a member of society: unequal. [¶] When young people like me are constantly told that we don't have the same rights as other people it's hard to sense belonging. . . . It's frustrating knowing that I won't have the same opportunities as my peers simply because I'm a lesbian.[54]

A sixteen-year-old told the Child Rights Project that the unavailability of marriage "has made [him] feel less as a person." It meant to him that he "would never be able to have a family, a wedding, or things [he] had dreamed about since childhood."[55] Another high school student wrote:

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[53] Isabella Levy, *Why marriage matters to the youth*, Garden State Equality (Feb. 12, 2012), http://www.gardenstateequality.org/2012/02/why-marriage-matters-to-the-youth/ (last visited Feb. 22, 2013).

[54] *An Act To End Discrimination in Civil Marriage and Affirm Religious Freedom: Hearing on LD 1020 Before Me. Joint Comm. on the Judiciary* (Apr. 22, 2009) (statement of Gabriella do Amaral).

> I've known I was gay since I was in 6th grade but I also knew that if I was gay I wouldn't be able to get married with that one I truly loved, therefore I wouldn't be able to share those moments [that] my parents enjoyed[.] I thought that the bond of marriage is what keeps two people together through thick and thin [but] was not for me, and thus my adult life would not be the haven [that I had thought] as a kid.[56]

This is not just a question of short-lived, adolescent disappointment. The current generation of LGBT youth is the next generation of LGBT parents. Denying them what one of Proponents' supporters calls "a gateway to adult responsibilities, including childbearing, childrearing, and the inculcating of civic virtues in the next generation for the benefit of the larger society,"[57] is flatly inconsistent with the interests asserted by the Proponents in both *Hollingsworth* and *Windsor*.

Comments from LGBT youth illustrate the powerful effect of state-sanctioned disapproval of the relationships that many – including the Proponents – tout as the cornerstone of responsible adulthood. A college student described the laws at issue in these cases as "saying I am a second-rate citizen. . . . My expectation is that while the rest of my community may disengage me because of my orientation, my government would not."[58] Another young man wrote:

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[55] Child Rights Project Survey, *supra* note 52.

[56] Child Rights Project Survey, *supra* note 52.

[57] Brief of Amicus Curiae Helen M. Alvaré in Supp. of Hollingsworth and BLAG Addressing the Merits and Supporting Reversal at 34.

> The federal government denying marriage equality has led to a sense of 'it's against the law to be gay.' . . . I felt that the feelings I felt were wrong, even illegal. It took me several years to finally accept myself. Not even the government approved of me.[59]

Barring millions of young people from full participation in the institution the Proponents insist is uniquely capable of supporting "stable and enduring" relationships cannot be reconciled with the interest the Proponents claim is at the heart of the issues before the Court – that of "nurturing the next generation."[60]

◆

CONCLUSION

While the Proponents will tell you that Proposition 8 and DOMA are good for children, children raised by same-sex parents will tell you otherwise. These children will tell you that Proposition 8 and

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[58] Child Rights Project Survey, *supra* note 52.

[59] Child Rights Project Survey, *supra* note 52.

[60] *Hollingsworth*, Pet'r Br. at 41 & 8.

DOMA stigmatize and de-legitimize their families. And they will tell you that their families are just as deserving of recognition, respect, and protection as those of children with opposite-sex parents. And while the Proponents say that Proposition 8 and DOMA will improve society by encouraging individuals to commit to adult responsibilities, the LGBT youth whom these laws actively discourage from assuming these responsibilities and who have personally experienced the harm that these laws engender and perpetuate cannot agree.

Based on the foregoing, amici urge this Court to affirm the Ninth Circuit's decision in *Hollingsworth v. Perry* and the Second Circuit's decision in *United States v. Windsor.*

Respectfully submitted.

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CURIAE
BRIEF

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UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR
AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF ON THE MERITS OF *AMICI CURIAE* FAMILY LAW PROFESSORS AND THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS IN SUPPORT OF RESPONDENT EDITH SCHLAIN WINDSOR

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TABLE OF CONTENTS

Page

INTERESTS OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. DOMA DOES NOT CREATE, AND THERE HAS NEVER BEEN, FEDERAL UNIFORMITY WITH REGARD TO MARITAL STATUS. FEDERAL LAW RELIES ON STATE DETERMINATIONS OF FAMILY STATUS NOTWITHSTANDING TREMENDOUS DIVERSITY AMONG THE STATES. 5

  A. Federal Law Accepts State Diversity With Regard To Marriage............................ 8

  B. Federal Law Accepts State Diversity With Regard To Divorce. 11

  C. Federal Law Accepts State Diversity With Regard To Parenthood............................ 14

II. DOMA IS UNLIKE ANY PAST FEDERAL INTERVENTION INTO THE FAMILY BECAUSE IT DISESTABLISHES FAMILY STATUS AT THE FEDERAL LEVEL. 19

  A. The Vast Majority of Federal Statutes Implicitly Rely On State Determinations Of Status. 20

TABLE OF CONTENTS
(continued)

Page

B. Some Federal Statutes Explicitly Rely On State Determinations of Status. 25

C. Some Federal Statutes Impose Conditions Beyond Marital Status Reflecting Policy Concerns Specific To Those Statutes. 26

1. Eligibility Based On Marriage Plus Other Conditions 27

2. Eligibility In the Absence of Marriage 30

III. THE FEDERAL GOVERNMENT HAS DEFINED MARITAL STATUS ONLY WHEN THERE IS NO STATE JURISDICTION TO DETERMINE FAMILY STATUS. 33

CONCLUSION 36

LIST OF *AMICI* 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Andrews v. Page,
50 Tenn. (3 Heisk.) 653 (1871) 32

Ankenbrandt v. Richards,
504 U.S. 689 (1992)..2, 10

Astrue v. Capato ex rel. B.N.C.,
__ U.S. __, 132 S. Ct. 2021 (2012) 17, 22, 25

Barrons v. United States,
191 F.2d 92 (9th Cir. 1951)........................ 23

Bell v. Tug Shrike,
215 F. Supp. 377 (E.D. Va. 1963), *aff'd* 332 F.2d 330 (4th Cir. 1964)..23

Bell v. Tug Shrike,
332 F.2d 330 (4th Cir. 1964)..................................8

Boggs v. Boggs,
520 U.S. 833 (1997)...20

Brinkley v. King,
549 Pa. 241, 701 A.2d 176 (1997).......................16

Brown v. Astrue,
2012 WL 948926 (N.D. Cal. March 20, 2012)...14

De Sylva v. Ballentine,
351 U.S. 570 (1956)...................................2, 10, 24

In re Ann Cahal,
9 P.D. 127 (Oct. 2, 1987)...7

In re C.S.,
277 S.W.3d 82 (Tex. App. 2009) 15

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Lucy Hart,
19 P.D. 417 (March 30, 1906) 7

In re Paternity of Cheryl,
434 Mass. 23, 746 N.E.2d 488 (2001) 16

Johnson v. Calvert,
5 Cal. 4th 84, 851 P.2d 776 (1993) 16

Lembcke v. United States,
181 F.2d 703 (2d Cir. 1950) 23

Loving v. Virginia,
388 U.S. 1 (1967) 6

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681 F. Supp. 506 (N.D. Ill. 1988) *amended*,
1988 WL 33843 (N.D. Ill. Apr. 1, 1988) 9

Matter of D---,
3 I. & N. Dec. 480 (BIA 1949) 7

Michael H. v. Gerald D.,
491 U.S. 110 (1989) 14

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811 F.2d 1474 (Fed. Cir. 1987) 13

Murphy v. Houma Well Service,
409 F.2d 804 (5th Cir. 1969) 17, 22

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32 Cal. 2d 711, 198 P.2d 17 (1948) 6

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787 F.2d 50 (2d Cir. 1986) 9

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436 U.S. 49 (1978) 34

TABLE OF AUTHORITIES
(continued)

Page(s)

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835 F.2d 937 (1st Cir. 1987) 13

Stanley v. Illinois,
405 U.S. 645 (1972)...14

State, Department of Revenue, Office of Child Support Enforcement v. Ductant,
957 So. 2d 658 (Fla. Dist. Ct. App. 2007)...........16

Turner v. Safley,
482 U.S. 78 (1987)..6

United States v. Bivins,
49 M.J. 328 (C.A.A.F. 1998) 35

United States v. Kyles,
20 M.J. 571 (N.M.C.M.R. 1985)...........................35

United States v. Richardson,
4 C.M.R. 150 (1952) 36

United States v. Smith,
18 M.J. 786 (N.M.C.M.R. 1984)...........................35

United States v. Yazell,
382 U.S. 341 (1966)..8

Weinberger v. Salfi,
422 U.S. 749 (1975)..29

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2010 WL 691938 (S.D.N.Y. Mar. 1, 2010)..........10

Windsor v. United States,
699 F.3d 169 (2d Cir. 2012) 3

TABLE OF AUTHORITIES
(continued)

	Page(s)
FEDERAL STATUTES AND REGULATIONS	
1 U.S.C. § 8	22
5 U.S.C. § 8101	20, 28
5 U.S.C. § 8331	29
5 U.S.C. § 8341	28, 29
8 U.S.C. § 1101	22, 28
8 U.S.C. § 1154	28, 31
8 U.S.C. § 1186a	27
8 U.S.C. § 1255	27
10 U.S.C. § 934	35
10 U.S.C. § 1408	20
17 U.S.C. § 101	21
18 U.S.C § 228	17
25 U.S.C. § 183	34
26 U.S.C. § 2	30
26 U.S.C. § 7703	30
29 U.S.C. § 1001	20, 21
29 U.S.C. § 1002	20, 21
29 U.S.C. § 1021	20, 21
29 U.S.C. § 1055	20, 21
29 U.S.C. § 1056	20, 21
29 U.S.C. § 1162	20, 21
29 U.S.C. § 1163	20, 21

TABLE OF AUTHORITIES
(continued)

Page(s)

29 U.S.C. § 1167 ....20, 21

29 U.S.C. § 1181 ....20, 21

38 U.S.C. § 101 25

38 U.S.C. § 103 ....25, 31

42 U.S.C. § 402 30

42 U.S.C. § 416 ....10, 25, 28, 29, 31

42 U.S.C. § 1382c 28, 32

48 U.S.C. § 736 34

48 U.S.C. § 1561 34

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Morrill Anti-Bigamy Act, ch. 125–26, 12 Stat. 501, 501–02 (July 1, 1862) 34

Uniform Parentage Act, § 102 cmt. (Supp. 2009) 15

STATE STATUTES

750 Ill. Comp. Stat 47/15 (2012). 16

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(continued)

Page(s)

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Mich. Comp. Laws § 722.857 (2012).........................16

Mich. Comp. Laws § 551.3 (2012)..............................9

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Mont. Code Ann. § 40-6-108 (2011) 15

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N.Y. Dom. Rel. Law § 5 (McKinney 2013).................9

N.Y. Dom. Rel. Law § 15 (McKinney 2013)...............8

N.Y. Dom. Rel. Law § 15-a (McKinney 2013) 8

N.Y. Dom. Rel. Law § 122 (McKinney 2013)...........16

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(continued)

Page(s)

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BRIEF OF FAMILY LAW PROFESSORS AND THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT EDITH SCHLAIN WINDSOR

This brief is submitted on behalf of the Family Law Professors listed in Appendix A and the American Academy of Matrimonial Lawyers in support of Respondent Edith Schlain Windsor.[1]

INTERESTS OF *AMICI CURIAE*

Amici Law Professors are American family law professors, including family law casebook authors and reporters for the ALI *Principles of the Law of Family Dissolution*, who seek to clarify the relationship between Congress and the states with regard to family status, particularly marital status. *Amici* American Academy of Matrimonial Lawyers ("AAML") is a national organization of more than 1,600 family law attorneys in the fifty states. The AAML was founded in 1962 by highly regarded family law attorneys. Its mission is to "promote professionalism and excellence in the practice of family law," with the goal of protecting the welfare of the family and of society.

The Defense of Marriage Act ("DOMA") disestablishes marital status, for any federal purpose, for one subset of married couples in contravention of a strong norm of federal deference to state family-status determinations. Unlike any other federal statute, DOMA selectively withdraws state-conferred marital status, thus telling some married couples that they are not married for any federal purposes and altering the status of being married as conferred by the states.

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici*, its members, or its counsel has made any monetary contribution intended to fund the preparation or submission of this brief. The parties' consent letters have been filed with the Clerk's office.

All parties have consented to the filing of this *amicus* brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

DOMA is the first and only federal law to create a blanket federal rule of non-recognition of family status in contravention of state family law. Before DOMA, married status was understood as a comprehensive condition for all purposes, recognized by state and federal sovereigns, unless that status was terminated by the state or death. While federal rights and duties flowed from married status, only states determined who was eligible for that status. "The scope of a federal right is . . . a federal question, but that does not mean that its content is not to be determined by state, rather than federal law." *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956). This Court noted that "[t]his is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern." *Id.* The "core" aspect of family law left to the states includes "declarations of status, *e.g.*, marriage, annulment, divorce, custody, and paternity." *Ankenbrandt v. Richards*, 504 U.S. 689, 716 (1992) (Blackmun, J., concurring).

Throughout our nation's history, it has been states' responsibility to confer and withdraw marital status. A state's conferral of married status grants a couple more than eligibility for benefits, reciprocal responsibilities, and other legal incidents of marriage. It allows a couple to partake in a social institution imbued with rich historical and contemporary symbolism. Having married status has always entailed an understanding that one was married for all purposes, including federal purposes, for all time, unless one secured termination of that married status from the state. DOMA disrupts this understanding of marriage and redefines what it means to be married for gay and lesbian couples. As the Second Circuit correctly held, "DOMA is an unprecedented breach of longstanding deference" to state determinations of marital status. *Windsor v. United States*, 699 F.3d 169, 186 (2d Cir. 2012). Regardless of whether the federal government has the power as a sovereign to abrogate marital status for one subset of married couples for all federal purposes, it had never done so before DOMA.

Intervenor Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") argues in its opening brief that DOMA's unprecedented breach of deference was necessary to "maintain uniformity." Brief on the Merits for Respondent BLAG ("BLAG Br.") 33. But DOMA neither maintains nor creates uniformity. Congress has always, and still does, respect non-uniform state determinations of marital status. As detailed in Part I, DOMA does not define marriage nor "clarify what marriage *means*" at the federal level, BLAG Br. 3, because federal law remains silent on critical eligibility criteria for marriage. Thus, similarly situated couples in different states have always been, and still are, treated differently at the federal level. Instead, DOMA singles out only one feature of marriage for comprehensive nonrecognition.

Section 3 of DOMA's unprecedented rejection of state marital status determinations also conflicts with Congress's long history of deference to different state criteria for divorce. Congress never "maintained uniformity" with regard to divorce—which are marital status determinations—even during times of tremendous social upheaval and state disagreement over eligibility for divorce. Nor has Congress expressed a need for uniformity with regard to parental-status determinations, from which eligibility for many federal benefits flows. Modern technological and scientific achievements have made diversity in the state laws of parenthood far more complicated and extensive than current state disagreements over marriage for same-sex couples. Yet there is no federal law of parenthood.

DOMA is nothing like the numerous federal statutes that BLAG and opposition *amici* cite as indications that the federal government already defines marriage. As detailed in Part II, all federal statutes pertaining to family status can be divided into three categories, and all maintain the federal government's traditional deference to state-determined family status. First, and most common, are federal statutes that *implicitly* invoke the state law of family status. Second are federal statutes and regulations that *explicitly* invoke the state law of family status. Third are federal statutes and regulations that expand or restrict the category of who will be eligible for federal benefits under particular statutes based on policy reasons, particularly fraud-prevention and public-fisc protection, pertinent to those specific statutes.

In enacting DOMA, Congress did not "[p]roceed[] with [c]aution." BLAG Br. 41. Rather, it acted in haste—before *any* state had even conferred married status on same-sex couples—to nullify potential federal marital status for an entire class of married persons. DOMA does not enhance the debates between the states with regard to marriage. Brief Addressing the Merits of the State of Indiana et al. as *Amici Curiae* in Support of Respondent BLAG ("States Br.") 21. It stifles debate by nationalizing marriage policy in an unprecedented manner. In short, DOMA respects neither federalism nor tradition; it disrupts them.

ARGUMENT

I. DOMA DOES NOT CREATE, AND THERE HAS NEVER BEEN, FEDERAL UNIFORMITY WITH REGARD TO MARITAL STATUS. FEDERAL LAW RELIES ON STATE DETERMINATIONS OF FAMILY STATUS NOTWITHSTANDING TREMENDOUS DIVERSITY AMONG THE STATES.

There has always been variety in the conditions that states impose on who may marry, and when that status matters for purposes of federal law. Federal law has deferred to states regardless of the varying conditions imposed by the states.[2] *See, e.g.*, Christopher J. Hayes, Note, *Married Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code*, 47 Hastings L.J. 1593, 1602 (1996) (noting that "at no time before 1996 has Congress ever refused to recognize a state-law determination of marital status" for access to tax benefits of marriage).

According to the 2010 Census, an estimated 131,729 same-sex couples in the United States were married under the law of their states. Gary J. Gates & Abigail M. Cooke, *United States Census Snapshot: 2010*, The Williams Institute, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf (last visited Feb. 22, 2013). These states, breaking with the practice in other states, have determined that same-sex couples may marry, just as years ago many states broke with the practice in other states with regard to interracial marriage. *See Perez v. Lippold*, 32 Cal. 2d 711, 731–32, 198 P.2d 17, 29 (1948) (overturning California's anti-miscegenation law); Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* 42, 43, 63 (2009) (charting miscegenation laws in different states); *see also* Brief of *Amici Curiae* Family Historians ("Historians' Br.") § III.A.

The federal government always deferred to those state-determined marital statuses, even when that meant denying marriage benefits to married interracial couples who resided in states in which they could not marry. *See, e.g.*, *Matter of D---*, 3 I. & N. Dec. 480, 481–83 (BIA 1949) (refusing to recognize, for immigration-law purposes, Canadian marriage because of criminal prohibition in state of residence against "cohabitation and marriages between negroes and white person"); *In re Lucy Hart*, 19 P.D. 417, 418 (March 30, 1906); *In re Ann Cahal*, 9 P.D. 127, 128 (Oct. 2, 1897) (denying pensions to, respectively, white and African-American widows, because both were married to men of a different race and therefore marriages were illegal under laws of their states).

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[2] Such federal deference is, of course, bounded by the Constitution. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 9 (1967); *Turner v. Safley*, 482 U.S. 78, 84 (1987).

BLAG contends that some states' consideration of whether to grant married status to same-sex couples forced Congress to "choose between retaining a uniform federal rule or continuing simply to borrow state definitions." BLAG Br. 33. BLAG constructs a false choice in two ways. First, DOMA is not a uniform federal definition of marriage. There is and always has been diversity between the states with regard to marital status, and the federal government continues to honor that diversity. *See* Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* 34 (2d ed. 1988) ("A complete list of the laws of all states on licensing and the solemnization of marriage would be unduly long, since, there is a large variety of such statutes.").

Second, there was accordingly no need for Congress to choose between anything. Congress never chose between competing definitions of marriage or family status before DOMA. Similarly situated couples have always been, and still are, treated differently at the federal level if they live in states with different marital-status requirements. As this Court concluded with regard to federal deference to different state laws of marital property, "[t]here is here no need for uniformity." *United States v. Yazell*, 382 U.S. 341, 357 (1966); *see also Bell v. Tug Shrike*, 332 F.2d 330, 332–34 (4th Cir. 1964) (rejecting argument that admiralty law seeks "national uniformity" and holding meaning of "widow" under Jones Act is determined by state law).[3]

A. Federal Law Accepts State Diversity With Regard To Marriage.

States have always varied considerably in the conditions they impose on those requesting married status. For example, New York permits fourteen-year-olds to marry in certain circumstances, N.Y. Dom. Rel. Law §§ 15(3), 15-a (McKinney 2013). Hawaii does not. Haw. Rev. Stat. § 572-1(2) (West 2012). Montana requires a blood test to marry unless certain exceptions apply. Mont. Code Ann. § 40-1-203 (West 2011). Arizona does not. Ariz. Rev. Stat. Ann. § 25-121 (West 2012). Some states confer married status on couples who hold themselves out and act as married; most states do not. *See* POMS

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[3] *Amici* Senators cite the Tax Revenue Act of 1948 as an example of Congress being concerned about uniformity. Brief for *Amici* United States Senators Orrin G. Hatch, et al. ("Senators' Br.") 19–20. Indeed, the 1948 Act helped equalize federal tax burdens between married couples, which had varied depending on whether a couple lived in a community-property or a common-law state. DOMA does the opposite. Not only does it treat married couples in different states differently for tax purposes, it treats married couples within the same state differently for tax purposes.

§ GN 00305.060(A)(1)(e) (Social Security Administration's Program Operations Manual System digest of state laws regarding recognition of common-law marriages).

State statutes also differ considerably with respect to the degree of consanguinity that constitutes incest. For example, it is legal to marry one's first cousin in Connecticut, New York, and California, *see* Conn. Gen. Stat. Ann. § 46b-21 (West 2012); N.Y. Dom. Rel. Law § 5 (McKinney 2013); Cal. Fam. Code § 2200 (West 2012), but not in New Hampshire, Pennsylvania, or Michigan, *see* N.H. Rev. Stat. Ann. § 457:2 (2013); 23 Pa. Cons. Stat. Ann. § 1304(e) (West 2012); Mich. Comp. Laws § 551.3 (2012).

Policy differences underlie all of these variations, but the federal government does not take sides. Thus, two people who never went through a marriage ceremony but hold themselves out as married can be treated as married for federal income-tax purposes if they live in Colorado, which permits common-law marriage, but not if they live in Connecticut, which does not. *See* Rev. Rul. 58-66, 1958-1 C.B. 60 (1958). *Compare Renshaw v. Heckler*, 787 F.2d 50, 52–54 (2d Cir. 1986) (awarding benefits because New York, which does not recognize common-law marriage, would recognize claimant's common-law marriage because couple traveled to jurisdiction that recognized common-law marriage), *with Lynch v. Bowen*, 681 F. Supp. 506, 511–12 (N.D. Ill. 1988) *amended*, 1988 WL 33843 (N.D. Ill. Apr. 1, 1988) (denying benefits because Illinois would not recognize common-law marriage merely because couple traveled to jurisdiction that recognized common-law marriage).

BLAG cites testimony from several members of Congress who were concerned about "people in different States" having "different eligibility" for federal benefits, BLAG Br. 8, but differing eligibility is and has been the norm in a nation where states determine the marital status implicated in so many federal laws. The Congress members' simultaneous desires (i) for uniformity; and (ii) to treat marriage as it always had been treated suggest a deep misunderstanding of *De Sylva*, *Ankenbrandt*, and the practical functioning of federal agencies that rely on state law for family-status determinations.

For example, a person can marry her first cousin in Massachusetts and be treated as married by the Social Security Administration, because Massachusetts recognizes first cousin marriages. *See* 42 U.S.C. § 416(h)(1)(A)(i). Yet a similarly situated person in Washington cannot marry his first cousin, and thus is not entitled to the same federal benefit. *See Weiner v. Astrue*, 2010 WL 691938, at *3–5 (S.D.N.Y. Mar. 1, 2010) (citing *Renshaw* and holding state recognition of common-law marriage controls whether applicant entitled to Social Security benefits).

The federal government as an employer might have a desire to treat its employees the same whether they live in Virginia or Maryland, *see* BLAG Br. 43, but it has not previously done so. A federal employee whose relationship meets the requirements of common-law marriage is treated as married by the federal government if she lives in

Washington D.C. (which recognizes common-law marriage), but not if she lives in New York (which does not).

B. Federal Law Accepts State Diversity With Regard To Divorce.

Consistent with the strength of the federal norm of deference to state marital-status determinations, the federal government has always respected state authority over divorce determinations. It was not until the early 1980s that most states adopted provisions for no-fault divorce. Prior to that time, there was tremendous diversity in state fault-based divorce laws, generating enormous practical and legal difficulties on an interstate level.[4] For much of the twentieth century, individuals would travel to states in which they were not domiciled to get divorced, in the same way that some opposition *amici* suggest same-sex couples were threatening to travel to Hawaii to get married. Senators' Br. 16–17; *see* Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 Va. L. Rev. 1497, 1504–05 (2000). In an effort to attract divorce business, Nevada repeatedly eased its jurisdictional residency requirements in the mid-twentieth century. *Id.* at 1505. "'Going to Reno' became almost a synonym for getting a divorce." *Id.* By 1946, Nevada's divorce rate was fifteen times higher than California's, and fifty times higher than New York's. *Id.*

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[4] *See* Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 Wm. & Mary Bill Rts. J. 381, 386–88 (2007) (describing different state policies regarding respecting sister-state divorce determinations).

Courts and scholars at the time and since have noted the troubling issues created by this diversity among the states. *See, e.g.*, Estin, 16 Wm. & Mary Bill Rts. J. at 390–92. Different states had different understandings regarding the divisibility of the marital relationship. Thus, contrary to Professor Wardle's suggestion at the Senate Hearings on DOMA, marital-status determinations were not remotely "fungib[le]." *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. On the Judiciary*, 104th Cong. 27, n.4 (1996) ("Senate Hearings").

Calls for national rules for adjudicating divorce were common for more than fifty years between the latter part of the nineteenth and the first part of the twentieth centuries, but Congress never created uniformity in the substantive definition of divorce. Many people assumed that any attempt to draft a uniform federal definition of divorce would impermissibly invade states' rights. *See* William L. O'Neill, *Divorce In the Progressive Era* 252–53 (1967). Congress never stepped in to override this diversity. *See* Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 Cornell J.L. & Pub. Pol'y 267, 313 (2009) ("Congress's enactment of DOMA contrasts with its inaction over decades as the states debated the problem of migratory divorce."); *see also* Historians' Br. § III.

The transformation in family law between 1965 and 1985 largely solved the problem of migratory divorce, as states finally accepted some, though differing, versions of no-fault divorce. States adopted no-fault rules as marriage changed, both legally and socially, from a permanent union severable only if one spouse could prove unreciprocated fault by the other spouse, to a companionate bond dissolvable at will by either party. The years of that transformation were some of the most contentious and rapidly changing in the history of family relationships and law. Indeed, the changes that occurred during that time are repeatedly referred to as a "revolution." *See e.g.*, Leslie J. Harris et al., *Family Law* 390 (3d ed. 2005) ("no-fault revolution"); Homer H. Clark, Jr. & Ann Laquer Estin, *Cases and Problems on Domestic Relations* 645 (7th ed. 2005) ("divorce revolution"); Mary Ann Glendon, *The Transformation of Family Law: Family Law in Transition in the United States and Western Europe* 1 (1989) ("unparalleled upheaval").

Certainly, there were people during that time who thought the emerging redefinition of marriage was just as "unprecedented" and "fundamentally" different as BLAG and its *amici* maintain that marriage for same-sex couples is today. Yet Congress did nothing to disrupt the evolving understanding of marriage as a dissolvable bond based on companionship. The norm of federal deference to state determinations of marital status remained firm. Courts continue to respect state determinations with regard to divorce. *See, e.g.*, *Slessinger v. Sec'y of Health & Human Svcs.*, 835 F.2d 937, 940 (1st Cir. 1987) (refusing to apply federal divorce-recognition rule for Social Security purposes, because marital status determined by state law); *Money v. Office of Pers. Mgmt.*, 811 F.2d 1474, 1478 (Fed. Cir. 1987) (holding court must determine whether petitioner divorced under state law to determine whether petitioner entitled to relief as a widow of a federal employee); *Brown v. Astrue*, 2012 WL 948926, at *5 (N.D. Cal. March 20, 2012) (holding ALJ must "appl[y] Virgina law to determine the validity of plaintiff's divorce" before ascertaining entitlement to Social Security benefits).

Despite the moral issues permeating the topic of divorce, despite the threat that unilateral divorce posed to traditional marriage, and despite the widely disparate state responses to these policy debates, Congress never adopted a plenary definition of divorce. It never, in the name of caution, uniformity, administrative expediency, defending the status quo, preserving past legislative judgments or preserving traditional marriage, jettisoned its longstanding deference to state determinations of marital status.

C. Federal Law Accepts State Diversity With Regard To Parenthood.

Any claim that the federal government needs to treat family status uniformly is also refuted by the federal government's treatment of parental status. States are responsible for determining parental status just as they are responsible for determining marital status. That determination matters at the federal level for comparable reasons: Federal rights, responsibilities, and benefits flow from that status.[5] As with marital status, states differ in how they weigh policy considerations determining who should be afforded parental status. And, as with marital status, the federal government defers to that status.

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[5] State determinations of the parent-child status, like state determinations of the marital status, *see supra* note 3, are bounded by the Constitution. *See Stanley v. Illinois*, 405 U.S. 645, 652 (1972); *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989).

As an indication of just how varied parental status determinations are, consider that the most recent version of the Uniform Parentage Act provides "four separate definitions of 'father' . . . to account for the permutations of a man who may be so classified." Uniform Parentage Act, § 102 cmt. (Supp. 2009). The drafters recognized that states will take different approaches to defining "father." There is no "one" definition of "parent," and the federal government has always accepted the states' different ways of defining parental status.

There is tremendous variation in how states determine paternity. Some states still make the marital presumption of paternity irrebuttable after a short statute of limitations. *E.g.*, Cal. Fam. Code § 7541(b) (West 2012) (two years to disestablish paternity); Minn. Stat. Ann. § 257.57, subdiv. 1(b) (West 2012) (same). Others make it rebuttable for a longer time. *E.g.*, Tenn. Code Ann. § 36-2-306 (West 2012) (allowing action before or after birth until three years beyond child's age of majority); Vt. Stat. Ann. tit. 15, § 302(b) (West 2012) (presumption rebuttable through and past child's age of majority). Still others have no statutes of limitations. *E.g.*, Ala. Code § 26-17-607(a) (2012); Mont. Code Ann. § 40-6-108(1) (2011).

Some states allow men who have acted as fathers to disestablish their own parental status with genetic evidence. *See, e.g.*, *In re C.S.*, 277 S.W.3d 82, 86–87 (Tex. App. 2009) (husband allowed to challenge legal paternity with genetic evidence); *State, Dept. of Revenue, Office of Child Support Enforcement v. Ductant*, 957 So. 2d 658, 660 (Fla. Dist. Ct. App. 2007) (father allowed to rescind acknowledgement of paternity more than 60 days after its execution). Other states estop men who have acted as fathers from disestablishing their paternity with genetic evidence. *See, e.g.*, *In re Paternity of Cheryl*, 434 Mass. 23, 37–38, 746 N.E.2d 488, 499 (2001); *Brinkley v. King*, 549 Pa. 241, 251, 701 A.2d 176, 181 (1997).

Some states allow both motherhood and fatherhood to be determined in a surrogacy contract. *E.g.*, 750 Ill. Comp. Stat. 47/15(d) (2012) (making intended mother and father, as determined in a surrogacy contract, legal mother and father); *see also Johnson v. Calvert*, 5 Cal. 4th 84, 93, 851 P.2d 776 (1993) (using intent-to-parent standard to determine parental status). Some states not only refuse to enforce, but actually criminalize, surrogacy contracts. *E.g.*, N.Y. Dom. Rel. Law § 122 (McKinney 2013) (surrogate parenting contracts contrary to public policy, void, and unenforceable); Mich. Comp. Laws § 722.857(2) (2012) (criminalization). Some states allow two parents of the same sex to assume parental status through adoption. Other states do not. *See* Jane S. Schacter, *Constructing Family in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 Chi.-Kent L. Rev 933, 934 (2000) (describing variety of ways in which some but not all states have recognized second-parent adoption).

As with marital status, deference to state determinations of parental status leads to disparities in treatment. A man not genetically related to a child but who was determined to be a father in Massachusetts might be subject to provisions of the Child Support Recovery Act, 18 U.S.C § 228, while a similarly situated man in Texas would not be. A child born to a gestational surrogate mother might be considered a child for Social Security purposes in Indiana, but not in Illinois. *See Astrue v. Capato ex rel. B.N.C.*, __ U.S. __, 132 S. Ct. 2021, 2033 (2012) (noting Social Security Administration's practice of looking to state law to determine who qualifies as a child for benefit purposes); *Murphy v. Houma Well Serv.*, 409 F.2d 804, 811 (5th Cir. 1969) ("daughter" is rightful beneficiary under Jones Act because neither marital father nor any heirs de-legitimated child within short period allowed under Louisiana law). The fact that someone might be considered a parent in Nebraska but not in Nevada has never been a reason to adopt a uniform federal definition of parenthood.

The federal government has always worked with diverse definitions of both marital and parental status. *Amici* Senators imply that without DOMA there would have been too much uncertainty regarding which states would recognize marriages of same-sex couples, and therefore which of those marriages would be valid for purposes of a federal marital benefit or obligation. Senators' Br. 5–6. As the evolving state laws of parenthood and marriage show, however, there is already tremendous diversity and sometimes uncertainty with regard to family-status determinations.

Moreover, the Senators overstate their case. Most state positions on marriage between couples of the same sex are clear. According to the National Conference of State Legislatures, there are not even a handful of states whose position on marriage between couples of the same sex is remotely in doubt. *See* Nat'l Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws, available at* http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx (last updated Feb. 2013). In short, states were and are capable of clarifying which marriages they recognize, and thus the federal government's routine reliance on state law does not lead to unmanageable "confusion" or "inconsistency" in this or any other context. Senate Hearings at 34. (Comments of Lynn Wardle, Professor of Law, Brigham Young University).

Even with DOMA, there are no "uniform" federal definitions of marital or parental status. There are instead a variety of different eligibility rules in different states that allow both state and federal authorities to determine family status for people in a given state. These rules have never been consistent or fungible across states. Section 3 of DOMA does not dispense with this diversity and make a uniform rule of federal marriage recognition. It nationalizes one particular marital-status requirement, for all federal purposes, in contravention of the unbroken historical practice of federal deference to state marital-status determinations.

II. DOMA IS UNLIKE ANY PAST FEDERAL INTERVENTION INTO THE FAMILY BECAUSE IT DISESTABLISHES FAMILY STATUS AT THE FEDERAL LEVEL.

BLAG and its *amici* invoke a variety of federal statutes to argue that DOMA is just one of many federal statutes that regulate domestic relations. *See, e.g.*, BLAG Br. 48 (asserting that Congress "has a long history, when it sees fit, of supplying its own definitions of marriage for various federal purposes"); *Amicus Curiae* Brief of Nat'l Org. of Marriage on the Merits in Support of Respondent BLAG ("NOM Br.") 9 (asserting that "Congress has long defined marriage for purposes of federal statutes, even when such definitions conflicted with applicable state law"). But none of the statutes cited by BLAG or its *amici* does what DOMA does, which is to strip one subset of married couples of their married status for all federal purposes. Instead, prior to and since DOMA, all federal statutes pertaining to family status can be divided into three categories, and all maintain the federal government's traditional deference to state-determined family status.

First, and most common, are federal statutes that *implicitly* invoke the state law of family status. Second, there are federal statutes and regulations that *explicitly* invoke the state law of family status. Third, there are federal statutes that place limitations on or expand the category of who will be eligible for federal benefits under particular statutes based on policy reasons pertinent to those specific statutes.[6]

A. The Vast Majority of Federal Statutes Implicitly Rely On State Determinations Of Status.

Most federal statutes that refer to family status fail to provide any definition or guidance on how to determine family status. In using terms such as "spouse" or "married" or "parent," these laws necessarily rely on state law for those status determinations. Most of the examples cited by BLAG and its *amici* fall into this category. The Federal Employees' Compensation Act assumes a state-conferred marriage when it defines "widow" as a surviving "wife" without ever defining "wife." 5 U.S.C. § 8101(6). The Uniformed Services Former Spouses' Protection Act defines "spouse" as a "husband or wife" who was "married" without further defining those terms. 10 U.S.C. § 1408(a)(6). The Employment Retirement Income Security Act (ERISA) uses the term "spouse" more than twenty-five times without ever defining it.[7] *See, e.g.*, 29

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[6] *Amici* Family Law Professors and the AAML have considered all of the statutory examples cited by BLAG and *amici* NOM, Senators, and Law Professors. None of those examples departs from the framework discussed herein, and we are not aware of any contemporary statutes that do depart from this framework.

[7] The fact that ERISA and federally provided pensions may preempt state community-property law, *see, e.g.*, *Boggs v. Boggs*, 520 U.S. 833, 853–54 (1997), in no way indicates Congressional intent to disregard state-conferred marital statuses, which remain unaltered. *See* NOM Br. 14–15 (arguing that ERISA preempts some family law). Just as

U.S.C. §§ 1001, 1002, 1021, 1055, 1056, 1162, 1163, 1167, 1181.

Federal law also often uses the term "parent" or "child" without defining it. The Copyright Act cited by *amici* Law Professors defines "children," whether legitimate or not, as "immediate offspring, whether legitimate or not," and any adopted children, but does not further define "offspring." 17 U.S.C. § 101. *See* Brief for *Amici Curiae* Law Professors in Support of Respondent BLAG Addressing the Merits and Supporting Reversal ("Law Prof. Br.") 24–25. The failure to provide a more precise definition of "parent" or "offspring" is particularly notable given the myriad contemporary debates, referenced above, with regard to how to define "parent" and "offspring" in an age when it is common to both buy and sell genetic material and to separate conception from gestation and sexual activity. *See* Rene Almeling, *Sex Cells: The Medical Market for Eggs and Sperm* 165 (2011).

Just last Term, this Court rejected the Third Circuit's reliance on biology in interpreting the term "child" in favor of the Social Security Administration's practice of relying on state law.

Congress may decide what one is entitled to as a married person as a matter of tax or Social Security policy, Congress may decide what one is entitled to as a matter of federal pension policy. That is wholly different from deciding whether one is married for all federal purposes. *See also* NOM Br. 17 (arguing "[b]ankruptcy law determines the meaning of alimony, support and spousal maintenance using federal law rather than state law" and citing H.R. Rep. No. 95-595, at 364 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320, but ignoring that bankruptcy law does not define marital status).

See Capato, 132 S. Ct. at 2033. Looking to state law is consistent with how federal courts have always interpreted family status at the federal level.[8] *See Murphy*, 409 F.2d at 811 ("[I]n construing the terms 'child' or 'children' in a federal statute, a court should look to state law.").

Comparably, federal courts look to state law to define terms like "spouse" or "widow." As the Second Circuit held, "the word 'widow' has no popular meaning which can be determined without reference to the validity of the wife's marriage to her deceased husband," which "necessarily depends upon the law of the place where the marriage was contracted." *Lembcke v. United States*, 181 F.2d 703, 706 (2d Cir. 1950). The Ninth Circuit, in interpreting a statute governing the Veterans Administration that did not define the term "marriage," held that "[t]he relevant law to which the regulations refer is the general law of the state of residence." *Barrons v. United States*, 191 F.2d 92, 95 (9th Cir. 1951). In another case interpreting the Jones Act in the context of common-law marriage, one district court warned that "[i]f the federal courts do not apply the existing state law of domestic relations, we will have created a federal common law of domestic relations wherever a federally-created right is involved." *Bell v. Tug Shrike*, 215 F. Supp. 377, 380 (E.D. Va. 1963), *aff'd* 332 F.2d 330, 335 (4th Cir. 1964) (noting "the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law").

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[8] *Amici* Law Professors appear to claim that 1 U.S.C. section 8 defines "child" for federal purposes in a manner akin to how they maintain DOMA defines "marriage" for federal purposes. Law Prof. Br. 24. If that were the case, however, *Capato* would have been unnecessary, because there would have been a definition of "child" without relying on state law. In context, it is clear that section 8 is meant only to distinguish already-born children from expected children, not define the parent-child relationship. *See* 1 U.S.C. § 8(a) ("[T]he word[] . . . 'child' . . . shall include every infant member of the species homo sapiens who is born alive at any stage of development."). They also suggest that the Immigration and Naturalization Act defines the parent-child relationship without resort to state law. *See* Law Prof. Br. 24 (citing 8 U.S.C. § 1101(b)(1)). But if section 1101(b)(1) defined the parent-child relationship, then the federal government, in contravention of almost all state law, has accepted a notion of three or more parents for one child. Under the INA's definition of "child," it is possible for a child to have two fathers—one who was married to its mother at the child's birth, 8 U.S.C. § 1101(b)(1)(A), and one who was its genetic father, *id.* § 1101(b)(1)(C). Even if the INA meant to give such a child an avenue to citizenship through either relationship, it would be extraordinary if it were interpreted to declare the existence of two fathers and a mother for the child.

As all of these courts have held, Congress could not have been assuming one particular definition of "spouse" or "parent" every time it used those status concepts in legislation. There is simply too much diversity in how family status is defined by the states to assume one particular federal definition of marriage or parent. Thus, before DOMA, when past Congresses passed statutes using the term "marriage," it was not, as BLAG contends, intending or not intending to exclude same-sex couples in that definition any more than it was intending or not intending to include common-law marriages or a particular understanding of divorce. BLAG Br. 21. Congress was doing what it had always done, which is rely on states to determine marital status.

The fact that so many federal statutes do not define family status underscores the strength of the norm of federal deference to state determinations of family status. *Amici* Senators argue that, in using the term "marriage," Congress never meant to create "an empty vessel into which the states can pour any relationship that they please." Senators' Br. 15. This Court has already encountered and rejected this argument with regard to family status. In *De Sylva*, the Court explained that state determinations of family status control, though a state is not free "to use the word 'children' in a way entirely strange to those familiar with its ordinary usage." *De Sylva*, 351 U.S. at 580.

Currently, nine states and the District of Columbia authorize marriage between qualified same-sex couples, while other states such as California recognize marriages of same-sex couples married before a particular date for particular purposes. *See* Nat'l Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, *available at* http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx (last updated Feb. 2013).

In none of these situations is a state just pouring any relationship into the marriage vessel; they are pouring relationships that, in all respects, save the genders of the parties, comport with the rich traditional and contemporary symbolism of marriage.

B. Some Federal Statutes Explicitly Rely On State Determinations of Status.

Some federal statutes and the regulations implementing them explicitly invoke state law in order to interpret family status for purposes of that federal statute. For instance, the Social Security Act states that "[a]n applicant is the wife, husband, widow, or widower . . . if the courts of the State in which such insured individual is domiciled . . . would find that such applicant and such insured individual were validly married." 42 U.S.C. § 416(h)(1)(A)(i); *see also Capato*, 132 S. Ct. at 2031.

An administrative ruling by the Internal Revenue Service states that "[t]he marital status of individuals as determined under state law is recognized in the administration of the Federal income tax laws." Rev. Rul. 58-66, 1958-1 C.B. 60 (1958).

The Veterans' Benefits Act states that "[i]n determining whether or not a person is or was the spouse of a veteran, their marriage shall be proven as valid . . . according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued." 38 U.S.C. § 103(c).[9]

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[9] The statute's explicit reliance on state law is notable because elsewhere in the same title, "spouse" and "surviving spouse" are defined as "a person of the opposite sex." 38 U.S.C. § 101(3), (31). The legislative history suggests that these definitions were inserted in 1975 as part of the effort to rewrite the statute to conform with emerging Constitutional mandates for gender equality. *See* S. Rep. No. 94-568, at 19–20 (1975). They were not intended to override section 103(c)'s

All of these examples, and others that fall in this category, support only the argument that the federal government defers to state determinations of marital status.[10]

C. Some Federal Statutes Impose Conditions Beyond Marital Status Reflecting Policy Concerns Specific To Those Statutes.

The third category of federal statutes that invoke marital status either condition eligibility for federal marriage benefits on factors in addition to marital status or provide marriage benefits to people who are not married but in good faith thought they were. Unlike DOMA, these statutes do not disregard state-conferred married status and deny married status to an entire class of married people for all federal

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mandate to determine marital status in accordance with state law. Even if sections 101(3) and 101(31) were intended to exclude married same-sex couples from eligibility for veterans' benefits, such an exclusion for only one program is substantially different in scope and nature from DOMA, which disrupts and redefines a person's married status for all federal purposes.

[10] Despite the fact that the regulations implementing the Family and Medical Leave Act explicitly define "spouse" as a "husband or wife as defined or recognized under State law," 29 C.F.R. § 825.122(a), BLAG argues that the Department of Labor, in adopting final regulations, rejected the inclusion of "same-sex relationships" in the definition of spouse. BLAG Br. 5. In reality, the Department of Labor regulations rejected the inclusions of all unmarried "domestic partners in committed relationships including same-sex relationships" within the definition of "spouse." 60 Fed. Reg. 2180, 2190–91 (1995). Such action is entirely consistent with 29 C.F.R. section 825.122(a)'s deference to state law.

purposes. Instead, these statutes address different policy concerns, intrinsic to each particular statute, by conditioning receipt of some government benefits on statute-specific requirements.

1. *Eligibility Based On Marriage Plus Other Conditions*

All governmental programs that confer benefits based upon a person's marital status must be concerned with people who try to manipulate eligibility requirements for the sole purpose of securing benefits. For example, Congress conditions immigration status on marital status to support the important role that marriage plays in most married people's lives. When it appears that a couple has married only to secure some immigration benefit, however, Congress appropriately denies that benefit. *See* 8 U.S.C. § 1186a(b)(1)(A)(i) (marriage "entered into for the purpose of procuring an alien's admission as an immigrant" does not qualify for permanent residency status purposes); *id.* § 1255(e) (restricting adjustment of status based on marriages entered into during admissibility or deportation proceedings).

Still, immigration laws first defer to state law to define marital status. *See* Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 Wm. & Mary J. Women & L. 537, 550 (2010) ("Immigration officials and federal courts first insist that a marriage meets the procedural and substantive requirements of the state or country where the marriage was 'celebrated' . . . ."). Once the status has been established, then federal immigration laws may impose other requirements, such as the rule that spouses must be physically present during the marriage ceremony (unless the "marriage" has "been consummated"). 8 U.S.C. § 1101(a)(35). Similarly, section 1154(a)(2)(A) restricts and subjects to additional scrutiny the marital treatment of an alien spouse who previously obtained lawful immigration status based on his or her marriage to a citizen or permanent resident, but then petitions to have a new spouse enter the country. These provisions are designed to prevent people from entering marriages to take advantage of an immigration policy that favors married individuals.

BLAG suggests that, instead of deferring to state law, Congress has "suppl[ied] its own definitions of marriage" with the Social Security Act's definitions of "wife," "husband," "widow," "widower," and "divorce" and the Federal Employee Benefits Act's comparable definitions. BLAG Br. 4, 5, n.2 (citing 42 U.S.C. § 1382c(d)(2); 5 U.S.C. §§ 8101(6), (11), 8341(a)(1)(A)–(a)(2)(A)). BLAG omits the crucial distinction: The Social Security Act *requires* that marital status—as opposed to qualifying conditions for benefits—must first be determined by the law of "the courts of the State in which . . . [the] insured individual is domiciled at the time such applicant files." 42 U.S.C. § 416(h)(1)(A)(i).

The more specific rules for qualification do not override the initial rule of deference to state determinations of family status. *See also* 20 C.F.R. § 404.345. Rather, the statute imposes additional requirements that are geared to preventing fraud or protecting the public fisc. *See, e.g.*, 42 U.S.C.

§ 416(d)(4) (for "divorced husband" to qualify for benefits on ex-spouse's earning record, he must have been "married to such individual for a period of 10 years immediately before the date the divorce became effective"); *Weinberger v. Salfi*, 422 U.S. 749, 767 (1975) (upholding legitimacy of nine-month durational requirement before spouse is eligible for Social Security benefits, to "prevent the use of sham marriages to secure Social Security payments"). None of these eligibility requirements abrogates or defines an applicant's existing marital status.

Comparably, when the Federal Employees Retirement System Act defines "former spouse" as a spouse of a civil servant who was married to the individual "for at least 9 months," 5 U.S.C. § 8331(23), or a "widow" as someone "married" for "at least 9 months immediately" prior to the death of her spouse, *id.* § 8341(a)(1)(A), it is not negating the existence, at a federal level, of a five-month marriage or a ten-year marriage that ended two years before the employee died. It is instead attaching additional conditions beyond marital status for the purpose of determining eligibility for benefits. Marital status in the first instance is determined by state law.

These statutes limit access to certain benefits in order to protect the public fisc and avoid fraud in the program at issue. The requirements in addition to marital status are specific to each statute and do not define marital status at all, let alone for all federal purposes. For example, a widower who has remarried may be considered a "surviving spouse" for tax purposes for a specific tax year provided that he did not remarry "any time before the close of [that] taxable year," 26 U.S.C. § 2(a)(2)(A), even if he would not be considered a "widower" for Social Security purposes, *see* 42 U.S.C. § 402(f)(1)(A) (excluding from eligibility for widower benefits any individual who has remarried). Whether one is eligible for federal marriage benefits depends on the specific policy concerns of the particular federal statutes, and not on a blanket Congressional declaration of marital status. Indeed, these statutes accept state-conferred marital status and then go on to determine which married persons are eligible for federal benefits, for reasons specific to the program at issue.[11]

2. *Eligibility In the Absence of Marriage*

BLAG also notes that some statutes afford some individuals eligibility for marital treatment even in the absence of state-conferred marital status. *See, e.g.*, BLAG Br. 4 n.1. These statutes, however, do not constitute federal definitions of marriage. Just as Congress's decision to impose additional eligibility requirements beyond marriage does not constitute a federal denial of married status, Congress's decision to extend some federal marriage benefits to unmarried individuals under specific statutory provisions does not constitute a federal creation of married status.

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[11] *See, e.g.*, 26 U.S.C. § 7703(b) (allowing married individual to file as unmarried only if he or she: (a) decides not to file a joint return with the spouse; (b) lives apart from the spouse during last six months of the year; and (c) maintains the home and support of a qualifying child). BLAG and NOM mischaracterize this example as a denial of marital recognition or benefits to certain married couples. BLAG Br. 5; NOM Br. 18. To the contrary, section 7703(b) simply provides an additional and more beneficial filing option to married taxpayers living apart from their spouses.

For example, the Social Security Act extends the payment of spousal Social Security benefits to someone who "in good faith went through a marriage ceremony . . . resulting in a purported marriage . . . which, but for a legal impediment not known to the applicant at the time of such ceremony, would have been a valid marriage" or who would otherwise qualify for a spousal distribution under the state's intestacy laws. 42 U.S.C. § 416(h)(1)(B)(i). Comparably, the Veterans' Benefits Act provides marital treatment for someone who lived with or had a child with a veteran if that person married the veteran but was unaware of a legal impediment to the marriage. 38 U.S.C. § 103(a). In the immigration context, federal law allows an individual to petition for immigrant status based on marriage to a citizen if the petitioner believed the marriage was legitimate, but later found that the marriage was invalid because of the citizen's bigamous conduct. 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(BB).

In these specific settings, Congress has embraced a version of the putative-spouse rule applied in many states to protect individuals potentially made vulnerable by marriage laws for Social Security, veterans' benefits, or immigration purposes. These statutes do not make any individual married for all federal purposes in contravention of state law.

BLAG and its *amici* point to two other instances of potential Congressional recognition of relationships that might constitute common-law marriage in some states. First, income from cohabitants who "hold[] themselves out to the community" as married may be deemed to applicants under the Supplemental Social Security Income Program, which provides extra income for the aged, blind, and disabled. 42 U.S.C. § 1382c(d)(2); *see* BLAG Br. 4. Deeming income from cohabitants, in a program intended to provide benefits to only the most needy individuals, is a measure designed to protect the public fisc and prevent fraud. This provision attempts to ensure that applicants have no other source of financial support. It not an attempt to incorporate common-law marriage even into all of the Social Security Act, much less into all federal law.

Second, *amici* Law Professors cite two Civil War statutes that recognize, for pension and freedom purposes, cohabitants of Colored Union War soldiers.[12] Law Prof. Br. 25. These statutes, however, offered federal benefits to a class of women who were prevented, under Confederate state laws, from marrying without the consent of their owners or from inheriting property. *Andrews v. Page*, 50 Tenn. (3 Heisk.) 653, 666 (1871). These statutes did not recognize common-law marriages for all Union soldiers or for all African Americans, much less for all federal purposes. Congress's decision to grant these women widow's benefits and freedom in order to recruit African American soldiers to the Union army is entirely different in kind and scope from its creation of a blanket rule of federal non-recognition for one subset of state-licensed marriages.

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[12] *See* A Resolution to Encourage Enlistments and to Promote the Efficiency of the Military Forces of the United States, ch. 29, 13 Stat. 571 (Mar. 3, 1865) (codified at R.S. § 2037); An Act Supplementary to an Act Entitled "An Act to Grant Pensions," ch. 247, § 14, 13 Stat. 387, 389 (July 4, 1864) (codified at R.S. § 4773).

In summary, all of the statutes cited by BLAG and opposition *amici*, except for those pertaining to family-status classification when there is no relevant state authority, *see infra* Section III, fall into the categories outlined in this section. None of these statutes, individually or together, does what DOMA does. None of them defines marital status *per se*. None of them tells an entire class of married people that they are not married for all federal purposes.[13]

III. THE FEDERAL GOVERNMENT HAS DEFINED MARITAL STATUS ONLY WHEN THERE IS NO STATE JURISDICTION TO DETERMINE FAMILY STATUS.

When there is no state sovereign, such as in federal territories, Congress may have a role in regulating marital status. *See* Historians' Br. § IV.B. For example, there were federal definitions and proscriptions on who could marry in numerous territories, most notably Utah, before those territories became states. *See, e.g.*, Morrill Anti-Bigamy Act, ch. 125–26, 12 Stat. 501, 501–02 (July 1, 1862). Federal definitions of marriage still control in the U.S. territories of the Virgin Islands, 48 U.S.C. § 1561, and Puerto Rico, 48 U.S.C. § 736. Those federal definitions do not usurp state authority to define marital status because there is no state authority in federal territories.

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[13] Some examples cited by *Amici* NOM and Law Professors do not even remotely pertain to classification determinations of family status at the federal level. *See, e.g.*, NOM Br. 13 (citing Homestead Act of 1862, which governs the grant of federal land to qualified homesteaders and, in the event of death prior to the requisite 5-year period, to their spouses); Law Prof. Br. 27–28 (same). The fact that the Homestead Act delineated that the spouse of a patentee should inherit the patent in the event of death in no way overrides state intestacy law or state determinations of family status. NOM Br. 15–16 (arguing DOMA is a family regulation akin to the 2010 Census counting married same-sex couples as married or the 1850 Census, which utilized a functional definition of "family" for census purposes). Neither example involves extirpating a person's marital status under federal law.

Although family law is a matter of tribal sovereignty, Congress has also regulated family law among Native Americans to protect the sovereignty of tribes from encroachment. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978). For example, Congress has established rules related to marriages between American Indians and white persons to protect tribal members from marital claims to Indian lands by non-members of the tribe. *See, e.g.*, 25 U.S.C. § 183 (imposing elevated standard of proof to show marriage of "any white man with any Indian woman"). Comparably, the Indian Child Welfare Act reflects Congress's desire to protect tribal integrity during adoption proceedings. *See* NOM Br. 26 n.68. Because these rules pertain to American Indian tribes, over which Congress has plenary authority under Article I, Section 8, no state definition of marital status is implicated.

With respect to the military, the federal government has not directly defined "marriage" or "married," though it has criminalized polygamy. *See*

United States v. Bivins, 49 M.J. 328, 332 (C.A.A.F. 1998) (authorizing prosecution for marriage with person already married as "conduct of a service-discrediting nature" under general Article 134 of the Code of Uniform Military Justice, 10 U.S.C. § 934); *United States v. Kyles*, 20 M.J. 571, 574 (N.M.C.M.R. 1985) (interpreting Code of Uniform Military Justice to forbid bigamy as "prejudicial to good order and discipline" and "service-discrediting").

These instances of marital regulation in the military regulate military personnel conduct rather than define marriage. Indeed, the military code regulates and punishes all sorts of behavior that it thinks is "service-discrediting." *Manual for Courts Martial, United States*, Part IV, Art. 134, ¶ 60, U.S. Dep't of Defense (2012 ed.), *available at* http://armypubs.army.mil/epubs/pdf/mcm.pdf (last visited Feb. 25, 2013) (criminalizing conduct "of a nature to bring discredit upon he armed forces"); *see also United States v. Smith*, 18 M.J. 786 (N.M.C.M.R. 1984) (prosecution for adultery as discrediting behavior). The military's proscriptions on certain kinds of marital conduct are just one piece of the military's extensive regulation of service member behavior.[14] They do not constitute a uniform federal definition of marriage, nor do they usurp state authority to define marriage.

CONCLUSION

Because existing federal statutes operate in an entirely different manner than DOMA, striking down DOMA will not interfere with the operation of current federal statutes that pertain to the family. DOMA is exceptional. It denies to the states the authority that states have always had to confer married status. It cuts into the class of married people in contravention of state law and in sharp contrast to the entrenched norm of federal deference to state determinations of marital status. DOMA disestablishes marriages comprehensively at the federal level and changes what it means to be married for same-sex couples.

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[14] *Amicus* NOM's military benefit and pension examples fail for these same reasons, as well as because NOM mischaracterizes its supporting case law. *See, e.g.*, NOM Br. 14 n.33 (misrepresenting *United States v. Richardson*, 4 C.M.R. 150, 158–59 (1952), as "holding a marriage valid for purposes of military discipline, although it would have been invalid in the state where the marriage began," when *Richardson* holds that "[i]n military law, as in civilian, the validity of a marriage is determined by the law of the place where it is contracted," *id.* at 156).

Respectfully submitted,

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APPENDIX A

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AMICUS
CURIAE
BRIEF

No. 12-307

In the
Supreme Court of the United States

The United States of America, *Petitioner*,

v.

Edith Schlain Windsor and Bipartisan Legal
Advisory Group of the United States
House of Representatives, *Respondents*.

On Writ of *Certiorari* to the United States
Court of Appeals for the Second Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

INTEREST OF *AMICUS CURIAE*. 1

INTRODUCTION. 3

SUMMARY OF ARGUMENT. 9

ARGUMENT. 11

SECTION 3 OF DOMA DOES NOT VIOLATE THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT. 11

Section 3 of DOMA, On Its Face, Does Not Discriminate On The Basis Of Sexual Orientation. 11

The Disparate Impact Of Section 3 Of DOMA On Homosexuals Who Wish To Marry Persons Of The Same Sex Is Not Constitutionally Cognizable In The Absence Of Any Evidence That In Enacting § 3, Congress Had The Purpose Or Intent To Discriminate Against Homosexuals. 13

Assuming That Section 3 Of DOMA Classifies On The Basis Of Sexual Orientation, Such Classification Is Subject To Traditional Rational Basis Review. 17

CONCLUSION. 33

TABLE OF AUTHORITIES

Cases:

Adams v. Howerton, 486 F.Supp. 1119 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1981). 5

Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1981). 6

Andersen v. King County, 138 P.3d 963 (Wash. 2006). . . . . *passim*

Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). 11-12

Baker v. State, 744 A.2d 864 (Vt. 1999). 12

Baker v. Wade, 769 F.2d 289 (5th Cir. 1985) (*en banc*). 18, 19

Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989). 18

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001). 32

Bolling v. Sharpe, 347 U.S. 497 (1954). 3

Bowen v. Gilliard, 483 U.S. 587 (1987). 26

Bowers v. Hardwick, 478 U.S. 186 (1986). 19

Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006). 18, 19, 32

City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985). . . . . *passim*

Clark v. Jeter, 486 U.S. 456 (1988).. 8

Conaway v. Deane, 932 A.2d 571 (Md. 2010). . . 26, 30

Cook v. Gates, 528 F.3d 42 (1st Cir. 2008). 18, 19

Dean v. District of Columbia, 653 A.2d 307 (D.C. Ct. App. 1995). 12, 16-17

Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996), *on remand*, 128 F.3d 289 (6th Cir. 1997).. 18, 25

Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati, 128 F.3d 289 (6th Cir. 1997).. . . . . 18, 19, 31, 32

Ferraro v. Ferraro, 77 N.Y.S.2d 246 (N.Y. Fam. Ct. 1948), *aff'd sub nom. Fernandes v. Fernandes*, 87 N.Y.S.2d 707 (N.Y. App. Div. 1949). 6

Flores v. Morgan Hill Unified School District, 324 F.3d 1130 (9th Cir. 2003). 18, 19, 25

Frontiero v. Richardson, 411 U.S. 677 (1973). 23

Goodridge v. Dep't of Public Health,
798 N.E.2d 941 (Mass. 2003). 12, 30

Hernandez v. Robles, 805 N.Y.S.2d 354
(N.Y. App. Div. 2005), *aff'd*, 855 N.E.2d 1
(N.Y. 2006). 21

Hernandez v. Robles, 855 N.E.2d 1
(N.Y. 2006). 12, 17, 21, 30

Hernandez-Montiel v. I.N.S., 225 F.3d 1084
(9th Cir. 2000), *overruled in part on other grounds*, *Thomas v. Gonzales*,
408 F.3d 1177 (9th Cir. 2005). 24

High Tech Gays v. Defense Industrial Services Clearance Office, 895 F.2d 563
(9th Cir. 1990).. . . . . 18, 24

Holmes v. California National Guard,
124 F.3d 1126 (9th Cir. 1997). 18, 19

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In re Marriage Cases, 183 P.3d 384
(Cal. 2008).. . . . . *passim*

In re Marriage of J.B. and H.B., 326 S.W.3d 654
(Tex. App. 2010). 22

In re Parentage of L.B., 89 P.3d 271 (Wash. Ct. App. 2004), *aff'd in part, rev'd in part on other grounds*, 122 P.3d 161 (Wash. 2005). . . . 12-13

In re Valente's Will, 188 N.Y.S.2d 732 (Surr. Ct. 1959). 6

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Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004). 18, 19

Johnson v. Robison, 415 U.S. 361 (1974). 22

Kerrigan v. Comm'r of Public Health, 957 A.2d 407 (Conn. 2008). . . 21, 27-28, 29, 30

Lawrence v. Texas, 539 U.S. 558 (2003). 5, 15, 19

Levy v. Louisiana, 391 U.S. 68 (1968). 23

Lofton v. Secretary of the Dep't of Children & Family Services, 358 F.3d 804 (11th Cir. 2004). 18, 19, 32

Loomis v. United States, 68 Fed. Cl. 503 (2005). . . 20

Lyng v. Castillo, 477 U.S. 635 (1986). 20, 24, 29

Massachusetts v. United States Dep't of Health & Human Services, 682 F.3d 1 (1st Cir. 2012). 15-16

Morrison v. Sadler, 821 N.E.2d 15
(Ind. Ct. App. 2005). 22

National Gay Task Force v. Board of Education of the City of Oklahoma City, 729 F.2d 1270
(10th Cir. 1984), *aff'd mem. by an equally divided Court*, 470 U.S. 903 (1985). 18, 19

Nordlinger v. Hahn, 505 U.S. 1 (1992). 21

Padula v. Webster, 822 F.2d 97
(D.C. Cir. 1987). 18, 25

Perry v. Schwarzenegger, 704 F. Supp.2d 921 (N.D. Cal. 2010), *aff'd sub nom., Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted*, Dec. 7, 2012 (No. 12-144). 13

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Philips v. Perry, 106 F.3d 1420
(9th Cir. 1999). 18, 19

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(10th Cir. 2008). 18, 19

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(10th Cir. 1984). 18, 19

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(8th Cir. 1996). 18, 19

Romer v. Evans, 517 U.S. 629 (1996). . . . . *passim*

San Antonio Independent School District v.
Rodriguez, 411 U.S. 1 (1973). 29

Scarborough v. Morgan County Board of Education,
470 F.3d 250 (6th Cir. 2006). 18. 19

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282 F.3d 946 (7th Cir. 2002). 18, 19

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(C.D. Cal. 2005), *aff'd in part, vacated in part*
and remanded with directions to dismiss
for lack of standing, 447 F.3d 673
(9th Cir. 2006).. 11

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(Ariz. Ct. App. 2003).. 32

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(*en banc*). 18

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334 U.S. 410 (1948). 23

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(*en banc*). 18

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413 U.S. 528 (1973). 5

Varnum v. Brien, 763 N.W.2d 862
(Iowa 2009). 27, 29, 30

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Washington v. Davis, 426 U.S. 229 (1976). 14

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972). 23

Witt v. Dep't of the Air Force, 548 F.3d 1264 (9th Cir. 2008). 18, 19, 25

Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989). 18, 23-24

Statutes:

U.S. Const. art. I. 7

U.S. Const. amend. V. *passim*

U.S. Const. amend. X. 7

U.S. Const. amend. XIV. 5, 14, 22, 23

Defense of Marriage Act, § 3, 1 U.S.C. § 7. . . . *passim*

8 U.S.C. § 1101(a)(35). 6

Pub. L. 111-321, § 2, 124 Stat. 3515, 3516. 28

Pub. L. 111-84, § 4707, 123 Stat. 2190, 2839. 28

Pub. L. 100-649, § 601(a), 104 Stat. 4978, 5067, *codified as* 8 U.S.C. § 1182(a). 28

Arizona Enabling Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 569. 5

New Mexico Enabling Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557, 558. 5

Oklahoma Enabling Act of June 16, 1906, ch. 3335, § 3, 34 Stat. 267, 269. 5

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Presidential Memorandum, Extension of Benefits to Same- Sex Domestic Partners of Federal Employees, 75 Fed. Reg. 32247 (June 2, 2010). 29

Presidential Memorandum, Federal Benefits and Non-Discrimination, 74 Fed. Reg. 29393 (June 17, 2009). 29

H.R. Rep. No. 104-664.. 15

http://www.marriagedebate.com/pdf/ iMapp.Fact.Sheet.Votes.pdf. 31

http://www.marriagedebate.com/pdf/ iMapp.Fact.Sheet.Snapshot2.pdf.. 31

INTEREST OF *AMICUS CURIAE*[*]

The Family Research Council (FRC) was founded in 1983 as an organization dedicated to the promotion of marriage and family and the sanctity of human life in national policy. Through publications, media appearances, public events, debates and testimony, FRC's team of policy experts reviews data and analyzes Congressional and executive branch proposals that affect the family. FRC also strives to assure that the unique attributes of the family are recognized and respected in the decisions of courts and regulatory bodies.

FRC champions marriage and family as the foundation of civilization, the source of virtue and the wellspring of society. Believing that God is the author of life, liberty and the family, FRC promotes the Judeo-Christian world view as the basis for a just, free and stable society. Consistent with its mission statement, FRC is committed to strengthening traditional families in America.

FRC actively supported the Defense of Marriage Act, the constitutionality of which is the subject of this litigation. FRC, therefore, has a particular interest in the outcome of this case. Requiring the United States to extend the federal benefits of marriage to couples who have entered into same-sex marriages would not promote any of the interests on the basis of which opposite-sex marriage is a protected social institution. And, for the reasons set forth herein, nothing in the Constitution, properly understood, compels that result. Accordingly, the judgment of the Court of Appeals for the Second Circuit should be reversed.

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[*] Letters of consent have been filed with the Clerk. None of the counsel for the parties authored this brief in whole or in part, and no one other than *amicus* or its counsel has contributed money or services to the preparation or submission of this brief.

INTRODUCTION

Section 3 of the Defense of Marriage Act provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.

1 U.S.C. § 7.

In her complaint, plaintiff alleged that § 3 of DOMA "discriminates on the basis of sexual orientation" "in violation of the right of equal protection secured by the Fifth Amendment." Amended Complaint, ¶¶ 84, 85.[1] Plaintiff argued that § 3 should be reviewed under the strict scrutiny standard of review (or at least intermediate scrutiny) "because homosexuals as a class present the traditional indicia that characterize a suspect class: a history of discrimination, an immutable characteristic upon which the classification is drawn, political powerlessness, and a lack of any relationship between the characteristic in question and the class's ability to perform in contribute to society." Order of June 6, 2012, at 13-14 (summarizing plaintiff's argument).

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[1] Although the Fifth Amendment does not contain express equal protection language, the due process protection conferred by the Amendment ("nor shall any person . . . be deprived of life, liberty, or property, without due process of law") has been construed to include an equal protection component. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

The district court declined plaintiff's invitation to apply heightened scrutiny to § 3 for several reasons. First, although there was "no case law in the Second Circuit binding the Court to the rational basis standard in this context," eleven of the other twelve circuit courts of appeal "have applied the rational basis test to legislation that classifies on the basis of sexual orientation." *Id.* at 14. Second, "as the Supreme Court has observed, 'courts have been very reluctant, as they should be in our federal system,' to create new suspect classes." *Id.* at 14-15 (quoting *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 442 (1985)). Third, the Court "has not designated homosexuals as a suspect class, even though it has had the opportunity to do so." *Id.* at 15 (citing *Romer v. Evans*, 517 U.S. 1 (1992) (striking down, on rational basis grounds, Colorado's Amendment 2)).

The district court, however, declared § 3 of DOMA unconstitutional under the rational basis standard. The court suggested that a more "searching" form of "rational basis scrutiny" *might* be required "where a classification burdens homosexuals as a class,"[2] and where the States' "prerogatives are concerned," referring to the States' traditional authority over domestic relations, including marriage.[3] Order of June 6, 2012, at 16.

---

[2] None of the four cases the district court cited supports the proposition that "law[s that] exhibit[] . . . a desire to harm a politically unpopular group" should be subjected to "a more searching form of rational basis review . . . under the Equal Protection Clause." *Lawrence v. Texas*, 539 U.S. 558, 579-80 (2003) (O'Connor, J., concurring). The district court's quotation from Justice O'Connor's concurring opinion in *Lawrence* (Order at 15-16) is curious because the court did *not* find that DOMA was motivated by an anti-homosexual animus. In any event, *Lawrence* was decided on due process, not equal protection, grounds. *Romer*, *City of Cleburne* and *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973), all applied standard rational basis review.

[3] In the district court, plaintiff claimed that "[t]he federal government . . . has *always* deferred to the [S]tates' determinations of whether a couple is validly married" and has "*never* . . . categorically disregarded state determinations of who is validly married and substituted its own definition." Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 2, 10 (emphases added). Apart from the observation that DOMA does not dictate whether, for purposes of *state* law, marriages between members of the same sex are valid, plaintiff's claim is demonstrably false. First, historically, the federal government required several States to ban polygamy in their constitutions as a condition of joining the Union. *Arizona*: Enabling Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 569; *New Mexico*: Enabling Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557, 558; *Oklahoma*: Enabling Act of June 16, 1906, ch. 3335, § 3, 34 Stat. 267, 269; *Utah*: Enabling Act of July 16, 1894, ch. 138, § 3, 28 Stat. 107, 108. Second, federal, not state, law determines the validity of marriages for purposes of immigration if state law "offends federal public policy." *Adams v. Howerton*, 486 F.Supp. 1119, 1123 (C.D. Cal. 1980) (even assuming that Colorado would recognize a same-sex

Without deciding, however, whether a more "searching" form of rational basis scrutiny is required, the district court determined that § 3 does not pass muster even under normal rational basis review. The court did not dispute the legitimacy of any of the legislative interests sought to be advanced by § 3, specifically, "defending and nurturing the traditional institution of marriage; promoting heterosexuality; encouraging responsible procreation and childrearing; preserving scarce resources; . . . defending traditional notions of morality[;] maintaining consistency in citizens' eligibility for federal benefits[;] promoting a social understanding

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marriage, "as a matter of federal law, [Congress] did not intend that a person of one sex could be a 'spouse' to a person of the same sex for immigration law purposes"), *aff'd*, 673 F.2d 1036, 1039 (9th Cir. 1981) ("the intent of Congress governs the conferral of spouse status under [the Immigration and Nationality Act of 1952], and a valid marriage is determinative *only if Congress so intends*") (emphasis added). Similarly, although several States and the District of Columbia appear to recognize "proxy" marriages, in which one party to the marriage ceremony is not physically present at the time of the marriage, *see In re Valente's Will*, 188 N.Y.S.2d 732, 736 (Surr. Ct. 1959), and *Ferraro v. Ferraro*, 77 N.Y.S.2d 246 (N.Y. Fam. Ct. 1948), *aff'd sub nom. Fernandes v. Fernandes*, 87 N.Y.S.2d 707 (N.Y. App. Div. 1949) (interpreting District of Columbia law), federal immigration law does not recognize such marriages for purposes of the "spouse" preference, at least when the marriage has not been consummated. 8 U.S.C. § 1101(a)(35). Third, federal, not state, law determines the validity of marriages for purposes of federal bankruptcy law. *In re Kandu*, 315 B.R. 123, 132 (W.D. Wash. 2004) (DOMA does not "overstep[] the boundary between federal and state authority" in the definition of marriage because "DOMA is not binding on states and, therefore, there is no federal infringement on state sovereignty").

that marriage is related to childrearing[;] and providing children with two parents of the opposite sex." *Id.* at 17. Instead, the court determined that § 3 of DOMA either did not advance those interests or interfered with the States' "exclusive[]" authority over "domestic relations law." *Id.* 18-26.[4]

The court of appeals, Judge Straub dissenting in part, affirmed, but on different grounds. The majority held that "Section 3 of DOMA requires heightened scrutiny" because "all four factors" that this Court has considered in determining whether a given class is suspect (requiring strict scrutiny) or quasi-suspect (requiring intermediate scrutiny) are satisfied, specifically, that "homosexuals as a group have historically endured persecution and discrimination," that "homosexuality has no relation to aptitude or ability to contribute to society," that "homosexuals are a discernable group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages," and that "the class remains a politically weakened minority." Op. at 24-25. "[B]ased on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect," the court concluded that the class (homosexuals) is "quasi-suspect (rather than suspect)." *Id.* at 34. "To withstand intermediate scrutiny, a classification must be 'substantially related to an important government interest.'" *Id.* at 34-35 (quoting *Clarke v. Jeter*, 486 U.S. 456, 461 (1988)).

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[4] The district court's conclusion that § 3 of DOMA "does not square with our federalist system of government," *id.* at 24, is difficult to reconcile with the court's acknowledgment that "DOMA does not affect the state laws that govern marriage." *Id* at 19. *See also* n. 3, *supra*. Moreover, plaintiff did not claim and the district court did not hold that, in enacting § 3 of DOMA, Congress exceeded its powers under art. I of the Constitution or that § 3 violates the Tenth Amendment. Plaintiff's claim is based *solely* on equal protection principles.

The Bipartisan Legal Advisory Group of the House of Representatives (BLAG) argued that § 3 advances "unique federal interests," to wit, "maintaining a consistent federal definition of marriage, protecting the fisc, and avoiding 'the unknown consequences of a novel redefinition of a foundational social institution.'" Op. at 34 (summarizing argument). BLAG argued further "that Congress enacted the statute to encourage 'responsible procreation,'" *Id.* The majority held that none of these interests could satisfy the intermediate scrutiny standard of review. *Id.* at 34-43.

Judge Straub dissented in part and concurred in part. Dissenting from the majority's selection of the intermediate scrutiny standard of review, Dissent at 35-40, Judge Straub stated that "[t]he discrimination in this case does not involve a recognized suspect or quasi-suspect classification," but, rather, "is squarely about the preservation of the traditional institution of marriage and its procreation of children." *Id.* at 2. The classification created by § 3 of DOMA "is to be reviewed on the basis of whether it has a rational relation to any legitimate end." *Id.* at 2-3. When reviewed under that standard, § 3 passes constitutional muster. *Id.* at 3-5, 17-35

SUMMARY OF ARGUMENT

Amicus curiae submits that the Second Circuit's conclusion that § 3 of DOMA should be evaluated under a heightened standard of judicial review is deeply flawed. First, § 3, on its face, does not discriminate between heterosexuals and homosexuals, but between opposite-sex married couples and same-sex married couples. Although § 3 admittedly has a greater *impact* on homosexuals than heterosexuals, that impact, under this Court's precedents, is not constitutionally relevant unless it can be traced back to an *intent* or *purpose* on behalf of Congress to discriminate against homosexuals, as opposed to the mere *knowledge* that § 3 would have a disparate impact on them. Neither the plaintiff nor the Government, however, has presented any relevant evidence of discriminatory intent or purpose on the part of the Congress that enacted DOMA (as opposed to individual members thereof) or President Clinton, who signed the bill into law. Second, even assuming that § 3 may be said to classify on the basis of sexual orientation, such classification is subject to traditional rational basis review. Homosexuals do not satisfy the criteria this Court has considered in determining whether a class should be subject to strict scrutiny (as in the case of race, national origin or alienage) or intermediate scrutiny (as in the case of gender and illegitimacy). When evaluated under the appropriate standard of review (rational basis), the constitutionality of § 3 of DOMA is readily apparent. Section 3 is reasonably related to multiple, legitimate governmental interests, including promoting responsible procreation and ensuring that the children so procreated will experience, whenever possible, the benefits of being raised in a household with both a mother and father to whom the children are biologically related. Accordingly, the judgment of the court of appeals striking down § 3 of DOMA should be reversed.

ARGUMENT

SECTION § 3 OF DOMA DOES NOT VIOLATE THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT.

Plaintiff argued below (and the court of appeals agreed) that § 3 of DOMA should be reviewed under a heightened standard of judicial review because it discriminates on the basis of sexual orientation. Both the premise and conclusion of plaintiff's argument are erroneous.

Section 3 of DOMA, On Its Face, Does Not Discriminate On The Basis Of Sexual Orientation.

Plaintiff's argument assumes that § 3 of DOMA discriminates against same-sex married couples on the basis of their sexual orientation. That assumption is mistaken. Section 3, on its face, does not define "marriage" for purposes of federal law in terms of the sexual orientation of the parties to a marriage, but whether the parties are of the opposite sex. *See Smelt v. County of Orange*, 374 F. Supp.2d 861, 874 (C.D. Cal. 2005) (DOMA "does not mention sexual orientation or make heterosexuality a requirement for obtaining federal marriage benefits"), *aff'd in part, vacated in part and remanded with directions to dismiss for lack of standing*, 447 F.3d 673 (9th Cir. 2006). "Parties to 'a union between a man and a woman' may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals." *Baehr v. Lewin*, 852 P.2d 44, 51 n.

11 (Haw. 1993) (plurality).[5] *See also Dean v. District of Columbia*, 653 A.2d 307, 363 n. 1 (D.C. App. 1995) (following *Baehr*) ("just as not all opposite-sex marriages are between heterosexuals, not all same-sex marriages would necessarily be between homosexuals"); *Goodridge v. Dep't of Health*, 798 N.E.2d 941, 953 n. 11 (Mass. 2003) (same).[6]

In his concurring opinion in *Andersen v. King County*, 138 P.3d 963 (Wash. 2006), Justice J.M. Johnson noted that the state DOMA "does not distinguish between persons of heterosexual orientation and homosexual orientation," *id.* at 997 (J.M. Johnson, J., concurring in judgment only), and identified a recent case in which a man and a woman, both identified as "gay," entered into a valid opposite-sex marriage. *Id.* at 991 n. 1, 996 (citing *In re Parentage of L.B.*, 89 P.3d 271, 273 (Wash. Ct. App. 2004), *aff'd in part, rev'd in part on other*

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[5] Accordingly, "'[h]omosexual' and 'same-sex' marriages are not synonymous; by the same token, a 'heterosexual' same-sex marriage is not, in theory, oxymoronic"). *Id.*

[6] Judges in other cases have made the same observation. *See, e.g.*, *Baker v. State*, 744 A.2d 864, 890 (Vt. 1999) (Dooley, J., concurring) ("[t]he marriage statutes do not facially discriminate on the basis of sexual orientation); *id.* at 905 (Johnson, J., concurring in part and dissenting in part) (noting that "sexual orientation does not appear as a qualification for marriage under the marriage statutes" and the State "makes no inquiry into the sexual practices or identities of a couple seeking a license"); *Hernandez v. Robles*, 855 N.E.2d 1, 20 (N.Y. 2006) (Graffeo, J., concurring) (same).

grounds, 122 P.3d 161 (Wash. 2005)).[7] It is apparent, therefore, that the right to enter into a marriage that would be recognized under § 3 of DOMA "is not restricted to (self-identified) heterosexual couples," *id.* at 991, n. 1, but extends to all adults without regard to "their sexual orientation." *Id.* at 997. Contrary to the understanding of the California Supreme Court, *see In re Marriage Cases*, 183 P.3d 384, 440-41 (Cal. 2008), a law that restricts marriage (or the benefits thereof) to opposite-sex couples does not, *on its face*, discriminate between heterosexuals and homosexuals. The classification in the statute is not between men and women, or between heterosexuals and homosexuals, but between opposite-sex (married) couples and same-sex (married) couples.

The Disparate Impact Of Section 3 Of DOMA On Homosexuals Who Wish To Marry Persons Of The Same Sex Is Not Constitutionally Cognizable In The Absence Of Any Evidence That In Enacting § 3, Congress Had The Purpose Or Intent To Discriminate Against Homosexuals.

Admittedly, § 3 has a greater *impact* on those homosexuals who would want to marry someone of the same sex than on heterosexuals who would want to marry someone of the opposite sex. Nevertheless, disparate impact alone is insufficient to invalidate a classification, even with respect to suspect or quasi-suspect classes such as race and gender. Under well-established federal equal protection doctrine, a facially neutral law (or other official act) may not be challenged on the basis that it has a disparate impact on a particular race or gender unless that impact can be traced back to a discriminatory purpose or intent. The challenger must show that the law was enacted (or the act taken) *because of*, not *in spite of*, its foreseeable disparate impact. *See Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (rejecting equal protection challenge to police department's use of a job-related employment test to evaluate verbal skills of employment applicants on which a higher percentage of blacks than whites failed where there was no showing that racial discrimination entered into the establishment of formulation of the test); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-71 (1977) (municipality's refusal to amend zoning ordinance to allow multi-family, low income housing in village where single family homes predominated did not violate the Equal Protection Clause, even though such refusal to rezone had a disproportionate impact on blacks, where there was no evidence of discriminatory intent); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 271-80 (1979) (upholding hiring preference for veterans in state employment despite it disproportionate impact on women where there was no evidence that the statute conferring the preference was enacted with an intent to discriminate against women, as opposed to non-veterans of either sex).

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[7] In the federal challenge to Proposition 8, the district court acknowledged that "some gay men and lesbians have married members of the opposite sex." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 970 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted* Dec. 7, 2012 (No. 12-144).

Even assuming, for purposes of disparate impact analysis, that sexual orientation is to be treated in the same manner as race or gender and subject to heightened scrutiny, neither plaintiff nor the Government has cited any evidence that even remotely supports the conclusion that in enacting § 3 of the Defense of Marriage Act, *Congress*, as opposed to certain individual members thereof, had the *intent* or *purpose* to discriminate against homosexuals who wish to marry someone of the same sex, rather than the mere *knowledge* that § 3 could have a disparate impact on them. In a related challenge to § 3, the First Circuit rejected the charge "that DOMA's hidden but dominant purpose was hostility to homosexuality," observing that "[t]he many legislators who supported DOMA acted from a variety of motives, one central and expressed aim being to preserve the heritage of marriage as traditionally defined over centuries of Western civilization." *Massachusetts v. United States Dep't of Health & Human Services*, 682 F.3d 1, 16 (1st Cir. 2012) (citing H.R. Rep. No. 104-664, at 12, 16). "Preserving this institution," the court explained, "is not the same as 'mere moral disapproval of an excluded group,' *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring), and that is singularly so in this case given the range of bipartisan support for the statute." *Id.* Although, as in this case,[8] "[t]he opponents of section 3 point to selected comments from a few individual legislators," "the motives of a small group cannot taint a statute supported by large majorities in both Houses and signed by President Clinton." *Id.*[9] "Traditions are the glue that holds society together, and many of our own traditions rest largely on belief and familiarity – not on benefits firmly provable in court. The desire to retain them is strong and can be honestly held." *Id.* Other courts have concurred in rejecting claims that statutes reserving marriage to opposite-sex couples have been motivated by anti-gay prejudice.

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[8] *See* Br. of Plaintiff-Appellee, No. 12-2335, at 11-14 & nn. 6-7.

In *Andersen v. King County*, the Washington Supreme Court rejected the argument that the state DOMA had been enacted because of "anti-gay sentiment." After reviewing the legislative history, the court concluded that "the far more likely explanation for the majority, if not all [of the votes in favor of DOMA], is that they were not motivated by anti-gay sentiment in 1998 but instead were convinced for other reasons that marriage should not be extended to same-sex couples." 138 P.3d at 981 (plurality). Those "other reasons" included "traditional and generational attitudes toward marriage." *Id.* at 981 n. 15. *See also Dean v. District of Columbia*, 653 A.2d at 362-63 (Op. of Steadman,

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[9] Plaintiff conceded below that "it may be the case that many of the lawmakers enacting DOMA were not motivated by a conscious desire to harm lesbians and gay men, or a deliberate bias toward them . . . ." Br. of Plaintiff-Appellee at 12. That concession is fatal to plaintiff's equal protection claim. Where, as here, a law, *on its face*, does not discriminate between classes of persons, the mere fact that it may have a disparate *impact* on a particular group is of no constitutional significance in the absence of evidence of a discriminatory *intent* or *purpose*.

J., concurring) (finding no "purposeful" or "invidious" discrimination against homosexuals in former statute reserving marriage to opposite-sex couples). In upholding the State's marriage laws, the New York Court of Appeals refused to attribute an anti-homosexual prejudice to state statutes that, as construed by the court, limited marriage to opposite-sex couples. The court noted that "[t]he idea that same-sex marriage is even possible is a relatively new one," and observed that, "[u]ntil a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sexes," *Hernandez v. Robles*, 855 N.E.2d at 8 (plurality). "A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted. We do not so conclude." *Id.*[10] Plaintiff has not shown DOMA was enacted *for the purpose* of discriminating against homosexuals, as opposed to maintaining the traditional definition of marriage.

Assuming That Section 3 Of DOMA Classifies On The Basis Of Sexual Orientation, Such Classification Is Subject To Traditional Rational Basis Review.

Finally, even assuming, *arguendo*, that § 3 classifies persons on the basis of their sexual orientation, that classification is subject to rational basis review. This Court has reviewed such classifications under the rational basis standard, *see Romer v. Evans*, 517 U.S. 629 (1996), not under a higher standard of review. Eleven of the thirteen federal courts of appeals have held that homosexuals do *not* constitute a suspect or quasi-suspect class requiring greater than rational basis review.[11]

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[10] In striking down the State's marriage statutes, the California Supreme Court expressly repudiated the suggestion that "the current marriage provisions were enacted with an invidious intent or purpose." *In re Marriage Cases*, 183 P.3d at 452 n. 73.

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[11] *Cook v. Gates*, 528 F.3d 42, 60-62 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996) (*en banc*); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (*en banc*); *Scarborough v. Morgan County Board of Education*, 470 F.3d 250, 260-61 (6th Cir. 2006); *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 54 F.3d 261, 265-68 & n. 2 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996), *on remand*, 128 F.3d 289, 292-93 & nn. 1-2 (6th Cir. 1997); *Schroeder v. Hamilton School District*, 282 F.3d 946, 950-51, 953-54 (7th Cir. 2002); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 & n. 8 (7th Cir. 1989); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866-69 (8th Cir. 2006); *Richenberg v. Perry*, 97 F.3d 256, 260 & n. 5 (8th Cir. 1996); *Witt v. Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130, 1137 (9th Cir. 2003); *Holmes v. California National Guard*, 124 F.3d 1126, 1132-33 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420, 1424-25 (9th Cir. 1999); *High Tech Gays v. Defense Industrial Services Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113-14 & n. 9 (10th Cir. 2008); *Jantz v. Muci*, 976 F.2d 623, 630 (10th Cir. 1992); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *National Gay Task Force v. Board of Education of the City of Oklahoma City*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd mem. by an equally divided Court*, 470 U.S. 903 (1985); *Lofton v. Secretary of the Dep't of Children & Family Services*, 358 F.3d 804, 818 & n. 16 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n. 3 (D.C. Cir. 1994) (*en banc*); *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

Throughout this litigation, plaintiff and the Government have attempted to dismiss the significance of these cases on the ground that they relied, directly or indirectly, upon this Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled in *Lawrence v. Texas*, 539 U.S. 558 (2003), holding that there is no right to engage in homosexual sodomy. *See* Br. of Plaintiff-Appellee, No. 12-2335 (Second Circuit) at 18; Br. for the United States, Nos. 12-2335, 12-2435 (Second Circuit) at 10, 33-34). It must be noted, however, that of the twenty-three cases cited in n.11, *supra*, three (*Baker*, *Rich* and *National Gay Task Force*) were decided *before Bowers* and, therefore, could not have been based on the Court's opinion in that case, and thirteen others (*Cook*, *Johnson*, *Scarborough*, *Equality Foundation*, *Schroeder*, *Citizens for Equal Protection*, *Richenberg*, *Witt*, *Flores*, *Holmes*, *Philips*, *Price-Cornelison* and *Lofton*) were decided *after* this Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), which clearly, if only by implication, cast a long shadow on the continuing precedential value of *Bowers*. *See Romer*, 517 U.S. at 636 (Scalia, J., dissenting) (Court's holding that "homosexuality cannot be singled out for disfavorable treatment . . . contradicts a decision, unchallenged here, pronounced only 10 years ago") (citing *Bowers*). And seven of those cases (*Cook*, *Johnson*, *Scarborough*, *Citizens for Equal Protection*, *Witt*, *Price-Cornelison* and *Lofton*) were decided after *Bowers* was overruled. Moreover, although the Court overruled *Bowers* in *Lawrence*, *Lawrence* employed the rational basis standard of review, the very same standard that was used in the pre-*Lawrence* authorities cited above. Those authorities remain relevant precedents in suggesting the appropriate standard of review this Court should employ in deciding this case. *See Loomis v. United States*, 68 Fed. Cl. 503, 518, 522 (2005) (noting continuing vitality of pre-*Lawrence* cases holding that classifications based on homosexuality are not subject to heightened scrutiny).[12]

It should not be surprising that, with the exception of the court of appeals opinion in this case, no federal court of appeals (and no state court applying federal equal protection analysis) has concluded that homosexuals are members of a suspect (or quasi-suspect) class. They do not meet the standards applicable to such classifications. This Court has identified four characteristics that suspect classes commonly share: (1) a history of discrimination; (2) a trait that "bears no relation to ability to perform or contribute to society[;]" (3) an immutable trait; and (4) political powerlessness. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440-46 (1985); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). *Amicus curiae* does not dispute that homosexuals have been subjected to a history of discrimination, but they do not satisfy the remaining criteria (or "indicia") of "suspectness."

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[12] The Government's argument, in another challenge to § 3, that cases involving "challenges to military policy on homosexual conduct" are distinguishable because "classifications in the military context" "present different questions from classifications in the civilian context," Superceding Br. for the United States Dep't of Health & Human Services, Nos. 10-2204 10.2297, 10-2214 (First Circuit) at 27 n. 10, is misleading. The "military context" of those cases was relevant only to the strength of the military's interest in enforcing its policy against homosexuality, not whether homosexuals should be treated as members of a suspect class.

With respect to the second criterion, *amicus curiae* acknowledges that homosexuals are able to "perform or contribute to society" in many areas. But, for purposes of equal protection analysis, "groups that are treated differently by a statute are not similarly situated unless they 'are in *all* relevant respects alike.'" *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 520 (Conn. 2008) (Zarella, J., dissenting) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added by Justice Zarella). "The fact that same sex couples cannot engage in sexual conduct of a type that can result in the birth of a child is a critical difference in this context." *Id.* So, too, is the fact that, by definition, same-sex couples are unable to provide the benefits of dual-gender parenting. As an institution, marriage exists for the primary purpose of "ensuring a stable legal and societal framework in which children are procreated and raised, and providing the benefits of dual gender parenting for the children so procreated." *Hernandez v. Robles*, 805 N.Y.S.2d 354, 374 (N.Y. App. Div. 2005) (Catterson, J., concurring), *aff'd*, 855 N.E.2d 1 (N.Y. 2006). Because same-sex couples can neither "procreate by themselves" nor "provide dual-gender parenting," *id.*, they are not similarly situated to opposite-sex couples. *See Hernandez v. Robles*, 855 N.E.2d at 11 (plurality) ("[a] person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State's interest in fostering relationships that will serve children best"); *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 674 (Tex. App. 2010) ("a person's sexual orientation . . . does bear on whether he or she will enter a relationship that is naturally open to procreation and thus trigger the state's legitimate interest in child-rearing"). The Court has cautioned that "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant . . . to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Cleburne*, 473 U.S. at 441-42. "In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end." *Id.* at 442.

Section 3 of DOMA, of course, does not dictate what kinds of marriage the States may recognize. That is a matter for the States to decide. But in reserving the federal benefits of marriage to opposite-sex couples, Congress acted reasonably. Extending such benefits to same-sex couples would not promote Congress' interests in "responsible procreation," *Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005), or in dual-gender parenting. That is sufficient to sustain its constitutionality. *See Johnson v. Robison*, 415 U.S. 361, 383 (1974) (when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification . . . is invidiously discriminatory").

With respect to the third criterion – immutability – there is no evidence (and plaintiff has presented none) that sexual orientation, unlike race, sex or national origin, is irrevocably fixed at birth. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality) ("sex, like race and national origin, is an immutable characteristic *determined solely by the accident of birth*") (emphasis added). Nor, contrary to the court of appeals understanding, Op. at 30 n. 4, is a person's sexual orientation, which develops over time and cannot be known at birth, comparable to the other two suspect (or quasi-suspect) classes the Court has recognized – illegitimacy and alienage. Although illegitimates may be legitimated, discrimination against them, *as illegitimates*, is based upon an immutable characteristic, *i.e.*, their illegitimacy *at the time of their birth*. *See Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 176 (1972) ("the Equal Protection Clause . . . enable[s] us to strike down discriminatory laws relating to the status *of birth*") (emphasis added); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (same). Similarly, although an alien may acquire citizenship through naturalization, discrimination based on alienage is often a subterfuge for discrimination based on national origin (or ancestry), *see Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 422 (1948) (Murphy, J., concurring), which *is* an immutable characteristic. Moreover, one cannot be an "alien" unless one is of foreign birth which is an immutable characteristic.

As the Federal Circuit Court of Appeals explained in *Woodward*, "Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes. Members of recognized suspect or quasi-suspect classes, *e.g.*, blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature." 871 F.2d at 1076. *See also Lyng*, 477 U.S. at 638 ("[t]he disadvantaged group is . . . . not a 'suspect' or 'quasi-suspect' class . . . . they do not exhibit obvious, immutable or distinguishing characteristics that define them as a discrete group").[13] "The conduct or behavior of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups." *Woodward*, 871 F.2d at 1076. *See also High Tech Gays*, 895 F.2d at 573 ("[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes");[14]

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[13] The court of appeals' observation that "sexual preference is necessarily disclosed when two persons of the same sex apply for a marriage license," Op. at 30-31, ignores the fact that not all homosexuals desire to enter into a same-sex marriage and those who do not desire to marry someone of the same sex do not necessarily exhibit "obvious, immutable or distinguishing characteristics that define them as a group." Whether a particular characteristic (here, homosexuality) should be regarded as suspect (or quasi-suspect) cannot turn on whether those who share that characteristic choose to "disclose" it. This Court has never recognized a suspect (or quasi-suspect) class on the basis of the *behavior* (or *choices*) of individual members of the class.

[14] Although, in *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled in part on other grounds, Thomas v. Gonzales*, 408 F.3d 1177, 1187 (9th Cir. 2005), the Ninth Circuit characterized sexual orientation and sexual identity as "immutable," in subsequent cases the court has

Padula, 822 F.2d at 102-03 (implying that homosexuality is behavioral).

As the Sixth Circuit has explained, even assuming sexual orientation is a "characteristic beyond the control of the individual," "the reality remains that no law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives and thoughts." *Equality Foundation*, 54 F.3d at 267.

> Those persons having a homosexual "orientation" simply do not, as such, comprise an identifiable class. Because homosexuals generally are not identifiable "on sight" unless they elect to be so identifiable by conduct (such as public displays of homosexual affection or self-proclamations of homosexual tendencies), they cannot constitute a suspect class or a quasi-suspect class because "they do not [necessarily] exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group[.]"

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adhered to its decision in *High Tech Gays* and has continued to evaluate classifications based on a person's sexual orientation under the rational basis standard of review. *See Flores*, 324 F.3d at 1137; *Witt*, 527 F.3d at 821.

Id. (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)).

In rejecting a state constitutional challenge to the state law prohibiting same-sex marriage, the Maryland Court of Appeals concluded that the plaintiffs had failed to demonstrate that a person's sexual orientation is an immutable characteristic determined at birth:

> Based on the scientific and sociological evidence currently available to the public, we are unable to take judicial notice that gay, lesbian, and bisexual persons display readily-recognizable, immutable characteristics that define the group such that they may be deemed a suspect class for purposes of determining the appropriate level of scrutiny to be accorded the statute in the present case.

Conaway v. Deane, 932 A.2d at 614. Plaintiffs "point neither to scientific nor sociological studies, which have withstood analysis for evidentiary admissibility, in support of an argument that sexual orientation is an immutable characteristic." *Id.* at 615. In rejecting a similar challenge to the state DOMA, the Washington Supreme Court noted that the plaintiffs had failed to cite "any studies in support of the conclusion that homosexuality is an immutable characteristic." *Andersen v. King County*, 138 P.3d at 974.

Significantly, in each of the cases in which a state supreme court recognized (on state grounds) homosexuals as members of a suspect (or quasi-suspect) class, the court dispensed with the immutability requirement, concluding that it was sufficient if the characteristic at issue (sexual orientation) would be very difficult to change. *See In re Marriage Cases*, 183 P.3d at 442 ("immutability is not invariably required in order for a characteristic to be considered a suspect classification for equal protection purposes" under the state constitution); *Kerrigan*, 957 A.2d at 437 ("it is not necessary for us to decide whether sexual orientation is immutable in the same way and to the same extent that race, national origin and gender are immutable"); *Varnum v. Brien*, 763 N.W.2d 862, 892-93 (Iowa 2009) (under state equal protection analysis, "[t]he constitutional relevance of the immutability factor is not reserved to those instances in which the trait defining the burdened class is absolutely impossible to change").

With respect to the fourth criterion, homosexuals cannot be said to be "politically powerless" in influencing and shaping national policy.[15] For example, in 1990, the Immigration and

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[15] Contrary to the understanding of the court of appeals, *see* Op. at 24 (questioning whether a group's "lack of political power" is "strictly necessary" in "identify[ing] a suspect class"), "the political power of the group that seeks heightened scrutiny is a highly relevant consideration in the four part test to determine whether the legislation at issue is to be subject to that degree of scrutiny." *Kerrigan*, 957 A.2d at 491-92 (Borden, J., dissenting) (case decided on state grounds). Based upon a review of this Court's precedents, Justice Borden concluded

Nationality Act was amended to clarify the grounds on which an alien may be excluded on mental health grounds and to delete "sexual deviation," which had been understood from the legislative history to include homosexuality, as a specific ground for exclusion. Pub. L. 100-649, § 601(a), 104 Stat. 4978, 5067, *codified as* 8 U.S.C. § 1182(a). More recently, in the National Defense Authorization Act for Fiscal Year 2010, Congress enacted the "Matthew Shepard and James, Byrd, Jr., Hate Crimes Prevention Act," which defined as criminal certain acts of violence (or attempted violence) based on, *inter alia*, the victim's "actual or perceived . . . sexual orientation." Pub. L. 111-84, § 4707, 123 Stat. 2190, 2839. Two months later, Congress repealed the military's "Don't Ask, Don't Tell," policy, which barred openly gay and lesbian persons from military service. Pub. L. 111-321, § 2, 124 Stat. 3515, 3516.

President Obama has directed the Secretary of State and Director of the Office of Personnel Management to extend benefits "to qualified same-sex domestic partners of Federal employees where doing so can be achieved and is consistent with

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that "a principal purpose underlying heightened scrutiny judicial intervention into the realm of legislative judgment – into its essential process of classification – is directly related to the political power factor. Heightened scrutiny analysis is designed as an extraordinary form of judicial intervention on behalf of those insular minority classes who presumably are unlikely to be able to rectify burdensome or exclusive legislation through the political process." *Id.* at 490. For the reasons set forth in the text, such intervention is not warranted on behalf of homosexuals.

federal law." Presidential Memorandum, Federal Benefits and Non-Discrimination, 74 Fed. Reg. 29393 (June 17, 2009); Presidential Memorandum, Extension of Benefits to Same-Sex Domestic Partners of Federal Employees, 75 Fed. Reg. 32247 (June 2, 2010). Most tellingly, the Department of Justice, at the direction of the President and the Attorney General, has refused to defend § 3 of the DOMA in this (or any related) litigation and, in fact, is challenging it as unconstitutional. In light of the foregoing evidence of their demonstrated ability to influence and shape national policy relating to their interests, it cannot plausibly be said that homosexuals are "politically powerless."[16]

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[16] In striking down their statutes prohibiting same-sex marriage, the Supreme Courts of California, Connecticut and Iowa all held that classifications based on sexual orientation warrant intermediate (or strict) scrutiny. *See In re Marriage Cases*, 183 P.3d at 440-44; *Kerrigan*, 957 A.2d at 431-61; *Varnum*, 763 N.W.2d at 885-96. Those holdings, however, were based on the courts' interpretation of their own state constitutions and are inconsistent with the holdings of every other federal court of appeals to have considered the issue that such classifications require only rational basis review. Moreover, in addition to discarding the immutability factor, those courts were able to conclude that classifications based on sexual orientation are suspect (or quasi-suspect) only by eliminating (in California) or diluting to the point of irrelevancy (in Connecticut and Iowa) the requirement that the class in question be politically powerless. *See In re Marriage Cases*, 183 P.3d at 443; *Kerrigan*, 957 A.2d at 439-61; *Varnum*, 763 N.W.2d at 893-95. But that is to dispense with a factor that this Court has consistently identified as one of the "traditional indicia of suspectness." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973). *See also City of Cleburne*, 473 U.S. at 447-49 (1985); *Lyng*, 477 U..S. at 638.

Any lingering doubt that gays and lesbians are able to influence public policy, particularly with respect to the issue of same-sex marriage, should have been laid to rest by the results of the last election. Three States – Maine, Maryland and Washington, by popular vote, approved laws allowing same-sex marriage, and in a fourth State – Minnesota – voters rejected an amendment to the state constitution that would have prohibited same-sex marriage.[17] Even in States where such amendments have been approved, the margin of victory has often been narrow, in some cases barely passing (as in California in 2008 and South Dakota in 2006), indicating that homosexuals, who comprise no more than one to two percent of the population, have succeeded in enlisting many heterosexuals to support their cause for same-sex marriage.[18] In such a dynamic social and cultural environment, the belief that homosexuals are "politically powerless in the sense that they have no ability to attract the attention of the lawmakers," *Cleburne*, 473 U.S. at 445, strains credulity.[19]

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[17] Of the nine States that allow same-sex marriage, only three (Connecticut, Iowa and Massachusetts) have done so as the result of a state supreme court decision. *Kerrigan*, *Varnum* and *Goodridge v. Dep't of Health*. The other six (Maine, Maryland, New Hampshire, New York, Vermont and Washington), as well as the District of Columbia, have done so by the voluntary choice of their state legislature or, in the case of the District of Columbia, the city council, or by a vote of the people. Significantly, in three of those States (Maryland, New York and Washington) the legislature and/or the people approved same-sex marriage *after* their statutes prohibiting such marriages had been upheld by their state high courts, *see* *Conaway*, *Hernandez* and *Andersen*, which suggests that a decision by this Court upholding DOMA (or Proposition 8) would not foreclose reconsideration of DOMA (or Proposition 8) by the political branches of government or by the people themselves. But a decision by this Court striking down DOMA (or Proposition 8) would short-circuit and paralyze the political process from functioning as it should in a democracy.

"[P]ublic discrimination towards persons who are not members of a suspect or quasi-suspect class is permissible as long as such official discrimination is rationally linked to the furtherance of some valid public interest." *Equality Foundation*, 128 F.3d at 297 n. 8 (citing *Romer*, 517 U.S. at 632). This holding is supported by cases rejecting equal protection challenges to various forms of alleged discrimination against homosexuals where, regardless of animus, the discrimination in question was rationally related to a legitimate governmental purpose.[20] So, too, state courts have upheld state marriage statutes, notwithstanding claims that they were motivated in part by an anti-homosexual animus, because they determined that the statutes are reasonably related to legitimate state interests. *Standhardt v. Superior Court*, 77 P.3d 451, 464-65 (Ariz. Ct. App. 2003); *Andersen*, 138 P.3d at 980-85.[21] For the reasons set forth above and set forth in more detail in the brief of the Bipartisan Legal Advisory Group, § 3 of DOMA is reasonably related to multiple, legitimate governmental interests. That is enough to sustain its constitutionality under the Fifth Amendment. The judgment of the court of appeals should be reversed.

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[18] The votes, percentages and texts may be found at http://www.marriagedebate.com/pdf/iMapp.Fact.Sheet.Votes.pdf.

[19] The nine States where same-sex marriage is allowed, together with the District of Columbia, constitute almost 14% of the population, according to the most recent (2010) census data. When the eight States that recognize civil unions (or its legal equivalent) for same-sex couples (California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon and Rhode Island) are added, the percentage of the population that lives in States that allow same-sex marriage or its legal equivalent rises to almost 36%, more than one-third. The civil union statutes (or, in the case of California, the Domestic Partner Act) may be found at http://www.marriagedebate.com/pdf/iMapp.Fact.Sheet.Snapshot2.pdf.

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[20] *See Equality Foundation*, 128 F.3d at 300-01 (upholding city charter amendment that removed homosexuals, gays, lesbians and bisexuals from the protections afforded by the municipality's anti-discrimination ordinances, and precluded municipality from restoring them to protected status); *Citizens for Equal Protection*, 455 F.3d at 864-69 (upholding state constitutional amendment reserving marriage to opposite-sex couples); *Lofton*, 358 F.3d at 817-26 (upholding state law prohibiting practicing homosexuals from adopting children).

[21] In *Standhardt*, the Arizona Court of Appeals held that "Arizona's prohibition of same-sex marriages furthers a proper legislative end and was not enacted simply to make same-sex couples unequal to everyone else." 77 P.3d at 465. In *Andersen*, the Washington Supreme Court explained that under rational basis review, "*even if* animus in part motivates legislative decision making, unconstitutionality does not follow if the law is otherwise rationally related to legitimate state interests." 138 P.3d at 981-82 (emphasis in original) (citing *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 367 (2001)).

CONCLUSION

For the foregoing reasons, as well as those set forth in the brief of respondent Bipartisan Legal Advisory Group of the House of Representatives, *amicus curiae*, the Family Research Council, respectfully requests that the judgment of the court of appeals declaring § 3 of the Defense of Marriage Act unconstitutional be reversed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF FEDERALISM SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT WINDSOR

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI CURIAE........................ 1

SUMMARY OF ARGUMENT 2

ARGUMENT.. 5

I. THE LIMITS OF NATIONAL LEGISLATIVE POWER MUST INFORM THIS COURT'S ANALYSIS OF DOMA UNDER EQUAL-PROTECTION PRINCIPLES 5

   A. Congress Has No Legitimate Interest in Defining Marriage Because It Lacks Enumerated Power to Do So.. 7

   B. Restraints on National Power Are an Integral Part of the Constitution's Guarantees of Equal Protection and Individual Liberty 8

II. DOMA IS NEITHER A "NECESSARY" NOR A "PROPER" MEANS OF FURTHERING ANY OF CONGRESS'S ENUMERATED POWERS 11

   A. DOMA Is Not Valid Commerce or Spending Clause Legislation 13

   B. DOMA Is Not Incidental to an Enumerated Power under the Necessary and Proper Clause 15

   C. DOMA Is Too Broad to Be "Plainly Adapted" to Congress's Enumerated Powers 19

TABLE OF CONTENTS—Cont'd

Page(s)

D. DOMA Is Not a Proper Means for Executing Any Enumerated Power 21

III. DOMA INVADES THE STATES' RESERVED POWERS BY PURPORTING TO DETERMINE MARITAL STATUS IN A BLANKET WAY 25

A. Only States Can Confer and Define Marital Status under Their Police Powers 26

B. DOMA Infringes State Sovereignty and Individual Liberty by Interfering with Valid Marriages 31

1. Rather Than Simply Defining Marriage for Federal Purposes, DOMA Interferes with State Law 32

2. DOMA Infringes Individual Liberty by Pervasively Denying the Status of Validly Married Couples 36

CONCLUSION 40

TABLE OF AUTHORITIES

Page(s)

Cases

Alden v. *Maine*, 527 U.S. 706 (1999) 22

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Arlington Cent. Sch. Dist. Bd. of Educ. v. *Murphy*, 548 U.S. 291 (2006) 14

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TABLE OF AUTHORITIES—Cont'd

Page(s)

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Statutes

1 U.S.C. § 7 29

2 U.S.C. § 31-2 .... 14, 18

5 U.S.C. § 5724a 37

5 U.S.C. § 5924 37

5 U.S.C. § 8133 37

5 U.S.C. § 8341 37

5 U.S.C. § 8442 37

5 U.S.C. § 8445 37

5 U.S.C. § 8901 37

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8 U.S.C. § 1186a(b)(1)(A)(i) 18, 20, 30

10 U.S.C. § 1072 38

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TABLE OF AUTHORITIES—Cont'd

Page(s)

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10 U.S.C. § 1408 33
10 U.S.C. § 1447 38
10 U.S.C. § 1448 38
10 U.S.C. § 1784 38
10 U.S.C. § 2147 38
11 U.S.C. §101 33
11 U.S.C. § 362 33
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15 U.S.C. § 1673 34
17 U.S.C. § 101 14
17 U.S.C. § 203(a)(2) 14
20 U.S.C. § 1087nn(b) 35
20 U.S.C. § 1087ss(b)-(c) 35
20 U.S.C. § 932 38
22 U.S.C. § 1783 38
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TABLE OF AUTHORITIES—Cont'd

Page(s)

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29 U.S.C. § 1163 37

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29 U.S.C. § 2612 37

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TABLE OF AUTHORITIES—Cont'd

Page(s)

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Rules

Fed. R. Evid. 501 14

INTEREST OF THE AMICI CURIAE[1]

Amici are scholars who teach and write about constitutional law and federal structure. Jonathan Adler is Johan Verheji Memorial Professor of Law at Case Western Reserve University School of Law, where he teaches constitutional and administrative law and directs the Center for Business Law and Regulation. Lynn Baker is Frederick M. Baron Chair in Law at the University of Texas School of Law, where she teaches state and local government law. Randy Barnett is Carmack Waterhouse Professor of Legal Theory at Georgetown University Law Center, where he teaches constitutional law and directs the Georgetown Center for the Constitution. Dale Carpenter is Earl R. Larson Professor of Civil Rights and Civil Liberties Law at the University of Minnesota Law School, where he teaches constitutional law and sexual orientation and the law. Ilya Somin is Professor of Law at George Mason University School of Law, where he teaches constitutional law. Ernest Young is Alston & Bird Professor of Law at Duke Law School, where he teaches constitutional law and federal courts. Each has written about the federalism issues that this cases raises.

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[1] All parties have consented to the filing of this brief. No counsel for a party has written this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amici curiae* or their counsel, has made a monetary contribution to this brief's preparation or submission.

The signatories of this brief hold a variety of opinions about same-sex marriage and about how the Constitution's individual-rights provisions may bear on regulation of those marriages. But we agree that Section 3 of the Defense of Marriage Act (DOMA)[2] is an unconstitutional and unprecedented incursion into States' police powers.

SUMMARY OF ARGUMENT

Before this Court addresses whether DOMA denies equal protection of the laws, there is a prior question of federal *power*. This question is prior not only because DOMA cannot stand if it falls outside Congress's authority but also because DOMA can only survive an equal-protection challenge if it serves federal interests within Congress's legislative jurisdiction. As Chief Justice Marshall recognized in *McCulloch* v. *Maryland*, only ends "within the scope of the constitution" are "legitimate." 17 U.S. (4 Wheat.) 316, 421 (1819). That is true regardless of the level of scrutiny that this Court applies to Ms. Windsor's equal-protection claim.

DOMA falls outside Congress's powers. Marriage is not commercial activity, and DOMA is not limited to federal-benefit programs that might rest on the Spending Clause. Any action by Congress that falls outside its specifically enumerated powers must be justified under the Necessary and Proper Clause, and DOMA cannot pass that test. DOMA's definition of marriage is not "incidental" to an enumerated power, see *Nat'l Fed'n of Indep. Bus.* v. *Sebelius* (*NFIB*), 132 S. Ct. 2566, 2591 (2012), because—as the Bipartisan Legal Advisory Group has said—its purpose is to make social policy regarding domestic relations rather than "carry into execution" some federal enumerated power. DOMA's definition is also not "plainly adapted" to an enumerated end, see *McCulloch*, 17 U.S. (4 Wheat.) at 421, because it applies to more than 1100 federal statutes at once. Congress has never even considered how defining marriage to exclude same-sex couples will affect most of these statutory regimes, and BLAG does not defend DOMA in those terms. Finally, DOMA's definition is not "proper," see *Printz* v. *United States*, 521 U.S. 898, 923-24 (1997), because it violates the States' equal sovereignty and lacks a limiting principle to cabin its usurpation of state control over domestic relations.

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[2] This brief does not address the validity of DOMA's other provisions, and we refer to Section 3 simply as "DOMA."

"[U]nder the Constitution, the regulation and control of marital and family relationships are reserved to the States." *Sherrer* v. *Sherrer*, 334 U.S. 343, 354 (1948). DOMA represents an unprecedented intrusion into this domain. That is true even though Congress has enacted statutes, such as for cross-border enforcement of child-custody and support orders, within the sphere of domestic relations. Our claim is not that family law is an exclusive field of state authority, but rather that certain powers within that field—such as the power to define the basic status relationships of parent, child, and spouse—are reserved to the States.

Congress's establishment of a competing federal definition of family undermines the States' sovereign authority to define, regulate, and support family relationships. Federal law is massively intertwined with state law, and state officials implement many federal programs, like Medicaid, in parallel with their own legal regimes. DOMA thus wreaks confusion and imposes substantial administrative costs that undermine States' attempts to define marriage for themselves. These contradictory legal regimes impose costs on individuals as well, who cannot rely on a single body of law to settle their domestic status or hold a single set of officials politically accountable.

DOMA's appropriation of the power to define marriage cannot be justified as simply defining a term relevant to administering federal programs. The statute is not called the "Defense of Marriage Act" for nothing: Congress did not act, say, to make ERISA function more smoothly, but rather because it wished to establish and promote a national definition of marriage to compete with States' changing definitions. BLAG's argument in defense of DOMA could not be clearer on this point. It asserts that "the federal government has the same latitude as the states to adopt its own definition of marriage for federal-law purposes." Br. 19.

BLAG is wrong. The legitimacy of same-sex marriage is a difficult and divisive issue, yet it is one that our federalism has been addressing with considerable success. Congress may regulate in this area to the extent necessary to further its enumerated powers. But it may *not* simply reject the States' policy judgments as if it had the same authority to make domestic-relations law as they do. That is the difference between a government with a general police power and a government of limited and enumerated powers. And it is sufficient to decide this case.

ARGUMENT

I. THE LIMITS OF NATIONAL LEGISLATIVE POWER MUST INFORM THIS COURT'S ANALYSIS OF DOMA UNDER EQUAL-PROTECTION PRINCIPLES

Whether same-sex couples can marry is an evolving, unresolved, and contentious debate. A slight majority of Americans approve of same-sex marriage, but many disapprove.[3] States' domestic-relations laws reflect evolving public opinion. Nine States and the District of Columbia issue marriage licenses to same-sex couples. Another five States permit them to enter into civil unions with full spousal rights. Five more permit domestic partnerships conferring some or all rights and obligations of married couples. Two States recognize out-of-state same-sex marriages. But thirty-eight States, including some that permit civil unions or domestic partnerships, have prohibited same-sex marriage.

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[3] *Changing Attitudes on Gay Marriage*, PEW FORUM ON RELIGIOUS AND PUBLIC LIFE (Nov. 2012). http://features.pewforum.org/same-sex-marriage-attitudes/.

The Framers designed the federal system to allow States exactly this freedom to experiment and to debate contentious policy issues.[4] DOMA is an unprecedented federal intervention into this debate. For the first time, Congress has created an across-the-board federal-marital status that exists independently from, and in some cases conflicts with, States' marital-status determinations.

BLAG argues that DOMA serves five interests: DOMA (1) preserves each sovereign's ability to define marriage for itself, (2) ensures a nationally uniform definition of marriage, (3) preserves earlier Congresses' legislative judgments and protects the federal fisc, (4) maintains the status quo, and (5) serves the aims (such as promoting families and procreation) that States rejecting same-sex marriage have sought to promote. Br. 30-49. Those are interests that a *State* might assert under its police power. When this Court considers whether DOMA—under any standard of equal-protection review—serves legitimate government objectives, it can and should consider whether those ends fall within Congress's enumerated powers.

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[4] See Dale Carpenter, *The Federal Marriage Amendment: Unnecessary, Anti-Federalist, and Anti-Democratic*, CATO POL'Y ANALYSIS no. 570, Jun. 1, 2006, at 10 *available at* http://www.cato.org/sites/cato.org/files/pubs/pdf/pa570.pdf.

The Framers established federalism and separation of powers as a "double security" protecting "the rights of the people." THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961). By pressing the national majority's policy preferences on every State in the Nation in an area of intense national disagreement, DOMA embodies the sort of threat to liberty federalism was designed to prevent.

A. Congress Has No Legitimate Interest in Defining Marriage Because It Lacks Enumerated Power to Do So.

Under any level of scrutiny, DOMA is constitutional only if it serves legitimate federal purposes. For an "end [to] be legitimate," it must be "within the scope of the constitution." *McCulloch*, 17 U.S. (4 Wheat.) at 421. DOMA serves no legitimate purpose because its ends are not "within the scope of the constitution." As we explain, the federal government lacks constitutional authority to determine marital status in a blanket way.

Limiting Congress to enumerated objectives is all the more important in this case because the Court must decide *which* government to defer to—the States or Congress. The Court's tiers of scrutiny in equal-protection analysis reflect judgments about the degree of deference owed to legislative decision-makers. Rational-basis review, in particular, presumes that judges should leave basic value and policy judgments to the appropriate political branches. *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

But Congress intentionally enacted DOMA to *reject* state governments' policy judgments. Thus this case does not involve a simple choice between a court's judgment and "the" legislature's; it forces a choice between the New York legislature and Congress. Limiting Congress to enumerated objectives balances and guides that difficult inquiry. Outside the enumerated powers, the States—not Congress—are entitled to deference.

B. Restraints on National Power Are an Integral Part of the Constitution's Guarantees of Equal Protection and Individual Liberty.

"Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011). Respecting the limits of national power is as essential to protecting liberty as enforcing the Constitution's substantive equality guarantees.

For most of our history, the primary restraints on arbitrary and discriminatory action by the national government have been federalism and separation of powers. In divisive social controversies like the debate over same-sex marriage, federalism lets each State and its citizens decide how to proceed, largely free of national pressure. Federal diversity of outcomes enables the democratic process to accommodate a higher proportion of our citizens' views on the matter than would a uniform national answer. And it prevents the majority of States from impressing their policy preferences on the minority who want to recognize gay marriage. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 110 (2001). "That gradualist approach puts the constitutional debate to one side and lowers the political temperature." Richard A. Epstein, *The Constitutionality of Proposition 8*, 34 HARV. J.L. & PUB. POL'Y 879, 881 (2011).

Moreover, letting each State decide preserves the exit option for both same-sex couples living in a jurisdiction prohibiting their marriage and strong opponents of the practice who do not wish to live in a State where it is legal. Indeed, exit may be a more effective way for citizens to express political preferences than voting in elections. Ilya Somin, *Foot Voting, Federalism, and Political Freedom* 3-16 (Geo. Mason U. Law & Econ. Research Paper Series, No. 12-68 Oct. 12, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2160388. The exit option also "makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond*, 131 S. Ct. at 2364 (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991)).

This exit right is critical to equal protection of the laws. "The right to travel and to move from one state to another has long been accepted," and, "[i]n reality, right to travel analysis refers to little more than a particular application of equal protection analysis." *Zobel* v. *Williams*, 457 U.S. 55, 60 n.6 (1982) (collecting cases). That right is considerably less effectual, however, when national legislative action presses States to adopt a uniform outcome on a social controversy. "As long as the citizen's right to exit local communities is guaranteed in a meaningful way, localism promotes diversity as an important barrier against moral tyranny on the national scale." Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1872 (1995).

State-by-state policy diversity also facilitates experimentation, which can help resolve divisive questions reflecting deep-seated individual views about rights. For example, *Gonzales* v. *Oregon* applied separation-of-powers and federalism principles to prevent the Executive from preempting Oregon's experiment with physician-assisted suicide. 546 U.S. 243 (2006). To the extent that same-sex-marriage proponents and opponents disagree about its likely effect on traditional marriage, actual experience in States recognizing same-sex marriage could inform that debate. "Only when . . . competition between legal systems exists can we perceive which legal rules are most appropriate." Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the*

Corporation, 6 J. LEGAL STUD. 251, 276 (1977). Thus BLAG's argument that Congress enacted DOMA to wait and see how same-sex marriage would play out is exactly backwards. Br. 41-43. DOMA undermines and discourages those experiments by superimposing a uniform and inescapable federal definition of marriage.

II. DOMA IS NEITHER A "NECESSARY" NOR A "PROPER" MEANS OF FURTHERING ANY OF CONGRESS'S ENUMERATED POWERS

DOMA was enacted in 1996 to protect the "institution of traditional heterosexual marriage," H.R. REP. NO. 104-664, at 2 (1996), from the possibility that some States might legalize same-sex marriage. BLAG continues to insist that Congress has the power to define marital status because it is a "separate sovereign" just like the States. Br. 31.

Not so. "Bedrock principles of federalism make clear," BLAG Br. 19, that Congress never has the power to legislate on matters *because* States do. See U.S. CONST. Amend. X. Congress "can exercise only the powers granted to it." *McCulloch*, 17 U.S. (4 Wheat.) at 405.[5]

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[5] See also THE FEDERALIST No. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined . . The powers reserved to the several States will

Congress surely has authority to refuse to recognize particular marriages when executing its enumerated powers. But it cannot define marital status in DOMA's shotgun fashion. States derive the power to define marriage from their police powers, but Congress has no such power. Nor can Congress justify DOMA under the Commerce, Spending, or Necessary and Proper Clauses.

This Court's precedents and the Constitution's history, text, and structure establish three independent requirements for "necessary and proper" laws. First, an unenumerated action must be but a means to an enumerated power or end and "incidental" to the power it purports "to carry into execution." An incidental or implied power must be less significant than the enumerated powers. Any would-be power invoked in support of DOMA cannot be incidental because a general power to define marriage is such a great power that it would have to be enumerated—yet Article I, Section 8, enumerates no such power.

Second, if the implied power is incidental, it must also be "necessary," meaning "plainly adapted," to an enumerated power. A federal definition of marriage that applies to more than 1100 federal statutes, however, is "plainly adapted" to none. Finally, a law

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extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . . .").

must be "proper," which at the very least means it must not grant Congress unlimited power. But BLAG's rationales for DOMA contain no limiting principle. Therefore, DOMA fails each requirement.

A. DOMA Is Not Valid Commerce or Spending Clause Legislation.

This Court's Commerce Clause precedents have always held that "[t]he subject to be regulated [must be] commerce." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 72 (1824); *see also United States* v. *Morrison*, 529 U.S. 598, 610 (2000) (Congress's power is limited to "commercial activity"). DOMA does not purport to regulate interstate commerce. Although weddings may involve extensive commercial activity, marital status itself is not commerce, much less interstate commerce.

Nor is DOMA justified under the Spending Clause. DOMA is not a narrow statute that applies only to federal benefit schemes. It indiscriminately governs all federal statutes and programs and affects more than 1100 federal statutes, many of which have nothing to do with the power of the purse.[6] For instance, DOMA affects, among other things, copyright protection, government ethics, and

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[6] See also H.R. REP. NO. 104-664, at 23 (1996) (failing to state any constitutional basis for Congress's authority to enact DOMA and noting that "this legislation does not provide new budgetary authority or increased tax expenditures").

testimonial privileges. See, *e.g.*, 2 U.S.C. § 31-2; 17 U.S.C. §§ 101, 203(a)(2); 28 U.S.C. § 455(b); Fed. R. Evid. 501; *see also Trammel* v. *United States*, 445 U.S. 40, 52-53 (1980).

Even if DOMA were a spending statute, it would fail under this Court's precedents. Viewed as a spending condition, DOMA requires States administering federal-benefit programs to refuse to recognize state-sanctioned marriages. Under schemes involving federal-state matching funds, DOMA may prohibit the expenditure of *state* money to couples entitled to those benefits under state law. No relevant federal-spending program clearly states a "no same-sex marriage" condition, see *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006) (conditions must be stated "unambiguously"); *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987), and any such condition would operate retroactively for all federal programs that the States entered into before DOMA's enactment in 1996, see *NFIB*, 132 S. Ct. at 2606 ("[T]hough Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or 'retroactive' conditions."). Moreover, a condition cutting across so many federal programs, involving vast sums of money, would surely be coercive. See *id.* at 2604.

B. DOMA Is Not Incidental to an Enumerated Power under the Necessary and Proper Clause.

Since *McCulloch*, this Court has recognized that the Necessary and Proper Clause does not "license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated." *Id.* at 2591 (Roberts, C.J.) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 411).[7]

The Necessary and Proper Clause therefore does not grant all conceivable implicit powers that could be useful to an enumerated power; it does not grant powers we would expect the Constitution to enumerate separately. Here, this Court confronts the same kind of question it decided in *McCulloch* and *NFIB*: Is the power to define marital status the sort we would expect to be enumerated? It is.

In *McCulloch*, this Court upheld Congress's power to incorporate a bank because the "power of creating a corporation" is not a "great substantive and independent power." *McCulloch*, 17 U.S. (4 Wheat.) at 411. Chief Justice Marshall determined that a corporation is "never used for its own sake, but for the purpose of effecting something else." *Ibid.* Thus, there was "no reason to suppose[] that a constitution, omitting . . . to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified [chartering corporations]." *Id.* at 421.

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[7] Recent scholarship establishes that this "incidental" power doctrine was the legal default rule when the Constitution was ratified. See Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in Gary Lawson et al., *The Origins of the Necessary and Proper Clause* 52, 60-61 (2010) (explaining that at the founding an "incidental" power had to be "subordinate to" or "less worthy" than the power it was incidental to).

But in DOMA, defining marriage is not a means to an end; it is an end in itself. As even BLAG acknowledges, marriage is one of the "bedrock institutions" in our society. Br. 41-42; *see Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men"). The power to define marital status is therefore exactly the type of power we would expect the Constitution to enumerate. It is not, like chartering a corporation, a mere "means by which other objects are accomplished." *McCulloch*, 17 U.S. (4 Wheat.) at 411.

This case does not require this Court to say that Congress may *never* limit which marriages federal law will recognize. It is enough to say that nothing about DOMA is "incidental."

First, under the Necessary and Proper Clause, Congress may incidentally regulate intrastate *economic* activity that is not itself interstate commerce if that activity, in the aggregate, has a substantial effect on interstate commerce. *Gonzales* v. *Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring)

("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."). But marriage is not itself an economic activity, and the economic *effects* of marriage do not make the activity itself economic in nature. See, *e.g.*, *Morrison*, 529 U.S. at 615-16 (rejecting a broad view of "economic effects" because it would permit the federal government to regulate marriage, divorce, and childrearing).

Second, Congress may also incidentally regulate intrastate *noneconomic* activity if doing so is "essential" to a broader regulation of interstate commerce. See *Raich*, 545 U.S. at 38 (Scalia, J., concurring) ("[T]he power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective."). But DOMA stands apart from any particular regulatory scheme, and BLAG defends it in terms that are unique to DOMA itself. Some federal statutory regimes *do* bear on marriage, but the statutes themselves generally contain a directive regarding marriage. Moreover, these schemes have generally taken state-family law as they found it, and exceptions to that principle have always been narrow and tailored to the needs of the particular federal program.

Third, DOMA is not "narrow in scope" like the federal civil commitment program in *United States* v.

Comstock, 130 S. Ct. 1949 (2010), or the immigration antifraud marriage provision, 8 U.S.C. § 1186a(b)(1)(A)(i). As explained below, the antifraud provision withholds resident-alien status from some marriages, but only when the couple entered into the marriage to obtain a federal benefit fraudulently. The federal power to confer a benefit like resident-alien status includes the power to prevent someone from fraudulently obtaining the benefit. But that is not what DOMA accomplishes.

BLAG cannot avoid this problem by insisting that DOMA merely limits federal benefits to traditional marriages or, to put it another way, that defining who may receive a benefit is incidental to the power of conferring a benefit under the Spending power. If that were DOMA's true meaning, it would read very differently. Like the immigration antifraud provision, it would relate in some way to a statute's benefit. But DOMA indiscriminately declares that, for the entire U.S. Code, marriage means opposite-sex marriages. Congress did not consider potential applications to particular statutes or programs. DOMA even undermines some statutes, such as ethics laws regulating gifts to federal officials' spouses. 2 U.S.C. § 31-2. The risks of corruption that those statutes combat are equally present when same-sex couples are involved, and federal law's refusal to recognize the union amounts to willful myopia.

Almost two centuries ago, Chief Justice Marshall counseled vigilance "should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government." *McCulloch*, 17 U.S. (4 Wheat.) at 423. DOMA's broad sweep proves its real meaning: it creates a federal marital status to reflect Congress's preference that States should not extend the right to marry to same-sex couples. But the power to determine who can marry "belongs to the laws of the States and not to the laws of the United States." *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979).

C. DOMA Is Too Broad to Be "Plainly Adapted" to Congress's Enumerated Powers.

Since *McCulloch* this Court has held that a "necessary" law must have both a "legitimate" federal end "within the scope of the constitution" and some fit between that end and the means employed to pursue it. 17 U.S. (4 Wheat.) at 421. Congress has wide latitude to determine the fit between means and ends. See, *e.g.*, *id.* at 413-15. But that latitude has limits.

"This Court has not held that the *Lee Optical* test, asking if 'it might be thought that the particular legislative measure was a rational way to correct' an evil, is the proper test in this context. Rather, under the Necessary and Proper Clause, application of a 'rational basis' test should be at least as exacting as it has been in the Commerce Clause cases, if not more so." *Comstock*, 130 S. Ct. at 1966 (Kennedy, J., concurring in the judgment) (quoting *Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483, 487-88 (1955)). "The rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration." *Id.* at 1967. Congress has never even attempted such a link in support of DOMA.

In some contexts, administering a federal program might require federal officials to act based on a more-limited understanding of "marriage" than state law might provide for. One example is the immigration antifraud provision, discussed above, that limits resident-alien status to members of a "qualifying marriage," which excludes marriages that were "entered into for the purpose of procuring an alien's admission as an immigrant." 8 U.S.C. § 1186a(b)(1)(A)(i). It is at least conceivable that, in particular situations, the national government could demonstrate a need (apart from desiring to encourage a particular definition of marriage) to exclude same-sex couples. But, although the Necessary and Proper Clause might support a targeted limitation of state-conferred marital status for federal purposes, DOMA is a sawed-off shotgun. A federal definition of marriage that indiscriminately applies to more than 1100 federal statutes and programs can be "plainly adapted" to none of them.

The Court has historically deferred to Congress's assessment that legislation is "necessary" to exercise an enumerated power. If courts are to defer to Congress's judgments about fit, however, they should at least insist that Congress legislate in a way that allows those judgments to be made.[8] Congress has made no judgment here that treating same-sex couples as unmarried will, say, contribute to the efficient operation of ERISA or some other federal program. Until it does, DOMA should not be upheld as "plainly adapted" to any constitutional exertion of national authority under Congress's enumerated powers.

D. DOMA Is Not a Proper Means for Executing Any Enumerated Power.

Laws that violate core constitutional principles like state sovereignty and enumerated powers are improper. For instance, *Printz* struck down a federal law requiring state officials to conduct background checks on prospective handgun purchasers: "When a 'La[w] . . . violates the principle of state sovereignty reflected in . . . various constitutional provisions . . . it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause.'" 521 U.S. at 923-24 (quoting THE FEDERALIST NO. 33 (Alexander Hamilton)).

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[8] Cf. *Romer* v. *Evans*, 517 U.S. 620, 632 (1996) ("[E]ven [under] the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority.").

Instead, it is "merely an act of usurpation which deserves to be treated as such." *Ibid.* This Court again held, in *Alden* v. *Maine*, that the Necessary and Proper Clause does not vest Congress with the "incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers" because such authority is not proper. 527 U.S. 706, 732 (1999).

Just last Term, a majority of Justices determined that the individual-health-insurance mandate may have been "necessary" to insurance reform but that it was not "proper." They stressed that upholding the mandate would have granted the federal government unlimited power to impose other mandates. *NFIB*, 132 S. Ct. at 2588 (Roberts, C.J.); *id.* at 2646 (joint dissent). Because the government's proffered rationales for its claim of power had no judicially administrable limit and could ultimately justify a national police power, the mandate violated the constitutional principle that "[t]he Federal Government 'is acknowledged by all to be one of enumerated powers.'" *Id.* at 2577 (Roberts, C.J.) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 405). Here, too, the rationales offered in defense of Congress's effort to define "marriage" have no obvious limit.

The case against DOMA is even stronger than in *Printz*, *Alden*, and *NFIB* because, as we explain in Part III, DOMA invades a core area traditionally reserved to the States. Some limiting principle, especially in such areas, must restrict what Congress may do to effectuate federal programs. One can imagine an argument, for example, that a comprehensive federal family code would promote uniformity in the administration of the many federal programs touching family relationships. In any event, if DOMA is upheld—allowing Congress to enact a blanket definition of "spouse" in opposition to state law—then surely Congress may also define "divorce," "annulment," "parent," or "child" in Chapter 1 of Title 1 of the U.S. Code. And it could do so, not to further specific federal programs, but simply to promote its preferred domestic-relations policies. Such a result would tear down limits on Congress's powers set forth in Article I, Section 8.

DOMA also violates the principle of *equal* sovereignty between States by burdening those States that extend marriage to same-sex couples. For instance, Massachusetts has shown that it "stands both to assume new administrative burdens and to lose funding for Medicaid or veterans' cemeteries solely on account of its same-sex marriage laws." *Massachusetts* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 12 (1st Cir. 2012). This burden is a "departure from the fundamental principle of equal sovereignty" between the States. *Nw. Austin Mun. Util. Dist. No. One* v. *Holder* (*NAMUDNO*), 557 U.S. 193, 203 (2009). The federal government is not entitled to "differentiate[] between States" because authorizing same-sex marriage is not the type of "local evil" that *NAMUDNO* suggested could justify distinctions under Section 5 of the Voting Rights Act. *Ibid.*

The Founders recognized this principle of "propriety." See Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: a Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297 (1993) (in the founding era "proper" meant that laws "must be consistent with principles of separation of powers, principles of federalism, and individual rights"). As Alexander Hamilton recognized, "[t]he propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded." THE FEDERALIST No. 33, at 199 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton then stated that any attempt by the federal government to "vary the law of descent in any State" would be improper. *Ibid.* But DOMA accomplishes just such an "improper" result by altering marital status conferred by the States.

Nor can two of the purported federal interests BLAG advances save DOMA. First, the argument that federal statutes need a federal definition of marriage is disingenuous. Before DOMA, federal law took state law as it found it. DOMA continues to tolerate state differences on marriage. See Br. Amici Curiae Family Law Professors 5-18. It recognizes legal unions regardless of age differences, diseases, or how closely related two spouses might be, even though individual States differ significantly on these points. DOMA picks only one issue—same-sex marriage—and declares a federal public policy without even finding that same-sex marriages somehow undermine an enumerated power. See

United States v. *Kimbell Foods, Inc.*, 440 U.S. 715, 730 (1979) ("reject[ing] generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect the administration of federal programs").

Second, DOMA is not a proper way to protect the public fisc. DOMA does in some cases—such as Ms. Windsor's—save the government money. Whether it saves the government money overall remains uncertain, but rational-basis review generally lets the government guess incorrectly. *Massachusetts*, 682 F.3d at 9. DOMA, however, goes much further than simply trying to save money on federal spending programs. Its across-the-board drafting affects many statutes, including copyright law, ethics statutes, and testimonial privileges, that have zero relationship—rational or otherwise—to public money. Such an indiscriminate exercise of power is improper.

DOMA goes much further than background checks for firearm purchases or the individual-health-insurance mandate. Because DOMA set a new precedent for sweeping congressional power to impose a uniform federal family law, it is improper.

III. DOMA INVADES THE STATES' RESERVED POWERS BY PURPORTING TO DETERMINE MARITAL STATUS IN A BLANKET WAY

This Court closely examines whether "essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause." *NFIB*, 132 S. Ct at 2592

(Roberts, C.J.) (quoting *Comstock*, 130 S. Ct. at 1967-68 (Kennedy, J., concurring in judgment)). In DOMA, Congress has transgressed "the longstanding tradition of reserving domestic relations matters to the States." *Thompson* v. *Thompson*, 484 U.S. 174, 186 n.4 (1988). Congress's unprecedented assertion that it has equal power to decide who can marry forces States that recognize same-sex marriages to adjust their ordinary operations under pressure from the federal definition. DOMA also violates individuals' private liberty because it places validly married same-sex couples in the odd position of being married under state law and yet strangers in the eyes of federal law.

A. Only States Can Confer and Define Marital Status under Their Police Powers.

"[R]egulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975); *see also Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004) (collecting cases).[9] We do not maintain that Congress may not legislate in any way touching domestic relations, and in fact many federal regulations do affect family relations. As discussed below and by other *amici*, some even adjust family-status entitlements to suit a federal objective. See Family Law Professors Br. 26-32. But that does not mean that the national government can exercise all the same *powers* over family law that the States exercise. *Lopez* teaches that *something* important remains with the States.

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[9] The Court has been unanimous on this point. See *United States* v. *Lopez*, 514 U.S. 549, 564-65 (1995) (rejecting arguments that "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example"); *id.* at 624 (Breyer, J., dissenting) (acknowledging limits on federal regulation in those areas).

This Court has explained what does. *Ankenbrandt* v. *Richards*, 504 U.S. 689, 703, 706 (1992), held that the "domestic relations exception" to federal-court jurisdiction "divests the federal courts of power to issue divorce, alimony, and child custody decrees," that is, to "determin[e] . . . the status of the parties." Justice Blackmun, concurring in the judgment, correctly observed that States retain authority over the "core" of domestic-relations law, which includes "declarations of status, *e.g.*, marriage, annulment, divorce, custody, and paternity." *Id.* at 716. This Court has frequently, and recently, echoed that determining family status remains a State power. See, *e.g.*, *Newdow*, 542 U.S. at 16 ("Newdow's parental status is defined by California's domestic relations law.").[10]

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[10] See also, *e.g.*, *Williams* v. *North Carolina*, 317 U.S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its

This Court relied on that premise in *De Sylva* v. *Ballentine*, 351 U.S. 570 (1956). *De Sylva* decided whether an illegitimate child could renew a copyright under a federal statute that permitted, if an author died, the "widow, widower, or children," of the author, or his "executors" or "next of kin" to renew the copyright. *Id.* at 571-72. The Court held that state law determined who were "children" under the Act. *Id.* at 580-81.

The Court explained that state law created the relationships the statute depended on in the first place. "To decide who is the widow or widower of a deceased author, or who are his executors or next of kin, *requires* a reference to the law of the State which *created those legal relationships*." 351 U.S. at 580 (emphasis added). Similarly, the word "children" describes a "legal status" that state law created. *Ibid.* "To determine whether a child has been legally adopted, for example, *requires a reference to state law*." *Ibid.* (emphasis added). In other words, state law created family relationships; federal law then decided what, if any, authority to renew a copyright those relationships deserved.

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borders."); *Pennoyer* v. *Neff*, 95 U.S. 714, 734-35 (1877) ("[E]very State possesses [jurisdiction] to determine the civil *status* and capacities of all its inhabitants . . . The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.").

That federal dependence on state marriage law is consistent with historical practice. The federal government has never created domestic statuses independently from the States. Other than instances like the territories, where the federal government *is* the government with general police power (see Family Law Professors Br. 33-35), the federal government does not issue marriage licenses or divorce decrees. It does not legitimate children, perform adoptions, or terminate parental rights. Though federal legislation might promote, shape, or encourage those relationships, it cannot create or extinguish them wholesale.

DOMA shatters two centuries of federal practice. Read plainly and fairly, DOMA creates, for the first time, a blanket federal marital status that exists independent of States' family-status determinations. See Carpenter, *supra*, at 10 ("there has never been a national definition of marriage"). It defines "marriage" and "spouse" across the board for every federal purpose and for more than 1100 federal statutes. 1 U.S.C. § 7; DAYNA K. SHAH, GOV'T ACCOUNTABILITY OFFICE, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004).

DOMA's sweeping language differs markedly from the handful of federal statutes that choose to exclude from a federal benefit some relationships that state law might respect. Compare, for example, the immigration antifraud provision. Although that statute prohibits conferring resident-alien status based on marriages that were "entered into for the purpose of procuring an alien's admission as an immigrant," 8 U.S.C. § 1186a(b)(1)(A)(i), it does not redefine marriage as DOMA does. It simply says that *otherwise married* couples cannot qualify for this particular benefit. Equally important, it serves Congress's "plenary" power to govern immigration and its need to close gaping loopholes in immigration restrictions. *Kleindienst* v. *Mandel*, 408 U.S. 753, 769-70 (1972). It is tailored to that objective: "qualifying marriage" is defined in the antifraud provision *only* for the purpose of that provision.

DOMA reads differently because it was never designed to serve a particular federal objective. It was deliberately drafted to express Congress's policy judgment rejecting same-sex marriage—that is why it is called the "Defense of Marriage Act." That is why its preamble reads, "An act to define and protect the institution of marriage." Pub. L. 104-199, 110 Stat. 2419 (1996). And that is why its legislative history makes clear that "Section 3 will mean simply that [State-recognized same-sex] 'marriage' will not be recognized as 'marriage' for purposes of federal law." H.R. REP. 104-664 at 31.

Far from concealing this objective, BLAG defends it. Among its five proffered justifications, BLAG argues that Congress possesses sovereign authority to define marriage for itself. Br. 30. And it insists that Congress could enact DOMA for the same reasons States can reject same-sex marriage. Br. 30, 43-49. In other words, as BLAG makes plain, DOMA's drafters and defenders have assumed that "the federal government has the same latitude as the states to adopt its own definition of marriage for federal-law purposes." *Id.* at 19.

Congress does not enjoy that latitude because *the Constitution left that power to the States.* U.S. CONST. Amend. X. The ability to create, define, or dissolve marriages is glaringly absent from Congress's enumerated powers and from its historic practice. U.S. CONST. Art. I, § 8; *see NFIB*, 132 S. Ct. at 2586 ("[S]ometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action." (quoting *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010))).

B. DOMA Infringes State Sovereignty and Individual Liberty by Interfering with Valid Marriages.

DOMA not only creates a restrictive federal marriage status unauthorized by the Constitution, but it also interferes with the States' exercise of their reserved power to define marriage for their own purposes. DOMA forcibly creates a two-tiered marriage system in States that recognize same-sex marriage. As a result, DOMA increases those States' administrative costs, needlessly complicates their domestic-relations systems and introduces potential errors and frustration into their chosen marriage regime. DOMA thus discourages States from experimenting in this area at all, placing the heavy hand of the federal government on one side of the scale (through legislation rather than a command of the Constitution, cf. *Loving*, 388 U.S. 1) for the first time in our Nation's history.

DOMA also offends same-sex couples' individual interests in stability and predictability of their basic personal relationships. DOMA creates two contradictory marriage regimes applicable within the same territory. It thus undermines both the public and private significance of same-sex couples' State-sanctioned marriages because it tells them that their *otherwise valid* marriages are invalid in the eyes of the federal government. And it blurs vital lines of political accountability by forcing individuals to look to two sets of laws and officials for redress.

1. Rather Than Simply Defining Marriage for Federal Purposes, DOMA Interferes with State Law.

BLAG argues that "DOMA does not interfere with or override state law." Br. 27. That is false. Most contemporary federal regulatory and benefits programs are cooperative-federalism schemes under which States implement federal programs according to federal directives. Medicaid is a classic example. As Massachusetts explained in related litigation, however, DOMA took the "cooperative" aspect out of cooperative federalism by forcing the Commonwealth to choose between violating state domestic-relations law and forgoing billions of dollars in federal funding. *Massachusetts* v. *U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 243 (D. Mass. 2010). As an employer, Massachusetts pays higher taxes when it extends health insurance to its employees' same-sex spouses. *Id.* at 243-44. And it cannot bury married same-sex couples together in veterans' cemeteries. *Id.* at 239-41.

Medicaid is not the only funding program forcing States to choose between state law and federal funding. For example, States that have adopted programs to promote healthy marriages among "spouses," 42 U.S.C. § 603(a)(2)(iii), presumably would similarly lose funding if they extended those programs to validly married same-sex couples. DOMA interferes with States' domestic-relations laws by undermining States' ability to enforce divorce judgments and spousal-support orders arising from divorces of same-sex couples. The Bankruptcy Code gives spousal-support obligations the highest priority, exempts them from the automatic stay, and generally makes them not dischargeable. 11 U.S.C. §§ 362, 507, 523.[11] Those accommodations do not extend to divorced same-sex couples. See *id.* § 101. A variety of federal statutes help States garnish federal tax returns, federal wages, federal benefits, and federal pensions to enforce spousal support. E.g., 10 U.S.C. § 1408; 42 U.S.C. § 659; 42 U.S.C. § 664; 50 U.S.C.

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[11] For a longer list of ways DOMA disrupts bankruptcies of same-sex couples, see Jackie Gardina, *The Defense of Marriage Act, Same-Sex Relationships and the Bankruptcy Code* (Vermont Law Sch. Faculty Working Paper No. 04-12, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1850926.

§ 2094. And the Consumer Credit Protection Act lifts severe limits on wage garnishment when the creditor is recovering spousal support. 15 U.S.C. § 1673. The unavailability of these standard remedies to enforce spousal support obligations for same-sex couples throws a wrench into the administration of state family law.

States that recognize same-sex marriage likewise face added administrative burdens and confusion when collecting state taxes. State-income-tax regimes often "piggyback" on federal forms, rules, and enforcement. Carlton Smith & Edward Stein, *Dealing with DOMA: Federal Non-Recognition Complicates State Income Taxation of Same-Sex Relationships*, 24 COLUM. J. GENDER & L. 29, 33-41 (2012). DOMA disrupts that complementary relationship. *Id.* at 48-71. For example, Vermont law provides, "A husband and wife or a surviving spouse may file a joint Vermont personal income tax return for any taxable year for which the husband and wife or surviving spouse are permitted to file a joint federal income tax return under the laws of the United States." Vt. Stat. Ann. tit. 32, § 5861(c). Because Vermont's legislature has recognized same-sex marriage, *id.* tit. 15, § 8, DOMA has forced the state to issue special rules requiring same-sex couples to recalculate their federal tax returns as if they had filed jointly. Tech. Bull. TB-55, 2010 Vt. Tax LEXIS 6 (Oct. 7, 2010).

As a final example, DOMA distorts state universities' financial-aid policies. Federal law governs eligibility for federal student loans, the bedrock of any financial-aid package. Those statutes ordinarily permit States to consider a student's spouse's income when determining need—unless the student is in a same-sex marriage. 20 U.S.C. §§ 1087nn(b), 1087ss(b)-(c). Universities must thus either adopt the federal definition for *all* their financial aid determinations—violating state law—or somehow develop a hybrid assessment of need based on two separate definitions of family.

In short, DOMA forces States to adjust their ordinary operations to accommodate a *federal marital status* that the affected States would not otherwise recognize. The practical consequences are real. States have validly married tens of thousands of same-sex couples who pay taxes, attend state universities, and file for divorce. States that recognize same-sex marriage face added administrative burdens and, in some cases, greater expenses. As these burdens become clearer in practice, some States may well decide that departing from the federal vision of family is simply too difficult. DOMA thus discourages States from experimenting with same-sex marriage and punishes those that do.

DOMA's interference is all the more concerning because it treads in a core area of state authority: deciding who is married. DOMA deliberately rejects, and so interferes with, some States' policy judgment that "family and society" would be strengthened by permitting committed adult couples to marry legally. It is hard to imagine a more direct invasion of the heart of States' police powers.

2. DOMA Infringes Individual Liberty by Pervasively Denying the Status of Validly Married Couples.

Throughout history and today, marriage stands as "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12. That is why this Court has held that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence* v. *Texas*, 539 U.S. 558, 573-74 (2003). DOMA creates significant uncertainty within that private realm. It forces same-sex couples to live a divided life, married for state purposes but unmarried for federal ones. Worse, DOMA blurs lines of political accountability for this intrusion, particularly when state officials must administer federal rules that do not respect marriage rights under state law. Without DOMA, same-sex marriage would be either legal or illegal in any given State. Same-sex couples would know their rights, and both proponents and opponents of those marriages would know which level of government to petition to change the law.

For the first time, the federal government, without individualized determinations (such as "sham" marriages entered into for immigration purposes), has created dual domestic statuses—a person who thought he was a spouse suddenly enjoys the benefits and bears the burdens of that status only partially and episodically. Married same-sex couples have, at the state level, all the rights, privileges, and obligations of married couples. They file joint tax returns, enjoy preferential inheritance and tax treatment on their shared property, and live as one another's life partners and next of kin. Yet, whenever they interact with federal law, they are no different than college roommates.

That interaction with federal marriage law is pervasive. Same-sex spouses cannot obtain Social Security or Medicare based on their partners' work histories. See, *e.g.*, 42 U.S.C. § 402. Same-sex couples cannot file joint tax returns or enjoy the preferential tax treatment that opposite-sex marriages do. E.g., 26 U.S.C. §§ 106, 152, 2053, 2056, 6013.

But DOMA goes well beyond federal spending and taxing. Same-sex spouses enjoy no testimonial privileges. They cannot take leave to care for a sick spouse under the Family Medical Leave Act. See 29 U.S.C. §§ 2611-12, § 2614. Nor can divorcing spouses obtain COBRA coverage from their spouses' employers. See 29 U.S.C. §§ 1161, 1163. Same-sex spouses lack notification and access rights when their spouses are in some health-care facilities. See, *e.g.*, 24 U.S.C. § 325(b); 42 U.S.C. §§ 1395i, 1396r.

DOMA most deeply affects government employees, especially members of the Armed Forces, and their families. Everything from access to federal pensions to maintenance stipends to relocation expenses to health insurance depends on marital status. See, *e.g.*, 5 U.S.C. §§ 5724a, 5924, 8341, 8442, 8445, 8901, 8905. Same-sex spouses are particularly excluded from the many programs—such as education and employment assistance—the military offers to assist families of members and veterans of the Armed Forces to ease the burdens military life places on them. See, *e.g.*, 10 U.S.C. §§ 1072, 1078a, 1143, 11447-48, 1784, 2147; 20 U.S.C. § 932; 38 U.S.C. §§ 1781, 3501, 1311. DOMA even bars same-sex spouses whose partners are killed in military service from receiving compensation, notice, and bereavement services. E.g., 5 U.S.C. § 8133; 10 U.S.C. § 1115; 22 U.S.C. § 2715b; 22 U.S.C. § 1783.

Thus DOMA places same-sex couples in the untenable and humiliating position of being married and yet, for any purpose touching federal law, being denied the ordinary rights and duties that have historically flowed from that status. By placing them in a legal labyrinth of changing status, DOMA injects uncertainty into the most fundamental and intimate aspects of these couples' lives. For the first time, individuals cannot rely on their States to settle their marital status definitively, allowing them to order their affairs accordingly.

This Court has recognized a basic interest in predictability in contexts far less fundamental than this one. See, *e.g.*, *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (striking down a state-minimum-wage law under the Due Process Clause's void-for-vagueness doctrine because of the uncertainties it imposed on employers); *Kimbell Foods, Inc.*, 440 U.S. at 728-29 (discouraging creation of federal common law when it would "disrupt commercial relationships predicated on state law"). It is inconceivable that

Congress would be permitted to inject similar uncertainty into other basic family-status relationships. If DOMA is valid, however, it is hard to say why the federal government could not adopt a blanket definition of "children" or "parent" that excluded adopted children or children conceived using sperm or egg donors. BLAG's assertion that Congress can undermine the very relationships this Court has said are "essential to the orderly pursuit of happiness by free men," *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923), has implications far beyond same-sex marriage.

This Court has also recognized the value of identifying a single sovereign responsible for regulatory decisions so that the correct officials may be held accountable for those decisions through the democratic process. See *Printz*, 521 U.S. at 930; *New York* v. *United States*, 505 U.S. 144, 168-69 (1992). By undermining marriage rights conferred by state law, often in cooperative-federalism contexts where *state* officials will have to enforce the federal definition, DOMA blurs the "distinct and discernible lines of political responsibility" that are vital if "political accountability [is not to] become illusory." *United States v. Lopez*, 514 U.S. 549, 576-77 (1995) (Kennedy, J., concurring); *see generally* MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 77 (2012) (discussing the structural federalism principle of "one problem, one sovereign").

Thankfully, the Constitution avoids these serious problems by leaving the power to determine those relationships to the States. Not every State will resolve these questions to the liking of same-sex couples. But if States are permitted to fix family status with certainty, then same-sex couples can either hold the state officials responsible for that decision to account through ordinary political processes or move to a more congenial jurisdiction. Any State's choice remains subject, of course, to the Fourteenth Amendment's constraints, and we do not argue that state sovereignty provides any reason to narrowly construe the Equal Protection Clause. But unless equal protection requires recognition of same-sex marriage, the Constitution best protects liberty of same-sex marriages proponents and opponents by guaranteeing each State the right to decide for itself. That is inevitably a somewhat messy solution, but it is the best option that the Constitution provides for those issues on which we have not yet reached a social consensus.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2013

AMICUS
CURIAE
BRIEF

No. 12-307

IN THE

Supreme Court of the United States

◆

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR and
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

◆

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

◆

AMICI CURIAE BRIEF OF FORMER ATTORNEYS GENERAL EDWIN MEESE III AND JOHN ASHCROFT ON JURISDICTION AND IN SUPPORT OF NONE OF THE PARTIES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. THE SEPARATION OF POWERS REQUIRES THE COURT TO HOLD THAT IT LACKS JURISDICTION IF IT DETERMINES THAT BLAG IS NOT PROPERLY BEFORE THE COURT 3

  A. Concrete Adversity Between the *Parties* Is Especially Essential in Cases Involving the Constitutionality of an Act of Congress 4

  B. Appointing an Amicus Curiae to Defend the Constitutionality of DOMA Is Not Appropriate 7

II. THE EXECUTIVE BRANCH'S DECISION TO ATTACK DOMA'S CONSTITUTIONALITY AFTER FIFTEEN YEARS OF DEFENDING IT REFLECTS AN UNPRECEDENTED READING OF THE PRESIDENT'S TAKE CARE OBLIGATION, AND UNDERMINES THE SEPARATION OF POWERS 11

- A. In Most Non-Defense Cases, Presidential Authority was Implicated. 15
- B. Other Non-Defense Examples Are Distinguishable 20

CONCLUSION 24

TABLE OF AUTHORITIES

Constitution

U.S. Const. art. II, § 3 12

Supreme Court Cases

Adkins v. Children's Hosp.,
261 U.S. 525 (1923) 4

Aetna Life Ins. Co. v. Haworth,
300 U.S. 227 (1937) 4

Am. Foreign Serv. Ass'n v. Garfinkel,
490 U.S. 153 (1989) 18

Ariz. Christian Sch. Tuition Org. v. Winn,
131 S. Ct. 1436 (2011) 3, 9, 10

Ashwander v. Tenn. Valley Auth.,
297 U.S. 288 (1936) 4, 5

Baker v. Carr,
369 U.S. 186 (1962) 7

Bailey v. Patterson,
369 U.S. 31 (1962) 21

Blodgett v. Holden,
275 U.S. 142 (1927)....................................4

Bob Jones Univ. v. United States,
456 U.S. 922 (1982) 9

Bowsher v. Synar,
478 U.S. 714 (1986)....................................18

Buckley v. Valeo,
424 U.S. 1 (1976)....................................17

Chi. & Grand Trunk Ry. Co. v. Wellman,
143 U.S. 339 (1892)....................................5

Dickerson v. United States,
530 U.S. 428 (2000)....................................21

Flast v. Cohen,
392 U.S. 83 (1968)....................................9

Freytag v. Commissioner,
501 U.S. 868 (1991)....................................15

Gutierrez de Martinez v. Lamagno,
513 U.S. 1010 (1994)....................................8

Hohn v. United States,
522 U.S. 944 (1997)....................................8

Humphrey's Ex'r v. United States,
295 U.S. 602 (1935)....................................18

INS v. Chadha,
462 U.S. 919 (1983)..................................7, 18

Kucana v. Holder,
130 S. Ct. 30 (2009).....................................8

League of Women Voters v. FCC,
468 U.S. 364 (1984)....................................22

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803)........................16

McConnell v. FEC,
540 U.S. 93 (2003)......................................22

Metro Broadcasting, Inc. v. FCC,
497 U.S. 547 (1990)...............................18–20

Moore v. Charlotte-Mecklenburg Bd. of Educ.,
402 U.S. 47 (1971)..6

Morrison v. Olson,
487 U.S. 654 (1988)....................................18

Muskrat v. United States,
219 U.S. 346 (1911)..................................5, 6

Myers v. United States,
272 U.S. 52 (1926) 17

Oregon v. Mitchell,
400 U.S. 112 (1970) 22

Pepper v. United States,
131 S. Ct. 32 (2010) 8

Rostker v. Goldberg,
453 U.S. 57 (1981) 4

Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995) 22

Simon v. E. Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 4

Sinking-Fund Cases,
99 U.S. 700 (1878) 4

Sosna v. Iowa,
419 U.S. 393 (1975) 6

S. Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.,
145 U.S. 300 (1892) 6

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 3

Thigpen v. Roberts,
464 U.S. 1006 (1983)..9

Turner Broad. Sys., Inc. v. FCC,
520 U.S. 180 (1997)..22

United States v. Five Gambling Devices,
346 U.S. 441 (1953)..5

United States v Johnson,
319 U.S. 302 (1943)..5, 6

United States v. Lovett,
328 U.S. 303 (1946)......................................7, 18–19

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.,
454 U.S. 464 (1982)..3

Wiener v. United States,
357 U.S. 349 (1958)..17

Zivotofsky v. Clinton,
132 S. Ct. 1421 (2012)..18

Other Cases

Adolph Coors Co. v. Brady,
944 F.2d 1543 (10th Cir. 1991)...............................22

Gavett v. Alexander,
477 F. Supp. 1035 (D.D.C. 1979) 21

Hechinger v. Metro. Wash. Airports Auth.,
36 F.3d 97 (D.C. Cir. 1994) 17

League of Women Voters v. FCC,
489 F. Supp. 517 (C.D. Cal. 1980) 22

Simkins v. Moses H. Cone Mem'l Hosp.,
323 F.2d 959 (4th Cir. 1963) 20–21

Executive Branch Opinions

The Attorney General's Duty to Defend and
Enforce Constitutionally Objectionable Legislation,
43 Op. Att'y Gen. 275,
1980 OLC LEXIS 8 (1980) 16–18

Constitutionality of Congress' Disapproval of
Agency Regulations by Resolutions Not
Presented to the President,
43 Op. Att'y Gen. 231,
1980 OLC LEXIS 6 (1980) 13, 23

The Effect of an Appropriations Rider on
the Authority of the Justice Department
to File a Supreme Court Amicus Brief,
14 Op. O.L.C. 13,
1990 OLC LEXIS 60 (1990) 20

Income Tax—Salaries of President and Federal Judges,
  31 Op. Att'y Gen. 475,
  1919 U.S. AG LEXIS 50 (1919) 16

Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege,
  8 Op. O.L.C. 101,
  1984 OLC LEXIS 50 (1984) 17

Recommendation That the Department of Justice Not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984,
  8 Op. O.L.C. 183,
  1984 OLC LEXIS 42 (1984) .... *passim*

Rendition of Opinions on Constitutionality of Statutes—Federal Home Loan Bank Act,
  39 Op. Att'y Gen. 11,
  1937 U.S. AG LEXIS 31 (1937) 13

Other Sources

Confirmation Hearings on the Nominations of Thomas Perrelli Nominee to Be Associate Attorney General of the United States, and Elena Kagan Nominee to Be Solicitor General of the United States Before the S. Comm. on the Judiciary, 111th Cong. 47 (2009)..........14

Drew S. Days III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 Ky. L.J. 485 (1995)..........13

Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 Yale L.J. 970 (1983)..........22

Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011)..........11, 12, 21

Letter from Donald B. Verrilli, Jr., U.S. Solicitor General, to William K. Suter, Clerk of the Supreme Court of the United States, *Millbrook v. United States*, No. 11-10362 (U.S. Nov. 9, 2012)..........15

Letter from Paul D. Clement, Acting U.S.
Solicitor General, to Patricia Mack Bryant,
U.S. Senate Legal Counsel, Office of the
Solicitor General, Regarding *ACLU v. Mineta*,
No. 04-0262 (Dec. 23, 2004) 21

Daniel J. Meltzer, *Executive Defense of*
Congressional Acts,
61 Duke L.J. 1183 (2012).......................................16

Message to the Senate Returning Without
Approval the Cable Television Consumer
Protection and Competition Act of 1992,
28 Weekly Comp. Pres. Doc. 1860
(Oct. 3, 1992)...22

Note, *Should the Supreme Court Stop Inviting*
Amici Curiae to Defend Abandoned Lower Court
Decisions?,
63 Stan. L. Rev. 907 (2011) 7, 9

Statement on Signing the Bipartisan Campaign
Reform Act of 2002,
1 Pub. Papers 503 (Mar. 27, 2002).......................22

Charles Tiefer, *The Senate and House Counsel*
Offices: Dilemmas of Representing in Court
the Institutional Congressional Client,
61 Law & Contemp. Probs. 47 (1998) 21

Transcript of Oral Argument, *Bob Jones University v. United States*, 461 U.S. 574 (1983),
1982 U.S. Trans. LEXIS 15
(Oct. 12, 1982) 15

James Wilson, The Convention of the State
of Pennsylvania on the Adoption of the
Federal Constitution (Dec. 1, 1787) 15

INTEREST OF AMICI*

Amicus, Edwin Meese III, served as the Seventy-Fifth Attorney General of the United States under President Reagan from 1985 to 1988. He previously served as Counsellor to President Reagan.

Amicus, John Ashcroft, served as the Seventy-Ninth Attorney General of the United States under President George W. Bush from 2001 to 2005. He previously served as a United States Senator and as Governor of Missouri.

Amici submit this brief because they wish to highlight the significant separation of powers concerns raised by the posture in which this case comes before the Court.

SUMMARY OF THE ARGUMENT

If this Court determines that BLAG lacks standing to appeal, it should hold that it lacks jurisdiction. Allowing the case to proceed without adverse *parties* who will sharpen the presentation of issues would violate the case-or-controversy requirement of Article III. Appointing amicus curiae to defend DOMA is not appropriate. Because this case involves the constitutionality of a Congressional Act, and also embroils the Court in one of the most politically contentious issues of the day, strict adherence to Article III boundaries is absolutely essential.

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* Counsel for the United States and BLAG have filed with the Court blanket consents to the filing of amicus curiae briefs in this case. Counsel for Edith Windsor has consented to the filing of this brief. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The Department of Justice's decision to cease defense of and affirmatively attack DOMA's constitutionality is unprecedented in Executive Branch history. Although the Executive Branch had successfully defended the law for fifteen years, and ample authority supports DOMA's constitutionality, the Department of Justice abruptly reversed course. The Department's attempted nullification of an Act of Congress passed with overwhelming bipartisan support undermines both the Legislative function and the Judiciary's role as final arbiter of a law's constitutionality.

To allow the Executive to nullify an Act of Congress by abdicating its constitutionally-assigned function and then seek this Court's approval in a non-adversarial context would shake the foundations of our tripartite structure.

ARGUMENT

I. THE SEPARATION OF POWERS REQUIRES THE COURT TO HOLD THAT IT LACKS JURISDICTION IF IT DETERMINES THAT BLAG IS NOT PROPERLY BEFORE THE COURT.

If this Court determines that BLAG lacks standing to appeal, the Court would be deprived of jurisdiction because what would remain is a friendly suit between Windsor and the government.

> The concept and operation of the separation of powers in our National Government have their principal foundation in the first three Articles of the Constitution. Under Article III, the Federal Judiciary is vested with the "Power" to resolve not questions and issues but "Cases" or "Controversies." This language restricts the federal judicial power "to the traditional role of the Anglo–American courts."

Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1441 (2011) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009)).

Where Article III's requirements are not met, the court lacks jurisdiction. A "bedrock requirement" of Article III, Section 2 of the Constitution is that federal courts only have jurisdiction over disputes that qualify as a "case" or "controversy." *Valley Forge Christian Coll. v. Americans United for Separation of*

Church & State, Inc., 454 U.S. 464, 471 (1982); *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37, (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–41 (1937).

A. Concrete Adversity Between the *Parties* Is Especially Essential in Cases Involving the Constitutionality of an Act of Congress.

The separation of powers requires the federal judiciary to act with "great gravity and delicacy" when judging the constitutionality of a coequal Branch's action. *Adkins v. Children's Hosp.*, 261 U.S. 525, 544 (1923); *see also Blodgett v. Holden*, 275 U.S. 142, 147–48 (1927) (Holmes, J., concurring). DOMA "has successfully borne the scrutiny of the legislative branch of the government, which, by enacting it, has affirmed its validity." *Adkins*, 261 U.S. at 544; *see also Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) ("The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality."). DOMA is therefore entitled to "[e]very possible presumption" in favor of its validity. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 355 (1936) (Brandeis, J., concurring) (quoting *Sinking-Fund Cases*, 99 U.S. 700, 718

(1878)); *see also United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953) (plurality opinion).

The constitutional corollary to the high degree of deference owed to Congressional Acts is a "rigid insistence" that Article III's boundaries be observed. *Ashwander*, 297 U.S. at 346. The Court has jurisdiction only over actual cases and controversies between adverse parties and may not give advisory opinions. *United States v Johnson*, 319 U.S. 302, 303–04 (1943); *Muskrat v. United States*, 219 U.S. 346, 361–63 (1911). To be a true Article III case or controversy, the parties must have *adverse legal interests*. *Muskrat*, 219 U.S. at 361–63. In *Chicago & Grand Trunk Railway Co. v. Wellman*, the Court defined adverse parties as those who pursue "an honest and actual antagonistic assertion of rights" against each other. 143 U.S. 339, 345 (1892). The controversy between them must be "real, earnest, and vital." *Id.* Moreover, "by means of a friendly suit, a party beaten in the legislature [cannot] transfer to the courts an inquiry as to the constitutionality of the legislative act." *Id.*

In the absence of BLAG, there is no case or controversy. Windsor and the Department both assert that DOMA is unconstitutional. They therefore cannot allege honest, antagonistic differences for this Court to resolve in the context of an adversarial presentation of the issues. Rather, the Department is attempting to use the judiciary to achieve what it cannot achieve through proper legislative channels. The government's refusal to defend DOMA is fundamentally a policy disagreement with the Congress that passed the law and the President who signed it. As the Attorney General acknowledged in his letter notifying Congress that he would no longer defend DOMA, there is ample authority supporting its constitutionality. Without BLAG, this is a friendly case in which the remaining parties are aligned in pursuing the same result and the Court would accordingly be deprived of Article III jurisdiction. *See Johnson*, 319 U.S. at 303–04 (finding that the parties arranged to bring a nonadversarial case to the court to further the defendant's objectives); *Muskrat*, 219 U.S. at 361–63; *S. Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300, 301 (1892) (noting, where control of both party-companies had come into the hands of the same individuals, that "the litigation has ceased to be between adverse parties, and the case therefore falls within the rule applied where the controversy is not a real one"); *see also Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48 (1971) (per curiam) (holding that, when both parties seek the same result, there is no case or controversy).

The fact that it may be convenient and promote judicial economy for the government to have a final determination from this Court on the constitutionality of DOMA cannot justify circumvention of Article III's requirements. "Article III is not a rule always consistent with judicial economy." *Sosna v. Iowa*, 419 U.S. 393, 418 (1975) (White, J., dissenting).

Article III's separation of powers concerns should be at their apex where the Executive Branch has abandoned its responsibility to defend an Act of Congress.[1]

B. Appointing an Amicus Curiae to Defend the Constitutionality of DOMA Is Not Appropriate.

While this Court has routinely appointed amici curiae to brief issues and defend judgments, it has not appointed amici to defend the constitutionality of Acts of Congress. *See generally* Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 Stan. L. Rev. 907 (2011) (cataloging all of the Court's appointments of amici curiae). It would be inappropriate to do so here. Adherence to Article III's requirement that adverse *parties* brief and argue the core issues is most necessary when passing on an act of a coordinate branch of government which has conducted its own evaluation of the act's constitutionality. *See Baker v. Carr*, 369 U.S. 186, 204 (1962) (noting that Article III is satisfied only when "the appellants [have] alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions").

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[1] For the reasons set forth in the Court-appointed Amica Curiae's brief, Br. Ct.-Appointed Amica Curiae Addressing Jurisdiction 24-27, Amici agree that the Court's decisions in *INS v. Chadha*, 462 U.S. 919 (1983), and *United States v. Lovett*, 328 U.S. 303 (1946), do not control the jurisdictional question in the case.

The cases in which this Court has appointed an amicus curiae generally fall into several categories. First, as in this case, the Court has appointed an amicus curiae to address questions of either its own jurisdiction or the jurisdiction of the court below. *See, e.g., Kucana v. Holder*, 130 S. Ct. 30 (2009) (mem. decision); *Hohn v. United States*, 522 U.S. 944 (1997) (mem. decision).

The Court has also assigned an amicus curiae to brief specific issues upon which the Solicitor General has confessed error. This most frequently occurs because the federal government employs thousands of attorneys who litigate their caseloads without direct oversight from the Solicitor General. The Solicitor General often does not become involved until a case reaches this Court,[2] and at that point he or she may determine that the government's position in the lower courts was in error. *See, e.g., Pepper v. United States*, 131 S. Ct. 32 (2010) (mem. decision); *Gutierrez de Martinez v. Lamagno*, 513 U.S. 1010

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[2] While the Solicitor General must approve all appeals taken by the federal government, in the many cases where the government has prevailed in the lower court and the other party appeals, the Solicitor General need not play a role. And even where the Solicitor General has approved an appeal, the level of attention given a case will presumably be much less than when this Court's review is at stake.

(1994) (mem. decision); *Bob Jones Univ. v. United States*, 456 U.S. 922 (1982) (mem. decision); Note, 63 Stan. L. Rev., *supra*, at 920.

Additionally, the Court has appointed amici in a large number of cases in which, for various reasons, the Respondent chose either not to appear at all or changed its mind about defending its victory below. *See, e.g.*, *Thigpen v. Roberts*, 464 U.S. 1006 (1983) (mem. decision) (finding the Respondent not represented by a member of the Bar of the Court); *see generally* Note, 63 Stan. L. Rev., *supra*, at 933–39.

Appointing an amicus curiae to defend DOMA would mark an unprecedented expansion of the Court's amicus curiae appointment practice and would largely eviscerate Article III's adverse party requirement.

Article III's case or controversy requirement assures that "federal courts will not intrude into areas committed to the other branches of government." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). And a restrained judiciary promotes the public's confidence in the unelected Third Branch, *Ariz. Christian Sch.*, 131 S. Ct. at 1442, especially in cases that involve emotionally charged political issues, as this one does. For the Court to decide the case without benefit of a concrete dispute between adversaries would not only violate Article III, but also would cast doubt on the decision's legitimacy.[3]

The Executive Branch's unprecedented decision to attack DOMA after fifteen years of successfully defending it—discussed in the next section—weighs further against the exercise of jurisdiction in this case (in the absence of BLAG). The Executive Branch's attempted nullification of DOMA warrants heightened vigilance against even the appearance of issuing an advisory opinion.

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[3] As this Court stated in *Arizona Christian School*:

> If the judicial power were "extended to every *question* under the constitution," Chief Justice Marshall once explained, federal courts might take possession of "almost every subject proper for legislative discussion and decision." The legislative and executive departments of the Federal Government, no less than the judicial department, have a duty to defend the Constitution. See U.S. Const. art. VI, cl. 3. That shared obligation is incompatible with the suggestion that federal courts might wield an "unconditioned authority to determine the constitutionality of legislative or executive acts." For the federal courts to decide questions of law arising outside of cases and controversies would be inimical to the Constitution's democratic character. And the resulting conflict between the judicial and the political branches would not, "in the long run, be beneficial to either." Instructed by Chief Justice Marshall's admonition, this Court takes care to observe the "role assigned to the judiciary" within the Constitution's "tripartite allocation of power."

131 S. Ct. at 1442 (citations omitted).

II. THE EXECUTIVE BRANCH'S DECISION TO ATTACK DOMA'S CONSTITUTIONALITY AFTER FIFTEEN YEARS OF DEFENDING IT REFLECTS AN UNPRECEDENTED READING OF THE PRESIDENT'S TAKE CARE OBLIGATION, AND UNDERMINES THE SEPARATION OF POWERS.

The decision by President Obama and Attorney General Holder to instruct the Department of Justice ("DOJ") to no longer defend DOMA after fifteen years of doing so, and to affirmatively attack its constitutionality in court, is unprecedented in the nation's history. The Attorney General's February 2011 letter explaining why DOJ would no longer defend DOMA stated that he and the President had concluded that laws implicating sexual orientation should be subject to strict scrutiny, despite "substantial circuit court authority applying rational basis review" in such situations. Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html [hereinafter "DOMA letter"]. Attorney General Holder also acknowledged that, "consistent with the position [DOJ] has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under [the rational basis] standard." *Id.* In addition, the letter stated, "[DOJ] has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense, a practice that accords the respect appropriately due to a coequal branch of government." *Id.*

The administration's change of position marks a significant departure from over two centuries of Executive Branch practice. Historically, the President's obligation to "take care that the laws be faithfully executed," U.S. Const. art. II, § 3, has been understood to include the vigorous defense of Acts of Congress when they are challenged. Executive Branch practice has consistently recognized that the Constitution requires the President to, in all but rare circumstances, faithfully enforce and defend federal laws. As one Office of Legal Counsel opinion explains:

> Any decision by the Executive that a law is not constitutional and that it will not be enforced or defended tends on the one hand to undermine the function of the Legislature and, on the other, to usurp the function of the Judiciary. . . . Any action of the President which precludes, or substitutes for, a judicial test and determination would at the very least appear to be inconsistent with the allocation of judicial power by the Constitution to the courts.

Recommendation That the Department of Justice Not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984, 8 Op. O.L.C. 183, 1984 OLC LEXIS 42, at *28 (1984).

Another opinion notes:

> [T]he Attorney General must scrutinize with caution any claim that he or any other executive officer may decline to defend or enforce a statute whose constitutionality is merely in doubt. Any claim by the Executive to a power of nullification, even a qualified power, can jeopardize the equilibrium established by our constitutional system.

Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President, 43 Op. Att'y Gen. 231, 1980 OLC LEXIS 6, at *19–20 (1980); *see also* Rendition of Opinions on Constitutionality of Statutes—Federal Home Loan Bank Act, 39 Op. Att'y Gen. 11, 1937 U.S. AG LEXIS 31, at *8 (1937) ("Should the Attorney General . . . vouchsafe his opinion holding the legislation unconstitutional, he would set himself up as a judge of the acts of the Congress and of the President."); *id.* at *2, *7–9; Drew S. Days III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 Ky. L.J. 485, 502 (1995) (arguing that Executive Branch practice and policy "prevents the Executive Branch from using litigation as a form of post-enactment veto of legislation that the current administration dislikes").

Two narrow exceptions to the Executive Branch's duty to defend have been recognized where a federal law 1) arguably infringes upon the President's constitutional authority (implicating the separation of powers), or 2) is patently unconstitutional, leaving no room for reasonable arguments. *See, e.g.*, 8 Op. O.L.C. 183, 1984 OLC LEXIS 42, at *29–31. As Justice Kagan explained during her hearing to become the Solicitor General:

> [T]he Solicitor General has . . . critical responsibilities to Congress—most notably, the vigorous defense of the statutes of this country against constitutional attack. Traditionally, outside of a very narrow band of cases involving the separation of powers, the Solicitor General has defended any Federal statute in support of which any reasonable argument can be made.[4]

The Defense of Marriage Act does not fall within either of these narrow categories, and the Attorney General's refusal to defend the law represents an abdication of his constitutionally assigned role and threatens the separation of powers.[5]

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[4] *Confirmation Hearings on the Nominations of Thomas Perrelli Nominee to Be Associate Attorney General of the United States, and Elena Kagan Nominee to Be Solicitor General of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 47 (2009), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg55828/pdf/CHRG-111shrg55828.pdf; *see also id.* at 95, 102, 175–76.

[5] Although the Administration has stated that it will continue to enforce DOMA, there is no historical precedent for its decision to attack DOMA in litigation regardless of whether one looks to past examples of refusals to enforce laws or decisions to affirmatively attack them in court. Also, cases in which the Executive Branch changed its position concerning a matter of statutory interpretation are not relevant where, as here, the government has declined to defend a law against constitutional

A. In Most Non-Defense Cases, Presidential Authority Was Implicated.

James Wilson, one of the Constitution's authors, once stated—as part of an argument that the Constitution includes several means for the President, the federal courts, and the States to shield themselves from Congressional acts that violate the separation of powers or federalism—that, if Congress exceeded the bounds of its constitutional authority, the President "could shield himself, and refuse to carry into effect an act that *violates* the Constitution." James Wilson, The Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (Dec. 1, 1787), *available at* http://www.constitution.org/rc/ rat_pa.htm; *see also Freytag v. Commissioner*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring) (noting in a separation of powers case that "the means to resist legislative encroachment upon [Executive Branch] power" provided by the Constitution include "the power to veto encroaching laws . . . or even to disregard them when they are unconstitutional" (citation omitted)). This presidential authority does not, however, give rise to a broad authority to decline to defend laws that do not implicate the President's power. *See, e.g.*,

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challenge. *See* Letter from Donald B. Verrilli, Jr., U.S. Solicitor General, to William K. Suter, Clerk of the Supreme Court of the United States, *Millbrook v. United States*, No. 11-10362 (U.S. Nov. 9, 2012); Transcript of Oral Argument, *Bob Jones University v. United States*, 461 U.S. 574 (1983), 1982 U.S. Trans. LEXIS 15, at *22, *26 (Oct. 12, 1982).

Income Tax—Salaries of President and Federal Judges, 31 Op. Att'y Gen. 475, 1919 U.S. AG LEXIS 50, at *2 (1919) ("[I]t is not within the province of the Attorney General to declare an Act of Congress unconstitutional—at least, where it does not involve any conflict between the prerogatives of the legislative department and those of the executive department . . ."); *id.* at *25–26.

Perhaps the earliest example of a President refusing to defend an Act of Congress gave rise to this Court's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and was based upon the separation of powers. The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 43 Op. Att'y Gen. 275, 1980 OLC LEXIS 8, at *15–16 (1980). Also, after President Andrew Johnson removed his Secretary of War in violation of the Tenure of Office Act, which he considered to violate his appointment authority, a House member in favor of impeaching Johnson argued that presidents must execute and defend all federal laws, even those the president believes are unconstitutional. Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 Duke L.J. 1183, 1192–93 (2012). Chief Justice Chase, who presided over the impeachment trial, stated that

> the President had a duty to execute a statute passed by Congress which he believed to be unconstitutional "precisely as if he held it to be constitutional." However, . . . in the case of a statute which "directly attacks and impairs the

> executive power confided to him by the Constitution . . . the clear duty of the President [is] to disregard the law, so far at least as it may be necessary to bring the question of its constitutionality before the judicial tribunals."

Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 1984 OLC LEXIS 50, at *104–05 (1984).

Similarly, *Myers v. United States*, 272 U.S. 52 (1926), arose out of President Wilson's refusal to comply with a similar tenure law prohibiting him from removing postmasters without the approval of the Senate. The Solicitor General argued that the law unconstitutionally limited the President's appointment and removal authority, while a senator argued that the statute was constitutional. 43 Op. Att'y Gen. 275, 1980 OLC LEXIS 8, at *11–12. This was the first case in which DOJ attacked the constitutionality of a federal law in court. 8 Op. O.L.C. 183, 1984 OLC LEXIS 42, at *35–36. This Court held that the statute was unconstitutional, as was the Tenure of Office Act of 1867. *Myers*, 272 U.S. at 176. Since *Myers*, Presidents have attacked and/or failed to defend other laws that they believed infringed upon their appointment authority.[6] More broadly, in most instances in which a President has attacked, failed to defend, or failed to enforce a law, the President asserted that Congress had infringed upon his authority or otherwise violated the separation of powers.[7]

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[6] *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976); *Wiener v. United States*, 357 U.S. 349 (1958); *Hechinger v. Metro. Wash. Airports Auth.*, 36 F.3d 97 (D.C. Cir. 1994).

Two cases that have been cited as providing historical precedent for DOJ's non-defense of DOMA—*United States v. Lovett*, 328 U.S. 303 (1946), and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)—are distinguishable. In 1943, President Franklin D. Roosevelt raised constitutional objections upon signing an appropriations provision prohibiting the payment of salaries to specific named employees of federal agencies who had been deemed to be "subversive." *Lovett*, 328 U.S. at 313–14.

> The Executive enforced the letter of the statute (by not paying the salary of the employees in question), but joined with the employees in a legal attack upon the constitutionality of the relevant provision. When the case came before the Supreme Court, an attorney was permitted to appear on behalf of Congress, as *amicus curiae*, to defend the statute against the combined assault.

43 Op. Att'y Gen. 275, 1980 OLC LEXIS 8, at *17.

The Office of Legal Counsel has characterized *Lovett* as a separation of powers case:

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[7] *See, e.g., Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012); *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Chadha*, 462 U.S. 919; *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

> [In *Lovett*], [t]he Supreme Court decided that the statute in question was unconstitutional as a bill of attainder, a constitutional defect not necessarily suggesting a clash between legislative and executive power. Because the statute was directed at subordinates of the President, however, the case took on that characteristic both as regards the bill of attainder issue and, more specifically, with respect to the argument advanced by the employees and joined in by the Solicitor General that the statute at issue constituted an unconstitutional attempt by Congress to exercise the power to remove Executive Branch employees.

8 Op. O.L.C. 183, 1984 OLC LEXIS 42, at *37 n.5.

Similarly, *Metro Broadcasting* was part of a larger struggle between Congress and the President for control over agency policy and leadership. The FCC adopted minority preference policies but indicated that it was going to reconsider them. In response, Congress passed an appropriations rider that prohibited the FCC from using any appropriated funds to review or alter its policy. Although the Solicitor General presented arguments against the FCC's policy, neither the President nor the Solicitor General prohibited the FCC from defending its policy through the FCC's own counsel. Moreover, an Office of Legal Counsel opinion explained that Congress had not attempted to prohibit DOJ from filing an amicus brief with this Court in *Metro Broadcasting*, stating:

> A statute that purported to prohibit the Executive from filing an amicus or other brief on the constitutionality of federal agency action or policy would raise the most serious constitutional concerns.
>
> . . . The filing of briefs in courts of law through his subordinates—particularly as such filings may bear on the legality of action taken by Executive departments or agencies—is integral to the discharge of his constitutional duty to see that the laws are faithfully executed.

The Effect of an Appropriations Rider on the Authority of the Justice Department to File a Supreme Court Amicus Brief, 14 Op. O.L.C. 13, 1990 OLC LEXIS 60, at *13–14 (1990).

B. Other Non-Defense Examples Are Distinguishable.

During the first 174 years after the Constitution was ratified, the Executive Branch never argued in litigation that a federal law that did not implicate the separation of powers was unconstitutional. *See* 8 Op. O.L.C. 183, 1984 OLC LEXIS 42, at *30 n.2. The first case in which this occurred was *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963). DOJ intervened in a lawsuit that alleged that hospitals that received federal funding and that provided "separate but equal" services to African-Americans violated their equal protection rights. The previous year, in *Bailey v. Patterson*, 369 U.S. 31 (1962), this Court stated that state-sponsored racial discrimination was not only unconstitutional but was "foreclosed as a litigable issue." *Id.* at 33. The court of appeals held that the hospitals had violated the Constitution. 323 F.2d at 967–70.

Simkins does not support DOJ's decision to challenge DOMA because it involved a patently unconstitutional provision, whereas Attorney General Holder has acknowledged that the arguments that DOJ made in defense of DOMA for over a decade are reasonable, and that "there is substantial circuit court authority applying rational basis review to sexual-orientation classifications." DOMA letter; *see also Dickerson v. United States*, 530 U.S. 428 (2000) (DOJ declined to defend a law that it believed was patently unconstitutional); *Gavett v. Alexander*, 477 F. Supp. 1035, 1043–44 (D.D.C. 1979) (same); Letter from Paul D. Clement, Acting U.S. Solicitor General, to Patricia Mack Bryant, U.S. Senate Legal Counsel, Office of the Solicitor General, Regarding *ACLU v. Mineta*, No. 04-0262 (Dec. 23, 2004), *available at* https://www.aclu.org/files/FilesPDFs/mineta_letter.pdf ("I have therefore determined that the government does not have a viable argument to advance in the statute's defense . . . .").[8]

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[8] At times, DOJ has changed positions on the issue of whether reasonable arguments could be made in defense of a law. *See* Charles Tiefer, *The Senate and House Counsel Offices:*

Cases of this nature are rare; in fact, the Executive Branch has routinely defended laws despite doubts about the law's constitutionality. For example, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Solicitor General defended a provision of a statute despite previous public statements by President Nixon and the Attorney General questioning its constitutionality. Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 Yale L.J. 970, 981 n.40 (1983). Similarly, in *McConnell v. FEC*, 540 U.S. 93 (2003), DOJ defended the Bipartisan Campaign Reform Act of 2002 despite President Bush's signing statement declaring that "[c]ertain provisions present serious constitutional concerns." Statement on Signing the Bipartisan

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Dilemmas of Representing in Court the Institutional Congressional Client, 61 Law & Contemp. Probs. 47, 54 & n.35 (1998) (noting that DOJ has, on occasion, "refus[ed] to defend a statute when it deemed the arguments for the statute's constitutionality unreasonable," and citing *Adolph Coors Co. v. Brady*, 944 F.2d 1543 (10th Cir. 1991), *aff'd sub nom. Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), and *League of Women Voters v. FCC*, 489 F. Supp. 517 (C.D. Cal. 1980), *aff'd* 468 U.S. 364 (1984), cases in which the government changed positions by the time the cases reached this Court); 8 Op. O.L.C. 183, 1984 OLC LEXIS 42, at *30 & n.2; Message to the Senate Returning Without Approval the Cable Television Consumer Protection and Competition Act of 1992, 28 Weekly Comp. Pres. Doc. 1860 (Oct. 3, 1992) (stating in veto message that a cable must-carry provision "is unconstitutional," though the provision was later enacted over veto, and the DOJ initially declined to defend it but eventually did in *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997)).

Campaign Reform Act of 2002, 1 Pub. Papers 503 (Mar. 27, 2002).

In sum, there is no historical precedent for a decision to decline to defend a federal law where, as here: 1) fifteen previous years of defense had occurred, 2) no intervening constitutional amendment or change in controlling case law dictates a different result, 3) there are reasonable arguments to be made in defense of the law, and 4) the separation of powers is not implicated. In light of the longstanding constitutional tradition addressed above, the Executive Branch's decision to change course and challenge DOMA's constitutionality represents an unjustified abdication of the President's constitutional duty to defend Acts of Congress and thereby "jeopardizes the equilibrium established by our constitutional system." *See* 43 Op. Att'y Gen. 231, 1980 OLC LEXIS 6, at *20.

CONCLUSION

For the foregoing reasons, Amici urge this Court to hold that it lacks jurisdiction if it determines that BLAG lacks standing to appeal.

Respectfully submitted,

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February 27, 2013

AMICUS
CURIAE
BRIEF

No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the estate of THEA CLARA SPYER, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF FORMER FEDERAL ELECTION COMMISSION OFFICIALS SUPPORTING RESPONDENT EDITH SCHLAIN WINDSOR ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT.......................................2

ARGUMENT 3

- I. DOMA Legally Precludes Married Gays and Lesbians from Political Expression and Association Opportunities Available to Other Married Individuals 3
  - A. Federal Candidates in Same-Sex Marriages May Not Fund Their Campaigns from Personal Resources That Are Accessible to Other Married Candidates 3
  - B. Individuals in Same-Sex Marriages May Not Attend Certain Political Meetings or Interact with Certain Political Groups That Are Open to Other Married Individuals 6
- II. DOMA's Impact on Political Expression and Association Informs This Court's Judgments on Applying Heightened Scrutiny and on Exercising Jurisdiction 9

CONCLUSION..11

APPENDIX: List of *Amici Curiae* A-1

TABLE OF AUTHORITIES

Page(s)

CASES

Bowen v. Gilliard,
483 U.S. 587 (1987) 9

Buckley v. Valeo,
424 U.S. 1 (1976) 3, 4, 6

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) 9

Virginia v. Black,
538 U.S. 343 (2003) 2

STATUTES

1 U.S.C. § 7 2

2 U.S.C. § 431 .... 4, 5

2 U.S.C. § 441a 4

2 U.S.C. § 441b 7

Federal Election Campaign Act of 1971,
Pub. L. 92-225, 86 Stat. 3 1

REGULATIONS

11 C.F.R. § 100.33 .... 4, 5

11 C.F.R. § 100.52 .... 4, 5

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11 C.F.R. § 100.142 .... 4, 5

11 C.F.R. § 110.1 3

TABLE OF AUTHORITIES
(continued)

Page(s)

11 C.F.R. § 110.10 4

11 C.F.R. § 110.11 4

11 C.F.R. § 114.1 7

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Brief *Amici Curiae* of Former Federal Election Commission Officials Supporting Respondent Edith Schlain Windsor on the Merits

---

INTEREST OF *AMICI CURIAE*[1]

Amici are a bipartisan group of former officials of the Federal Election Commission ("FEC"), an independent federal agency that administers and enforces the Federal Election Campaign Act of 1971, as amended ("FECA"). Pub. L. 92-225, 86 Stat. 3. FECA is the primary statute that governs federal campaign finance activity.

Amici have many years of experience, derived from both government service and other roles, in applying and interpreting the legal rules that affect participation in the political process. They have an interest in explaining to this Court the Defense of Marriage Act's deleterious effects on political expression and association. *Amici* are described and identified in the appendix to this brief.

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[1] No party counsel authored any of this brief, and no party, party counsel, or person other than *amici* or their counsel paid for brief preparation and submission. All parties consented to the filing of this brief. The United States and the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG") provided blanket consent. Respondent Edith Windsor provided a letter of consent, which is filed with this brief. Trevor Potter submits this brief both in his individual capacity and in his role as counsel for *amici*. Other *amici* submit this brief only in their individual capacities and not on behalf of any organization or client.

SUMMARY OF ARGUMENT

An individual's right to political expression and association is "at the core of what the First Amendment is designed to protect." *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion).

The Defense of Marriage Act ("DOMA") hinders many Americans in exercising this "core" right. The term "spouse," DOMA says, must be interpreted in all federal statutes, regulations, rulings, and interpretations as "only . . . a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7. DOMA's mandate, when superimposed on to federal campaign finance laws, legally precludes individuals in same-sex marriages from political expression and association opportunities afforded to other married citizens.

This inequality undermines any assertion that gays and lesbians are too politically powerful for DOMA to receive heightened scrutiny from this Court, since this inequality is embedded in the very rules that shape political involvement and speech. DOMA's broad reach into this area of particular constitutional sensitivity also offers this Court a prudential and practical reason for exercising its jurisdiction and ultimately issuing a definitive determination in this case. *Amici* therefore believe that although FECA and FEC rules are not presented directly in Edith Windsor's particular circumstance, this Court's deliberations would benefit from understanding DOMA's discriminatory impact on the core First Amendment freedoms of married gays and lesbians.

ARGUMENT

I. DOMA Legally Precludes Married Gays and Lesbians from Political Expression and Association Opportunities Available to Other Married Individuals.

DOMA dictates that "spouse," wherever it appears in FECA or FEC rules, refers only to an individual in an opposite-sex marriage. *Amici* describe below two particular consequences[2] of this public policy for married gays and lesbians: (A) federal candidates in same-sex marriages may not fund their own campaigns using personal resources that are accessible to other married candidates; and (B) individuals in same-sex marriages are prohibited from attending certain political meetings and interacting with certain political groups that are open to others who are married.

A. Federal Candidates in Same-Sex Marriages May Not Fund Their Campaigns from Personal Resources That Are Accessible to Other Married Candidates.

A candidate for public office, according to this Court, has "a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election." *Buckley v. Valeo*, 424 U.S. 1, 52 (1976). Past restrictions on a candidate's ability to spend personal funds to advocate his own election imposed a "substantial," "clea[r]," and "direc[t]" restraint on that right without serving a compelling governmental interest. *Id*. at 52-53.

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[2] *Amici* do not intend this brief to catalogue all DOMA-related influences within FECA and FEC rules. Indeed, the application of a number of federal campaign finance provisions appear to be affected by DOMA. *See, e.g.*, 11 C.F.R. §§ 110.1(i) (permitting a "spouse" who does not earn income to make a contribution without attribution to an income-earning marital partner), 113.2(a)(1) (permitting a federal officeholder to use campaign funds to pay travel costs for an accompanying "spouse").

Consequently, FECA and FEC rules permit a federal candidate to tap an unlimited amount of "personal funds" to further her candidacy. 2 U.S.C. § 441a(a)-(b); 11 C.F.R. § 110.10.

Amounts derived from an asset held exclusively by a candidate are obviously "personal funds," available for unlimited use in the candidate's campaign. 2 U.S.C. § 431(26)(A); 11 C.F.R. § 100.33(a). A candidate's jointly held assets are, however, conceptually distinct. A joint asset is held concurrently by the candidate and by at least one other individual, with each possessing an undivided interest in the entire asset. William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 5.1 (3d ed. 2000). Because of the concurrent and shared nature of the interest, a federal candidate who utilizes a jointly held asset raises the prospect of receiving from the asset's joint owner a campaign contribution, which is a receipt that is amount-limited under FECA and FEC rules. 2 U.S.C. § 441a(a); 11 C.F.R. § 110.11.

The FEC has addressed the campaign use of jointly held assets with this in mind. A federal candidate who encumbers a jointly held asset in order to secure a campaign loan is deemed to receive a contribution from any endorser, guarantor, or co-signer of the loan. 2 U.S.C. § 431(8)(B)(vii)(I); 11

C.F.R. §§ 100.52(b)(3), 100.82(c), 100.83(b), 100.142(c). The FEC has also determined that amounts derived from an asset are, as a general matter, "personal funds" only if the candidate has a unilateral right of access to and control over the asset. FEC Advisory Op. 1991-10 at 3 (Apr. 12, 1991) (concluding that when "withdrawals from [a joint] account require the signatures of both" account holders, "the candidate does not have legal right of access to or control over" the account, as that phrase is used in the "personal funds" definition).

However, these general restrictions on treating joint assets as "personal funds" are subject to special exemptions for assets held jointly with a "spouse." In fact, only a "spouse" may endorse, guarantee, or co-sign a campaign loan without making a campaign contribution. 11 C.F.R. §§ 100.52(b)(4), 100.82(c), 100.83(b), 100.142(c). Similarly, "to address the concept of 'personal funds' in joint ownership situations," FECA and the FEC "carve[d] out a narrow area to allow for the use of property in which the candidate's *spouse* has an interest." 48 Fed. Reg. 19,019, 19,019-19,020 (Apr. 27, 1983) (emphasis added). Pursuant to this "narrow" exemption, a federal candidate may utilize at least part of any asset held jointly with a "spouse" to support her own campaign. 2 U.S.C. § 431(26)(C); 11 C.F.R. § 100.33(c). A candidate's access to a personal asset in many instances therefore hinges on whether that asset is held jointly with a "spouse."

When imported into the "personal funds" context, then, DOMA' requirement that "spouse" mean "only . . . a person of the opposite sex who is a husband or a wife" financially handicaps federal candidates in same-sex marriages, relative to other married candidates. The so-called "spouse exemptions" under FECA and FEC rules free a candidate in an opposite-sex marriage to utilize for his campaign at least part of any asset owned jointly by the married couple. A candidate in a same-sex marriage is not free to do so because his spouse is not recognized as a "spouse" under federal law.

This is not a mere technicality or theoretical issue. Many federal candidates rely on personal funds to support their own campaigns. FEC records show, for example, that over 40 percent of the 3,061 candidates for U.S. Senate and U.S. House during the 2012 election cycle drew on personal resources to finance their campaigns. FEC, 2012 Candidate Summary, *available at* http://www.fec.gov/data/CandidateSummary.do?format=html&election_yr=2012. Unfortunately, DOMA's application to federal campaign finance law means that married gays and lesbians who become federal candidates do not have the same opportunity as other married candidates to exercise the First Amendment right to advocate their own election.

B. Individuals in Same-Sex Marriages May Not Attend Certain Political Meetings or Interact with Certain Political Groups That Are Open to Other Married Individuals.

The First Amendment "protects political association as well as political expression." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976).

FECA and FEC rules permit only the "restricted class" of a corporation or labor union to associate fully with political activities undertaken by that corporation or union. 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. § 114.3(a)(1). "Restricted class" is carefully defined, and includes corporate executives, labor union members, and "their families." 11 C.F.R. § 114.1(j). The "family" of a corporate executive or union member may engage in the full range of corporate or union political activities by, among other things, attending sponsored political meetings that feature federal candidates and interacting with the "connected" political committee of the corporation or labor union. 2 U.S.C. § 441b(b)(2), (4)(A); 11 C.F.R. §§ 114.3(c)(2), 114.5(g). Those who are not "family" may not.

The FEC has drawn on legislative history to interpret "family" in this context to include only those within a historically conventional, heterosexual family unit: "the mother, father, sons, and daughters" who live in the same household. 117 Cong. Rec. 43,387-43,388 (1971) (remarks of Congressman Hansen). The FEC has adhered to this definition of "family" over the past 30 years based on this legislative history. FEC Advisory Op. 1980-102 at 2 (Oct. 1, 1980) ("For purposes of 2 U.S.C. § 441b therefore, the Commission views the term 'family' to mean the mother, father, sons, and daughters who live in the same household."); *see also* FEC Advisory Op. 1983-48 at 4 n.7 (Sept. 14, 1984); FEC Advisory Op. 1990-18 at 4 (Oct. 5, 1990); FEC, Campaign Guide for Corporations and Labor Unions 20 (2007), *available at* http://www.fec.gov/pdf/colagui.pdf.

In DOMA's absence, the FEC could perhaps look to state law definitions (as it does in other areas) or otherwise interpret "the mother" or "[the] father" to include individuals within a same-sex marriage, and thereby facilitate full political association for them. But DOMA's prescribed interpretation of "spouse" (and its related provision concerning "marriage") as "only . . . a person of the opposite sex who is a husband or a wife" inhibits such an action. FECA's legislative history, like DOMA, refers to an adult couple with singular, gender-specific terms in a manner that contemplates a "family" relationship between adults as only a pairing of one man and one woman. Construing "the mother" or "[the] father," or adding to the list of "family" members, to include same-sex married couples could therefore be seen as essentially expanding the definition of "spouse" in violation of DOMA.

DOMA's practical consequences here are best demonstrated through a few examples. Consider, for instance, an employer that decides to hold a political meeting at which a federal candidate will appear in order to solicit and gather campaign contributions from the employer's executives and their spouses. An opposite-sex spouse could attend the meeting to hear the candidate speak and express, in association with others, their collective political and financial support for that candidate. A same-sex spouse could not attend, or even be invited to, this political meeting. Similarly, if the employer sponsored a federal political committee to pool voluntary contributions from its executives and their spouses for later distribution to various federal candidates, an opposite-sex spouse could openly communicate with and assist this committee, and have his contributions facilitated by the committee. A same-sex spouse could not.

Simply put, DOMA bars individuals in same-sex marriages from attending certain political meetings and interacting with certain political groups that are open to other married individuals. This unfairly burdens the freedom of political association, which is protected under the First Amendment.

II. DOMA's Impact on Political Expression and Association Informs This Court's Judgments on Applying Heightened Scrutiny and on Exercising Jurisdiction.

Amici realize Edith Windsor has made no claim under FECA or FEC rules. DOMA's effects on political expression and association, though, inform two key determinations by this Court in this case: whether to apply heightened scrutiny to DOMA and whether to exercise jurisdiction.

This Court has held that heightened scrutiny should apply under certain circumstances to statutes that single out groups of individuals for differential treatment. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 472 (1985). To determine when such heightened scrutiny is appropriate, a court may consider whether the singled-out group is disadvantaged in attempting to influence the government's political branches. *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987). In an attempt to distance DOMA from heightened scrutiny, BLAG makes much of recent political successes by gays, lesbians, and related advocacy groups, even heralding a record number of openly gay candidates for federal office. BLAG Br. 51-54. BLAG did not mention that DOMA causes those candidates, if married, to forgo sources of campaign funding that are available to candidates in opposite-sex marriages. Indeed, it is difficult to argue that gays and lesbians are *not* politically disadvantaged when they are impaired by the very rules that shape political involvement and speech. Gays and lesbians are, perhaps, increasingly able to overcome political obstacles, such as those found at the confluence of DOMA and federal campaign finance law. But their newfound ability to do so should not save DOMA from heightened scrutiny here.

This Court has also specifically asked for briefing and argument on whether it has jurisdiction to decide this case, given "the Executive Branch's agreement with the court below that DOMA is unconstitutional." Order Granting Cert. (Dec. 7, 2012). *Amici* wish only to note their belief that DOMA's differential treatment of married persons who engage in federal political activity offers this Court a prudential reason to exercise jurisdiction here. *See* Windsor Jur. Br. 31. FECA and FEC rules are a prime example of "DOMA cut[ting] across a wide swath of federal law" that includes legal regimes administered by independent agencies. *Id.* at 33-34. The FEC, as an independent agency, is not legally able to ignore a federal statute merely because the Attorney General has stated that he believes it is unconstitutional. And the FEC itself has shown no signs of adopting an interpretation of law that could be at odds with the dictates of DOMA. A definitive determination from this Court is needed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully Submitted,

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APPENDIX

APPENDIX:
LIST OF *AMICI CURIAE*[1]

Craig Engle has practiced federal election and campaign finance law for 27 years. He was legal counsel to a Commissioner of the Federal Election Commission for nine years, general counsel to a Republican national party committee for six years, founded the political law practice of a Washington, D.C.-based law firm, and has authored *amicus* briefs and law review articles on the constitutionality of campaign finance laws.

Kenneth A. Gross served as Associate General Counsel - Enforcement at the Federal Election Commission from 1980 to 1986. He currently leads the Political Law practice of a Washington, D.C. law firm, where he advises clients on matters relating to the regulation of political activity.

Robert D. Lenhard served as Chairman of the Federal Election Commission in 2007 and Vice Chairman of the agency in 2006. He has served as legal counsel on political law matters to labor organizations, corporations, trade associations and other politically active organizations and individuals for over twenty years. Mr. Lenhard currently practices political law at a Washington, D.C. law firm.

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[1] Trevor Potter submits this brief both in his individual capacity and in his role as counsel for *amici*. Other *amici* submit this brief only in their individual capacities and not on behalf of any organization or client.

Lawrence M. Noble was General Counsel of the Federal Election Commission from 1987 to 2000. He currently leads an election-related advocacy group and is an adjunct professor at George Washington University Law School, where he teaches campaign finance law.

Trevor Potter was appointed a Commissioner of the Federal Election Commission by President George H. W. Bush in 1991 and held the position of Chairman in 1994. He has also served as legal counsel to three Republican presidential campaigns, and is currently head of the Political Law practice at a Washington, D.C. law firm.

Scott E. Thomas served in various capacities at the Federal Election Commission from 1975 to 2006, including service as a Commissioner from 1986 to 2006 and Chairman in 1987, 1993, 1999, and 2005. Mr. Thomas is currently the head of the Political Law practice at a Washington, D.C. law firm.

AMICUS
CURIAE
BRIEF

SUPREME COURT, U.S.
FILED
MAR 1 - 2013
OFFICE OF THE CLERK

No. 12-307

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

BRIEF OF FORMER FEDERAL INTELLIGENCE OFFICER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND RESPONDENT

(Merits)

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QUESTION PRESENTED

Section 3 of the Defense of Marriage Act (DOMA) defines the term "marriage" for all purposes under federal law, including the provision of federal benefits, as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7. It similarly defines the term "spouse" as "a person of the opposite sex who is a husband or a wife." *Id.* The question presented is as follows:

Whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

TABLE OF CONTENTS

Page

QUESTION PRESENTED....................i

TABLE OF AUTHORITIES.................... iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT....................4

ARGUMENT 5

DOMA HAMPERS THE FEDERAL GOVERNMENT'S ABILITY TO ATTRACT AND RETAIN PERSONNEL WITH SKILL SETS ESSENTIAL TO THE DEFENSE OF NATIONAL SECURITY....................5

A. Workforce Diversity Is Essential to the Defense of National Security 6

B. DOMA Negatively Affects Employee Recruitment and Retention In Areas Critical to National Security....................10

CONCLUSION....................14

APPENDIX: Intelligence Community Joint Statement on Commitment to Equal Employment Opportunity and Diversity (2013) ...1a

TABLE OF AUTHORITIES

Page

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U.S. Const. amend. V 4

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Graham M. Segroves served as an employee of the Central Intelligence Agency (CIA or Agency) from 2002 to 2012.[1] During his tenure with the Agency, Mr. Segroves acted in various capacities within the CIA's National Clandestine Service, which is responsible for the coordination, deconfliction, and evaluation of clandestine operations across the United States intelligence community.[2] For example, from 2002 to 2007, Mr. Segroves served as a Collection Management Officer and Branch Chief, where he managed overseas collection of classified human intelligence on counterterrorism issues for the CIA's Counterterrorism Center; served as a substantive expert on counterterrorism issues involving Africa, Europe, global terrorism finance, and terrorism involving weapons of mass destruction; and interacted with United States intelligence and law-enforcement personnel to identify, prioritize, and fill intelligence gaps.

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[1] All statements of fact, opinion, or analysis expressed are those of the *amicus* and do not reflect the official positions or views of the CIA or any other United States Government agency. Nothing in the contents should be construed as asserting or implying United States Government authentication of information or the CIA endorsement of the *amicus*'s views. This material has been reviewed by the CIA to prevent the disclosure of classified information. No counsel for a party authored this brief in whole or in part, and no person other than the *amicus* or his counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner United States and intervenor Bipartisan Legal Advisory Group of the United States House of Representatives have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs. Respondent Edith Schlain Windsor's written consent to the filing of this brief has been filed with the Clerk.

[2] Nat'l Clandestine Serv., U.S. Cent. Intelligence Agency, *Clandestine Service*, https://www.cia.gov/offices-of-cia/clandestine-service/index.html (last visited Jan. 30, 2013).

From 2009 to 2012, Mr. Segroves helped improve the manner in which the Agency as a whole accomplishes its vital mission using a diverse workforce operating in a world of diverse threats to our national security. He received the CIA Director's Award for Diversity in 2010 for significant impact on awareness and on the corporate strategic view of diversity and inclusion, laying a broad foundation for thinking and acting on diversity within the Agency. In 2011, Mr. Segroves received the Office of the Director of National Intelligence Community Equal Employment Opportunity and Diversity Exceptional Service Award. Moreover, Mr. Segroves served as a chairperson of the CIA's employee group for gay, lesbian, bisexual, and transgender employees and allies, a role that led him to function as an institutional resource and occasional public representative on policy matters affecting Agency employees and applicants for employment. Although Mr. Segroves recently left the CIA to pursue other professional opportunities, he is proud of the fact that, like many federal agencies, the CIA has made significant efforts to maintain a high-performing, engaged, and diverse workforce.

One of the core values of National Clandestine Service employees is to "put country first and Agency before self."[3] A good number of those employees—past and present—happen to be gay, lesbian, or bisexual. Mr. Segroves is one of them. In 2010, Mr. Segroves's four-year-old ecclesiastical union to his same-sex partner was formally recognized as a marriage by the laws of the jurisdiction in which he resides. *See* Religious Freedom and Civil Marriage Equality Amendment Act of 2009, D.C. Act No. 18-248, § 2(b), 57 D.C. Reg. 27 (Jan. 1, 2010) (codified at D.C. Code § 46-401(a)).

Since its enactment in 1996, Section 3 of the Defense of Marriage Act (DOMA) has defined the term "marriage" for all purposes under federal law, including the provision of federal benefits, as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7. It similarly defines the term "spouse" as "a person of the opposite sex who is a husband or a wife." *Id.*

Mr. Segroves has experienced firsthand DOMA's discriminatory effect. *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012) (explaining that, "[f]or those married same-sex couples of which one partner is in federal service, the other cannot take advantage of medical care and other benefits available to opposite-sex partners"). More importantly for present purposes, Mr. Segroves understands the negative effect of DOMA on the Federal Government's ability to attract and retain personnel with skill sets essential to the defense of national security. Accordingly, Mr. Segroves brings a unique perspective to the primary question presented by this case: namely, whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

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[3] Nat'l Clandestine Serv., U.S. Cent. Intelligence Agency, *Core Values*, https://www.cia.gov/offices-of-cia/clandestine-service/code-of-ethics.html (last visited Jan. 30, 2013).

SUMMARY OF ARGUMENT

The Federal Government is the Nation's largest employer. It does not make widgets, however. Instead, one of the Federal Government's most essential functions is to defend national security. Our Nation's foreign enemies typically speak languages far different from our own, practice customs far different from our own, and, in some cases, do not recognize our right to exist. As a result, the threats that face our Nation today are exceedingly complex. Our defense against those threats requires a diverse workforce of dedicated public servants with unique skill sets, including the ability to speak foreign languages, understand foreign customs, operate discreetly within foreign nations, and develop leading-edge technologies.

DOMA hampers the Federal Government's ability to attract and retain the personnel necessary to meet these unique challenges. Mr. Segroves observed this effect firsthand through his interactions with applicants and potential applicants for CIA employment, who expressed to him their hesitations to apply for or accept an offer of employment without the opportunity for their same-sex spouses to be accorded benefits equal to those offered opposite-sex spouses. By treating legally married gay, lesbian, and bisexual Americans as if they are unmarried, DOMA dissuades countless patriotic and intelligent Americans from entering or continuing federal service, regardless of the agency involved. Therefore, in addition to its negative effect on private individuals, DOMA harms the Federal Government itself as an institution based on privately held religious or moral beliefs that, while subject to respect and protection under the First Amendment, have no place in the codification of laws that bind all Americans. *See Lawrence v. Texas*, 539 U.S. 558, 571 (2003) ("Our obligation is to define the liberty of all, not to mandate our own moral code.") (internal quotation marks and citation omitted); *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.") (internal quotation marks and citation omitted).

ARGUMENT

DOMA HAMPERS THE FEDERAL GOVERNMENT'S ABILITY TO ATTRACT AND RETAIN PERSONNEL WITH SKILL SETS ESSENTIAL TO THE DEFENSE OF NATIONAL SECURITY

In the course of evaluating the stated reasoning of DOMA's legislative proponents and the *post hoc* rationalizations since advanced in defense of the statute's constitutionality, it should not be forgotten that DOMA's negative effects extend inward as well as outward. As demonstrated by the facts of this case, DOMA discriminates against private individuals with no employment relationship to the Federal Government, withholding from them equal protection of the laws. However, because DOMA also governs the entire federal workforce, the statute has the unintended consequence of harming the Federal

Government as an institution. Nowhere is this more troublesome than in the area of national security.

A. Workforce Diversity Is Essential to the Defense of National Security

The threats to our national security are exceedingly complex. For example, approximately two years after DOMA's enactment, American embassies in two African countries—Kenya and Tanzania—were bombed by agents of al Qaeda. *See The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* 115-16 (2004). On September 11, 2001, agents of al Qaeda murdered thousands on American soil. *Id.* at 316. "Countering terrorism has become, beyond any doubt, the top national security priority for the United States." *Id.* at 361.

Our Nation's principal foreign enemies typically speak languages far different from our own, practice customs far different from our own, and do not wear military uniforms readily identifying themselves as combatants. To face these complicated threats, our Nation requires dedicated public servants with specialized skill sets, including the ability to speak foreign languages, understand foreign customs, and operate discreetly within foreign nations. This, in turn, requires a diverse workforce. As one former CIA Director explained in describing the critical value diversity plays at the Agency: "Excellence in foreign intelligence requires broad perspectives, both in our understanding of a complex world and in our approach to problems and solutions."[4]

In order for the CIA to accomplish its vital mission, the Agency itself has declared that it must employ a workforce

> as diverse as America itself—the most diverse nation on earth. Diversity reflects the unique ways we vary as Intelligence Officers—our nationality, race, ethnicity, gender, age, language, culture, sexual orientation, education, values, beliefs, abilities, and disabilities. These assorted attributes create different demographic, functional, and intellectual views, which are so vital to our innovation, agility, collection, and analysis.[5]

The CIA is by no means alone in this regard within the United States intelligence community. As explained by the head of the agency responsible for integrating the analysis and collection of intelligence by multiple different agencies:

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[4] David H. Petraeus, Dir., U.S. Cent. Intelligence Agency, *Diversity at CIA: The Critical Value of Diversity* (2012), *available at* https://www.cia.gov (last visited Jan. 30, 2013); *see also* Press Release, U.S. Cent. Intelligence Agency, *Director Leon E. Panetta Speaks on the Importance of Workforce Diversity* (Mar. 15, 2011) (explaining that diversity is "crucial to our intelligence mission" and that "[i]f a citizen wants to serve his or her country in the field of intelligence, it is fundamentally wrong if things like race, sexual orientation, cultural heritage, or disability stand in the way"), *available at* https://www.cia.gov (last visited Jan. 30, 2013).

[5] U.S. Cent. Intelligence Agency, *Diversity*, https://www.cia.gov/careers/diversity/index.html (last visited Jan. 30, 2013).

> In the midst of increasingly complex and ever-evolving threats, our fellow Americans must know that they can count on us to deliver timely and accurate intelligence. To achieve this, we must foster fairness, equity, and inclusion to create workplace environments where all employees are treated with respect and dignity.[6]

Despite these good-faith intentions to maintain workplaces free from discrimination on the basis of sexual orientation, the Federal Government's hands have been tied by DOMA when it comes to treating its employees' married same-sex spouses as such. As a matter of general practice, federal agencies do not consistently collect workforce data regarding the number of gay, lesbian, or bisexual federal employees, which inhibits precise quantification of DOMA's negative impact on the federal workforce. Government service by such individuals, however, is by no means a recent or isolated phenomenon. *See, e.g.*, David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (2004). Moreover, both the Executive and Legislative Branches have recognized the value of government service by gays, lesbians, and bisexuals in the defense of national security. *See, e.g.*, Exec. Order 12,968, § 3.1(c), 60 Fed. Reg. 40,245, 40,250 (Aug. 7, 1995) ("The United States Government does not discriminate on the basis of . . . sexual orientation in granting access to classified information."); Exec. Order 13,087, § 1, 63 Fed. Reg. 30,097 (June 2, 1998) (prohibiting discrimination based upon sexual orientation within Executive Branch civilian employment); Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2, 124 Stat. 3515 (creating administrative process for repealing policy of requiring members of the Armed Services to keep their sexual orientation secret, which policy was repealed on July 22, 2011).

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[6] James R. Clapper, Dir., U.S. Office of Nat'l Intelligence, *Statement on Intelligence Community Equal Employment Opportunity and Diversity* (2010), *available at* http://www.dni.gov (last visited Jan. 30, 2013); *see also Intelligence Community Joint Statement on Commitment to Equal Employment Opportunity and Diversity* (2013) ("Our need to recruit and retain a high-performing, mission-aligned workforce, reflective of the diversity of our country and the world cannot be overstated.") (copy reproduced in appendix); U.S. Nat'l Sec. Agency, *Diversity*, http://www.nsa.gov/careers/diversity/index.shtml (last visited Jan. 30, 2013) ("Diversity is a collection of different perspectives. It's the intelligence that grows from your religion and race, your traditions and social sensibilities, ethnicity, lifestyle, family structure, upbringing, and more."); U.S. Def. Intelligence Agency, *Diversity*, http://www.dia.mil/careers/diversity (last visited Jan. 30, 2013) ("The Defense Intelligence Agency's success depends on the skills of its diverse workforce and a shared commitment to executing the defense intelligence mission. . . . [A] richly diverse workforce, with a broad range of skills, capabilities and perspectives is only achieved through thoughtful recruitment, development, and retention activities.").

In short, "valor and sacrifice are no more limited by sexual orientation than they are by race or by gender or by religion or by creed." Presidential Statement on Signing the Don't Ask, Don't Tell Repeal Act of 2010, *as reprinted in* 2010 U.S.C.C.A.N. vol. 5, S47. Accordingly, the CIA actively recruits gay, lesbian, and bisexual employees with skill sets essential to the defense of national security. As one Agency official recently explained: "[W]e want the best and the brightest regardless of your sexual orientation." *Mission Diversify: CIA Begins LGBT Recruiting* (Nat'l Pub. Radio, All Things Considered, broadcast Dec. 2, 2012); *see also* Press Release, U.S. Cent. Intelligence Agency, *CIA Serves as Corporate Sponsor for National LGBT Conference* (Nov. 8, 2012) (explaining that the CIA helped sponsor a conference for gay, lesbian, and bisexual science, technology, engineering, and mathematics professionals "as part of its nationwide outreach to diverse communities with mission-critical talent"), *available at* https://www.cia.gov (last visited Jan. 30, 2013); U.S. Cent. Intelligence Agency, *Sexual Orientation and the CIA: Answers to Common Questions* (2006) (providing information tailored to gay, lesbian, or bisexual potential applicants for CIA employment), *available at* https://www.cia.gov/careers/pdf/ads/CCB10642_AngleBroch.pdf (last visited Jan. 30, 2013).

B. DOMA Negatively Affects Employee Recruitment and Retention In Areas Critical to National Security

As the Court is well aware, pecuniary gain is not the principal reason most highly educated individuals choose to work for the Federal Government. For such individuals, employment in the private sector typically brings with it financial rewards that cannot be matched by the federal taxpayer. As a result, the Federal Government already finds itself at an inherent disadvantage in the so-called "war for talent." *See* Nancy E. Day & Patricia G. Greene, *A Case For Sexual Orientation Diversity Management in Small and Large Organizations*, 47 Hum. Res. Mgmt. 637, 639 (2008).

DOMA further exacerbates that inherent disadvantage by precluding federal agencies from extending to legally married same-sex spouses most of the benefits offered to opposite-sex spouses by private employers. *See Hearing on H.R. 2517, Domestic Partnership Benefits & Obligations Act of 2009, Before the Subcomm. on Fed. Workforce of the H. Comm. on Oversight & Gov't Reform*, 111th Cong. 51 (2009) (statement of John Berry, Dir., U.S. Office of Personnel Mgmt.) (explaining that over 80 percent of Fortune 100 companies offered benefits to their employees' same-sex partners at that time) (*House Hr'g*). This departure from uniformity with regard to recognizing valid marriages, in turn, hampers the Federal Government's ability to recruit the personnel necessary to meet the unique security challenges facing our Nation.

Mr. Segroves observed this effect firsthand through his interactions with applicants and potential applicants for CIA employment, who expressed to him their hesitations to apply for or accept an offer of employment without the opportunity for their same-sex spouses to be accorded benefits equal to those offered opposite-sex spouses. This negative effect will only grow stronger with time as younger generations of professionals become increasingly unwilling to work for employers who discriminate in the provision of benefits based on sexual orientation. *See, e.g.*, Pew Research Ctr., *The Generation Gap and the 2012 Election* 84 (Nov. 3, 2011) (discussing generational attitudes toward same-sex marriage), *available at* http://www.people-press.org (last visited Jan. 30, 2013).

DOMA's damage to the Federal Government as an institution does not end at the stage of recruiting employees, however. As in almost every employment context, retention of high-performing employees is of paramount importance given the high cost of employee turnover. *See* David G. Allen, ***Retaining Talent: A Guide to Analyzing and Managing Employee Turnover*** 3 (SHRM Found. 2008) (discussing research demonstrating direct-replacement costs as high as 60 percent of an employee's annual salary). This is especially true in the context of agencies within the American intelligence community, all of which rely on employees with security clearances. As explained in recent congressional testimony by the head of the Office of Personnel Management, DOMA

> undermines the Federal Government's ability to . . . retain the Nation's best workers. . . . We spend quite a bit of money doing security clearances on employees, and after they have that clearance, that clearance goes with the employee, not with the position. And so, essentially, if an employee can be recruited away, these are the kinds of tools where we can invest a lot of money, and then that employee walks out the door to [a private employer] who need employees with security clearances.

House Hr'g at 51-52 (statement of John Berry, Dir., U.S. Office of Personnel Mgmt.); *see also id.* at 64 (explaining that the Federal Government spends as much as $15,000 per employee when conducting security-clearance investigations); U.S. Gov't Accountability Office, *Human Capital: Federal Workforce Challenges in the 21st Century*, Rep. No. GAO-07-556T, at 7 (2007) ("Faced with a workforce that is becoming more retirement-eligible and finding gaps in talent because of changes in the knowledge, skills, and competencies in occupations needed to meet their missions, agencies need to strengthen their efforts and use of available flexibilities to acquire, develop, motivate, and retain talent.").

At a time when the CIA, like many federal agencies, "strives to embody the values of teamwork, diversity, fairness, respect and inclusion and to be an employer of choice because of these attributes,"[7] DOMA dissuades countless patriotic and intelligent Americans from continuing government service in areas critical to national security. However, DOMA also has more subtle negative effects on the Federal Government as an institution by altering the assignment choices, career paths, and promotion-meriting experiences of gay, lesbian, and bisexual employees at many federal agencies.

For example, an employee of a domestic-oriented agency may perceive that a different assignment within her agency but at another geographic location would match her skills to a critical mission need, yet hesitate to apply for or accept that assignment because of heightened uncertainty about her same-sex spouse's access in the new location to employer-provided health insurance. Similarly, an employee at a foreign service agency may opt out of a dangerous overseas assignment because he perceives added risk to his same-sex spouse, since DOMA prevents his spouse from accessing such fundamental safeguards as federal pension survivorship benefits accorded to opposite-sex spouses.

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[7] Press Release, U.S. Cent. Intelligence Agency, *CIA Officer Receives EEOD Award* (Nov. 1, 2012), *available at* https://www.cia.gov (last visited Jan. 30, 2013).

In each of these illustrative examples, variations of which Mr. Segroves encountered firsthand, federal employees must weigh their commitment to the Federal Government's mission against the additional sacrifices their spouses would endure beyond the burdens typically borne by opposite-sex spouses. Employees who decline advantageous career opportunities for the sake of avoiding the uncertainty DOMA causes often risk slower career advancement; meanwhile, the Federal Government experiences the harm of failing to engage some of its best and brightest employees in the critical mission roles for which they are best suited, merely because DOMA prevents the government from recognizing all legal marriages.

CONCLUSION

Over half a century ago, the United States submitted a brief in a case before the Court with no less constitutional significance than this one, explaining:

> The proposition that all men are created equal is not mere rhetoric. It implies a rule of law—an indispensable condition to a civilized society—under which all men stand equal and alike in the rights and opportunities secured to them by their government. Under the Constitution every agency of government, national and local, legislative, executive, and judicial, must treat each of our people as an *American*, and not as a member of a particular group classified on the basis of race or some other constitutional irrelevancy.

Br. for U.S. as *Amicus Curiae* at 3, *Brown v. Bd. of Educ. of Topeka, Kan.*, OT-1952 No. 8 (U.S. Dec. 3, 1952), *available at* 1952 WL 82045. Sexual orientation is just as much a "constitutional irrelevancy" as race, religion, color, and gender. It should be held as such—especially where, as here, legislation founded upon that constitutional irrelevancy hampers the Federal Government's ability to attract and retain personnel with skill sets essential to the defense of national security.

For the reasons stated above and in the briefs submitted by the United States and respondent, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2013

APPENDIX

Intelligence Community Joint Statement on Commitment to Equal Employment Opportunity and Diversity

[2013]

The Intelligence Community's (lC) mission is to create decision advantage and protect our nation's interests at home and abroad through the integrated analysis and collection of information. A highly skilled workforce is essential to insightful, responsive, and responsible intelligence operations. The IC must exemplify the highest values to be successful in building and retaining a multicultural, multigenerational workforce. We define diversity in a broad context, but also in relation to the mission, considering all aspects that make individuals unique and America strong—race, color, ethnicity, national origin, gender, age, religion, language, disability, sexual orientation, gender identity and heritage.

Our need to recruit and retain a high-performing, mission-aligned workforce, reflective of the diversity of our country and the world cannot be overstated. Our goal is to develop a workforce that can operate in a wide range of circumstances and situations and is ready to tackle an even wider range of challenges. The knowledge, perspectives, ideas, and experiences of all IC employees are vital to the success of our global mission.

The key to promoting diversity is leadership. As leaders, we are called to have more than a general endorsement of diversity efforts; our commitment to a diverse workforce must be visible, specific, persistent, intentional, and personal. Every senior executive, manager, and supervisor should ensure that the workplace for which they are responsible runs on the principles of equity, fairness, and inclusion. All IC element directors are expected to also be responsible for results and evaluated at intervals during our strategic planning sessions.

Equally important is a well-crafted roadmap to achieve success—created through the design and implementation of innovative and effective Equal Employment Opportunity (EEO), Diversity, and Human Capital programs, policies, and processes. We are currently updating our five-year IC EEO and Diversity Strategic Plan and the IC Strategic Human Capital Plan, both of which are linked to the National Intelligence Strategy. All IC elements have strategic or implementation plans that are linked to the IC strategy. We will continue to revise our policies and processes to ensure all employees are able to participate and contribute to their fullest potentials.

Diversity brings innovation and creativity to the workplace, combats group-think, and demonstrates our commitment to inclusion and respect for all people. Achieving diversity and creating a culture where everyone is valued is everyone's business. We encourage each of you to make diversity a priority; share your own values with a little personal history. Your efforts will enable us to achieve our vision of a diverse and highly-integrated Intelligence Community of the future. This is a critical moment in our nation's history. With your support, we will work together to advance our global mission and ensure that the diversity of the country we serve is displayed proudly in the work of the IC.

To show integration, collaboration, and a broad commitment to EEO, diversity, and inclusion in the IC; and to emphasize the value we place on our employees and having a workplace free of discrimination, we the undersigned commit to this joint statement.

s/James R. Clapper
James R. Clapper
Director of National Intelligence

s/Michael J. Morell
Michael J. Morell
Acting Director, Central Intelligence Agency

s/Michael T. Flynn
Michael T. Flynn
Lieutenant General, U.S. Army
Director, Defense Intelligence Agency

s/Keith B. Alexander
Keith B. Alexander
General, U.S. Army
Director, NSA/Chief, CSS

s/Betty J. Sapp
Betty J. Sapp
Director, National Reconnaissance Office

s/Letitia A. Long
Letitia A. Long
Director, National Geospatial-Intelligence Agency

s/Mary A. Legere
Mary A. Legere
Lieutenant General, U.S. Army
Deputy Chief of Staff, G-2

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for Intelligence and Criminal Investigations

s/Edward B. Held
Edward B. Held
Director for Intelligence and Counterintelligence
Department of Energy

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S. Leslie Ireland
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s/Caryn A. Wagner
Caryn A. Wagner
Under Secretary
for Intelligence and Analysis
Department of Homeland Security

AMICUS
CURIAE
BRIEF

No. 12-307

[illegible] U.S.
[illegible]ED
MAR 1 - 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, in her capacity as Executor
of the estate of THEA CLARA SPYER, ET AL.,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR *AMICI CURIAE* FORMER SENATORS BILL BRADLEY, TOM DASCHLE, CHRISTOPHER J. DODD, AND ALAN K. SIMPSON ON THE MERITS IN SUPPORT OF RESPONDENT WINDSOR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

I. DOMA Was Premised Largely On Fear And Speculation, With Little Independent Consideration Of Its Constitutionality 7

II. Developments Since 1996 Have Eroded DOMA's Justifications. 11

  A. Time And Experience Have Proven The Fears That Led To DOMA Unfounded. 11

  B. Legal Developments Have Swept Away DOMA's Constitutional Foundations. 17

III. This Court Should Strike Down DOMA. 20

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia,
536 U.S. 304 (2002) 24

Baehr v. Lewin,
852 P.2d 44 (Haw. 1993) 7

Bd. of Trs. of Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 22

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411 U.S. 677 (1973) 24

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383 U.S. 663 (1966) 18

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2008 WL 5006172 (Fla. Cir. Ct. Nov. 25, 2008), *aff'd sub nom. In re Adoption of X.X.G. & N.R.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010) 13

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INTEREST OF *AMICI CURIAE*[1]

In 1996, as United States Senators, we voted in favor of the Defense of Marriage Act ("DOMA"). Much has changed since then. As Senators, and then as citizens, we have watched over the past seventeen years as the assumptions that led to the passage of DOMA have proven unfounded and as the nation's understanding of what equality requires has evolved. That experience has convinced us that DOMA is unconstitutional—a statute badly out of step not only with emerging realities, but with America's enduring commitment to equal protection of the law.

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[1] Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no person other than amici or his counsel made a monetary contribution to the preparation or submission of this brief. Petitioner and respondents have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

Legislation is not a science, grounded in timeless, immutable truths. It is, instead, often premised on beliefs about the world and the Constitution that are proven unfounded by later experience. As our nation progresses toward the more perfect union of our Founders' aspirations, we sometimes find that laws that once seemed constitutional, necessary, and fair have grown incompatible with our understanding of the world and with our national conceptions of decency, dignity, and equality. The Defense of Marriage Act ("DOMA") is such a law, and this Court should now hold it unconstitutional.

DOMA is a reflection of the era of its enactment. At the time, the world had no experience with gay marriage, and the debate over its legal recognition was still in its infancy. In that time of uncertainty, DOMA enjoyed broad support, but for reasons that varied widely. Some who supported it fervently opposed discrimination on the basis of sexual orientation in other areas. They pushed for protection against discrimination toward gays and lesbians in employment, adoption, and the military. They nonetheless supported DOMA's stated purpose of leaving the debate on gay marriage to develop in the states. And they believed that passing DOMA would defuse a movement to enact a constitutional amendment banning gay marriage, which would have ended the debate for a generation or more.

Others backed it out of opposition to any government ever recognizing gay marriages. Some feared the consequences of granting legal recognition to same-sex marriages. They believed state recognition of gay marriages would have pernicious effects on traditional marriage, children, and our communities. Others acted out of simple hostility towards homosexuality, an animus toward gays and lesbians, or a willingness to exploit such feelings for political gain.

In the last seventeen years, much has changed, and for the better. Gay Americans and their families are now much more common and visible—in our communities, schools, and houses of worship, as well as in our business, government, and popular culture. While our progress toward a more tolerant society has been uneven, we increasingly have come to accept, even to embrace, same-sex families. And several states have recognized same-sex marriages.

That experience has taught us—and social scientists have confirmed—that the original justifications for DOMA can no longer be credited today. Gay families have proven stable, healthy environments for children and valuable members of our communities. There is no evidence that extending legal recognition to same-sex marriages has discouraged heterosexual marriage or encouraged fathers to abandon their children. And states have been able to recognize the civil institution of same-sex marriage without impinging on the rights of religious bodies to define the sacrament of marriage according to their beliefs. The only real purpose DOMA now serves is to stigmatize gays and lesbians, by singling out for federal disapproval their otherwise lawful marriages.

We now understand that our constitutional commitment to equality does not tolerate such discrimination. When DOMA was enacted, there was little serious discussion whether the statute violated the Equal Protection clause. A decade earlier, this Court had condoned the criminalization of homosexual relationships in *Bowers v. Hardwick*. It was implausible to think that the government could brand gays and lesbians criminals, yet was constitutionally required to recognize gay marriages. But this Court has since overruled *Bowers*, and recognized that laws designed to express moral disapproval of homosexuality are inconsistent with our constitutional commitment to equality.

To be sure, marriage occupies a special status in our society. Marriage is simultaneously an intensely personal commitment, a foundational social institution, a matter of deep religious conviction, and a legal classification upon which hundreds of civil rights and civic obligations depend. Many Americans have had difficulty overcoming the traditional understanding of the word "marriage" as encompassing only opposite-sex couples, even while fully embracing the vital need for equal rights for gays and lesbians elsewhere. Some supported civil unions conferring the full incidents of marriage on gay couples, but believed that "marriage" was somehow different in a way that required it to be reserved only to heterosexual couples. But we now realize that it is precisely *because* the institution of marriage is so important that its legal aspects must not be exempt from the reach of the Constitution's commitment to equality. For the government to discriminate with regard to such a fundamental privilege is inconsistent with the principles on which our country was founded.

Ordinarily this Court should be hesitant to strike down a statute passed by Congress and signed by the

President. But it is ultimately the role of this Court to ensure that our laws respect our constitutional commitment to equal protection for all. The Court did not wait for the political process to desegregate the schools, or to repeal laws forbidding mixed race marriage. It did not delay justice to women subject to discriminatory laws founded on outdated assumptions. Nor has the Court shied away from its constitutional duty when faced with laws grounded in homophobia and animus toward gays. The Court should not hesitate to do its duty in this case either.

ARGUMENT

As DOMA's defenders note, judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform."[2] DOMA, like all federal statutes, was passed by Congress and signed by the President. But while the Court should not ignore that our political representatives also take an oath to uphold the Constitution, "when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"[3]

DOMA is an especially poor candidate for any claim of deference to the constitutional judgment of the political braches. It was enacted hastily, with little independent consideration of its constitutionality, against the backdrop of a constitutional jurisprudence this Court has since abandoned. It was premised in large part on fears that subsequent experience has proven unfounded. And it effects a discrimination that we now have come to recognize as incompatible with our constitutional commitment to equal treatment under the law.

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[2] Bipartisan Legal Advocacy Group Br. 22 [hereinafter BLAG Br.] (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985)).

[3] *Zivotofsky ex rel Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427-28 (2012) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

I. DOMA Was Premised Largely On Fear And Speculation, With Little Independent Consideration Of Its Constitutionality.

DOMA was proposed in response to a Hawaii Supreme Court decision that left Hawaii seemingly poised to recognize same-sex marriage.[4] At the time, the consequences of such a step—on other states, on the federal government, and on the nation as a whole—were unknown. No state had yet legalized same-sex marriage. In fact, gay and lesbian couples could not legally marry anywhere in the world. Many feared that one court in one state could require national recognition of same-sex marriages conducted in that state, including for purposes of many federal programs.

In response to those fears, Congress enacted DOMA in September 1996. Section 2 allowed a state to refuse to recognize same-sex marriages performed in other states.[5] Section 3, the provision challenged in this case, defined marriage for purposes of federal law as "between one man and one woman."[6] The statute therefore withholds from gay families a broad range of federal benefits that are ordinarily bestowed on married couples, even to same-sex couples legally married under the laws of their home state.

The statute enjoyed broad bipartisan support, but the reasons for that support varied widely. Some supported DOMA even while staunchly opposing discrimination against gays in employment, adoption, military service, and other spheres. Some believed that DOMA was necessary to allay fears that a single state's recognition of same-sex marriage could automatically extend to all other states through the Full Faith and Credit Clause. And they believed that enacting DOMA would eliminate the possibility of a federal constitutional amendment banning same-sex marriage—an outcome that would have terminated any further debate about same-sex marriage, potentially for generations. At the same time, even for many who generally opposed sexual orientation discrimination, the traditional conception of marriage was so engrained that it was difficult to see the true nature of the discrimination DOMA wrought.

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[4] *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

[5] 28 U.S.C. § 1738C.

[6] 1 U.S.C. § 7.

Others supported DOMA for very different reasons, voicing an open hostility toward gays and lesbians that was regrettably common in public discourse at the time. The House Report declared that "Civil laws that permit only heterosexual marriage reflect . . . . both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."[7] On the floor of the House, a Congressman asserted that "homosexuality is immoral, that it is based on perversion, [and] that it is based on lust."[8] Same-sex marriage, others claimed, "legitimize[s] unnatural and immoral behavior."[9] For them, DOMA was a way of stigmatizing those they viewed as outside the boundaries of our greater community.

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[7] H.R. Rep. No. 104-664, at 15-16 (1996) (footnote omitted).

[8] 142 Cong. Rec. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn).

Others acted out of fear. For example, some worried that same-sex marriages would be harmful to children[10] or would undermine traditional families.[11] Some worried that legal recognition of same-sex marriage could interfere with the traditional prerogative of religious groups to define marriage according to their customs and beliefs. Some claimed that recognizing same-sex marriage would strain the federal budget.

Congress enacted DOMA in this environment with uncharacteristic haste: in less than five months, DOMA went from an obscure idea to a federal law. Congress held only a single day of hearings, with little examination of the constitutionality of the discrimination inherent in Section 3.[12] The prevailing understanding at the time was that *Bowers v. Hardwick*[13] – which rejected a constitutional challenge to state convictions of two gay men for engaging in private intimate conduct – conclusively established the constitutionality of discrimination on the basis of sexual orientation.[14]

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[9] 142 Cong. Rec. H7494 (daily ed. July 12, 1996) (statement of Rep. Smith).

[10] *See, e.g.*, *Defense of Marriage Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 1 (1996) (statement of Rep. Canady, Chairman, H. Subcomm. on the Constitution) ("[H]eterosexual marriage provides the ideal structure within which to beget and raise children.").

[11] The House Report declared that DOMA responded to the "orchestrated legal assault being waged against traditional heterosexual marriage by gay rights groups and their lawyers." H.R. Rep. No. 104–664, at 2-3.

[12] The constitutional discussion that took place focused almost exclusively on whether DOMA contravened principles of federalism, not on whether Section 3 of DOMA violated the

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Equal Protection clause. *See The Defense Of Marriage Act: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 2, 23 (1996) [hereinafter *Senate Hearing*] (testimony of Professor Wardle) (stating that "the primary issue facing the committee today is whether Congress has the authority to enact [DOMA]" consistent with federalism principles, and only briefly discussing the equal protection argument); *id.* at 44 n.1 (statement of Professor Cass Sunstein) (explaining that he will "focus throughout on section 2" and summarily stating his belief that Section 3 is constitutional); *id.* at 56-59 (letter from Professor Michael McConnell) ("The argument that the proposed statute would violate the Equal Protection Clause requires little comment.").

[13] 478 U.S. 186 (1986).

[14] *See* H.R. Rep. No. 104-664, at 32-33 (relying on *Bowers* to reach a "certain" conclusion that DOMA was constitutional). Indeed, in light of *Bowers*, there was little serious discussion of constitutional limitations on discrimination against gays in the years preceding the enactment of DOMA. There was no legal scholarship discussing classifications based on sexual orientation. The first casebook on sexuality and the law was not published until 1997. William B. Rubenstein, *My Harvard Law School*, 39 HARV. C.R.-C.L. L. REV. 317, 326 (2004) (citing SEXUALITY, GENDER, AND THE LAW (William N. Eskridge, Jr. & Nan D. Hunter eds., 1997)). William Rubenstein, now a law professor at Harvard, once described a futile search he conducted in the 1980s of the school's library – "where no subject was too obscure for its own shelf" – for materials about gay people. *Id.* at 318. "[T]he absence of legal materials about my life," recalled Rubenstein, "was deafening." *Id.*

For that reason, the Office of Legislative Affairs at the Department of Justice concluded without further analysis that DOMA "would be sustained as constitutional if challenged in court."[15]

II. Developments Since 1996 Have Eroded DOMA's Justifications.

Time is a remarkable teacher. It tests our assumptions and forces us to confront unexamined beliefs that all too often stand in the way of our progress towards the ideals on which the nation was founded. With the benefit of time and experience, we can now see that the understandings on which DOMA was premised have not survived our nation's increased knowledge about same-sex families or our modern understanding of what equality requires.

A. Time And Experience Have Proven The Fears That Led To DOMA Unfounded.

1. Many of the fears that led to the passage of DOMA were based on nothing more than speculation. In 1996, the nation had no experience with same-sex marriage. And, indeed, many had little experience with the gay community or gay families, many of whom were understandably reluctant to speak publicly about themselves and their relationships at

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[15] *Senate Hearing*, *supra* note 12, at 2 (letter from Andrew Fois, Assistant Att'y Gen.). Although *Romer v. Evans*, 517 U.S. 620 (1996), had recently been decided, few understood its significance at the time. *See* n.38, *infra*.

a time when discrimination and open hostility toward homosexuality was more common and accepted.

We have come a long way since then. Now, seventeen years later, gay men and women have become much more visible. Nearly 80% of Americans now know a gay relative, friend, or co-worker.[16] Gay individuals and gay families are increasingly prominent on TV, in the movies, and in the news. These changes are having a real effect: knowledge, understanding, and acceptance are gradually but inexorably replacing ignorance, fear, and hostility.

We also no longer need to speculate about the consequences of recognizing same-sex marriage. Since 1996, nine states and the District of Columbia have legalized gay marriage, and several other states have allowed civil unions between same-sex couples. As of 2010, the Census reported that 130,000 same-sex couples were married.[17] Another 515,000 same-sex couples led households.[18] There are now more than 100,000 same-sex couples with children.[19]

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[16] *See Poll: Attitudes Toward Gays Changing Fast*, USA Today (December 5, 2012), http://www.usatoday.com/story/news/politics/2012/12/05/poll-from-gay-marriage-to-adoption-attitudes-changing-fast/1748873/.

[17] Martin O'Connell & Sarah Feliz, *Same-sex Couple Household Statistics from the 2010 Census* 26 tbl.E (SEHSD Working Paper Number 2011-26, Sept. 27, 2011), *available at* http://www.census.gov/hhes/samesex/. These numbers are likely even higher today given that the Census figures were collected before New York legalized same-sex marriage.

[18] *Id.*

[19] *See Same-Sex Unmarried Partner or Spouse Households*

Indeed, a recent Gallup poll indicates that lesbian, gay, bisexual, and transgender women as a group are as likely as heterosexual women to raise a child.[20]

2. In light of this experience, the justifications offered for DOMA's discrimination have fallen by the wayside one by one.

We have learned, for example, that the recognition of gay marriage does not undermine families. We know now that gays and lesbians form stable, long-lasting relationships.[21] We have learned that gay parents are equally as capable as heterosexual parents of raising children that are healthy, successful, and well-adjusted.[22] There is no evidence that recognizing gay marriage discourages

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by Sex of Householder by Presence of Own Children: 2010 Census and 2010 American Community Survey, Gallup, http://www.census.gov/hhes/samesex/files/supp-table-AFF.xls (last visited Jan. 22, 2013).

[20] Gary J. Gates & Frank Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT*, Gallup Politics (Oct. 18, 2012), http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx.

[21] *See, e.g.*, Lawrence A. Kurdek, *Lesbian and Gay Couples*, *in Lesbian, Gay, and Bisexual Identities over the Lifespan: Psychological Perspectives* 243, 243 (Anthony R. D'Augelli & Charlotte J. Patterson eds., 1995).

[22] *See* Charlotte J. Patterson & Paul D. Hastings, *Socialization in the Context of Family Diversity*, *in Handbook of Socialization: Theory and Research* 328, 339-43 (Joan E. Grusec & Paul D. Hastings eds., 2007). Courts have recognized this proposition as well. *See, e.g.*, *In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008), *aff'd sub nom. In re Adoption of X.X.G. & N.R.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

traditional heterosexual marriage and childrearing. We have also learned that governmental recognition of same-sex marriage has not forced religious institutions to officiate over marriages inconsistent with their beliefs.

Indeed, gays and lesbians have strengthened, not harmed, the institutions that embrace them. In business, many major Fortune 500 companies – including, for example, Chevron, Bank of America, J.P. Morgan, and Lockheed Martin – welcome gay employees and their families on equal footing, providing equal benefits to same-sex couples.[23] And the number increases each year.[24] Gays and lesbians who now openly serve in the military, teach in our schools, and represent us in government are making our nation safer, smarter, and wiser.

In short, the suggestion that our country's vital institutions need protection from gay families has been thoroughly discredited by our national experience.

3. We have also come to recognize that DOMA actually undermines the federalism principles it purported to serve.

Many supported DOMA as a way of leaving same-sex marriage to the states, which have traditionally defined marriage in our constitutional structure.[25] But as Representative Bob Barr, DOMA's author, cogently acknowledged in a 2009 editorial advocating for the repeal of the law,

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[23] *See* Human Rights Campaign Foundation, *Corporate Equality Index 2013* 25, 45-48 (2012), *available at* www.hrc.org/files/assets/resources/CorporateEqualityIndex_2013.pdf.

[24] *Id.*

> DOMA is not working out as planned. . . . I have concluded that DOMA is neither meeting the principles of federalism it was supposed to, nor is its impact limited to federal law. In effect, DOMA's language reflects one-way federalism: It protects only those states that don't want to accept a same-sex marriage granted by another state.[26]

For example, under DOMA, the federal government has threatened to withhold Medicaid funding from states that extend Medicaid benefits to lawfully married same-sex couples.[27] Far from empowering states to recognize same-sex marriage or not as they see fit, DOMA penalizes states that decline to adopt the 1996 Congress's view of marriage as an institution between one man and one woman.

4. DOMA likewise has not served the federal interests it purported to protect. Although the statute was promoted as a way to preserve federal funds, when the Congressional Budget Office did the math in 2004, it determined that DOMA actually

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[25] *See* H.R. Rep. No. 104-664, at 16-17.

[26] Bob Barr, *No Defending the Defense of Marriage Act*, L.A. Times (Jan. 5, 2009), http://www.latimes.com/news/opinion/commentary/la-oe-barr5-2009jan05,0,1855836.story.

[27] *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 242-43 (D. Mass. 2010), *aff'd*, 682 F.3d 1 (1st Cir. 2012).

costs the government about $1 billion annually.[28] For instance, by allowing same-sex couples to avoid the so-called "marriage penalty," DOMA materially lowers federal tax revenue.

DOMA has harmed the federal government in other unexpected ways as well. The Director of the U.S. Office of Personnel Management has explained that by denying spousal benefits to same-sex couples, DOMA "undermines the Federal Government's ability to recruit and retain the Nation's best workers."[29] That is hardly surprising, given that in many critical areas – including, for example, high-tech positions vital to our national security – the government must compete with the major corporations that offer equivalent benefits for same-sex and opposite-sex couples.[30] DOMA has particularly harmful consequences for the men and women in our military, whose same-sex spouses are denied basic benefits (such as on-base medical care) and respect (including recognition as a spouse at their partners' military funerals) afforded to all other military families.[31] This discrimination directly "impairs military readiness, unit cohesion, and soldier retention."[32]

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[28] *See* Douglas Holtz-Eakin, Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* 1 (2004), *available at* http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf.

[29] *H.R. 2517, Domestic Partnership Benefits and Obligations Act of 2009: Hearing Before the Subcomm. on Fed. Workforce, Postal Service, & D.C. of the Comm. on Oversight and Gov't Reform*, 111th Cong. 51 (2009) (statement of John Berry, Director, U.S. Office of Personnel Mgmt.).

[30] *See* Human Rights Campaign Foundation, *Corporate Equality Index 2013*, *supra* note 23, at 24-25

DOMA also undermines other important federal laws, including, for example, anti-nepotism statutes,[33] judicial recusal rules,[34] and gift bans imposed on senators and their spouses.[35] Under DOMA, the law that prohibits a straight government official from giving a government job to his wife, does not apply to a gay official who gives the same job to his same-sex spouse.

B. Legal Developments Have Swept Away DOMA's Constitutional Foundations.

The past seventeen years have also seen the erosion of DOMA's constitutional underpinnings, including a transformation of this Court's treatment of laws that impair the rights of gay and lesbian Americans.

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[31] *See* Mark Thompson, *The Battle of Fort Bragg*, Time Magazine, Feb. 4, 2013, at 10 (noting same-sex spouse of soldier killed in combat in Afghanistan was denied the traditional presentment of the flag that covered her partner's coffin and "was treated as if she didn't exist.").

[32] Daniel Pasek, *Love and War: An Argument for Extending Dependent Benefits to Same-Sex Partners of Military Service Members*, 6 Harv. L. & Pol'y Rev. 459, 459 (2012).

[33] *See* 5 U.S.C. § 3110; 5 U.S.C. § 2302(b)(7); 28 U.S.C. § 631(b).

[34] *See* 28 U.S.C. § 455.

[35] *See* 2 U.S.C. § 31-2(a).

The American concept of equality "is not shackled to the political theory of a particular era."[36] When this Court repudiated the widely accepted view that racial segregation was compatible with equal protection, it was not because the Constitution had changed, but because our understanding of the world and of the nature of equality had evolved.[37] We finally recognized that our commitment to equality was fundamentally incompatible with the government dictating that some among us were unworthy of participating in the fundamental institutions of society on equal footing with the rest.

Our generation has seen a similarly profound shift in our understanding of the Constitution's protection against discrimination on the basis of sexual orientation. DOMA was enacted against the backdrop of *Bowers*.[38] The reasoning and rhetoric of the decision condoned using the power of the government to express disapproval of, and even to punish, the physical expression of intimacy between same-sex couples.[39]

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[36] *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966).

[37] *See Brown v. Bd. of Educ.*, 347 U.S. 483, 492-93 (1954).

[38] Although *Romer v. Evans*, 517 U.S. 620 (1996), was decided a few months before DOMA was enacted, few understood its full import at the time, particular given that the majority in *Romer* never mentioned *Bowers*. *See* H.R. Rep. No. 104-664, at 31-33; *Romer*, 517 U.S. at 641 (Scalia, J., dissenting) ("If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.").

In the years after DOMA was enacted, this Court repudiated that constitutional decision and the worldview it represented. In *Romer v. Evans*[40] and *Lawrence v. Texas*,[41] the Court recognized that a government committed to liberty and equality cannot use the awesome power of the law to single out an unpopular group for disapproval, imposing legal harm on its members for who they are and whom they chose to love.

This new constitutional understanding reflects an emerging social consensus. The open hostility toward homosexuality that was common in the DOMA debates is being replaced by a recognition that sexual orientation discrimination is incompatible with our nation's core principles of equality. Today, 63% of Americans agree that discrimination based on sexual orientation is a serious problem.[42] At the same time, the American definition of marriage – not what marriage means but who it is for – is broader and more inclusive than ever before. Fifty-three percent of Americans support gay marriage, up from 27% in 1996.[43] A growing number of religious denominations have come to accept legal recognition of gay marriages, and some have embraced it as within their religious tradition.[44] Moreover, though DOMA enjoyed wide bipartisan support in 1996, the current President and many members of Congress – including some who voted for DOMA in 1996 – now oppose DOMA's federal definition of marriage and believe that the law is unconstitutional.[45]

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[39] *See Bowers*, 478 U.S. at 192-96.

[40] 517 U.S. 620 (1996).

[41] 539 U.S. 558 (2003).

[42] *Gay and Lesbian Rights*, Gallup, http://www.gallup.com/poll/1651/Gay-Lesbian-Rights.aspx (last visited Jan. 22, 2013).

[43] *Id.* The two most common reasons offered for this view are that all Americans should have equal rights (32%) and that

III. This Court Should Strike Down DOMA.

Sometimes experience shows "that laws once thought necessary and proper in fact serve only to oppress."[46] So it is with DOMA. Like this Court's

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individuals are entitled to their personal choice as to whom they marry (32%). *Id.*

[44] *See Religious Groups' Official Positions on Same-Sex Marriage*, Pew Forum (Dec. 7, 2012), http://www.pewforum.org/gay-marriage-and-homosexuality/religious-groups-official-positions-on-same-sex-marriage.aspx.

[45] *See* Charlie Savage & Sheryl Gay Stolbery, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. Times (Feb. 23, 2011), http://www.nytimes.com/2011/02/24/us/24marriage.html?pagewanted=all&_r=0; Brief of Members of the U.S. House of Representatives – Including Objecting Members of the Bipartisan Legal Advisory Group, Representatives Nancy Pelosi and Steny H. Hoyer – as Amici Curiae in Support of Plaintiff-Appellee and Urging Affirmance, *Windsor v. United States*, 699 F.3d 169 (2012) (Nos. 12-2335, 12-2435), 2012 WL 4338882, at *1 ("Some *amici* voted against . . . [DOMA] . while others voted for it; still others were not in Congress when DOMA was enacted. But all believe, today, that Section 3 of DOMA . . . lacks a rational relationship to any legitimate federal purpose and accordingly is unconstitutional.").

[46] *Lawrence*, 539 U.S. at 579.

regrettable decision in *Bowers*, the opinion DOMA's supporters would have this Court write cannot be reconciled with our constitutional commitments now, and would not withstand the judgment of history.

1. "[O]ur laws and traditions afford constitutional protection to personal decisions relating to marriage, procreation," and "family relationships."[47] Such choices are "central to personal dignity and autonomy" and form the core of the "liberty protected by the Fourteenth Amendment."[48] When the government legislates on the basis of those private decisions, when it makes hundreds of legal rights and obligations turn on a citizen's most intimate choices, it is compelled by the Constitution to treat all of its citizens with equal dignity. If Congress is to discriminate among state-recognized marriages – accepting the judgment of some states while disregarding others' – such discrimination must rest on substantial and legitimate grounds, not on fear and speculation that is at odds with actual experience.

As a result, contrary to the claims of DOMA's defenders, what we have learned from real world experiences in the years since DOMA's passage is not only relevant, but critical to deciding whether the discrimination the statute visits upon thousands of decent American families is constitutionally justifiable. And our experience over the past decades has shown that the fears upon which DOMA was premised have proven unfounded. The only function the statute truly serves today is to express moral disapproval of an individual's choice to make a lifelong commitment to another person of the same sex, and to disrespect a state's decision to give those marriage vows legal recognition. Such discrimination – whether premised in hatred and hostility,[49] or simple "want of careful, rational reflection"[50] – has no place in our constitutional system.

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[47] *Id.* at 574.

[48] *Id.* (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

2. We recognize that some believe that marriage is different. It is probably no accident that marriage was one of the last strongholds of racial discrimination, lingering decades after this Court had declared that racial discrimination was unconstitutional in other areas of civic life.[51] We all recognize that marriage is a special institution. It is an intensely personal commitment between two people, a profoundly private decision into which the government of a free people should not intrude. At the same time, it is one of our bedrock social institutions. And it is a sacrament subject to the diverse religious traditions that our Constitution

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[49] *See Romer*, 517 U.S. at 634 ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (quoting *Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

[50] *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

[51] *See Loving v. Virginia*, 388 U.S. 1, 12 (1967).

protects from government interference. But it is also a civil, legal status bearing important consequences in many areas of civic life.

For too long, we drew the conclusion that because marriage is so special, discrimination that would be intolerable in any other context is acceptable when deciding who can enjoy the legal benefits of this civil institution. In the past decades, however, we have come to realize that precisely because marriage *is* special, we must not exclude civil marriage from the reach of our commitment to equal treatment under the law. Our respect for individual liberty demands that every American be allowed to decide for himself or herself whom to marry. Our respect for the family requires extending the government benefits that foster this fundamental social institution to all families. And while the Constitution preserves the religious definition of marriage for our religious institutions, our respect for the Constitution's guarantee of equality under the law requires that we extend the legal benefits of marriage to every married couple, gay or straight. To decree that a particular group of people cannot avail themselves of such a fundamental societal institution is to label those people second-class citizens – a result our Constitution does not permit.

3. DOMA's supporters urge this Court to defer to the democratic process, allowing for "compromise and way-stations" along the road to recognizing the equal

rights of gays and lesbians.[52] That plea misconceives this Court's role.

Time and again, the Court has been required to enforce constitutional principles despite lingering opposition from some quarters. The Court did not wait for the "compromise and way-stations" of the democratic process to resolve the problem of racial segregation.[53] It did not leave the equal rights of women to politicians, even though it recognized the many victories that women had achieved through the political process.[54] It did not wait for states to repeal statutes that outlawed mixed-race marriages[55] or permitted the execution of the young or the mentally retarded before declaring those practices inconsistent with our national charter.[56] And, in recent times, the Court has not hesitated to enforce the equal protection rights of gays and lesbians when legislators have failed to repeal laws premised on hostility and unfounded fears.[57]

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[52] BLAG Br. 22 ("[T]he democratic process allows compromise and way-stations, whereas constitutionalizing an issue yields a one-size-fits-all solution . . . .").

[53] *See Brown*, 347 U.S. at 495.

[54] *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973).

[55] *See Loving*, 388 U.S. at 12.

[56] *See Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

[57] *See Lawrence*, 539 U.S. at 578-79; *Romer*, 517 U.S. at 633-35.

The history of this nation is a long march toward a more diverse and inclusive democracy. We know the direction of that journey, we know its destination, but we also know we are not there yet. Regrettably, gay Americans still face widespread discrimination in their everyday lives – in the workplace, in schools and universities, in the political arena. And discrimination can linger in the law long after it has ceased to define us as a society. Our legislative process can allow minority views to prevent the repeal of legislation that no longer reflects contemporary constitutional values. While outdated legislation remains in force, ordinary people like Edie Windsor suffer. And when our citizens come to this Court seeking relief from that suffering, it is this Court's enduring obligation to vindicate their constitutional right to liberty and equality.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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CURIAE
BRIEF

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UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE DECISION TO ENFORCE A STATUTE WHILE DECLINING TO ARGUE IN ITS DEFENSE IS A MEASURED APPROACH THAT RESPECTS BOTH THE PRESUMPTION OF VALIDITY ACCORDED TO ACTS OF CONGRESS AND THE JUDICIARY'S ROLE AS THE ARBITER OF CONSTITUTIONALITY 5

  A. The Executive Shows Respect For Congress By Defending Duly Enacted Statutes Except In Strictly Limited Circumstances 8

  B. When The Executive Determines That A Statute Cannot Reasonably Be Defended, The Executive Respects the Judiciary's Role As The Arbiter of Constitutionality By Enforcing The Statute And Appealing Adverse Judgments 13

II. WHERE THE EXECUTIVE CONTINUES TO ENFORCE A STATUTE, THIS COURT POSSESSES JURISDICTION TO REVIEW ITS CONSTITUTIONALITY, WHETHER OR NOT THE EXECUTIVE ARGUES IN ITS FAVOR AND WHETHER OR NOT A LOWER COURT HAS STRUCK IT DOWN 18

TABLE OF CONTENTS—Continued

Page

A. Article III Adversity Is Present Here 18

B. The Executive Is A Proper Party To Petition For Certiorari 20

C. A Holding That The Court Lacks Jurisdiction, Or That Prudence Bars Its Exercise, Would Present Concerns Of Constitutional Structure 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Page(s)

American Electric Power Co. v. *Connecticut*, 131 S. Ct. 2527 (2011) 21

ACLU v. *Mineta*, 319 F. Supp. 2d 69 (D.D.C. 2004) 14

Baker v. *Carr*, 369 U.S. 186 (1962) 19, 20

Buckley v. *Valeo*, 424 U.S. 1 (1976) 12

City of Boerne v. *Flores*, 521 U.S. 507 (1997) 13

Cooper v. *Aaron*, 358 U.S. 1 (1958) 13

FEC v. *NRA Political Victory Fund*, 513 U.S. 88 (1994) 23

Flast v. *Cohen*, 392 U.S. 83 (1968) 18

INS v. *Chadha*, 462 U.S. 919 (1983) 12, 17, 19, 20

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 4, 13, 25

Metro Broadcasting, Inc. v. *FCC*, 497 U.S. 547 (1990) 12, 13

Reno v. *ACLU*, 521 U.S. 844 (1997) 8

Rogers v. *Tennessee*, 532 U.S. 451 (2001) 21

United States v. *Di Re*, 332 U.S. 581 (1948) 8

United States v. *Lovett*, 328 U.S. 303 (1946) 12, 17, 20

United States v. *Mendoza*, 464 U.S. 154 (1984) 13

United States v. *Providence Journal Co.*, 485 U.S. 693 (1988) 7

TABLE OF AUTHORITIES—Continued

Page(s)

DOCKETED CASES

McConnell v. *FEC*, Nos. 02-1674, et al. (U.S.)..............10

Oregon v. *Mitchell*, No. 43 Orig. (U.S.)..........................10

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const.
  art. II, § 1, cl. 7..5
  art. II, § 3..3, 5
  art. III, § 1..16
  art. VI, cl. 2..6

Defense of Marriage Act, 1 U.S.C. § 7..............................2

5 U.S.C. § 3331..5

28 U.S.C.
  § 516..7
  § 530D(a)(1)(A)..7

EXECUTIVE AND LEGISLATIVE MATERIALS

Statement on Signing the Voting Rights Act Amendments of 1970, 1970 Pub. Papers 512 (June 22, 1970)..10, 15

Role of the Solicitor General, 1 Op. O.L.C. 228 (1977)..11

The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55 (1980)...............6, 7, 10

The Attorney General's Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25 (1981)..9

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Page(s)

Constitutionality of Legislation Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer, 6 Op. O.L.C. 13 (1982) 9

Recommendation That the Department of Justice Not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984, 8 Op. O.L.C. 183 (1984) 9, 15

Letter from Alfred C. Sikes, Chairman of FCC, to Dick Thornburgh, Attorney General (Jan. 12, 1990), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/roberts/FCC_letter.pdf 13

Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18 (1992) 6

Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199 (1994) 16

Letter from Janet Reno, Attorney General, to Albert Gore, Jr., President of the Senate (Feb. 9, 1996), *available at* http://www.ciec.org/trial/abort_speech.html 6

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Page(s)

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Letter from Paul D. Clement, Acting Solicitor General, to Patricia Mack Bryant, Senate Legal Counsel (Dec. 23, 2004), *available at* https://www.aclu.org/files/FilesPDFs/mineta_letter.pdf 14

Confirmation Hearing on the Nomination of Paul D. Clement To Be Solicitor General of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2005) 9

Confirmation Hearings on the Nominations of Thomas Perrelli Nominee To Be Associate Attorney General of the United States and Elena Kagan Nominee To Be Solicitor General of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. (2009) 9

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TABLE OF AUTHORITIES—Continued

Page(s)

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GAO, *Defense of Marriage Act: Update to Prior Report* (2004), *available at* http://www.gao.gov/new.items/d04353r.pdf 22

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IN THE

Supreme Court of the United States

No. 12-307

UNITED STATES OF AMERICA,
Petitioner,
v.

EDITH SCHLAIN WINDSOR AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

BRIEF FOR AMICI CURIAE FORMER SENIOR JUSTICE DEPARTMENT OFFICIALS AND FORMER COUNSELS TO THE PRESIDENT ON JURISDICTION

INTEREST OF AMICI CURIAE[1]

Amici curiae are former United States Solicitors General, Assistant Attorneys General for the Office of Legal Counsel, and Counsels to the President who have served in administrations of both major political parties and have confronted the difficult questions of constitutional duty and inter-branch comity that arise when the President concludes that there is no reasonable argument to support the constitutionality of an Act of Congress.[2] Amici take no position in this brief on the constitutionality of Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, on the propriety of the current Administration's decision not to defend that statute, or on the specific standard for determining when a statute should not be defended. Indeed, amici disagree among themselves on those questions.

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

Amici agree, however, that this Court is not divested of jurisdiction by the Executive's decision not to proffer what it considers unreasonable arguments in support of a statute's constitutionality, where the Executive continues to enforce the statute and appeals a judgment declaring it unconstitutional. To the contrary, amici believe that the decision not to defend a statute—under strictly limited circumstances—is a crucial prerogative for the Executive. Amici also agree that, in appropriate circumstances, the Executive may enforce a statute but not defend its constitutionality in a judicial challenge, and that when the Executive so acts, the federal courts, including this Court, have Article III jurisdiction to determine the statute's constitutionality, assuming the other necessary constitutional and statutory prerequisites of jurisdiction are present. In this case, which involves a matter of great public import, the United States, having determined that Section 3 of DOMA could not be defended, acted appropriately by denying Ms. Windsor an estate tax refund and by appealing judgments declaring the statute unconstitutional in order to preserve a justiciable case or controversy for this Court to decide.

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[2] A complete list of amici is set forth in an appendix to this brief.

SUMMARY OF ARGUMENT

The President of the United States is bound by the Constitution to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. In the rare event that the President concludes that a federal statute conflicts with the Constitution—the highest of "the Laws" that the President must take care to execute faithfully—the Executive confronts a dilemma: enforcement of one law will cause it to violate a higher law.

Those officials charged with assisting the President in identifying the obligations of the Executive Branch—the Attorney General, the Solicitor General, the Assistant Attorney General for the Office of Legal Counsel, the Counsel to the President, and others—historically have tried to resolve such dilemmas by considering a variety of factors, including separation of powers, inter-branch comity, and the private interests affected by the statute in question. In rare cases, the Executive has concluded that a statute should not be enforced at all. But in other circumstances, especially those involving matters of great public import where enforcement does not require criminal prosecution, the Executive has concluded that the public interest warrants a definitive determination of the statute's constitutionality. In such cases, and in particular where the Executive has concluded that it cannot offer reasonable arguments in defense of the statute, it has acted to ensure a definitive judicial resolution by enforcing the statute, declining to proffer arguments in favor of the statute's constitutionality when it is challenged in court, and appealing judgments declaring it unconstitutional.[3] This practice honors the presumption of constitutionality accorded to Acts of Congress and ensures that the Judiciary has an opportunity to exercise its ultimate authority to "say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The current Administration has explained its decision to enforce but not defend DOMA as an application of these principles. Whether or not that decision was proper or wise—a point on which amici take no position in this brief—it reflects the same difficult calculus of comity and constitutional duty in which Executive Branch officials (including amici) have historically engaged. When the Executive concludes that a federal statute cannot reasonably be defended, the Executive may enforce the statute—even while declining to defend it—so as to leave the ultimate resolution of the statute's constitutionality to the Judiciary and, ultimately, this Court. This practice is an act of considered fidelity to our constitutional structure.

The utility and continued vitality of this practice depend, however, on this Court's exercise of jurisdiction to decide such constitutional questions when they are presented. The constitutionality of DOMA is a question of abiding national importance, affecting thousands of federal programs and hundreds of thousands of citizens who are treated as married under state law but unmarried under federal law. There is an actual controversy between the parties—the United States will not pay Ms. Windsor in the absence of a final, nonappealable judgment declaring the law unconstitutional. Were this Court to hold that it lacks jurisdiction because the Executive agrees with Ms. Windsor and the lower courts that DOMA violates the Constitution—even where it has continued to enforce the statute, and even where it intends to do so in the future until a definitive judicial ruling to the contrary—that holding would depart from the historical practice of both this Court and the Executive, and would unduly constrain the Executive's ability to deal with constitutionally questionable statutes in a manner that takes appropriate account of the separation of powers and inter-branch comity.

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[3] The circumstances under which the Executive has declined to defend the constitutionality of a statute turn on a variety of factors. *See infra* note 8. Amici take no position with respect to the specific contours of the standard for a decision not to defend.

ARGUMENT

I. THE DECISION TO ENFORCE A STATUTE WHILE DECLINING TO ARGUE IN ITS DEFENSE IS A MEASURED APPROACH THAT RESPECTS BOTH THE PRESUMPTION OF VALIDITY ACCORDED TO ACTS OF CONGRESS AND THE JUDICIARY'S ROLE AS THE ARBITER OF CONSTITUTIONALITY

The Constitution reserves to Congress the power to make laws and to this Court the power to interpret them. On the President, the Constitution imposes a singular duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The Executive respects this obligation by enforcing and defending any duly enacted statute that, in its judgment, complies with the Constitution.

In those rare cases where the Executive concludes that a statute conflicts with the Constitution, however, the Executive's duty becomes more difficult to discern. The President and all Executive officials swear oaths to "defend the Constitution of the United States" (U.S. Const. art. II, § 1, cl. 7; 5 U.S.C. § 3331), and the Constitution is the highest of "the Laws" that the President must "take Care" to execute (U.S. Const. art. VI, cl. 2; *see Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. 18, 31 (1992) ("Among the laws that the President must 'take Care' to faithfully execute is the Constitution.")). Determining the proper course of action when a statute and the Constitution appear to conflict is among the most serious duties of the President and of the attorneys advising him. In a 1980 opinion providing guidance on the subject, Attorney General Civiletti wrote that the Attorney General's duty is to "exercise conscientious judgment," to "examine the Acts of Congress and the Constitution and determine what they require of him; and if he finds in a given case that there is conflict between the requirements of the one and the requirements of the other," to "acknowledge his dilemma and decide how to deal with it." *The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 55 (1980) ("Civiletti Mem.").

On rare occasions, the Executive has determined that a statute should not be enforced at all. A number of those occasions have involved laws that trenched on individual rights, were clearly unconstitutional under this Court's precedents, and could be enforced only by criminal prosecutions. *See, e.g.*, Letter from Janet Reno, Attorney General, to Albert Gore, Jr., President of the Senate (Feb. 9, 1996) (noting the Executive's "longstanding policy to decline to enforce the abortion-related speech prohibitions" in several statutes). In such circumstances, the President may properly conclude that his duty to uphold the Constitution requires him not to enforce a patently unconstitutional law. The President is accountable for such decisions to Congress, which has required that the Executive report any such nonenforcement decisions (28 U.S.C. § 530D(a)(1)(A)), as well as to the electorate.

But in other circumstances—for example, where the constitutional question is not directly controlled by a decision of this Court, and where the statute can be enforced by means other than criminal prosecution—the Executive may properly conclude that the public interest and comity between the branches warrant a definitive judicial determination of a statute's constitutionality, even when the statute is subject to serious constitutional doubt. Typically, in those circumstances, the Executive Branch has continued to enforce and defend the statute. *See, e.g.*, Civiletti Mem., 4A Op. O.L.C. at 55 (observing that when an Executive Branch official "is confronted with such a choice, it is almost always the case that he can best discharge the responsibilities of his office by defending and enforcing the Act of Congress"). The Executive pursues each of these courses—enforcement and defense—for distinct reasons of inter-branch comity, as explained more fully below. The Executive *defends* statutes, as a general matter, out of respect for the presumption that Congress has independently determined any statute it enacts to be consistent with the Constitution, and because the Department of Justice is charged by statute with the duty to represent the interests of the United States—that is, "the sovereign composed of the three branches" (*United States* v. *Providence Journal Co.*, 485 U.S. 693, 701 (1988))—in "the conduct of litigation" (28 U.S.C. § 516). And the Executive *enforces* statutes in deference to comity between the branches and to the Judiciary's unique role in resolving constitutional disputes in properly presented cases or controversies.

But there are also circumstances, such as this one, where the Executive may properly *enforce* a statute even if it does not *defend* it.[4] In doing so, the Executive properly takes account of the powers and prerogatives of other branches—Congress's authority to enact statutes and the Judiciary's authority to "say what the law is" when presented with a justiciable case or controversy. And in doing so, the Executive also properly takes account of the public interest in a definitive and uniform resolution of constitutional questions surrounding a statute, such as Section 3 of DOMA, that affects innumerable private and public decisions every day and as to which a definitive judicial resolution would serve the public interest.

A. The Executive Shows Respect For Congress By Defending Duly Enacted Statutes Except In Strictly Limited Circumstances

Acts of Congress carry a "strong presumption of constitutionality" (*United States* v. *Di Re*, 332 U.S. 581, 585 (1948)), and the Executive in almost all circumstances defers to the constitutional judgment of its coequal branch by enforcing and defending duly enacted statutes, at least where Congress has not infringed on the Executive's core powers. This presumption of enforcement and defense has been the policy of the Solicitor General's Office across both Democratic and Republican administrations.[5] This has also been the consistent position of the Office of Legal Counsel, which has regularly stated that the "Executive's duty faithfully to execute the law and recognition of the presumption of constitutionality generally accorded duly enacted statutes result in all but the rarest of situations in the Executive's enforcing and defending laws enacted by Congress." *Recommendation That the Department of Justice Not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 8 Op. O.L.C. 183, 193 (1984) ("Olson Mem.").[6] In short, the practice of the Executive Branch—across the decades and across administrations of both major political parties—is to enforce and defend Acts of Congress in nearly all instances.

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[4] There are also cases where the Executive has the inverse option: it may defend, but not immediately enforce, a statute—for example, in litigation presenting a pre-enforcement challenge to the facial validity of a statute. *See, e.g., Reno* v. *ACLU*, 521 U.S. 844 (1997). In such cases, the Executive may properly exercise its prosecutorial discretion to withhold enforcement of a statute until its constitutionality is definitively determined by the courts, and the pre-enforcement challenge may present a justiciable controversy for the courts to make that determination.

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[5] *See, e.g., Confirmation Hearings on the Nominations of Thomas Perrelli Nominee To Be Associate Attorney General of the United States and Elena Kagan Nominee To Be Solicitor General of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 47 (2009) (statement of Elena Kagan) ("Traditionally, outside of a very narrow band of cases involving the separation of powers, the Solicitor General has defended any Federal statute in support of which any reasonable argument can be made."); *Confirmation Hearing on the Nomination of Paul D. Clement To Be Solicitor General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 6 (2005) (statement of Paul D. Clement) ("[O]utside a narrow band of cases implicating the President's Article II authority, the [Solicitor General's] office will defend the constitutionality of the acts of Congress as long as reasonable arguments can be made in the statute's defense.").

[6] *See also Constitutionality of Legislation Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer*, 6 Op. O.L.C. 13, 26 (1982) ("It is settled practice that the Department of Justice must and will defend Acts of Congress except in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid."); *The Attorney General's Duty to Defend the Constitutionality of Statutes*, 5 Op. O.L.C. 25, 25-26 (1981) ("In my view, the Department has the duty to defend an act of Congress whenever a reasonable argu-

Indeed, the Solicitor General may decide to defend a statute even where the President has concluded that it is unconstitutional or expressed reservations as to its constitutionality. In signing the Voting Rights Act Amendments of 1970, for example, President Nixon publicly stated his view that a provision of the statute conferring the right to vote on eighteen-year-olds violated the Constitution. *Statement on Signing the Voting Rights Act Amendments of 1970*, 1970 Pub. Papers 512, 512 (June 22, 1970). Solicitor General Griswold, however, filed a brief before this Court defending the constitutionality of the statute. U.S. Br., *Oregon* v. *Mitchell*, No. 43 Orig. (U.S. Oct. 1970); *see also* Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1081-1082 (2001). Similarly, the Solicitor General defended the Bipartisan Campaign Reform Act of 2002, notwithstanding the President's publicly expressed doubts whether portions of the Act were constitutional. *Compare Statement on Signing the Bipartisan Campaign Reform Act of 2002*, 1 Pub. Papers 503, 503 (Mar. 27, 2002) (expressing "reservations about the constitutionality" of certain provisions), *with* U.S. Br., *McConnell* v. *FEC*, Nos. 02-1674, et al. (U.S. Aug. 2003) (defending the statute).

Notwithstanding the nearly uniform practice of both enforcing and defending duly enacted statutes, So-

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ment can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts."); Civiletti Mem., 4A Op. O.L.C. at 55 ("The Attorney General has a duty to defend and enforce the Acts of Congress[.]").

licitors General in both Republican and Democratic administrations have in infrequent instances determined (typically after consultation with the President, the Attorney General, and other Justice Department and Executive Branch officials[7]) that a statute should not be defended, where the Executive has concluded that no reasonable argument supports the statute's constitutionality.[8] The Department of Justice has declined to make arguments defending a statute's constitutionality in numerous cases before both this Court and the lower courts. *See, e.g.*, Letter from Andrew Fois, Assistant Attorney General for the Office of Legislative Affairs, to Orrin G. Hatch, Chairman, Senate Committee on the Judiciary (Mar. 22, 1996) (listing cases).[9]

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[7] Although the Solicitor General typically enjoys "a marked degree of independence" in his function, the Attorney General—and through him, the President—does have the power to direct the Solicitor General to defend (or not to defend) a statute. *Role of the Solicitor General*, 1 Op. O.L.C. 228, 229 (1977); *see* Days, *When the President Says "No": A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, 3 J. App. Prac. & Process 509 (2001).

[8] This brief does not attempt to define the precise contours of the "reasonable arguments" that might be raised in a statute's defense (or the unreasonable arguments that should not be). Different administrations have approached that question differently. To amici's knowledge, however, no administration has concluded that the Justice Department must or should offer all arguments in support of a statute except those that would be frivolous. Thus, the Executive has in the past concluded, and surely may conclude, that professionally responsible, non-frivolous arguments are nonetheless not sufficiently "reasonable" to be raised in defense of a statute. For example, to amici's knowledge, the Department of Justice has never thought itself required to ask this Court to overrule one of its precedents in order to sustain a statute, even when such an argument would not be frivolous.

The Solicitor General has also declined to defend statutes that appeared to trench on the power of the Executive, even when reasonable arguments could be made in the statutes' defense. *See, e.g.*, Days, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 Ky. L.J. 485, 499-500 (1995). This case does not involve such a circumstance, and so this brief does not consider such instances of non-defense, which the Department of Justice has consistently treated differently from other cases where statutes raise serious constitutional problems.

The decision not to defend a statute is never taken lightly; indeed, it invariably involves debate at the highest levels of the Executive Branch. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), for example, President Ford was required personally to intercede in a dispute between the Solicitor General and Attorney General on the one hand, who wanted the government's brief to be neutral on the question of the constitutionality of the expenditure and contribution limits of the Federal Election Campaign Act, and the Chair of the FEC on the other hand, who wanted the government to defend all provisions of the statute. In the end, the Executive filed two briefs—one on behalf of the FEC (an independent agency) defending the statute, and another signed by the Attorney General and Solicitor General expressing "marked skepticism" toward it. Hasen, *The Nine Lives of* Buckley *v.* Valeo, *in First Amendment Stories* 345, 361 (Garnett & Koppelman eds., 2012); *see*

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[9] In *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), for example, the Acting Solicitor General declined to defend a statute forbidding the FCC from spending money to change its policy of favoring minority applicants for broadcast licenses. In *INS* v. *Chadha*, 462 U.S. 919 (1983), the Solicitor General declined to defend a statute authorizing each House of Congress to veto the INS's decision to suspend an alien's deportation. And in *United States* v. *Lovett*, 328 U.S. 303 (1946), the Solicitor General declined to defend a statute requiring the Executive to withhold the salaries of certain identified officials.

also, e.g., Letter from Alfred C. Sikes, Chairman of FCC, to Dick Thornburgh, Attorney General (Jan. 12, 1990) (urging the Attorney General to defend the FCC policy at issue in *Metro Broadcasting*, while acknowledging the Acting Solicitor General's "reluctance ... to do so").

B. When The Executive Determines That A Statute Cannot Reasonably Be Defended, The Executive Respects the Judiciary's Role As The Arbiter of Constitutionality By Enforcing The Statute And Appealing Adverse Judgments

The Constitution vests in the Judiciary the ultimate authority "to say what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and "the Executive Branch must of course defer to the Judicial Branch for final resolution of questions of constitutional law," *United States* v. *Mendoza*, 464 U.S. 154, 161 (1984).[10] The Executive acts appropriately and in recognition of this authority when it declines to defend a statute but takes measures to ensure that the statute does not escape definitive judicial review.

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[10] *See also City of Boerne* v. *Flores*, 521 U.S. 507, 535-536 (1997) ("Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is."); *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

Outside the exceedingly rare cases where the Executive determines that a statute is so patently unconstitutional that it cannot be enforced, the Executive acts appropriately under our constitutional structure by taking steps to ensure the presentation of a justiciable case or controversy, including enforcing the statute and appealing adverse judgments.[11] Some have framed this as a matter of constitutional duty: in a 1984 opinion of the Office of Legal Counsel, for example, Assistant

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[11] The Executive has, on occasion, declined to file appeals or petitions for certiorari from lower-court judgments against the constitutionality of federal statutes. *See, e.g.*, Letter from Paul D. Clement, Acting Solicitor General, to Patricia Mack Bryant, Senate Legal Counsel (Dec. 23, 2004) (explaining the decision not to authorize an appeal of a district-court judgment invalidating a statute that conditioned the receipt of federal funds for mass transit on the rejection of advertisements promoting legalization or medicinal use of substances including marijuana).

In some such cases, the Executive's decision not to appeal an adverse judgment might be viewed as a form of non-enforcement rather than non-defense. For example, in the case that was the subject of Solicitor General Clement's letter—*ACLU* v. *Mineta*, 319 F. Supp. 2d 69 (D.D.C. 2004)—the Executive could not have chosen not to enforce the statute, because the law was effectively implemented by an independent entity, the Washington Metropolitan Area Transit Authority, that received federal funds; it was that entity's obedience to the statute, not the Executive's enforcement, that gave rise to the alleged constitutional injury. In other circumstances, the Solicitor General might not have been aware of a constitutional challenge to a statute until after the entry of a judgment declaring the statute unconstitutional; a decision by the Solicitor General not to appeal such a judgment might amount to an acknowledgment that the statute ought never have been enforced at all. Finally, the Executive might decline to take steps to appeal a judgment against the constitutionality of a statute when the statute has been challenged in a lawsuit between private parties. Where the private party who is aggrieved by the judgment against a statute has adequate motive and resources to file an appeal, the Executive need not necessarily do so.

Attorney General Olson explained that "[i]t is ... generally for the courts, and not the Executive, finally to decide whether a law is constitutional," and stated that "[a]ny action of the President which precludes, or substitutes for, a judicial test and determination would at the very least appear to be inconsistent with the allocation of judicial power by the Constitution to the courts." Olson Mem., 8 Op. O.L.C. at 194. Whether or not submission of disputes about the constitutionality of legislation to the Judiciary is constitutionally obligated, it is certainly typical in practice. *See, e.g.*, Huq, *Enforcing (But Not Defending) "Unconstitutional" Laws*, 98 Va. L. Rev. 1001, 1069 (2012) ("The creation and preservation of a justiciable controversy is a goal routinely stipulated in official defenses of enforcement-litigation gaps."); *see also* 1970 Pub. Papers at 512 (President Nixon's statement on signing the Voting Rights Act Amendments of 1970, in which he "directed the Attorney General to cooperate fully expediting a swift court test of the constitutionality" of the voting-age provision that he considered unconstitutional).

Thus, even while declining to offer arguments in defense of a statute, the Executive can and properly often does seek to present the Judiciary with a justiciable case in which it can review the statute's constitutionality. In our federal system, where advisory opinions are unavailable and the United States typically cannot sue a private citizen for a declaratory judgment of unconstitutionality, an Executive that has determined that no reasonable argument supports a statute's constitutionality has few options. In general, the most efficacious way for the Executive to secure the Judiciary's ability to pass on such a statute is to enforce it, setting the stage for an aggrieved citizen to bring suit. *See* Waxman, 79 N.C. L. Rev. at 1078 n.14 ("Unlike a decision not to enforce a statute at all, the practice of 'enforce but decline to defend' permits the will of Congress to be honored in the first instance, allows the Executive Branch to make its views known to the Court, and ordinarily places before the Court the opportunity to resolve the constitutional dispute between the other two branches."); *cf. Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 201 (1994) ("[T]he President may base his decision to comply (or decline to comply) [with a statute he views as unconstitutional] in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch."). This is the course that the Administration has pursued in this case. *See* Letter from Eric H. Holder, Jr., Attorney General, to John A. Boehner, Speaker of the House of Representatives (Feb. 23, 2011) ("Holder Letter") (explaining the decision to continue enforcing DOMA, even while declining to defend it in this and other cases, on the ground that "[t]his course of action ... recognizes the judiciary as the final arbiter of the constitutional claims raised").

But enforcing a statute and triggering a constitutional challenge are not enough by themselves to secure a definitive judicial resolution of the statute's constitutionality; if that is the Executive's objective, it may and should take steps to ensure that the constitutional issue is presented not only to a district court, but also to a court of appeals and ultimately to this Court so that the Judiciary has an opportunity to rule definitively. The Constitution vests "[t]he judicial Power of the United States" not in the ninety-four district courts but in "one supreme Court." U.S. Const. art. III, § 1. Under the Constitution, this Court wields the ultimate authority of the Judicial Branch, and the Executive may therefore properly determine—as it determined here, and as it determined in *Chadha* and *Lovett*—that it will enforce an Act of Congress unless and until *this* Court has had an opportunity to render judgment on the Act. *See* Holder Letter ("[T]he President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the *judicial branch renders a definitive verdict* against the law's constitutionality." (emphasis added)).

The Executive's typical practice of appealing adverse lower court judgments shows respect not only for the Judiciary but also for Congress. If the Executive were not to appeal lower-court judgments against the constitutionality of a statute, Congress's independent judgment as to the constitutionality of legislation could be overridden by a single court, and federal statutes could have nonuniform application across the country (if different lower courts were to arrive at different conclusions). By appealing and filing petitions for certiorari from adverse judgments of laws the Executive has concluded are not subject to reasonable defense, the Executive as a general matter ensures that Congress's will cannot be overridden without at least putting the matter before this Court.[12]

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[12] Because the reasons for the Executive to appeal judgments against the validity of federal statutes arise from the structure of the Federal Constitution, those reasons do not necessarily apply to state and local executives. Nor are state and local executives necessarily subject to the same duties of enforcing or defending statutes, ordinances, or initiatives. To the extent that any such duties exist for state and local executives—a question on which this brief takes no position—they would be matters of state constitutional

II. WHERE THE EXECUTIVE CONTINUES TO ENFORCE A STATUTE, THIS COURT POSSESSES JURISDICTION TO REVIEW ITS CONSTITUTIONALITY, WHETHER OR NOT THE EXECUTIVE ARGUES IN ITS FAVOR AND WHETHER OR NOT A LOWER COURT HAS STRUCK IT DOWN

The court-appointed amica curiae argues that no genuine case or controversy exists here, where the Executive agrees with Ms. Windsor and the lower courts that DOMA violates the Constitution. That is incorrect; rather, all the relevant aspects of Article III adversity are present here. The interests animating Article III are not offended by permitting the Solicitor General to take the steps necessary to present the question of a statute's constitutionality to this Court—both by continuing to enforce it and by filing the necessary appeals from adverse judgments in the lower courts—and then to notify the Court that the Executive does not believe the statute is constitutional. Article III does not require DOMA's constitutionality to be adjudicated multiple times in the lower courts before this Court has the option of reviewing it.

A. Article III Adversity Is Present Here

Article III requires that this Court hear only cases in which "the questions will be framed with the necessary specificity, ... the issues will be contested with the necessary adverseness and ... the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." *Flast* v. *Cohen*, 392 U.S. 83, 106 (1968). Where, as here, the Executive continues to enforce a statute, and where inter-

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law, distinct from any federal constitutional considerations (including Article III standing).

venors or amici will present vigorous arguments in support of the statute even if the Executive does not, the requirements of Article III adversity are satisfied.

First, there is a genuine controversy between the United States and Ms. Windsor, who claims entitlement to $363,053 that the United States refuses to pay her. This controversy is in all relevant respects the same as the controversy the Court found to exist in *Chadha*. There, as here, the Executive considered the statute in question unconstitutional. There, as here, the Executive refused to defend the statute against a challenge. And there, as here, the Executive took the position that it would continue to implement the statute unless this Court rendered a definitive judgment invalidating it. In *Chadha*, this Court agreed with then-Judge Kennedy's opinion for the Ninth Circuit that an Article III controversy existed because the result of the proceeding would determine whether or not Mr. Chadha could remain in the country. *See INS* v. *Chadha*, 462 U.S. 919, 939-940 (1983) ("We agree with the Court of Appeals that 'Chadha has asserted a concrete controversy, and our decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold § 244(c)(2), the INS will execute its order and deport him.'"). Precisely the same is true here: regardless of the Executive's agreement with Ms. Windsor on the constitutional question presented and on the correctness of the judgment below, this Court's ruling will conclusively determine whether Ms. Windsor receives the money she claims the government owes her.

Second, there can be no question that this proceeding will be marked by the "sharp[] ... presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). The "concrete adverseness" of the case is preserved (*id.*)—notwithstanding the Executive's decision not to defend DOMA—by the ability of the Bipartisan Legal Advisory Group and amici to present what in their view are the strongest arguments in favor of the statute's constitutionality. And it can hardly be said that DOMA's defense by BLAG has been anything less than skillful and zealous.

B. The Executive Is A Proper Party To Petition For Certiorari

While the court-appointed amica acknowledges (at 23) that the district court was properly seized of Article III jurisdiction in this case, she suggests that the Executive lacked standing to appeal the district court's judgment. But the United States, represented by attorneys within the Executive Branch, is a proper party to invoke the jurisdiction of the court of appeals and this Court.

The judgment of the district court, which was affirmed by the court of appeals, directed the United States to pay Ms. Windsor a sum of money. The judgment was thus adverse to the financial interests of the United States. In keeping with its policy of enforcing DOMA, the United States has not in fact paid the disputed amount to Ms. Windsor, and it presumably would not do so if this Court were to reverse the judgment of the court of appeals.

In addition, the United States maintains an ongoing interest in the definitive, uniform resolution of DOMA's constitutionality. The Executive's position here, just as in *Chadha* and *Lovett*, is that it considers the statute unconstitutional and would prefer to stop enforcing it, but that obligations of comity towards Congress and the Judiciary warrant enforcing the statute unless and until this Court "renders a definitive verdict against the law's constitutionality." Holder Letter. The President could have ordered the IRS to pay Ms. Windsor's refund upon the entry of judgment by the district court. Instead, he directed the Department of Justice to appeal and seek certiorari, not because he was interested in making life more difficult for Ms. Windsor, or because he had second thoughts on DOMA's validity, but because (as the Holder Letter explains) he did not find it appropriate to stop enforcing the statute unilaterally, without allowing this Court to fulfill its constitutional function.

There are good reasons for the Executive's conclusion that a district court judgment would not resolve DOMA's constitutionality with sufficient definitiveness and finality for it to stop enforcing the statute. Our legal system depends on the orderly accretion of precedent, and district court judgments do not create precedent. *See Rogers* v. *Tennessee*, 532 U.S. 451, 461 (2001) ("[T]he incremental and reasoned development of precedent ... is the foundation of the common law system."); *American Electric Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2540 (2011) ("[F]ederal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court."). If the Executive were not to appeal from a district court judgment against DOMA, then the statute's constitutionality could be determined only in successive actions before dozens of district judges, none of whom would be bound even by his or her own prior determinations of the statute's validity. No binding precedent could be set unless a judge were to uphold the statute and an aggrieved party were to appeal that judgment, and no national precedent could be set unless a court of appeals were to follow suit and an aggrieved party were to petition for certiorari.

Here, that would be an unacceptable prospect. Section 3 of DOMA affects many day-to-day operations of the government and the lives of many thousands of people. *See* GAO, *Defense of Marriage Act: Update to Prior Report* 1 (2004) (noting the existence of "1,138 federal statutory provisions ... in which marital status is a factor in determining or receiving benefits, rights, and privileges"); U.S. Census Bureau, Press Release, *Census Bureau Releases Estimates of Same-Sex Married Couples* (Sept. 27, 2011) ("According to revised estimates from the 2010 Census, there were 131,729 same-sex married couple households ... in the United States."). Under these circumstances, both the orderly resolution of DOMA's constitutionality and the national uniformity of that resolution are essential.

And even aside from these practical problems with piecemeal adjudication in the district courts, a case like this one—involving a constitutional question of inarguable national import—is uniquely fit for resolution by this Court. It is reasonable for the Executive to have concluded that only this Court should finally resolve a question as fundamental as the one presented here.

Of course, the mere fact that the Solicitor General petitions this Court for review in a given case does not compel this Court to grant the petition. This Court remains free, as in any case, to deny certiorari. Such a consideration is not *jurisdictional*, however, and does not prevent this Court from reviewing the merits if it so chooses, particularly where—as here—there is no lack of intervenors and amici to put all of the relevant arguments before the Court.

C. A Holding That The Court Lacks Jurisdiction, Or That Prudence Bars Its Exercise, Would Present Concerns Of Constitutional Structure

Were this Court to rule that it lacks jurisdiction because the Executive agrees with a lower court judgment of a statute's unconstitutionality, even when the Executive continues to enforce the statute, the Executive would effectively be required to abandon the infrequently used but important practice of enforcing a statute but not defending it, and would instead be required to choose between two alternative approaches, each of which would be significantly less respectful of the separation of powers and of the historical relationship among the branches of government.

One approach would be for the Executive to present arguments defending a statute even when the President and Solicitor General believe that such arguments are unreasonable. But this approach would risk undermining the institutional relationship between this Court and the Office of the Solicitor General.

As many who have held that office have observed, the Solicitor General occupies a unique role of fidelity both to the Executive Branch and to this Court. "The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case." Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 A.B.A. J. 229, 229 (1955); *see also FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 96 (1994). In part because of the Solicitor General's institutional interest in seeking "to establish justice" across many cases (Sobeloff, 41 A.B.A. J. at 229), this "Court has come to rely on the Solicitor General to present briefs of the most scrupulous fidelity, and to combine statements of principle with strategies by which the Court may rule in a manner most consistent with principles of stability." Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 Ind. L.J. 1297, 1309 (2000). Every member of this Court's bar is obligated to advocate with candor and integrity, but "the Solicitor General is invited by tradition, as well as statute and regulation, to step out from the role of partisan advocate to assist in the orderly development of the law and to insist that justice be done even where the immediate interests of the federal government may not appear to benefit." Days, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 Ky. L.J. 485, 488 (1995). To require the Solicitor General to present arguments that he or she considered unreasonable in order to preserve this Court's jurisdiction would undermine this longstanding relationship of trust.

Such a requirement could also place the President in the untenable position of taking a position before the Judiciary that the President believes to be fundamentally wrong as a matter of law. Where questions of constitutional law touch on publicly contested issues, the President's ability to communicate with the Nation on matters of consequence—and the ability of the electorate to hold the President accountable for his or her views—would be complicated by a dissonance between the President's considered and strongly held views on the meaning of the Constitution and the positions that the President's administration advances in the courts.

Alternatively, the Executive could adhere to its current practice of declining—in rare instances and after sober consideration—to defend a statute for which it finds no reasonable argument to be made. But it would have to do so with the knowledge that this approach could deprive the appellate courts of jurisdiction to decide the statute's constitutionality, absent a lower court judgment upholding the statute. Such a result would increase the constitutional significance of the Executive's decision not to defend a statute, as it might interfere with the Judiciary's power to "say what the law is." As a practical matter, it could lead the Executive to stop enforcing constitutionally questionable statutes at all, since the alternative—the litigation of successive individual actions in dozens of district courts, with the possibility of no precedential resolution of the issue—is unsatisfactory. The foreclosure of judicial review on otherwise justiciable questions of constitutional law would significantly intrude on the prerogative that this Court has reaffirmed consistently since *Marbury*, and would undermine Congress's interest in protecting its constitutional and policy judgments from invalidation except where the courts have conclusively decided that those judgments cannot pass constitutional muster.

CONCLUSION

The Court has jurisdiction to decide whether Section 3 of DOMA violates the Constitution.

Respectfully submitted.

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MARCH 2013

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Gregory B. Craig served as Counsel to the President between 2009 and 2010.

Drew S. Days III served as Solicitor General of the United States between 1993 and 1996.

Arthur B. Culvahouse, Jr. served as Counsel to the President between 1987 and 1989.

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Seth P. Waxman served as Solicitor General of the United States between 1997 and 2001.

AMICUS
CURIAE
BRIEF

No. 12-307

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR, IN HER CAPACITY
AS EXECUTOR OF THE ESTATE OF
THEA CLARA SPYER, *et al*.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES

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QUESTIONS PRESENTED

1. Whether Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State

2. Whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case.

3. Whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE CONSTITUTIONALITY OF THE DEFENSE OF MARRIAGE ACT SHOULD BE DETERMINED BY THE TEXT OF THE CONSTITUTION, THE SUPREME LAW OF THE LAND 3

II. THE DEFENSE OF MARRIAGE ACT DOES NOT VIOLATE THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT BECAUSE THE FIFTH AMENDMENT CONTAINS NO SUCH COMPONENT 7

III. THE DEFENSE OF MARRIAGE ACT IS RATIONALLY SUPPORTED BY MANY LEGITIMATE REASONS AND IMPORTANT CONSIDERATIONS, INCLUDING THE "LAW OF NATURE AND OF NATURE'S GOD" AND THOSE INTERESTS ADVANCED BY CONGRESS WHEN IT PASSED THE STATUTE 13

TABLE OF CONTENTS—Continued

Page

A. "All men are created equal" and as either male or female. 13

B. Homosexual conduct was, at least until recently, strongly disapproved in most cultures and in Anglo-American law. 15

C. Same-sex "marriage" was inconceivable in Anglo-American common law 19

D. Congress offered legitimate reasons when it enacted the Defense of Marriage Act. 20

  1. Congress and the federal government have an interest in defending and nurturing the institution of marriage. 21

  2. Congress and the federal government have an interest in defending traditional notions of morality 26

CONCLUSION 28

TABLE OF AUTHORITIES

CASES Page

Able v. United States, 155 F.3d 628 (2nd cir. 1998).. 12

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 12

Baehr v. Lewin, 852 P.2d 44 (Haw. 1993)....... 23

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Gill v. Office of Personnel Management, 699 F. Supp. 2d 374 (D. Mass. 2010)................4, 11, 26

Graves v. O'Keefe, 306 U.S. 466 (1939)............ 28

Holmes v. Jennison, 39 U.S. (14 Peters) 540 (1840) 6, 9

Lake County v. Rollins, 130 U.S. 662 (1889)... 5

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Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 5, 6

Page

Massachusetts v. United States Dept. of Health and Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010) 4

McCreary County, Ky. v. ACLU of Kentucky, 545 U.S. 844 (2005) 7

Murphy v. Ramsey, 114 U.S. 15 (1885) 22

United States v. Sprague, 282 U.S. 716 (1931) 6

CONSTITUTIONS

U.S. Const. amend. V .... *passim*

U.S. Const. amend. XIV .... *passim*

U.S. Const. art. V 10

U.S. Const. art. VI 2, 4, 6

STATUTES

Defense of Marriage Act, § 3, 1 U.S.C. § 7 .... *passim*

Federal Employee Health Benefits program, 5 U.S.C. § 8901(5) 11

LEGISLATIVE MATERIALS

House R. Rep. No. 104-664 (1996) .. 21, 22, 23, 24, 26

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TABLE OF AUTHORITIES—Continued

Page

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- 1 Corinthians 6:9-10 (NKJV) 25
- Exodus 20:14 (NKJV) 25
- Genesis 1:27 (KJV) 14
- Genesis 2:18-25 (KJV) 15
- Genesis 2:24 (KJV) 14, 25
- Leviticus 18:22 (KJV) 14
- Leviticus 20:13 (KJV) 15
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Page

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Theodosian Code (IX.7.6).................................. 15

U.S. Dep. of Health & Human Services, Brief 21

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J.D. Unwin, *Sex and Culture* (Oxford University Press 1934).................................. 26

Noah Webster, *American Dictionary of the English Language* (1828)............................ 20, 22

STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the unalienable right to acknowledge God as the moral foundation of our laws; promoting a return to the historic and original interpretation of the United States Constitution; and educating citizens and government officials about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has filed *amicus* briefs in cases concerning the right of counseling students to disapprove of homosexuality, public display of the Ten Commandments, the recitation of the Pledge of Allegiance and prayer, partial-birth abortion and others.

The Foundation has an interest in this case because it believes that this nation's laws should reflect the moral basis upon which the nation was founded, and that the ancient roots of the common law, the pronouncements of the legal philosophers from whom this nation's Founders derived their view of law, the views of the Founders themselves, and the views of the American people as a whole from the beginning of American history through the present, have held that homosexual conduct has always been and continues to be immoral and should not be protected or sanctioned by law.

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[1] Pursuant to this Court's rule 37.3, all parties have consented to the filing of this *amicus* brief. Further, pursuant to Rule 37.6, this *amici curiae* states that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The district court below struck down the portion of the Defense of Marriage Act (DOMA) that defined marriage, for federal laws and regulations, as the union of one man and one woman. Not only did the court dismiss several interests asserted by Congress when DOMA was passed in 1996, but the court ignored the plain text of the Fifth Amendment that it purported to apply. This Court exercises its judicial authority under the United States Constitution, and it should do so based on the text of the document from which that authority is derived. A court has a solemn duty to decide a constitutional case based upon the Constitution's text. *Amicus* urges this Court to return to first principles in this case and to embrace the plain and original text of the Constitution, the supreme law of the land. U.S. Const. art. VI.

The court below erred in its application of the Fifth Amendment because there is simply no "equal protection" component in the due process clause of the Amendment. In fact, were the court to expand *Bolling v. Sharpe* to same-sex marriage, such a ruling would imply that the equal protection clause that is in the *Fourteenth* Amendment was unnecessary because that Amendment already had a due process clause. Such a result would violate basic rules of constitutional interpretation and should be rejected.

From Biblical law and other ancient law, through English and American common law and organic law, to recent times, homosexual conduct has been abhorred and opposed; the idea of a "marriage" based on such conduct never even entered the legal mind until very recent times. Congress's passage of the federal definition of marriage in DOMA had the force of that history behind it and several present-day interests that were asserted when DOMA was enacted in 1996, such as an interest in defending marriage and an interest in defending traditional notions of morality. DOMA easily bears a rational relationship to Congress's support of traditional marriage as it began to come under attack through the courts in 1993.

ARGUMENT

I. THE CONSTITUTIONALITY OF THE DEFENSE OF MARRIAGE ACT SHOULD BE DETERMINED BY THE TEXT OF THE CONSTITUTION, THE SUPREME LAW OF THE LAND.

At issue in the instant appeal is the constitutionality of Section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. §7, which provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

The district court below held in two companion cases that, by denying same-sex couples certain federal marriage-based benefits, § 3 of DOMA "violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution," *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010), and "induces the Commonwealth [of Massachusetts] to violate the equal protection rights of its citizens" as a condition to receiving federal funds, in violation of the Fourteenth Amendment's Equal Protection Clause, *Massachusetts v. United States Dept. of Health and Human Servs.*, 698 F. Supp. 2d 234, 248 (D. Mass. 2010). The Second Circuit majority opinion upheld the district court's decision.

The district court and the Second Circuit below made two fundamental errors in its holdings that will be addressed herein: first, the court disregarded the words of the Constitution, the "supreme law of the land"; and second, the court improperly dismissed Congress's legitimate and reasonable reasons for enacting the Defense of Marriage Act and protecting the traditional definition of marriage, reasons that the Department of Justice fails to defend in this case.

The Constitution itself and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. art. VI. All judges take their oaths of office to support *the Constitution* itself—not a person, office, government body, or judicial opinion. *Id.* The Constitution and the solemn oath thereto should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . the legitimate meanings of the Instrument must be derived from the text itself." J. Madison, Letter to Thomas Ritchie, September 15, 1821, in *3 Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). "The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889). A textual reading of the Constitution, according to Madison, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), in *Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824). The words of the Constitution are neither suggestive nor superfluous: "In expounding the Constitution . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

The U.S. Supreme Court reaffirmed this approach in *District of Columbia v. Heller*, 554 U.S.570, 128 S. Ct. 2783, 2788 (2008):

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague*, 282 U.S. 716, 731 (1931); *see also Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824).

The meaning of the Constitution is not the province of only the most recent or most clever judges and lawyers: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 128 S. Ct. at 2821.

Moreover, if the Constitution as written is not a fixed legal standard, then it is no constitution at all. By adhering to court-created tests rather than the legal text, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases "agreeably to the constitution," and instead mechanically decide cases agreeably to judicial precedent. *Marbury*, 5 U.S. at 180; *see also*, U.S. Const. art. VI. James Madison observed in *Federalist No. 62* that

> [i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood;

> if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

The Federalist No. 62 (James Madison), at 323-24 (George W. Carey & James McClellan eds., 2001). "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County, Ky. v. ACLU of Kentucky*, 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting). The constitutional text should be the basis for the judicial analysis in this and all other cases.

II. THE DEFENSE OF MARRIAGE ACT DOES NOT VIOLATE THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT BECAUSE THE FIFTH AMENDMENT CONTAINS NO SUCH COMPONENT.

Plaintiffs' argument that § 3 of DOMA violates the "equal protection component" of the Fifth Amendment fails for the simple reason that there is no equal protection component in the words of the Fifth Amendment,[3] either in the Due Process Clause or

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[3] The Fifth Amendment provides, in its entirety, as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

elsewhere. Besides proving a negative by examining the words of the Fifth Amendment, one need look no further for support than in the very Supreme Court case that purported to discover such an elusively penumbral component, *Bolling v. Sharpe*:

> The Fifth Amendment, which is applicable in the District of Columbia, *does not contain an equal protection clause*, as does the Fourteenth Amendment, which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases.

Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (emphasis added). The *Bolling* Court recognized that not only did the Fifth Amendment lack an equal protection clause, but that such a clause is a different and "more explicit safeguard" than the phrase "due process of law," which *does* appear in the Fifth Amendment. The Framers of the Bill of Rights declined to include an equal protection clause, and the Framers of the Fourteenth Amendment expressly limited its Equal Protection Clause to the states. Nevertheless, the undeterred *Bolling* Court held:

> In view of our decision [in *Brown v. Board of Education*, 347 U.S. 483 (1954),] that the Constitution prohibits the states from maintaining racially segregated public schools, it would be

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deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

> unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.

Id. at 500. But what the Court found "unthinkable" is exactly what the language of the Fifth and Fourteenth Amendments says: the duty of the states to assure "equal protection of the laws" in the Fourteenth Amendment is simply not found in the Fifth Amendment's limitations upon the powers of the federal government. Indeed, to rule, as the Court did in *Bolling*—that "due process of law" contains within it an "equal protection" component—is to render the true equal protection clause of the Fourteenth Amendment superfluous. If equal protection is implied in the wording of the Fifth Amendment Due Process, then it would also be implied in the almost identical wording of the Fourteenth Amendment Clause, the only material difference being that the Fourteenth Amendment Due Process Clause expressly applies to the states. This contradicts the rule of constitutional interpretation that "every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that *no word was unnecessarily used, or needlessly added*." *Holmes*, 39 U.S. (14 Peters) at 570-71 (emphasis added). James Madison, in an essay in the *National Gazette* (January 19, 1792), declared that "Every word of [the Constitution] decides a question between power and liberty."

Why, then, did the *Bolling* Court read equal protection into the Fifth Amendment? The answer is obvious: the Court was caught in a constitutional quandry. The plain language of the Fifth and Fourteenth Amendments applies the equal protection requirement to the states but not to the federal government. On the same day the Court had just held in *Brown v. Board of Education*, 347 U.S. 483 (1954), that the Fourteenth Amendment prohibited the states from segregating their public schools. It would be, in the Court's words, "unthinkable" to require the states to desegregate their schools but allow the federal government to maintain segregated schools in the District of Columbia. Such a result would have been roundly condemned as the height of hypocrisy and would have generated all sorts of opposition and resistance. But the "unthinkable" is in fact what the Constitution says. Perhaps the Framers of the Fourteenth Amendment should have applied the Equal Protection Clause to the federal government as well as the states. Perhaps the Fifth Amendment should have been or should now be amended to include an equal protection clause. But Article V of the Constitution commits the amendment process to Congress and the states, not to the judiciary.

Arguably, the Court had no alternative at that explosive time but to create this constitutional fiction. But the solution is not to expand that constitutional fiction to cover other situations, but rather to amend the Constitution to apply an equal protection clause to the federal government.

But instead, the Second Circuit has gone to the other extreme. The Second Circuit says the nonexistent equal protection clause of the Fifth Amendment requires the federal government to recognize same-sex marriages, even though the Supreme Court has never said the actual Equal Protection Clause of the Fourteenth Amendment requires that the states recognize same-sex marriages. How can it be, that the non-existent equal protection clause of the Fifth Amendment is stronger than the actual Equal Protection Clause of the Fourteenth? This anomaly demonstrates the danger and folly of allowing the federal judiciary to depart from the plain language of the Constitution and the intent of its Framers, and to wander aimlessly in the trackless fields of their own imaginations.

To put it another way, let the district court speak for itself: "A basic tenet of statutory construction teaches that 'where the plain language of a statute is clear, it governs.' Under the circumstances presented here, this basic tenet readily resolves the issue of interpretation before this court." *Gill*, 699 F. Supp. 2d at 385 (citation omitted). The district court below made this statement in the context of applying a statute regarding the Federal Employee Health Benefits program, 5 U.S.C. § 8901(5), but it should have heeded this advice in interpreting the Fifth Amendment, too: the plain language of the Fifth Amendment clearly does not contain an equal protection clause and no judicial opinion of any court can alter that. DOMA cannot violate a provision that does not appear in the Constitution, the "supreme Law of the Land."

Reading the majority opinion of the Second Circuit by itself, one would gain no indication that the Second Circuit majority was even aware that the Fifth Amendment contains no equal protection clause. The opinion uses such phrases as "violated the equal protection" (176), "equal protection review" (178), "equal protection challenge" (180), and "The district court ruled that DOMA violated the Equal

Protection Clause for want of a rational basis" (180). But nowhere does the majority mention that the Fifth Amendment contains no equal protection clause, nor does the majority make any mention of *Bolling* or the extraordinary circumstances that dictated the *Bolling* decision.

The opinion of Judge Straub, concurring in part and dissenting in part, at least explains the case law by which the Court has read equal protection into the Fifth Amendment: *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), *Able v. United States*, 155 F.3d 628 (2nd Cir. 1998), *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Judge Straub contended that *Adarand* requires the same analysis of equal protection under the Fifth Amendment as under the Fourteenth (193), although arguably that holding in *Adarand* is limited to race-based classifications and any language applying it to other classifications is only dicta. But even Judge Straub ignored the plain language of *Bolling*:

> . . . the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases.

Bolling at 499.

Amicus does not argue that *Bolling* should be overturned. Rather, *Amicus* argues that the Court should recognize that *Bolling* arose in a very difficult and volitile situation, being decided the same day as *Brown*. The Court should recognize that the Fifth Amendment equal protection doctrine rests on very shaky ground, and the Court should therefore be very hesitant about expanding it to other areas. The role of the Court is to *expound* the Constitution, not to *expand* the Constitution.

III. THE DEFENSE OF MARRIAGE ACT IS RATIONALLY SUPPORTED BY MANY LEGITIMATE REASONS AND IMPORTANT CONSIDERATIONS, INCLUDING THE "LAW OF NATURE AND OF NATURE'S GOD" AND THOSE INTERESTS ADVANCED BY CONGRESS WHEN IT PASSED THE STATUTE.

The district court below held that there is no "government interest" or rational justification for defining marriage under federal laws and regulations as "a legal union between one man and one woman as husband and wife." The Second Circuit majority held that the case must receive "intermediate scrutiny" and that DOMA is not substantially related to an important government interest. *Amicus* will not address which standard applies, others will address this issue, and because *Amicus* believes marriage is an institution at least as old and fundamental as the state and therefore not subject to such court-created tests. However, regardless of which standard is used, both courts erred as a matter of nature, law, and history.

A. "All men are created equal" and as either male or female.

An analysis of "equal protection" should at least start with the foundation of the American concept of created equality. The "birth certificate" of the United States and the first document in our organic law asserts the self-evident truth that "all men are created equal, [and] that they are endowed by their

Creator with certain unalienable rights." *Declaration of Independence* (1776). These rights were recognized by the Declaration, but they did not originate with it: "The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature, *by the hand of the divinity itself*; and can never be erased or obscured by mortal power." Alexander Hamilton, *The Farmer Refuted*, February 23, 1775 (emphasis added). Such rights are natural, unalienable, and are defined by God:

> Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture.

1 William Blackstone, *Commentaries on the Laws of England* 54 (1765).

Although we are "created equal," we are not created all the same, *i.e.*, with the same talents, skills, strength, beauty, personalities, wealth, etc. Rather, this equality speaks to our standing before the law as equal bearers of rights. But He Who created us with such rights defines the limits of those rights. We are told in Genesis that "God created man in His own image, in the image of God He created him; male and female He created them. . . . For this reason a man shall leave his father and his mother, and be joined to his wife; and they shall become one flesh." Genesis 1:27, 2:24 (King James Version).

The law of the Old Testament enforced this distinction between the sexes by stating that "[i]f a man lies with a male as he lies with a woman, both of them have committed an abomination." Leviticus 20:13 (KJV). At creation, therefore, the sexes were established as "male and female" and *"[f]or this reason,"* marriage was defined at its inception as a union between a man and his wife. Genesis 2:18-25. Only the male-female marriage is inherent in the same created order that gives us our legal equality before the law, as recognized in the Declaration of Independence. The Bible has been considered the authoritative source of morality and worldview for Western civilizations for nearly two millennia (three millennia for the Tanakh or Old Testament), including the time period in which the institutions of American law and government were established.

B. Homosexual conduct was, at least until recently, strongly disapproved in most cultures and in Anglo-American law.

Prohibitions against homosexual conduct go back to ancient times. The Bible, which has influenced moral values for Judaism, Christianity, Islam, and other religions, contains clear disapproval of homosexual conduct in the Old Testament (Leviticus 18:22) and in the New Testament (Romans 1:26-27).[3] Among the Romans, homosexual conduct did exist, but homosexual acts were capital offenses under the Theodosian Code (IX.7.6) and under the Justinian Code (IX.9.31). In the Middle Ages, St. Thomas

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[3] Although recently certain writers have tried to reinterpret these and other passages, throughout most of history Jews, Christians, and Muslims have interpreted them as prohibiting and/or disapproving homosexual conduct.

Aquinas, a preeminent disciple of natural-law theory, called homosexuality "contrary to right reason" and "contrary to the natural order." St. Thomas Aquinas, 4 *Summa Theologica, Secunda Secundae*, Quest. 154, Art. 11 (Benziger Bros. Press 1947).

The English common law maintained similar provisions. Sodomy was codified by statute as a serious crime early in England. "The earliest English secular legislation on the subject dates from 1533, when Parliament under Henry VIII classified buggery (by now a euphemism for same-sex activity, bestiality, and anal intercourse) as a felony. Penalties included death, losses of goods, and loss of lands." Vern L. Bullough, *Homosexuality: A History* 34 (New American Library 1979). Sir Edward Coke, the "Dean of English Law," called homosexuality "a detestable, and abominable sin, amongst Christians not to be named, committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast." "At common law 'sodomy' and the phrase 'infamous crime against nature' were often used interchangeably." Raymond B. Marcin, *Natural Law, Homosexual Conduct, and the Public Policy Exception*, 32 Creighton L. Rev. 67 (1998).

Sir William Blackstone—of whose *Commentaries on the Laws of England* (1765) Justice James Iredell said in 1799 that "[F]or near 30 years [it] has been the manual of almost every student of law in the United States"[4]—wrote in his *Commentaries* concerning homosexual conduct:

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[4] U.S. Supreme Court Justice James Iredell, *Claypool's American Daily Advisor*, April 11, 1799 (Philadelphia) 3; *Docu-*

IV. WHAT has been here observed, especially with regard to the manner of proof [for the crime of rape], which ought to be the more clear in proportion as the crime is the more detestable, may be applied to another offense, of a still deeper malignity; the infamous crime against nature, committed either with man or beast. A crime, which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offense of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of the crime itself.

I WILL not act so disagreeable part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in its very indictments, as a crime not fit to be named; "*peccatum illud horribile, inter christianos non nominandum*" ["that horrible crime not to be named among Christians"]. A taciturnity observed likewise by the edict of Constantius and Constans: "*ubi scelus est id, quod non proficit scire, jubemus insurgere leges, armari jura gladio ultore, ut exquisitis poenis subdantur infames, qui sunt, vel qui futuri sunt, rei.*" ["Where that crime is found, which it is unfit even to know, we command the law to arise armed with an avenging sword, that the infamous men who are, or shall in future

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mentary History of the Supreme Court of the United States, 1789-1800, at 347 (Maeva Marcus, ed., Columbus University Press 1990).

> be guilty of it, may undergo the most severe punishments."] Which leads me to add a word concerning its punishment.

4 Blackstone, *Commentaries on the Laws of England* Ch. 4. Blackstone next explained the punishment under the common law for this "crime not fit to be named":

> THIS the voice of nature and of reason, and the express law of God, determine to be capital. Of which we have a signal instance, long before the Jewish dispensation, by the destruction of two cities by fire from heaven: so that this is an universal, not merely a provincial, precept. And our ancient law in some degree imitated this punishment. . . .

Such consistent and universal condemnation of sodomy was carried over into American law as attested by Perkins and Boyce, who stated in their hornbook *Criminal Law*, "Homosexual conduct was made a felony by an English statute so early that it was a common-law offense in this Country, and statutes expressly making it a felony were widely adopted." Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 465 (3d ed. 1982).

The "crime against nature" was prohibited in many of the colonial law codes. When the Constitution was adopted, homosexual conduct was prohibited either by statute or by common law in all thirteen states. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986). When the Fourteenth Amendment was adopted, homosexual conduct was prohibited in 32 of 37 states, and during the twentieth century it was prohibited in all states until 1961. *Id.* at 192-3. Although the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, 570 (2003), claimed that many statutes specifically aimed at homosexual conduct are of relatively recent origin, the more general statutes and the common law prohibitions have been in effect since time immemorial.

C. Same-sex "marriage" was inconceivable in Anglo-American common law.

Defenders of marriage who seek to review ancient and common-law texts for support of their position do not easily find written sources stating "two men or two women cannot marry" because it was, to those early writers, as unnecessary and obvious as saying that men cannot bear children. Rather, the common law assumes the only definition of marriage is a union between one man and one woman. In Blackstone's *Commentaries*, Chapter 15 of Volume I ("Of the Rights of Persons") is simply titled "Of Husband and Wife," in which is discussed the "second private relations of persons . . . that of marriage, which includes the reciprocal duties of *husband and wife*. . . ." 1 *Commentaries* 421 (emphasis added). Blackstone notes that some legal disabilities prohibit a marriage as "void *ab initio*, and not merely voidable: not that they dissolve a contract already formed, but they render the parties incapable of forming any contract at all." *Id*. at 423-4. The first of these legal disabilities is "having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void: *polygamy being condemned both by the law of the new testament, and the policy of all prudent states*." *Id*. at 424 (emphasis added). If the aforementioned prohibition on polygamous marriages was rooted in the New Testament of the Bible and in international law, then especially considering the strong condemnation of homosexual activity, *a fortiori*, a "marriage" between two men or two women would be void *ab initio* at common law.

Almost 60 years after the publication of Blackstone's *Commentaries*, Noah Webster's *American Dictionary of the English Language* (1828) defined marriage as follows:

> MAR'RIAGE, n. [L. mas, maris.] The act of uniting a man and woman for life; wedlock; the *legal union of a man and woman for life*. Marriage is a contract both civil and religious, by which the parties engage to live together in mutual affection and fidelity, till death shall separate them. . . .

Noah Webster, American Dictionary of the English Language (Foundation for American Christian Educ. 2002) (1828).[5] Marriage at common law was only defined as between one man and one woman because there was and is no other definition of marriage.

D. Congress offered legitimate reasons when it enacted the Defense of Marriage Act.

The common law and its Biblical roots, Anglo-American criminal law, and, more recently, the passage of 41 state "defense of marriage" acts (either as statutes or as state constitutional amendments ratified overwhelmingly by the voters of the various states),[6] clearly demonstrate that homosexual acts meet with widespread disapproval in our laws and in our social values. At least until very recently, disapproval of homosexual acts was almost universal; at the very least it is still widespread.

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[5] Noah Webster was a close associate of many of the Convention delegates, frequently dined with some of them in the evenings after sessions of the Convention, and at their request wrote an essay urging ratification of the Constitution. Harlow Giles Unger, *Noah Webster: The Life and Times of an American Patriot* (John Wiley & Sons 1998). Thus we can fairly conclude that his concept of marriage would have been widely shared by the framers.

When the House of Representatives Committee on the Judiciary recommended the passage of DOMA in 1996, the report asserted four governmental interests advanced by the legislation:

> (1) defending and nurturing the institution of traditional, heterosexual marriage;
>
> (2) defending traditional notions of morality;
>
> (3) protecting state sovereignty and democratic self-governance; and
>
> (4) preserving scarce government resources.

H. R. Rep. No. 104-664 at 12 (1996). The appellants in this case abandoned all of these interests, apparently because of the Administration's political stance, even though the Department of Justice has a duty to defend laws enacted by the people. It is therefore left to other parties to do the job the Department of Justice will not do. *Amicus* will address below the first two interests asserted by Congress.

1. Congress and the federal government have an interest in defending and nurturing the institution of marriage.

In House Report No. 104-664, Congress begins its defense of traditional marriage with this quote from the United States Supreme Court:

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[6] *See* Br. U.S. Dept. of Health & Human Servs. at 35 n.19.

> Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on *the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy state of matrimony*; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Murphy v. Ramsey, 114 U.S. 15, 45 (1885) (emphasis added) (quoted in H. R. Rep. No. 104-664 at 12 n.41). Webster's 1828 definition of marriage also included similar societal concerns: "Marriage was instituted by God himself for the purpose of preventing the promiscuous intercourse of the sexes, for promoting domestic felicity, and for securing the maintenance and education of children." Webster, *American Dictionary*. If the family is the "building block" of society, then the union of a husband and a wife is the "sure foundation" of that building block and not only *may* but *should* enjoy support from Congress and other government branches.

It is important to note at this juncture that neither the Supreme Court in *Murphy* nor the Congress in 1996 were *determining* the definition of marriage—rather these federal branches were *describing* the pre-existing definition of marriage that this Country has always known. Section 3 of DOMA clarified the definition of marriage for purposes of federal laws and regulations, admittedly in response to the concerns that Hawaii might introduce same-sex "marriage" in the wake of *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). But DOMA was more than an effort to prevent one class of persons (same-sex couples) from entering into an otherwise lawful legal arrangement (same-sex "marriage")—it was a defensive reaction to an effort through the judiciary "to *redefine* 'marriage' to extend to homosexual couples . . . a truly radical proposal that would *fundamentally alter* the institution of marriage." H. R. Rep. No. 104-664 at 12 (emphasis added). Any redefinition of marriage from its definition of one-man-and-one-woman was excluded from federal law, be it same-sex couples, polygamous relationships, human-animal pairings, or whatever else may be dreamed up and falsely labeled "marriage." To allow *any* alternative relationship to enjoy the status of marriage would not simply add another class of persons who can be "married"—rather, it would undermine any basis for having a settled definition of marriage at all, especially the idea that marriage was "instituted by God" and the law of nature.

Congress asked why society recognizes the institution of marriage in the first place. H. R. Rep. No. 104-664 at 12. The answer: "At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children." The report referenced "'the irreplaceable role that marriage plays in childrearing and in generational continuity,'" and that marriage is the relationship "within which the community socially approves and encourages sexual intercourse and the birth of children." *Id.* at 14. The congressional report concluded:

> That, then, is why we have marriage laws. Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship. But because America, like nearly every known human society, is concerned about its children, our government has a special obligation to ensure that we preserve and protect the institution of marriage.

Id. at 14. The report, therefore, focused primarily upon the concern that children ought to be raised in a heterosexual union.

The district court and the Second Circuit majority below reject the notion that the government may promote traditional marriage to encourage responsible procreation, arguing that same-sex couples can raise well-adjusted children (according to some social scientists) and that the ability to procreate has never been a precondition to marriage in any state. These arguments try to prove too much. At issue in this case is the disbursement of federal benefits to couples in a marriage and what relationships will be given that label. The decision of whether heterosexual marriages provide a better context for childrearing than same-sex relationships is a policy determination for legislative bodies, not the courts, to decide. Moreover, by defining marriage as it did in DOMA, Congress was not forbidding the raising of children in same-sex couples' homes—a power reserved to the states—but deciding that federal policy would support only the traditional, time-honored marriages that have formed the basis of our society.

Finally, as to the notion that procreation is not a "precondition" to marriage, the simple answer is that actual fertility of any given couple is not the issue-rather, the traditional definition of marriage in DOMA recognizes the biological fact that the only combination of people who can naturally procreate is one man with one woman. Likewise, no combination of same-sex couples will procreate a child with one another. Procreation or fertility ought not to be a legal prerequisite to marriage, but Congress is free to support the social, moral, and Biblical preference that *marriage* be the prerequisite for *procreation*.

Noah Webster's definition of marriage provides two more purposes to marriage in addition to childrearing and generational continuity. One is "preventing the promiscuous intercourse of the sexes," as found in the Biblical principle that sexual intimacy is reserved only for a man and a woman within the bounds of marriage. *See* Exodus 20:14 ("You shall not commit adultery") (NKJV); 1 Corinthians 6:9-10 ("Do you not know that the unrighteous will not inherit the kingdom of God? Do not be deceived. Neither fornicators, nor idolaters, nor adulterers, nor homosexuals, nor sodomites, nor thieves, nor covetous, nor drunkards, nor revilers, nor extortioners will inherit the kingdom of God.") (NKJV). The second additional purpose for marriage is termed "promoting domestic felicity," or the happiness and pleasure to be found when the "two shall become one" within marriage and then make together their home. "Therefore a man shall leave his father and mother and be joined to his wife, and they shall become one flesh." Genesis 2:24 (NKJV). Though not proffered by Congress, these reasons provide additional interests that bear at least a rational relation to DOMA.

As further evidence of a rational basis, *Amicus* invites the Court's attention to the monumental study of J.D. Unwin, *Sex and Culture* (Oxford University Press 1934). After surveying numerous cultures, ancient and modern, Dr. Unwin concluded that the most successful societies were those which confined sexual urges to monogamous marriage.

2. Congress and the federal government have an interest in defending traditional notions of morality.

According to the House Report, "[c]ivil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." H. R. Rep. 104-664 at 15-16. American history, law, and traditional morality speak with a clear voice that homosexuality is to be opposed and any formal government recognition of a homosexual relationship is to be rejected. Nevertheless, the district court sweeps this interest aside by simply referring to *Lawrence v. Texas* and quoting the Supreme Court as saying that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law." *Gill*, 699 F. Supp. 2d at 389-90 (quoting *Lawrence*, 539 U.S. at 577 (quotation omitted)).

But DOMA is not simply *Lawrence* revisited. *Lawrence* expanded the right to liberty under the Due Process Clause of the Fourteenth Amendment to hold that government could not "justify its intrusion into the personal and private life of the individual" by criminalizing homosexual activity. 539 U.S. at 578. In fact, *Lawrence* explicitly limited its holding to consensual activity by adults in private, stating,

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. *It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter*.

Id. (emphasis added). Additionally, the district court below, in quoting Lawrence, left off salient words at the end of the quoted phrase: the phrase should have said, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law *prohibiting the practice*." *Lawrence*, 539 U.S. at 577 (emphasis added). Here, of course, DOMA does not prohibit a particular practice or even the recognition by the states of same-sex "marriage." It simply defines for the federal government what marriage will be on the federal level and what it will not be.

Marriage is more than a private act; it is a civil and religious institution that involves child welfare, child-rearing, income tax status (individual, joint, or separate tax returns; deductions; credits) estate and inheritance tax considerations, testamentary rights, privileged communications (husband-wife privilege), Social Security and Medicare benefits, military housing allowances, and a host of other matters. Even if we were to agree with *Lawrence*, which *Amicus* does not, that private sexual conduct is an aspect of a person's right to define one's own existence, that is far from saying that the person has a right to require that the federal government echo a state's "formal recognition" of same-sex "marriage" and convey upon it all the benefits and recognitions that usually follow. Not even *Lawrence* requires such a leap.

CONCLUSION

Justice Frankfurter once wisely wrote, "[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have written about it." *Graves v. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J. concurring). As in any case, the proper solution here is for this Honorable Court to fall back to the supreme law of the land, the text of the Constitution.

For the foregoing reasons, *Amicus* respectfully submits that the decision of the Second Circuit below should be reversed and that § 3 of the Defense of Marriage Act be upheld.

Respectfully submitted,

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BRIEF

Supreme Court, U.S.
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No. 12-307

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Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR
AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF GARY J. GATES AS *AMICUS CURIAE* ON THE MERITS IN SUPPORT OF RESPONDENT WINDSOR

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TABLE OF CONTENTS

Page

BRIEF FOR *AMICUS CURIAE* 1

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

- A. Over 8 Million American Adults Identify as LGBT. 7
  - 1. LGBT Americans Live Throughout the United States. 8
  - 2. LGBT Americans Are Diverse in Terms of Sex, Age, Race, and Ethnicity. 9
  - 3. LGBT Americans Are Socio-Economically Diverse. 11
  - 4. Thirty-Seven Percent of LGBT Adults in the United States Have Had a Child. 14
- B. Nearly 1.3 Million Adults in the United States Are Members of Same-Sex Couples. 15
  - 1. Same-Sex Couples Live Throughout the United States. 16

TABLE OF CONTENTS
(continued)

Page

2. Same-Sex Couples Are Diverse in Terms of Sex, Age, Race and Ethnicity. 16

3. Members of Same-Sex Couples Actively Participate in the U.S. Economy and Serve in the U.S. Armed Forces. 20

4. Members of Same-Sex Couples Are Socio-Economically Diverse. 22

C. Approximately 114,000 Same-Sex Couples in the United States Are Married, and Over 108,000 Are in Civil Unions or Registered Domestic Partnerships. 25

1. Same-Sex Couples Are More Likely to Marry Than to Enter into a Civil Union or a Domestic Partnership. 27

TABLE OF CONTENTS
(continued)

Page

2. Same-Sex Couples Who Marry or Enter into Other Legally Recognized Relationships Are More Likely To Be Women and Are Younger Than Different-Sex Couples............... 30

3. Dissolution Rates Are Similar for Same-Sex and Different-Sex Couples............... 31

D. Almost One in Five Same-Sex Couples in the United States Are Raising Children. 31

1. Nearly a Third of Same-sex Couples Who Consider Themselves To Be Spouses Have Children............................ 33

2. Same-Sex Couples with Children Live Throughout the United States...................... 34

3. Members of Same-Sex Couples with Children Are Diverse in Terms of Race, Ethnicity, and Income. 35

TABLE OF CONTENTS
(continued)

Page

4. Children of Same-Sex Couples Are Racially and Ethnically Diverse and More Likely To Be Adopted and Fostered. 37

CONCLUSION 40

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BRIEF FOR *AMICUS CURIAE* GARY J. GATES

STATEMENT OF INTEREST[1]

Amicus Curiae Gary J. Gates is the Williams Distinguished Scholar at the Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at the UCLA School of Law. He is also a member of the Scientific Advisory Committee of the U.S. Census Bureau and the Data Users Advisory Committee of the Bureau of Labor Statistics.

Gates co-authored *The Gay and Lesbian Atlas* and is a recognized expert on the geography and demography of the lesbian, gay, bisexual, and transgender (LGBT) population. He conducted the first significant research study using U.S. Census data to explore characteristics of same-sex couples. He publishes extensively on the demographic and economic characteristics of the LGBT population. Many national and international media outlets routinely feature his work. In addition, Gates regularly consults with federal and state governments and non-governmental organizations on data collection issues regarding LGBT populations.

As a scholar of sexual orientation and gender identity law and public policy, Gates has a substantial interest in the issues before this Court.[2] Gates has conducted extensive research and authored numerous studies regarding the geographic, demographic and economic characteristics of same-sex couples in the United States. Gates believes that this expertise and perspective as an academic scholar may help the Court more fully appreciate the impact of the federal government's non-recognition of the marriages of same-sex couples and the exclusion of same-sex couples and their families from marriage by many states, including California.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than Amicus Curiae and his counsel made a monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This brief presents and analyzes demographic and economic data available regarding LGBT adults and same-sex couples and their children in the United States.[3] This brief analyzes data from the 2010 United States Census, the Census Bureau's American Community Survey, the General Social Survey, and data from the Gallup Daily Tracking Survey.

(A) More than 8 million adults in the United States identify as LGBT.[4] LGBT adults live throughout the country and are racially and ethnically diverse in percentages similar to the non-LGBT population. LGBT American adults are diverse with respect to levels of educational achievement and socio-economic status. An estimated 37% of LGBT-identifying adults have had a child.

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[2] Amicus is filing identically worded briefs in both *United States v. Windsor*, No. 12-307 and *Hollingsworth v. Perry*, No. 12-144.

[3] Throughout this brief, the acronym "LGBT" refers collectively to lesbian, gay, bisexual, and transgender persons, and the acronym "LGB" refers collectively to lesbian, gay, and bisexual persons.

[4] *See infra* Section A.

(B) There are nearly 1.3 million adults who are members of 646,464 same-sex couples identified in the 2010 Census.[5] Same-sex couples were identified in all 50 states and in 93% of counties in the United States. The racial and ethnic distributions of individuals in same-sex and different-sex couples are very similar. In part because they are younger, individuals in same-sex couples in the United States are more likely than their different-sex counterparts to be in the labor force, but members of both sets of couples who are in the labor force have similar employment patterns. Women in same-sex couples are four times more likely to be veterans than women in different-sex couples (5% versus 1%, respectively). Nearly one in ten men in same-sex couples (9%) has served in the armed forces, compared to about one in five men in different-sex couples (21%). Median annual household incomes of same-sex and different-sex couples in the United States are similar, but same-sex couples have less access to health insurance than do different-sex couples.

(C) More than 114,000 same-sex couples are married in the United States, and more than 108,000 same-sex couples are in civil unions or registered domestic partnerships.[6] When offered the choice, same-sex couples are much more likely to marry than to pursue a civil union or a registered domestic partnership. Female same-sex couples are more likely to marry or to enter a civil union or registered domestic partnership than are male same-sex couples. In states with available data, dissolution rates for same-sex couples are slightly lower on average than divorce rates for different-sex couples.

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[5] *See infra* Section B.

[6] *See infra* Section C.

(D) U.S. Census Bureau data suggest that almost one-fifth (19%) of same-sex couples in the United States are raising children.[7] In other words, more than 125,000 same-sex couple households collectively include nearly 220,000 children under age 18 in their homes. Although most such children are biologically related to one of their parents (59%), same-sex couples are more than four times as likely as their different-sex counterparts to be raising an adopted child and six times as likely to be raising foster children. Same-sex couples raising children live throughout the United States, but childrearing among same-sex couples is most common in the South, Upper Midwest, and Mountain regions of the country. Parenting among same-sex couples is more prevalent among couples who are female, younger, and racial and ethnic minorities. Nationally, the median annual household income of same-sex couples with children under 18 in the home is more than 16% lower than for comparable different-sex couples. The median age of the 220,000 children being raised by same-sex couples is 9 years old, and half of these children are members of racial or ethnic minorities.

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[7] *See infra* Section D.

ARGUMENT

To assist the Court in understanding the possible effects of rulings in these cases regarding the validity of Section 3 of the federal Defense of Marriage Act, 1 U.S.C. § 7, and California's Proposition 8, Cal. Const., art. I, § 8.5, this brief analyzes demographic and economic data regarding same-sex couples and LGBT persons in the United States.

This brief uses data primarily from four sources.

- 2010 U.S. Census: The U.S. Census Bureau has been collecting data regarding same-sex couples for more than two decades, including as part of the 2000 and 2010 censuses.[8]
- American Community Survey (ACS): The ACS is an annual survey conducted by the U.S. Census Bureau that provides demographic information about the U.S. population.[9]
- General Social Survey (GSS): The GSS is a biannual survey of the National Opinion Research Center ("NORC") at the University of Chicago. The GSS, begun in 1972, is the largest project funded by the National Science Foundation's Sociology Program and is the most frequently used source of information in

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[8] *Decennial Census Data on Same Sex Couples*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/samesex/data/decennial.html (last visited Feb. 26, 2013).

[9] *American Community Survey*, U.S. CENSUS BUREAU, http://www.census.gov/acs/ (last visited Feb. 26, 2013).

the social sciences other than the U.S. Census.[10]

- Gallup: The Gallup Daily Tracking Survey asks respondents whether they identify as lesbian, gay, bisexual, or transgender. Data in this brief draw upon responses from more than 121,000 adults in the United States from June through September 2012, plus 85,000 more respondents from October through December 2012.[11] These data constitute the largest survey of LGBT persons in the history of the United States.[12]

Based primarily on these sources, this brief provides demographic data about four groups of people in the United States: (A) more than 8 million adults who identify as LGBT;[13] (B) nearly 1.3 million adults who are members of more than 646,000 same-sex couples identified in the 2010 Census;[14] (C) more than 113,000 same-sex couples who are married and more than 108,000 same-sex couples in civil unions or registered domestic partnerships;[15] and (D) more than 125,000 same-sex couples whose households collectively include nearly 220,000 children under age 18.[16]

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[10] *About GSS*, GSS GENERAL SOCIAL SURVEY, http://www3.norc.org/GSS+Website/About+GSS/ (last visited Feb. 25, 2013).

[11] Gary J. Gates & Frank Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT*, GALLUP (Oct. 18, 2012), http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx; Gary J. Gates & Frank Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, GALLUP (Feb. 15, 2013), http://www.gallup.com/poll/160517/lgbt-percentage-highest-lowest-north-dakota.aspx.

[12] Gates & Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, *supra* note 10.

[13] *See infra* Section A.

[14] *See infra* Section B.

A. *Over 8 Million American Adults Identify as LGBT.*

In a recent survey of adults aged 18 and older in the United States, 3.5% identified themselves as LGBT.[17] Extrapolating that percentage to 2010 U.S. Census data suggests that, out of nearly 235 million adults in the United States,[18] more than 8 million adults are LGBT. The actual number of LGBT

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[15] *See infra* Section C.

[16] *See infra* Section D.

[17] Gates & Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, *supra* note 10 (noting that "[t]hese results are based on responses to the question, 'Do you, personally, identify as lesbian, gay, bisexual, or transgender?' included in 206,186 Gallup Daily tracking interviews conducted between June 1 and Dec. 30, 2012"). The Gallup data do not allow for separate estimates or analyses of the lesbian, gay, and bisexual population from the transgender population. *Id.* *Amicus Curiae* Gates' analysis of multiple studies estimating the LGBT population in the United States suggests that approximately 0.3% of adults in the U.S. identify as transgender and 3.5% as lesbian, gay, or bisexual. Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?*, THE WILLIAMS INST. 1 (Apr. 2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf.

[18] Lindsay M. Howden & Julie A. Meyer, U.S. CENSUS BUREAU, *Age and Sex Composition: 2010 Census Briefs* 2 (May 2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf.

American adults is likely higher because evidence suggests that some adults who have a same-sex sexual orientation are reluctant to identify as LGBT, due in part to social stigma associated with LGBT identity.[19]

1. LGBT Americans Live Throughout the United States.

Two analyses of the largest population-based survey to have ever included a question asking if respondents identified as LGBT show substantial geographic, demographic and socio-economic variation among LGBT adults.[20]

LGBT adults are present in every state in the country, ranging from more than 5% of the adult population in Hawaii to just under 2% in North Dakota.[21] In all states, the LGBT population is within two percentage points of the national average of 3.5%.[22] The portion of adults identifying as LGBT is 3.7% in the East, 3.2% in the South, 3.4% in the Midwest, and 3.6% in the West.[23] Applied to Census 2010 tabulations, these percentages imply that an estimated 1.6 million LGBT adults live in the East, 2.8 million live in the South, 1.7 million live in the Midwest, and more than 1.9 million live in the West.[24]

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[19] Analyses of the 2008 General Social Survey suggest that about 1% of adults in the U.S. (approximately 2.3 million) reported having a same-sex sexual partner within the previous year, but did not identify as lesbian, gay or bisexual. Gary J. Gates, *LGBT Identity: A Demographer's Perspective*, 45 LOY. L.A. L. REV. 693, 704 (2012). About 1.3% of adults in the U.S. (more than 3 million) reported having a same-sex sexual partner within the previous five years, but did not identify as lesbian, gay, or bisexual. *Id.*

[20] The analyses were of survey data based on Gallup Daily Tracking Survey responses from more than 121,000 adults in the United States from June through September 2012 plus 85,000 more respondents from October through December 2012. Gates & Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT*, *supra* note 10; Gates & Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, *supra* note 10.

[21] Gates & Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, *supra* note 10.

2. LGBT Americans Are Diverse in Terms of Sex, Age, Race, and Ethnicity.

In the United States, women are slightly more likely than men to identify as LGBT, with 3.6% of women and 3.3% of men so identifying in the Gallup survey.[25] Approximately 53% of LGBT adults in the United States are female, and approximately 47% are male.[26]

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[22] In contrast, 10% of adults self-identified as LGBT in the District of Columbia. *Id.*

[23] Gates & Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT*, *supra* note 10. The East includes Maine, Connecticut, Massachusetts, New Hampshire, Rhode Island, Vermont, New Jersey, New York, and Pennsylvania. *See* U.S. CENSUS BUREAU, *Census Regions and Divisions of the United States*, *available at* https://www.census.gov/geo/www/us_regdiv.pdf. The South includes Delaware, the District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, West Virginia, Alabama, Kentucky, Mississippi, Tennessee, Arkansas, Louisiana, Oklahoma, and Texas. *Id.* The Midwest includes Indiana, Illinois, Michigan, Ohio, Wisconsin, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. *Id.* The West includes Arizona, Colorado, Idaho, New Mexico, Montana, Utah, Nevada, Wyoming, Alaska, California, Hawaii, Oregon, and Washington. *Id.*

[24] Howden & Meyer, *supra* note 17.

As shown in Table 1, while Americans of all ages identify as LGBT, younger Americans are more likely to identify as LGBT than older Americans. Adults aged 18 to 29 are more than three times as likely as seniors aged 65 and older to identify as LGBT.[27]

Table 1: Percentages of U.S. Adults Identifying as LGBT by Age[28]

Age	Percentage Identifying as LGBT
18-29	6.4%
30-49	3.2%
50-64	2.6%
65+	1.9%

LGBT adults are racially and ethnically diverse in percentages similar to the non-LGBT population. A third of LGBT adults in the United States (33%) are members of racial or ethnic minorities, compared to 27% of the non-LGBT population. The percentage of adults who identify as LGBT is higher among adults who are members of racial and ethnic minorities than among white adults: 4.6% of Black adults, 4.0% of Hispanic adults, and 4.3% of Asian adults identify as LGBT, compared to 3.2% of white adults who are non-Hispanic, as shown in Figure A below.[29]

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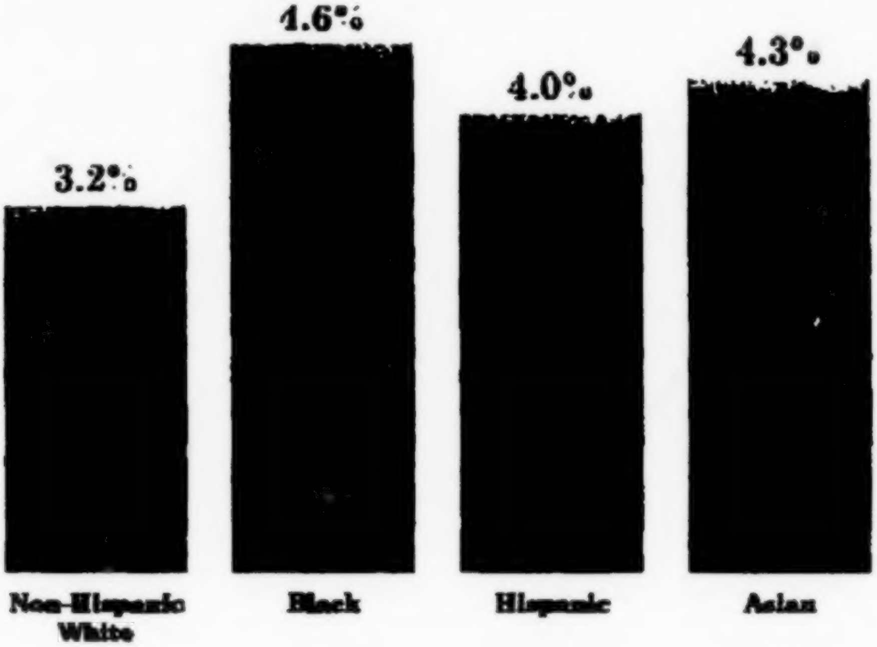
[25] Gates & Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT*, *supra* note 10.

[26] *Id.*

[27] *Id.*

[28] *Id.*

Figure A. Percentages of LGBT adults in certain racial or ethnic groups[30]



3. LGBT Americans Are Socio-Economically Diverse.

LGBT American adults are diverse with respect to levels of educational achievement. LGBT identification is higher among American adults with lower levels of education than among those with higher levels of education, as shown in Table 2, below. Approximately 3.5% of adults with a high school education or less in the United States identify as LGBT, along with 4.0% of those with some college education. The figures for college graduates and those with post-graduate education are lower at 2.8% and 3.2%, respectively, as shown in Table 2.[31]

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[29] *Id.* The racial and ethnic identifications used here (Non-Hispanic White, Black, Hispanic, Asian) are those used in the Gallup report. *Id.*

[30] *Id.*

Table 2: Percentages of U.S. Adults Identifying as LGBT by Education Level[32]

Education Level	Percentage Identifying as LGBT
High school or less	3.5%
Some college education	4.0%
College graduate	2.8%
Post-graduate education	3.2%

LGBT adults show substantial socio-economic diversity, and the percentage of LGBT adults declines as household income rises. The percentage of LGBT adults in households with annual incomes lower than

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[31] *Id.*

[32] *Id.*

$24,000 was 5.1% compared to just 2.8% in households with annual incomes above $90,000, as shown in Table 3.[33]

Table 3: Percentages of U.S. LGBT Adults by Household Income

Household Income	Percentage Identifying as LGBT
Under $24,000	5.1%
$24,000 to <$60,000	3.6%
$60,000 to <$90,000	2.8%
$90,000+	2.8%

More than a third (35%) of LGBT adults report living in households with median annual incomes below $24,000 per year, compared to less than a quarter of non-LGBT individuals. Conversely, LGBT individuals are less likely than non-LGBT identifying individuals to live in households with high annual incomes above $90,000. Just 16% of LGBT adults live in these high income households compared to more than one in five adults (21%) who do not identify as LGBT.[34]

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[33] *Id.*

[34] *Id.*

4. Thirty-Seven Percent of LGBT Adults in the United States Have Had a Child.

An estimated 37% of LGBT adults have had a child[35] (including children who have now reached adulthood). This implies that more than 3 million LGBT Americans have had a child.[36] On average, LGBT individuals who have had children report having 2 children, implying that there may be as many as 6 million American children and adults who have an LGBT parent.[37]

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[35] The exact nature of parentage is not available as this figure is based on data from two different surveys and neither has great specificity about the nature of parentage. The General Social Survey asked respondents, "How many children have you ever had?" while the National Transgender Discrimination Survey asked a variety of questions that indicated whether a respondent ever had children or parented any children. Gary J. Gates, *LGBT Parenting in the United States*, THE WILLIAMS INST. 2 n.1 (Feb. 2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf.

The General Social Survey (GSS) is a now biannual survey of NORC at the University of Chicago. *About GSS*, *supra* note 9.

The National Transgender Discrimination Survey was conducted by the National Gay and Lesbian Task Force and the National Center for Transgender Equality and was a web-based survey of more than 6,000 transgender individuals in the U.S. Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 12 (2011), *available at* http://www.thetaskforce.org/reports_and_research/ntds.

[36] Gates, *LGBT Parenting in the United States*, *supra* note 34, at 1.

[37] *Id.* at 2.

Among those under the age of 50 who are single and living alone or living with a spouse or partner, nearly half (48%) of LGBT women are raising a child, as are one in five (20%) LGBT men.[38]

B. *Nearly 1.3 Million Adults in the United States Are Members of Same-Sex Couples.*

Since 1990, same-sex couples have been identified in the U.S. Census by combining responses to Census questions regarding sex and relationship to the householder.[39] In the 2010 Census, 646,464 same-sex couples identified as such, meaning that nearly 1.3 million Americans are members of a same-sex couple.[40] Of this group, nearly 132,000 couples identified as spouses while nearly 515,000 identified as unmarried partners.[41]

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[38] Gallup data on LGBT individuals only provide information about the presence of children under 18 in the home, instead of actual parenting status. *Id.* To assess the likelihood of parenting among LGBT and non-LGBT individuals, comparisons are made among those who are most likely to be functioning as parents to any children under age 18 in the home: those under age 50 who are living alone or those with a spouse or partner where only two adults are present in the home. *Id.*

[39] Same-sex couples are defined as such when a householder (Person 1 on the survey form) identifies another individual aged 16 or older as being of the same sex and as his or her "husband/wife" or "unmarried partner." Gary J. Gates, *Same-Sex Couples in US Census Bureau Data: Who Gets Counted and Why*, THE WILLIAMS INST. 3 (Aug. 2010), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Who-Gets-Counted-Aug-2010.pdf. Approximately one in seven same-sex couples who live in the United States (14.4%) did not identify themselves in the 2010 Census. *Id.* Approximately 9.7% identified themselves as "roommates" or "non-relatives"; for many, this was because they were concerned about confidentiality, because they understood that the Census was a federal survey and that the federal government did not recognize their relationships and/or did not have a question about sexual orientation, or because they understood their relationship in a way other than the responses provided on the Census forms. *Id.* The remaining 4.7% were couples in which neither partner was "Person 1" (the householder) on the Census

1. Same-Sex Couples Live Throughout the United States.

Like LGBT people in general, same-sex couples live in all parts of the country. In the 2010 Census, same-sex couples were identified in all 50 states and in 93% of counties in the United States.[42] *See* Appendix 1.

2. Same-Sex Couples Are Diverse in Terms of Sex, Age, Race and Ethnicity.

Analyses from the U.S. Census Bureau's 2011 American Community Survey show that same-sex couples are demographically similar to the broader LGBT community.[43] For example, the majority of

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form—for example, if a same-sex couple lived in the home of another person who was designated as householder. *Id.*

[40] Gary J. Gates & Abigail M. Cooke, *United States Census Snapshot: 2010*, THE WILLIAMS INST. 1, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf (last visited Feb. 25, 2013).

[41] *Id.*

[42] *Id.*

[43] *Compare* Gary J. Gates, *Same-sex and Different-sex Couples in the American Community Survey: 2005-2011*, THE WILLIAMS INST. (Feb. 2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACS-2013.pdf (providing demographic data on same-sex couples)

same-sex couples are female (51%),[44] just as the majority of LGBT adults are female (53%).[45]

While members of same-sex couples span all age groups, the average age of individuals in same-sex couples in the United States is 44.4, nearly 5 years younger than the average age of those in different-sex couples, 49.5 years old.[46] As shown in Table 4, over 6% of members of same-sex couples are over the age 65.[47]

Table 4. Adults in same-sex couples, by age (2011 American Community Survey)[48]

Age	Percentage of Adults in same-sex couples
<30	15%
30-49	50%
50-64	28%
65+	6%

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with Gates & Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT*, *supra* note 10 (providing demographic data on LGBT individuals).

[44] Gates, *Same-sex and Different-sex Couples in the American Community Survey: 2005-2011*, *supra* note 42, at 3.

[45] Gates & Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT*, *supra* note 10.

[46] Gates, *Same-sex and Different-sex Couples in the American Community Survey: 2005-2011*, *supra* note 42, at 3.

[47] *Id.*

[48] *Id.* at 9.

In the United States, the racial and ethnic distributions of individuals in same-sex and different-sex couples are very similar. In total, 24% of individuals in same-sex couples are members of racial or ethnic minorities compared to 27% of individuals in different-sex couples. The portion of African-Americans is the same in each group (7%), while Latinos and Latinas comprise 11% of those in same-sex couples and 13% of those in different-sex couples. Asians, Native Hawaiians, and Pacific Islanders comprise 3% of individuals in same-sex couples and 5% of those in different-sex couples.[49]

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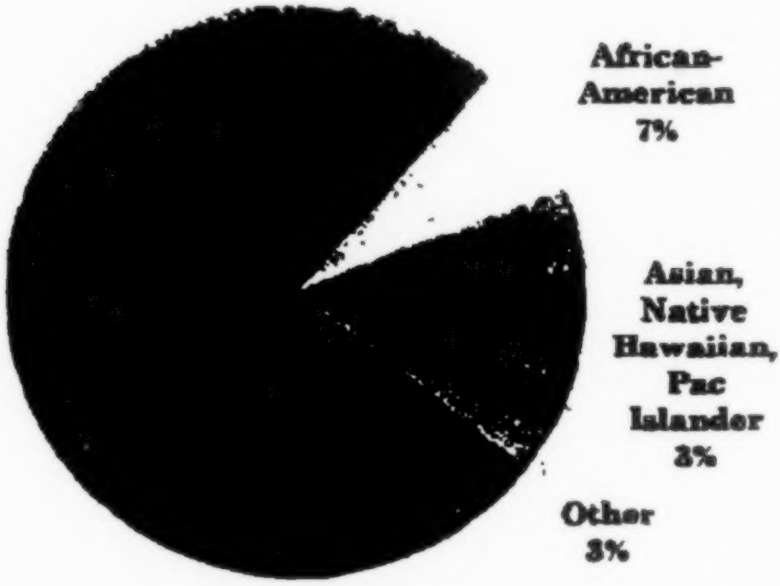
[49] *Id.* at 3-4. The racial and ethnic identification terms used here (African-American, Latino/Latino, and Asian, Native Hawaiian, and Pacific Islander) are consistent with the terminology used in the report. *Id.*

Figure B. Race/ethnicity of adults in same-sex couples.[50]



Same-sex couples are about as likely as their different-sex counterparts to be binational, with just one spouse or partner a U.S. citizen. An estimated 5.0% of same-sex couples indicated that they are binational, compared to 5.5% of different-sex couples.[51] There are more than 32,000 same-sex couples who are binational in the United States.[52] Without legal recognition of their marriages, non-citizens within same-sex couples cannot seek legal residency or a work permit by virtue of their marriage or partnership.[53]

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[50] *Id.*

[51] *Id.* at 8.

[52] This estimate was reached by applying the percentage of binational same sex couples (5%) from Gates, *Same-sex and Different-sex Couples in the American Community Survey: 2005-2011*, *supra* note 42, at 8, to the number of same-sex couples in the United States (616,464) from Gates & Cooke, *United States Census Snapshot: 2010*, *supra* note 39, at 1.

Same-sex couples in the United States are much less likely to include two non-citizens than are different-sex couples. In 2011, the figure was just above 5% for different-sex couples, but was less than 2% for same-sex couples.[54]

Same-sex couples are about as likely as different-sex couples to include a spouse or partner who is disabled. An estimated 18% of same-sex couples in the United States include at least one spouse or partner who is disabled compared to 19% of different-sex couples.[55]

3. Members of Same-Sex Couples Actively Participate in the U.S. Economy and Serve in the U.S. Armed Forces.

In part because they are younger, individuals in same-sex couples in the United States are more likely than their different-sex counterparts to be in the labor force (82% versus 69%, respectively).[56] Among those in the labor force, more than 90% of individuals in both same-sex and different-sex couples are employed.[57] In addition, members of both sets of couples have similar employment patterns. Approximately 74% of individuals in same-sex couples work in the private sector compared to 71% of those in different-sex couples. For public sector employment, the comparison is 15% and 17%, respectively, and for self-employment, the figures are 11% and 12%, respectively.[58]

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[53] *E.g.*, Julia Preston, *With No Shortcut to a Green Card, Gay Couples Leave U.S.*, N.Y. Times, Feb. 17, 2013, http://www.nytimes.com/2013/02/18/us/with-no-shortcut-to-a-green-card-gay-couples-leave-us.html?pagewanted=all&_r=1&.

[54] Gates, *Same-sex and Different-sex Couples in the American Community Survey: 2005-2011*, *supra* note 42, at 8.

[55] *Id.* at 7.

[56] *Id.* at 1.

Many individuals in same-sex couples in the United States, particularly women, have served their country in the armed forces. In total, more than 84,000 same-sex couples (13%) include at least one veteran,[59] and nearly 6,200 same-sex couples (1%) include a spouse or partner who was on active duty in the military within the past year.[60]

Women in same-sex couples are four times more likely to be veterans than women in different-sex couples (5% versus 1%, respectively).[61] Nearly one in ten men in same-sex couples (9%) has served in the armed forces, compared to about one in five men in different-sex couples (21%).[62]

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[57] *Id.* at 9, 11.

[58] *Id.*

[59] This estimate was reached by applying percentage of same-sex couples that include at least one veteran (13%) from Gates, *Same-sex and Different-sex Couples in the American Community Survey: 2005-2011*, *supra* note 42, at 8, to the number of same-sex couples in the United States (646,464) from Gates & Cooke, *United States Census Snapshot: 2010*, *supra* note 39, at 1.

[60] This estimate was reached by applying the percentage of same-sex couples that include one member who was on active duty within the past year (0.7%) from Gates, *Same-sex and Different-sex Couples in the American Community Survey: 2005-2011*, *supra* note 42, at 8, to the number of same-sex couples in the United States (646,464) from Gates & Cooke, *United States Census Snapshot: 2010*, *supra* note 39, at 1.

Evidence from analyses of Census 2000 data suggests that men and women in same-sex couples have served in U.S. combat operations for many decades. For example, among those eligible to have served in World War II, an estimated half of men in same-sex couples and 16% of women in same-sex couples served in World War II.[63]

4. Members of Same-Sex Couples Are Socio-Economically Diverse.

Median annual household incomes of same-sex and different-sex couples in the United States are very similar. Among couples in which neither partner or spouse is in the labor force, both same-sex and different-sex couples have median household incomes of approximately $42,000. If only one spouse or partner is in the labor force, the figure is approximately $60,000 for both same-sex and different-sex couples. Among couples in which both spouses or partners are in the labor force, same-sex couples report household incomes that are about 9% higher than their different-sex counterparts ($94,000 versus $86,000, respectively).[64]

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[61] Gates, *Same-sex and Different-sex Couples in the American Community Survey: 2005-2011*, *supra* note 42, at 1.

[62] *Id.*

[63] Gary J. Gates, *Lesbians and Gay Men in the U.S. Military: Estimates from Census 2000*, THE WILLIAMS INST. 22 (Oct. 2005), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-GL-Military-Census2000Estimates-Oct-2005.pdf.

In terms of individual incomes, among those in the labor force, men in same-sex couples report slightly lower median personal income than men in different-sex couples ($47,000 per year versus $48,000, respectively).[65] Among those not in the labor force, men in same-sex couples evidence substantial economic disadvantage relative to their counterparts in different-sex couples. Among men who are not in the labor force, men in same-sex couples report median annual personal incomes that are $9,000 lower than those of men in different-sex couples ($13,000 versus $22,600, respectively).[66]

Conversely, women in same-sex couples who are in the labor force report higher personal income than women in different-sex couples ($38,000 per year versus $30,000, respectively).[67] Similarly, for those not in the labor force, women in same-sex couples report higher annual personal income compared to their counterparts in different-sex couples ($11,400 versus $5,100, respectively).[68]

A study using data from Census 2000 found that same-sex female couples had a poverty rate of 6.9%

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[64] Gates, *Same-sex and Different-sex Couples in the American Community Survey: 2005-2011*, *supra* note 42, at 6.

[65] *Id.* at 4.

[66] *Id.* at 9, 11.

[67] *Id.* at 5.

[68] *Id.* at 9, 11.

compared to 4.0% for gay male couples and 5.4% for different-sex married couples.[69]

Same-sex couples appear to have less access to health insurance than do different-sex couples. In almost one out of four same-sex couples (24%), either both members of the couple lack health insurance or one member lacks health insurance. This is only true for 16% of different-sex couples.[70]

This difference in health insurance access may be due in large part to the fact that many employers do not offer health insurance to same-sex partners.[71] Even if employers do offer same-sex partner health coverage, that benefit is taxable as income and thus may not be affordable to some couples. Because same-sex partner health coverage is taxable as income, such coverage costs same-sex couples, on average, $1,000 more per year than comparable different-sex married spouse coverage.[72]

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[69] Randy Albelda et al., *Poverty in the Lesbian, Gay, and Bisexual Community*, THE WILLIAMS INST. ii (March 2009), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf.

[70] Gates, *Same-sex and Different-sex Couples in the American Community Survey: 2005-2011*, *supra* note 42, at 1.

[71] The Henry J. Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits: 2009 Annual Survey* 43 (2009), *available at* http://ehbs.kff.org/pdf/2009/7936.pdf.

[72] M.V. Lee Badgett, *Unequal Taxes on Equal Benefits, The Taxation of Domestic Partner Benefits*, THE WILLIAMS INST. 1 (Dec. 2007), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-UnequalTaxesOnEqualBenefits-Dec-2007.pdf.

C. *Approximately 114,000 Same-Sex Couples in the United States Are Married, and Over 108,000 Are in Civil Unions or Registered Domestic Partnerships.*

Of the 646,464 same-sex couples who identified as such in Census 2010, nearly 132,000 couples identified as spouses while nearly 515,000 identified as unmarried partners.[73]

Couples who identified as spouses live throughout the United States. In every state in the United States, at least 10% of reported same-sex couples designate one partner as a spouse.[74] More than 28,000 same-sex couples in California identified as spouses in the 2010 Census.[75]

For all couples, both different-sex and same-sex, Census data are based on how individuals describe their relationship, which is not always consistent with their legal relationship status. Accordingly, same-sex couples who are legally married, as well as those who are not legally married but consider themselves to be spouses can identify one partner as a "husband or wife."[76] Based on a 2010 survey of same-sex couples funded by the Census Bureau, an estimated 71% of same-sex couples who identified a partner as "husband" or "wife" in Census 2010 are legally married, 15% are in civil unions or registered domestic partnerships, and 14% are not in a legally recognized relationship.[77] For those who identified as "unmarried partner," 79% are not in a legally recognized relationship, 17% are in civil unions or registered domestic partnerships, and only 4% are legally married.[78]

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[73] Gates & Cooke, *United States Census Snapshot: 2010*, *supra* note 39, at 1.

[74] *Supplemental Table: Same-Sex Unmarried Partner or Spouse Households by Sex of Householder by Presence of Own Children: 2010 Census and 2010 American Community Survey*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/samesex/files/supp-table-AFF.xls (last visited Feb. 25, 2013).

[75] Gary J. Gates & Abigail M. Cooke, *California Census Snapshot: 2010*, THE WILLIAMS INST. 1, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_California_v2.pdf (last visited Feb. 25, 2013).

Combining these estimates with Census 2010 data suggests that approximately 114,100 same-sex couples in the United States are legally married, having legally married either in the United States or in another country, and over 108,600 are in civil unions or registered domestic partnerships.[79]

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[76] *Id.*

[77] Gates, *Same-sex couples in US Census Bureau Data: Who Gets Counted and Why*, *supra* note 38, at ii.

[78] Put differently, 22% of legally married same-sex couples decided to identify as unmarried partners in Census 2010. *Id.* at 5. When asked why they made this choice, most said this was primarily because they thought it was the "correct" answer since either their state or the federal government did not formally recognize their marriage. *Id.*

[79] *Amicus Curiae* Gates and Cooke report 131,729 same-sex couples who identified as spouses and 514,735 who identified as unmarried partners. Gates & Cooke, *United States Census Snapshot: 2010*, *supra* note 39, at 1. *Amicus Curiae* Gates suggests that 71% of spousal couples are legally married (amounting to approximately 92,500 legally married same-sex couples) along with 4% of unmarried partner couples (approximately 20,600 married couples). *See* Gates, *Same-sex*

1. Same-Sex Couples Are More Likely to Marry Than to Enter into a Civil Union or a Domestic Partnership.

Analyses of state-level administrative data provide additional information about approximately 50,000 same-sex couples who had legally married in the United States as of 2010 and a similar number who had entered into other forms of legal recognition such as civil unions or registered domestic partnerships by that date.[80]

These administrative data show that when offered the choice, same-sex couples are much more likely to marry than to pursue a civil union or a registered domestic partnership. On average, 30% of same-sex couples married in the first year that their state allowed them to marry,[81] while only 18% entered into civil unions or broad domestic partnerships in the first year states offered those statuses.[82] Furthermore, only 8% entered into more

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Couples in US Census Bureau Data: Who Gets Counted and Why, *supra* note 38, at 6. Combined, this implies an estimated 113,000 legally married same-sex couples.

[80] M.V. Lee Badgett & Jody L. Herman, *Patterns of Relationship Recognition by Same-Sex Couples in the United States*, THE WILLIAMS INST. 4 (Nov. 2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Herman-Marriage-Dissolution-Nov-2011.pdf.

[81] *Id.* at 13 (analyzing data from the following three states that had extended marriage to same-sex couples: Iowa, Massachusetts, Vermont).

[82] *Id.* (analyzing data from the following six states that had extended civil union or domestic partnership statuses to same-

limited statuses, such as reciprocal beneficiary relationships,[83] which extend a smaller set of rights and obligations than marriage, in the first year that their respective states offered those statuses.[84]

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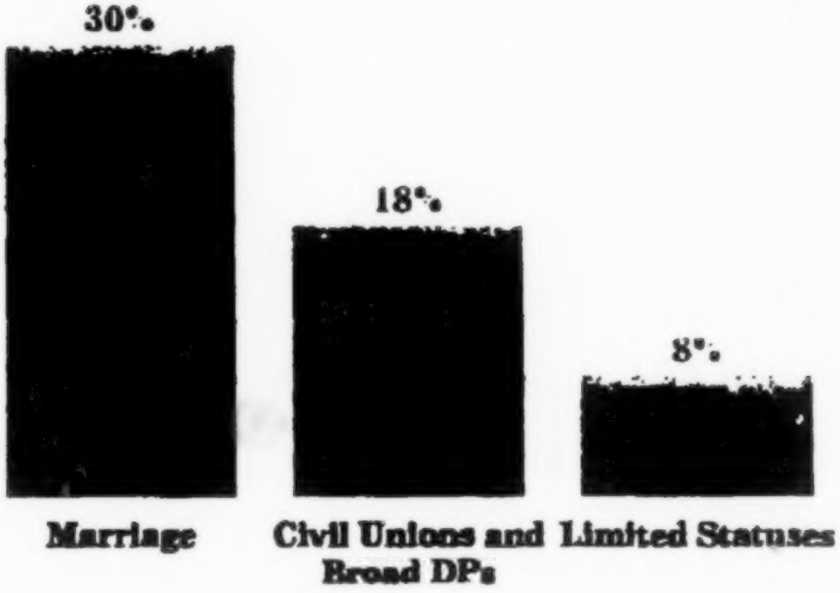
sex couples offering all or almost all of the rights and obligations to marriage to same-sex couples: Connecticut, Nevada, New Hampshire, New Jersey, Oregon, and Vermont).

[83] *Id.* at 11-12 (analyzing data from the following five states and the District of Columbia that had extended a more limited set of rights to same-sex couples through limited domestic partnerships or reciprocal or designated beneficiary statuses: California, the District of Columbia, Hawai'i, Maine, New Jersey, and Washington).

[84] *Id.* at 12.

Figure C. Percentage of same-sex couples who pursued legal relationship recognition in the first year it was offered, by type of recognition.[85]



Looking past the first year that recognition is offered, almost half (47%) of same-sex couples who live in a state that offers some form of legal relationship recognition have entered into such a status.[86] In Massachusetts, where marriage for same-sex couples has been legal since 2004, this is true of 68% of same-sex couples.[87]

Based on state level administrative data, in California, an estimated 18,000 same-sex couples were married in the state during the period in 2008 when marriages were legally performed there.[88] Nearly 57,000 same-sex couples registered as domestic partners in the state between 2000 and 2010.[89]

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[85] *Id.*

[86] *Id.* at 6.

[87] *Id.* at 19.

2. Same-Sex Couples Who Marry or Enter into Other Legally Recognized Relationships Are More Likely To Be Women and Are Younger Than Different-Sex Couples.

Female same-sex couples are more likely to marry or to formalize their relationships by entering into another legal status such as a civil union or registered domestic partnership than are male same-sex couples. In eight states that release marriage, civil union, or registered domestic partnership data by gender, 62% of same-sex couples who sought legal recognition were female couples.[90]

Same-sex couples who are legally married or have a legally recognized relationship are younger than the general population of married different-sex couples in states where same-sex couples can marry or enter into legally recognized relationships.[91] However, when one compares the age of same-sex and different-sex couples when they actually marry, newly married same-sex couples tend to be older than newly married different-sex couples.[92] This is most likely due to the fact that when states first offer marriage to same-sex couples, many couples have been waiting years or decades to marry.

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[88] *Id.* at 4.

[89] *Id.*

[90] *Id.* at 7-8 (analyzing data from the following seven states and the District of Columbia: Connecticut, Iowa, Maine, New Hampshire, New Jersey, Oregon, and Washington).

[91] *Id.* at 8 (analyzing data from Connecticut and Washington).

3. Dissolution Rates Are Similar for Same-Sex and Different-Sex Couples.

In states with available data, dissolution rates for same-sex couples are slightly lower on average than divorce rates for different-sex couples.[93] The percentage of those in same-sex couples who have ended legal relationships ranges from 0% to 1.8% annually. By comparison, 2% of married different sex couples divorce annually.[94]

D. *Almost One in Five Same-Sex Couples in the United States Are Raising Children.*

U.S. Census Bureau data suggest that almost one in five (19%) same-sex couples in the United States are raising children.[95] In other words, more than

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[92] *Id.* at 9 (analyzing data from Connecticut).

[93] *Id.* at 18-19 (analyzing data from the following ten states and the District of Columbia: California, Colorado, Connecticut, Hawai'i, Maine, Nevada, New Hampshire, New Jersey, Vermont, and Washington).

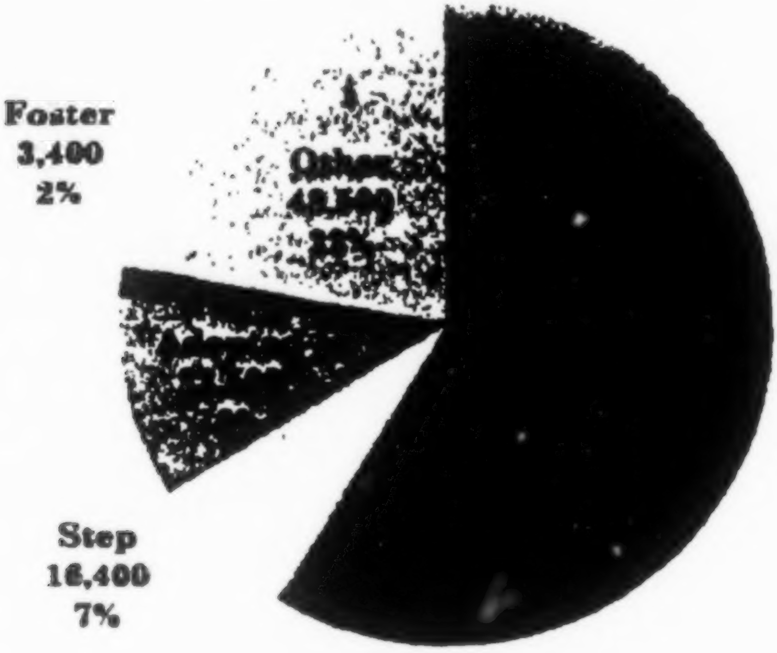
[94] *Id.* at 19.

[95] Gates, *LGBT Parenting in the United States*, *supra* note 34, at 1. Among different-sex couples the proportion with children is 43.5%. Gates, *Same-sex and Different-sex Couples in the American Community Survey: 2005-2011*, *supra* note 42, at 6.

125,000 same-sex couple households include nearly 220,000 children under age 18 in their homes.[96]

Although most such children are biologically related to one of their parents (59%), same-sex couples are more likely to adopt or foster children than different-sex couples.

Figure D. Relationship of children under age 18 to householder (person 1) in same-sex couple households.



Among the 125,000 same-sex couples raising children, more than 111,000 same-sex couples are raising an estimated 129,200 biological children, 16,400 step children, and 22,500 adopted children.[97]

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[96] Gates, *LGBT Parenting in the United States*, *supra* note 34, at 1.

[97] *Id.* at 3.

Approximately 2,600 same-sex couples are raising 3,800 foster children.[98] Finally, more than a quarter of same-sex couples raising children (25.6%) are raising children identified as grandchildren, siblings, or other children who are related in some other way or unrelated to one of the same-sex spouses or partners.[99] Approximately 32,000 same-sex couples are raising 48,500 such children.[100]

1. Nearly a Third of Same-sex Couples Who Consider Themselves To Be Spouses Have Children.

Census 2010 figures show that same-sex couples who consider themselves to be spouses are more than twice as likely to be raising a biological, step, or adopted child as are same-sex couples who say that they are unmarried partners. Among same-sex couples who consider themselves to be spouses, 31% (41,194) are raising a biological, step, or adopted child under age 18.[101] Among those who consider themselves to be unmarried partners, 14% (69,839) are raising biological, adopted, or step children.[102]

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[98] *Id*

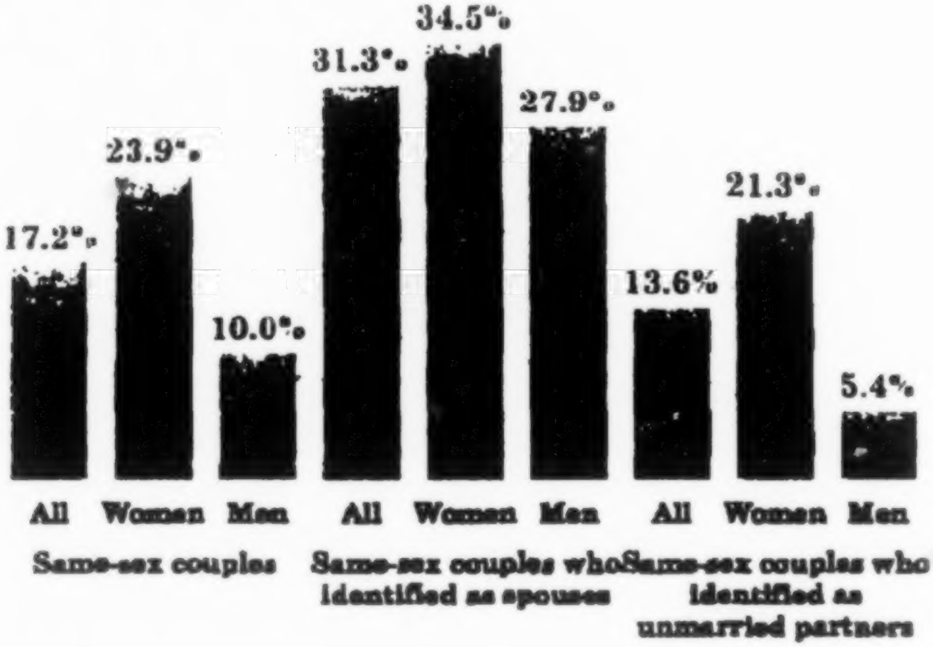
[99] *Id.*

[100] *Id.* at 1. Note that a same-sex couple household can include any or all of the different types of children discussed here (*e.g.*, biological, step, adopted, foster, grandchildren) so the number of couples raising each particular type of children will not add up to the total number of same-sex couples raising children.

[101] *Id.* at 1.

[102] *Id.*

Figure E. Percentage of same-sex couples with biological, adopted, or stepchildren under age 18 in the home, by relationship status and sex.



2. Same-Sex Couples with Children Live Throughout the United States.

Same-sex couples raising children live throughout the United States. Childrearing among same-sex couples in the United States is most common in the South, Upper Midwest, and Mountain regions of the country.[103]

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[103] *Id.*

States with the highest percentages of same-sex couples raising biological, adopted or step children include Mississippi (26%), Wyoming (25%), Alaska (23%), Idaho (22%), Montana (22%), Kansas (22%), North Dakota (22%), Arkansas (21%), South Dakota (21%), and Oklahoma (21%).[104]

3. Members of Same-Sex Couples with Children Are Diverse in Terms of Race, Ethnicity, and Income.

Parenting is more prevalent among racial and ethnic minorities who are members of a same-sex couple. A third (33%) of women who are members of racial or ethnic minorities and are in same-sex couples are raising a biological, step, or adopted child, compared to 18% of their white counterparts.[105] For men, the same comparison is 16% versus 5%, respectively.[106] Overall, 14% of individuals in same-sex couples who have children under age 18 in their homes are African-American compared with 8% of individuals in different sex couples raising children (see Figure F below).[107] Among individuals in couples with children, approximately one in five in both types of couples (19%) are Latino/as.[108]

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[104] *Id.* at 4.

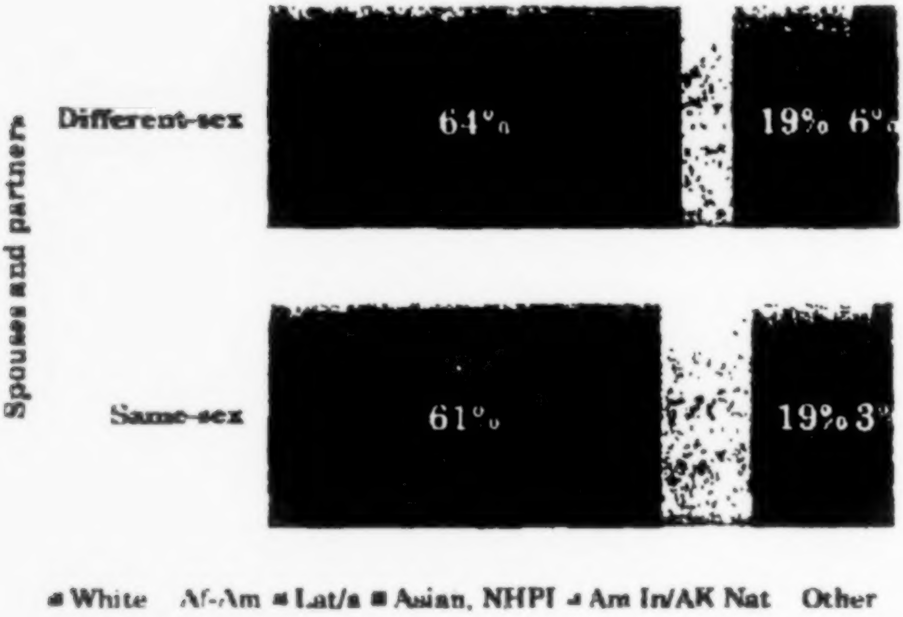
[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

Figure F. **Race/ethnicity of same-sex and different-sex spouses/partners with children under age 18.**[109]



Nationally, the median annual household income of same-sex couples with children under age 18 in the home is more than 16% lower than the median annual household income of comparable different-sex couples ($63,900 versus $74,000).[110]

Married or partnered LGBT adults living in two-adult households with children are twice as likely as comparable non-LGBT adults to report household incomes near the poverty threshold (less than $24,000 per year).[111]

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[109] *Id.*

[110] *Id.* at 5.

[111] *Id.*

Several factors likely contribute to the relative economic disadvantage of same-sex couples with children. First, LGB parents are, on average, younger than their different-sex counterparts.[112] Second, LGB parents are disproportionately female, and in the United States women, on average, have lower incomes than men.[113] In addition, same-sex couples raising children are disproportionately members of racial and ethnic minorities, African-Americans and Latino or Latinas comprise 33% of those in same-sex couples with children under age 18 in the home compared to 27% of their counterparts in different-sex couples. In the United States, African-Americans, Latinos, and Latinas have lower incomes than white persons.[114]

4. Children of Same-Sex Couples Are Racially and Ethnically Diverse and More Likely To Be Adopted and Fostered.

The median age of the 220,000 children under age 18 being raised by same-sex couples is 9 years old, compared to 8 for those being raised by different sex-couples.[115] However, adopted children being raised by same-sex couples are younger, with a median age of 6 compared to a median age of 10 among adopted children being raised by different-sex couples.

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[112] *Id.* at 4.

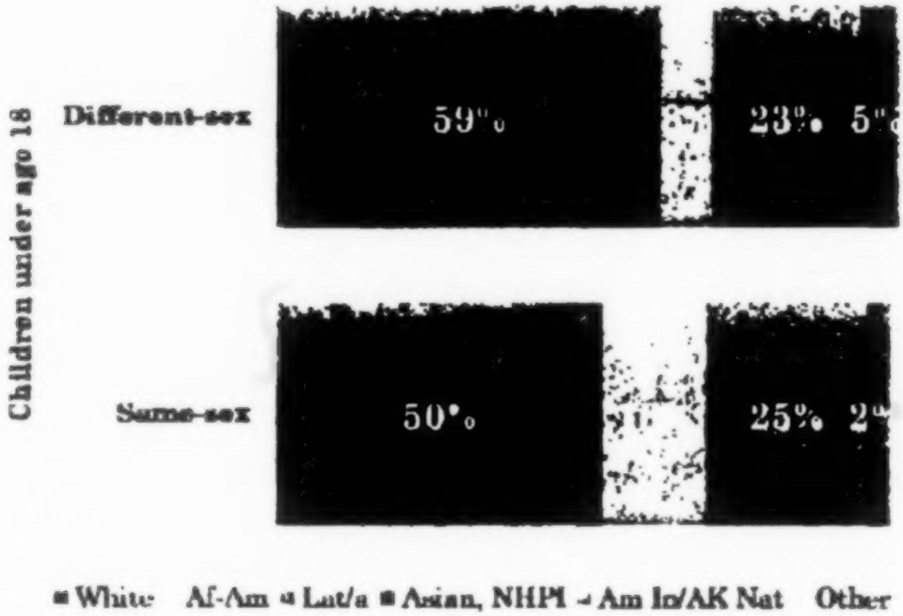
[113] *Id.; Women in the Labor Force,* U.S. BUREAU OF LABOR STATISTICS 51-52 (Dec. 2011), http://www.bls.gov/cps/wlf-databook-2011.pdf.

[114] Gates, *LGBT Parenting in the United States, supra* note 34, at 4; *Women in the Labor Force, supra* note 112, at 51.

[115] Gates, *LGBT Parenting in the United States, supra* note 34, at 4.

Among children under age 18 living with same-sex couples, half (50%) are members of racial or ethnic minorities compared to 41% of children living with different-sex couples. Children of same-sex couples are twice as likely to be African-American as children of different-sex couples (16% versus 8%). Approximately one in four children of both types of couples (25% versus 23%) are Latino/as. *See* Figure G below.

Figure G. Race/ethnicity of children under 18 living in the homes of same-sex and different-sex couples.[116]



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[116] *Id.* at 1.

Same-sex couples raising children are more than four times as likely as their different-sex counterparts to be raising an adopted child.[117] While only 2% of the children of different-sex couples are adopted, approximately 10% of the children of same-sex couples are adopted.

Similarly, same-sex couples are six times more likely than their different-sex counterparts to be raising foster children.[118] Among couples with children under age 18, 2% of same-sex couples are raising a foster child compared to just 0.3% of different-sex couples.[119]

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[117] *Id.* at 1.

[118] *Id.*

[119] *Id.* at 3.

CONCLUSION

In light of the foregoing and for the reasons set forth by the parties challenging the constitutionality of the federal DOMA and California's Proposition 8 in the *Windsor* and *Hollingsworth* cases, respectively, this Court should affirm the respective Court of Appeals judgments in those two cases.

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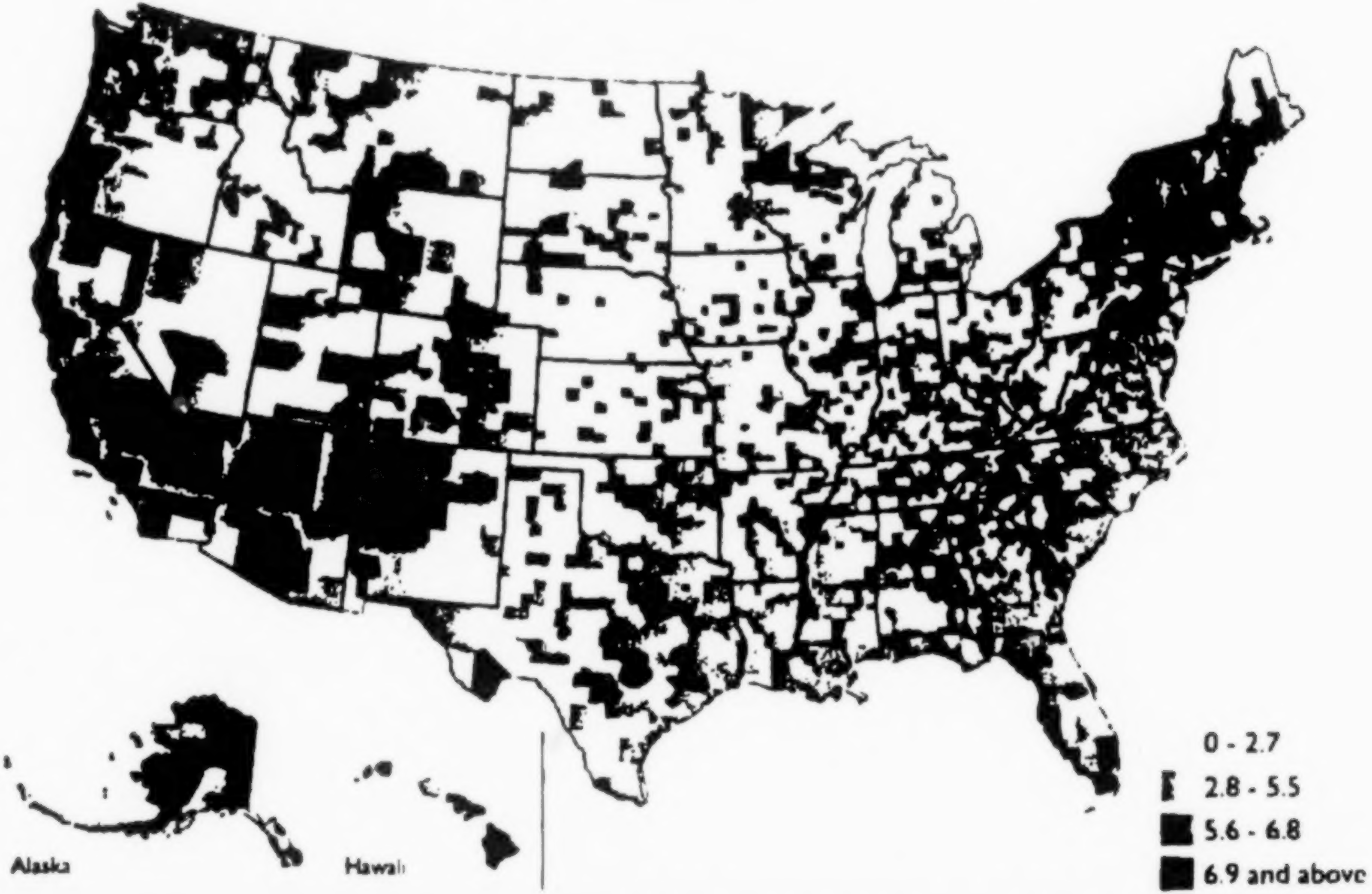
February 2013

APPENDIX

APPENDIX I: Same-sex couples per 1,000 households, Census 2010


Alaska
Hawaii
0 - 2.7
2.8 - 5.5
5.6 - 6.8
6.9 and above

AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
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No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR AND BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Amicus Curiae Brief of Gay & Lesbian Advocates & Defenders and Lambda Legal Defense & Education Fund, Inc. in Support of Edith Windsor and the United States Addressing the Merits and Supporting Affirmance

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. RATIONAL BASIS REVIEW IS CONTEXT-DEPENDENT. 5

  A. Rational Basis Review Takes Into Account Whether a Law Targets a Historically Disfavored Group. 7

  B. Rational Basis Review Takes Into Account Whether a Law Implicates Important Personal Interests, Even Indirectly. 9

  C. Rational Basis Review Takes Into Account Whether a Law Is Historically Anomalous. 12

  D. DOMA Is the Paradigmatic Law Calling for Close Attention Under Rational Basis Review. 13

II. THE "LEGITIMACY" ELEMENT OF THE RATIONAL BASIS TEST IS A MEANINGFUL LIMITATION ON CLASS-BASED ENACTMENTS. 15

  A. Measures May Not Privilege Preferred Groups or Disadvantage Disfavored Groups for the Purpose of Favoritism or Animus Alone. 16

  B. An Interest's "Legitimacy" Is Not Evaluated in the Abstract, but Rather Based on the Scope of Authority of the Entity Asserting It. 19

C. The "Legitimacy" Element of the Rational Basis Test Sharply Limits the Justifications that Can Permissibly Be Asserted on Behalf of DOMA. 21

III. THE "FIT" ELEMENT OF THE RATIONAL BASIS TEST IS ATTENTIVE TO PRETEXTUAL EXPLANATIONS FOR IMPERMISSIBLE DISCRIMINATION..............25

A. Broad Legislation Imposing Multiple, Varied and Unrelated Disadvantages Raises an Inference that No Legitimate Policy Purpose Exists. 27

B. Burdens on the Targeted Class Disproportionate or Excessive to the Claimed Interest Suggest Pretext..................28

C. Declining to Extend to Majority or Preferred Groups the Same Burdens Borne by the Targeted Group Undercuts the Plausibility of Explanations for Disparate Treatment. 29

D. Factual Justifications for Disparate Treatment Cannot Be Imaginary. 32

E. DOMA Bears All the Classic Indicia of Pretextual Discrimination..............................34

CONCLUSION ....,...39

TABLE OF AUTHORITIES

CASES

Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, 488 U.S. 336 (1989) 18, 23

Ankenbrandt v. Richards, 504 U.S. 689 (1992) 15

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) 17, 19, 24, 37

Bowers v. Hardwick, 478 U.S. 186 (1986) 25

Bragdon v. Abbott, 524 U.S. 624 (1998) 2

Bush v. Gore, 531 U.S. 98 (2000) 11

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 29

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) 8, 11, 17, 19, 30, 34

Dragovich v. United States Department of Treasury, 872 F. Supp. 2d 944 (N.D. Cal. 2012) 7

Eisenstadt v. Baird, 405 U.S. 438 (1972) 9, 10, 28, 30, 37

Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004) 14, 23

FCC v. Beach Communications, Inc., 508 U.S. 307 (1993) 31

F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 5

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Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 19, 20, 24, 36

Heller v. Doe, 509 U.S. 312 (1993) 32, 33

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) 16

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995) 2

Kelo v. City of New London, 545 U.S. 469 (2005) 26

Lawrence v. Texas, 539 U.S. 558 (2003) 2, 8, 9, 10, 13, 17, 22

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Mathews v. De Castro, 429 U.S. 181 (1976) 15

Mathews v. Diaz, 426 U.S. 67 (1976) 31

Mayer v. City of Chicago, 404 U.S. 189 (1971) 11

Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985) 16

Miller-Jenkins v. Miller-Jenkins, 550 U.S. 918 (2007) 2

Nashville, Chattanooga & St. Louis Railway v. Walters, 294 U.S. 405 (1935) 23

National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012) 12

Pedersen v. Office of Personnel Management, 881 F. Supp. 2d 294 (D. Conn. 2012), *petition for cert. before judgment filed*, 81 U.S.L.W. 3087 (U.S. Aug. 21, 2012) (No. 12-231), 81 U.S.L.W. 3115 (U.S. Sept. 11, 2012) (No. 12-302) 1-2, 7

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Romer v. Evans, 517 U.S. 620 (1996) .... *passim*

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Sosna v. Iowa, 419 U.S. 393 (1975) 15

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Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 31

Village of Willowbrook v. Olech, 528 U.S. 562 (2000) 18

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 10

Williams v. Vermont, 472 U.S. 14 (1985) 16

Zobel v. Williams, 457 U.S. 55 (1982) 16

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INTEREST OF AMICI[1]

Amici are among the nation's leading organizations committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and those with HIV through impact litigation, education, and public policy work.

Founded in 1978, Gay & Lesbian Advocates & Defenders ("GLAD") is New England's leading public interest legal organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. GLAD has litigated widely in New England in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. That litigation has included challenges to Section 3 of the federal Defense of Marriage Act ("DOMA"). *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3006 (U.S. June 29, 2012) (No. 12-13), 81 U.S.L.W. 3006 (U.S. July 3, 2012) (No. 12-15), 81 U.S.L.W. 3065 (U.S. July 20, 2012) (No. 12-97); and *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012), *petition for cert. before judgment filed*, 81 U.S.L.W. 3087 (U.S. Aug. 21, 2012) (No. 12-231), 81 U.S.L.W.

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

3115 (U.S. Sept. 11, 2012) (No. 12-302). In this Court, GLAD's work has included: *Bragdon v. Abbott*, 524 U.S. 624 (1998), *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Miller-Jenkins v. Miller-Jenkins*, 550 U.S. 918 (2007) (counsel for respondent on cert petition), *L.M.M. v. E.N.O.*, 528 U.S. 1005 (1999) (same), as well as being a participant on numerous amicus briefs.

Lambda Legal Defense & Education Fund, Inc. ("Lambda Legal"), founded in 1973, is the nation's oldest and largest national legal organization whose mission is to safeguard and advance the civil rights of lesbians, gay men, bisexuals, transgender people, and those with HIV through impact litigation, education, and policy work. Lambda Legal has appeared in this Court in numerous cases as counsel to parties and *amici*, including as counsel to the successful challengers of the anti-gay state initiative in *Romer v. Evans*, 517 U.S. 620 (1996), and of Texas's sodomy law in *Lawrence v. Texas*, 539 U.S. 558 (2003), two landmark sexual orientation cases decided by this Court. Lambda Legal is also counsel to the plaintiff in *Golinski v. United States Office of Personnel Management*, 824 F. Supp. 2d 968 (N.D. Cal. 2012), *appeal docketed*, Nos. 12-15388, 12-15409 (9th Cir. Feb. 24, 2012), *petition for cert. before judgment filed*, 81 U.S.L.W. 3048 (U.S. July 3, 2012) (No. 12-16), which held that DOMA violates the equal protection guarantee under both heightened scrutiny and rational basis review.

SUMMARY OF ARGUMENT

Amici support fully the position of the United States and of Edith Schlain Windsor that heightened scrutiny applies to classifications disadvantaging gay people, and that DOMA cannot survive application of that standard. *Amici* further believe that the Court should resolve this case on the basis of such heightened review, as confusion in the lower courts about the applicable standard leaves gay men and lesbians vulnerable to impermissible discrimination.

The focus on heightened scrutiny in the parties' filings, however, should not leave the Court with the impression that heightened scrutiny would be *required* to find DOMA unconstitutional. To the contrary, this Court's equal protection jurisprudence requires the same result even absent heightened review.

Although rational basis review affords the government significantly wider leeway to legislate in ways that incidentally advantage or disadvantage particular groups in pursuit of some permissible governmental goal, it is far from toothless. While deferential to legislative judgments, it still requires that a classification rationally serve a legitimate objective. This two-part test—requiring both that a classification serve a "legitimate" purpose (the "legitimacy" element of the test) and a rational relationship between the classification and such purpose (the "fit" element of the test)—remains a meaningful check on the majority's use of law to bestow advantages on itself while excluding others.

Recognizing that laws disadvantaging unpopular groups can arise out of improper objectives, particularly where important personal interests are targeted, the Court has been cautious, even under rational basis review, about approving such measures. And where a legislature states openly an impermissible purpose, the Court has been especially vigilant in assessing the credibility of any other asserted justifications.

More frequently, improper attempts to use the law to exclude disfavored groups from rights and protections bestowed upon the majority are justified in benign-sounding ways. Such justifications may deliberately mask intentional discrimination, or just reflect the majority's misunderstanding of the disfavored group. Whether based on pretext or unreasoned stereotypical thinking, such justifications frequently share recurring, identifiable features. When a disadvantageous treatment harms the targeted group in ways going well beyond the claimed purpose of the law, the rationale will not suffice. Conversely, a benign-sounding justification for a law that would appear to require extension of disadvantageous treatment to a larger class, when advanced on behalf of a measure that instead targets only a smaller, disfavored group, likewise raises a strong inference that the actual purpose of a law differs from the stated one.

DOMA bears each of the various indicia the Court has considered when it has invalidated laws under rational basis review. DOMA both targets a group disliked at the time of its passage and impacts important personal interests. It arose not out of the usual process of allocating federal rights and benefits but as a one-time departure from the traditional method of predicating eligibility for federal marriage-based protections on a couple's marital status under state law. It was accompanied by overt statements of the impermissible purpose to express disapproval of gay people—statements that undermine the credibility of other justifications now being put forward. Many of the rationales offered in DOMA's defense are not legitimate to begin with. And those permissible in theory would, if taken at face value, apply equally to many heterosexual couples DOMA leaves unaffected, and bear no logical nexus to the sheer number and variety of disadvantages DOMA imposes. These factors all demonstrate that DOMA is precisely the sort of law that should fail rational basis scrutiny. Indeed, a clearer example is hard to imagine.

ARGUMENT

I. RATIONAL BASIS REVIEW IS CONTEXT-DEPENDENT.

At its core, the Equal Protection Clause requires that "[a] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object or the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). It serves as a check on arbitrary and invidious exercises of power by the government.

Thus, "even in the ordinary equal protection case," the Court "insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end," the Court "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633.

A decision to apply rational basis review does not guarantee a measure's constitutionality, and the examination of the government's purpose and its relationship to the classification is not uniformly deferential. Rather, this Court's cases recognize that the context in which classifications arise can inform whether particular governmental purposes are likely to be legitimate and to bear the requisite relationship to the classification.

This Court has recognized circumstances when particular attention is warranted under equal protection review, including when: (1) the group disadvantaged by a measure is traditionally disliked or misunderstood, (2) important personal or liberty interests are at stake, and (3) the disadvantageous classification arises not in the usual course of governing but as a one-time departure from past practice. Under these circumstances, the usual presumption of constitutionality—that classifications are being drawn in good faith, for genuine purposes, and not arbitrarily or to penalize a disfavored group—is weakened. Because DOMA raises concerns under *all* these criteria, it presents the paradigmatic case for particularly demanding review under this Court's "conventional and venerable" rational basis test. *Romer*, 517 U.S. at 635. Indeed, that is why a string of recent lower court decisions, including the First Circuit's opinion in *Massachusetts v. United States Department of Health & Human Services* (Boudin, C.J.), *Pedersen v. Office of Personnel Management*, and *Golinski v. United States Office of Personnel Management* (each cited on pp. 1-2, *supra*), as well as *Dragovich v. United States Department of Treasury*, 872 F. Supp. 2d 944 (N.D. Cal. 2012), have each held DOMA unconstitutional even under rational basis review.

A. Rational Basis Review Takes Into Account Whether a Law Targets a Historically Disfavored Group.

With most classifications drawn in the regular course of ordinary legislation, there is no reason to believe that distinctions reflect impermissible purposes. "[A]bsent some reason to infer antipathy," the "Constitution presumes" the "democratic process" will correct "improvident decisions . . . and that judicial intervention is generally unwarranted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). However, BLAG's suggestion that judicial deference is therefore always at its "zenith" under rational basis review, BLAG Br. at 23, ignores that even absent application of heightened scrutiny, the normal presumption of constitutionality is less conclusive when a measure disfavors a historically disadvantaged or unpopular group. The targeting of such groups raises questions about whether bare antipathy formed the basis for the legislation. *See Romer*, 517 U.S. 620; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973). In such cases, the Court has applied "a more searching form of rational basis review." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment).

Romer, *Cleburne*, and *Moreno* all exemplify this principle. Each case reviewed a classification targeting a group to which the Court had not applied heightened scrutiny, but nonetheless was commonly held in disdain or misunderstood—gay people in *Romer*, those with mental disabilities in *Cleburne*, and those living in nontraditional households (or, as the legislative history characterized them, "hippie communes") in *Moreno*, 413 U.S. at 534. In applying rational basis review in each case, the Court did not ignore that the targeted group was widely disliked. The Court recognized instead the possibility that dislike of the groups might itself explain the measures in question, and responded by carefully assessing potential alternative explanations for each measure before reaching "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 520 U.S. at 634; *see also Schweiker v. Wilson*, 450 U.S. 221, 231 (1981) (condoning more deferential review where classification at issue did *not* "isolate the mentally ill or subject them, as a discrete group, to special or subordinate treatment").

B. Rational Basis Review Takes Into Account Whether a Law Implicates Important Personal Interests, Even Indirectly.

This Court's rational basis cases also consider the nature of the interests affected by a classification. Even when fundamental rights, and thus "strict" scrutiny, are not implicated, the Court has exercised much greater caution in evaluating classifications that disadvantage important "personal relationships" and liberty interests. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in the judgment) (collecting cases).

The Court approaches measures burdening intimate and family relationships with particular care. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), this Court invalidated a state law that discriminated between married and unmarried persons by prohibiting the distribution of contraceptives to the latter, but not the former. Although some Justices viewed the case as resolvable on substantive due process grounds, the plurality decided it on the narrower basis that the law impermissibly discriminated against unmarried persons, a class not meriting heightened review. *Eisenstadt* closely examined how the law operated in practice, including whether the state's claimed interest in public health could justify the range of contraceptives covered as well as the preferential treatment of married couples under the statute. *Id.* at 447-53. Far from deferring to the state's policy claims, the plurality concluded that "despite the statute's superficial earmarks as a health measure, health, on the face of the statute, may no more reasonably be regarded as its purpose than the deterrence of premarital sexual relations." *Id.* at 452. The opinion emphasized concern that the law infringed on personal relationships and "matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453-54; *see also Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) (citing *Eisenstadt*); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) (same).

M.L.B. v. S.L.J., 519 U.S. 102 (1996), shows that this same principle also holds true when a measure's impact on important personal interests is only indirect. There, the Court reviewed, in a termination-of-parental-rights proceeding, a state requirement that civil appellants prepay certain costs before appeal. *Id.* at 108. The Court acknowledged that there is no fundamental right to appeal a civil ruling, but emphasized that its equal protection analysis must nonetheless be guided by "the character and intensity of the individual interest at stake." *Id.* at 120. The Court gave "close consideration" to the fee requirement because it implicated "[c]hoices about marriage, family life, and the upbringing of children . . . among associational rights this Court has ranked as of basic importance in our society." *Id.* at 116 (internal quotation marks omitted). Thus, even in the absence of a direct infringement on a fundamental right, the Court held that the state could not deny indigent parents the same access to appeal available to non-indigent parents.

Romer demonstrates that these concerns extend beyond intimacy and the severing of familial relationships. *Romer* was animated not only by the fact that the amendment at issue disfavored gay people, *see supra* Part I.A, but also the fact that it impacted their ability to participate in transactions and endeavors across the board—from housing, real estate sales, education, and employment to health and welfare services—burdens the Court reviewed with particular care. *See* 517 U.S. at 629. The Court's focus thus extended to protecting the broader panoply of "transactions and endeavors that constitute ordinary civic life," *id.* at 631; *see also Cleburne*, 473 U.S. at 443-44 (carefully analyzing under rational basis review zoning scheme affecting interest of mentally disabled persons in residing in particular community); *Moreno*, 413 U.S. at 534-38 (cautiously reviewing food stamp eligibility requirements affecting non-familial relationships); *Bush v. Gore*, 531 U.S. 98, 104 (2000) (even though there is no "constitutional right to vote for electors for the President," Florida's method for counting ballots violated Equal Protection Clause because each voter must be treated with "equal dignity"); *Mayer v. City of Chicago*, 404 U.S. 189 (1971) (burden on individual's professional prospects formed basis for finding equal protection violation). Thus, the Court has a long history, in rational basis cases, of balancing the importance of the personal interests affected with the deference afforded the government.

C. Rational Basis Review Takes Into Account Whether a Law Is Historically Anomalous.

The Court's application of rational basis review also has reflected skepticism about unique and anomalous legislation imposing disadvantageous treatment. Because the regular business of governing routinely involves classifications that favor some groups and disfavor others, the mere drawing of such classifications does not normally raise an inference of improper purpose. Conversely, when the government goes out of its way to impose disadvantages on a group in an area where it has not traditionally drawn such classifications, the regular presumption—that some classification among persons is the inevitable business of governing—loses force. As the Court noted in a different context, "sometimes the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent for Congress's action." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (internal quotation marks omitted) (alterations in the original).

Romer, again, is on point. There, the Court emphasized that the Colorado amendment, which prohibited local governments and state agencies from enacting antidiscrimination ordinances protecting gay people, but not other groups, was "unprecedented." *Romer*, 517 U.S. at 633. The lack of precedent for such selective elimination of local political control over municipal ordinances was significant because "'[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" *Id.* at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32 (1928)) (brackets in original). As the Court in *Romer* noted, "[r]espect for th[e] principle [of equal protection] explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare." *Romer*, 517 U.S. at 633.

D. DOMA Is the Paradigmatic Law Calling for Close Attention Under Rational Basis Review.

DOMA is a veritable perfect storm, meriting close review for every one of the reasons listed above. First, irrespective of whether classifications targeting gay people garner heightened scrutiny, it is obvious that the persons disadvantaged by DOMA have historically been mistreated and condemned. *See Lawrence*, 539 U.S. at 571 ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral."). For that reason alone, laws that selectively disadvantage gay men and lesbians, as DOMA does, merit closer attention. *See Romer*, 517 U.S. at 633.

Second, irrespective of whether the burdens imposed by DOMA on the marriages of same-sex couples are viewed as encroaching on fundamental rights to family relationships, the family and liberty interests at stake are certainly substantial. The burdens of having one's lawful marriage negated in the many important areas of life touched by the federal government (which range from treatment under the tax laws to legal protections in federal court, private pension plans, rights under the Family Medical Leave Act, and federal benefits under numerous programs, among others) pervasively disadvantage those relationships and thereby implicate "[c]hoices about marriage, family life, and the upbringing of children." *M.L.B.*, 519 U.S. at 116. As *M.L.B.* recognized, even *indirect* burdens on such interests merit close attention. *See id.* at 116, 127-28. Moreover, DOMA's wholesale refusal to afford marriages of same-sex couples any legal recognition withdraws a panoply of protections of marriage that cumulatively "constitute ordinary civic life in a free society" taken for granted by other married couples. *Romer*, 517 U.S. at 631.

Finally, DOMA is precisely the sort of one-off, unprecedented government action that merits special attention. As explained more fully in the *amicus curiae* brief filed in this case by numerous historians and the American Historical Association, the traditional approach of the federal government has long been to use a couple's actual marital status under state law whenever the federal government chose to make a particular protection dependent upon marriage. Br. of *Amicus Curiae* Historians at Part III. Indeed, this longstanding federal deference to state law has constitutional dimensions given the states' traditional role as the sovereigns that issue marriage licenses, as well as make determinations of family status more generally. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) ("[T]he whole subject of the domestic relations . . . belongs to the laws of the States and not to the laws of the United States." (quoting *In re Burrus*, 136 U.S.

586, 593-94 (1890))); *see also Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992); *id.* at 716 (Blackmun, J., concurring) ("declarations of status, *e.g.*, marriage, annulment, divorce, custody, and paternity" lie at the "core" of domestic relations law reserved to states); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("domestic relations" are "an area that has long been regarded as a virtually exclusive province of the States"). DOMA's departure from this longstanding practice, cabined solely to same-sex couples, thus raises a potential inference that the effect of the law—disadvantaging same-sex couples—was also its purpose.

II. THE "LEGITIMACY" ELEMENT OF THE RATIONAL BASIS TEST IS A MEANINGFUL LIMITATION ON CLASS-BASED ENACTMENTS.

Even absent the considerations discussed in Part I *supra*, application of the Court's rational basis test, while more deferential than heightened forms of scrutiny, is far from "toothless." *Mathews v. De Castro*, 429 U.S. 181, 185 (1976). Among other things, the requirement that any governmental purpose served by a classification be "legitimate," *Romer*, 517 U.S. at 632, represents a real constraint on improper use of state power, which this Court has enforced to invalidate measures that classify persons for impermissible purposes.

A. Measures May Not Privilege Preferred Groups or Disadvantage Disfavored Groups for the Purpose of Favoritism or Animus Alone.

The legitimacy requirement, as an initial matter, ensures that a mere desire to bestow preferential treatment on a favored group, or disadvantages on a disfavored one, is an invalid reason for treating similarly situated persons differently. *Zobel v. Williams*, 457 U.S. 55 (1982), is instructive. There, the Court rejected under rational basis review a state dividend distribution plan giving preferential treatment to long-term residents, because such favoritism was not a legitimate purpose. *Id.* at 63-64. A string of similar cases illustrates that the mere desire to benefit a preferred group to the exclusion of others is an illegitimate basis for government action. *See, e.g.*, *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618-22 (1985) (tax exemption to Vietnam veterans residing in New Mexico before certain date); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880-83 (1985) (tax policy favoring in-state corporations); *Williams v. Vermont*, 472 U.S. 14, 23 (1985) (tax exemption favoring those residing in state at time of car purchase).

The converse is equally true: disfavoring some groups might be the consequence of certain government policies, but it cannot itself be their object. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."

Moreno, 413 U.S. at 534; *Cleburne*, 473 U.S. at 448. Indeed, as discussed in Part I.A *supra*, the impermissibility of such objectives is precisely why laws that single out disfavored groups for particular disadvantage, such as in *Moreno*, *Cleburne*, and *Romer*, trigger the need for greater caution in evaluating the laws' constitutionality.

This Court's decisions have sometimes used the term "animus" to describe this latter category of impermissible governmental objectives. Such "animus" toward gay people is not a legitimate basis for law. *Romer*, 517 U.S. at 632. This category of prohibited rationales extends well beyond overt animosity, bigotry, or hatred. Impermissible prejudice also includes a more subtle yet harmful "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). A belief that a particular group of persons is immoral is likewise impermissible; as Justice O'Connor noted in *Lawrence*, "[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause," *Lawrence*, 539 U.S. at 583, and thus a desire to express "dislike and disapproval against homosexuals" cannot form a valid basis for a classification. *Id.*; *see also Moreno*, 413 U.S. at 536 n.7 (citing favorably lower court's rejection, as raising "serious constitutional questions," of "morality" as basis for discriminating against households of unrelated persons in federal program (quotation marks omitted)).

This Court's cases also extend the prohibition against class-based legislation under rational basis review beyond animus to instances where there is no outright dislike of the disfavored class or desire to afford preferential treatment to a preferred group at all, but instead arbitrary treatment caused by mere neglect or inertia. In *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989), for instance, the Court invalidated under rational basis review a property tax regime that essentially assessed value based on a property's most recent purchase price, thus causing over time the assessments to vary substantially as between recently purchased properties and those not recently purchased. *Id.* at 343-44. The Court's decision did not turn on any holding that the county tax commissioner had targeted recent purchasers out of animosity, but on a recognition that the tax scheme, while perhaps not intentionally discriminatory at the time of adoption, had become indefensibly arbitrary "over time," such that continuing the system in the face of those consequences amounted to "intentional" action by the relevant official. *Id.* at 346; *see also Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (per curiam) ("irrational and wholly arbitrary" treatment by the government is sufficient to state an equal protection claim, even "apart from . . . subjective motivation" or "ill will" (internal quotation marks omitted)).

B. An Interest's "Legitimacy" Is Not Evaluated in the Abstract, but Rather Based on the Scope of Authority of the Entity Asserting It.

Because what constitutes a "legitimate" interest may depend on the scope of authority of the governmental entity asserting it, this Court's cases mandate a threshold inquiry into whether an interest advanced is within the purview of the particular government body drawing the classification. To be "legitimate," an interest must be not only a proper basis for government action in the abstract but also "properly cognizable" by the government body at issue, *Cleburne*, 473 U.S. at 448, and "relevant to interests" the classifying body "has the authority to implement." *Garrett*, 531 U.S. at 366 (quotation marks omitted).

For instance, in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), the Court considered an equal protection and due process challenge to a Civil Service Commission rule that limited federal employment to citizens. The Court expressly assumed "that if the Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interest in providing an incentive for aliens to become naturalized." *Id.* at 105. The Court refused to consider that and other immigration- or foreign-policy-related rationales as part of its inquiry, however, because they were "not matters which are properly the business of the Commission," and the rationality of the rule needed to be "justified by reasons which are properly the concern of that agency." *Id.* at 115-16. Therefore, the only justification *Hampton* analyzed was whether "administrative desirability" supplied a "rational basis" for the rule, given that there were some "important and sensitive positions" for which citizenship was a genuine requirement—an administrative convenience rationale the Court then went on to reject. *Id.* at 115.[2]

Similarly, in *Plyler v. Doe,* 457 U.S. 202 (1982), the Court did *not* hold that it was illegitimate, in the abstract, to treat undocumented immigrants differently when it invalidated a law excluding their children from public education. Rather, it noted that a claim of need to treat undocumented persons differently had to be viewed with particular skepticism when asserted by a state, as opposed to the federal government. The Court explained that, while it is a "routine and normally legitimate part of the business of the *Federal Government* to classify based on the basis of alien status . . . only rarely are such matters relevant to *legislation by a State*." *Id.* at 225 (emphasis added) (internal quotation marks omitted).[3] Thus, to defend a discriminatory classification, it is not enough to articulate some purpose that might be served by the classification. The purpose must also be an appropriate pursuit for the relevant government body.

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[2] Although *Hampton* blended both equal protection and due process analyses, the opinion framed the relevant inquiry as whether a "rational basis" could be found for the Commission's rule. 426 U.S. at 115.

[3] Although the level of equal protection scrutiny ultimately applied by *Plyler* is arguable, its dismissal of the state's claimed interest was based on the respective powers of the state and federal governments, and not on the precise level of review. 457 U.S. at 225-26.

C. The "Legitimacy" Element of the Rational Basis Test Sharply Limits the Justifications that Can Permissibly Be Asserted on Behalf of DOMA.

Leaving aside the other difficulties with the asserted rationales for DOMA, *see* Part III.E *infra*, the legitimacy element of the rational basis inquiry both undermines the contemporaneous justifications for enactment of the statute and excludes many of the rationales on which DOMA has been defended after the fact. Several of BLAG's claimed defenses of the law do not even survive this first element.

At the outset, because favoritism is not a legitimate governmental interest, DOMA cannot be justified as a measure to privilege heterosexual couples over same-sex couples—or, as BLAG puts it, to "retain" the privileged status of "traditional" marriage for heterosexuals on the theory that they had been the only ones to receive marital benefits in the past, and that previous Congresses had only wanted to confer marital benefits on heterosexuals. BLAG Br. 37, 43. Simply replicating and preserving special privileges for married heterosexual couples, not accessible to other married persons, smacks of precisely the sort of unreasoned favoritism for a preferred majority group that this Court's cases rule out as a legitimate justification. *See* Part II.A *supra*.

DOMA likewise cannot be sustained by the "morality" justifications invoked contemporaneously with its enactment. When it passed DOMA, Congress made crystal-clear that its purpose was to express moral disapproval of same-sex couples. *See, e.g.*, H.R. Rep. No. 104-664 at 15-16 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2919-20 (stating that goal of DOMA was to "reflect and honor a collective moral judgment about human sexuality" that "entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality" (footnote omitted)). Indeed, these were not stray statements from isolated legislators; they appear in the official Committee Report. But "moral disapproval" of gay people is not a legitimate government interest, and thus cannot suffice as a justification for DOMA's classification. *Lawrence*, 539 U.S. at 583; *see also Moreno*, 413 U.S. at 535 n.7.

Indeed, even to the extent that BLAG seeks to portray Congress's purposes for the law as having been sensible given the supposed unknowns at the time of enactment, *see* BLAG Br. at 39-41 (claiming unknown effects on the public fisc of marriages by same-sex couples); *id.* at 41-43 (claiming unknown effects on "society as a whole"), that is not enough. DOMA works a continuing violation of the rights of gay men and lesbians; what must be justified is not only the passage of the law in the first instance, but also its continued application. The "constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938); *see also Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 415 (1935) ("A statute valid when enacted may become invalid by change in the conditions to which it is applied."). *Allegheny Pittsburgh Coal Co.* teaches that the Court must consider not only whether a governmental measure or practice made sense at the time of enactment, but also its continuing rationality, because continuing a practice that has become irrationally arbitrary "over time" itself becomes "intentional" arbitrary action. *Allegheny Pittsburgh Coal Co.*, 488 U.S. at 346. Thus, BLAG's claims that Congress could have been rationally responding to unknown or little-known facts about same-sex couples and their relationships in 1996, *see* BLAG Br. at 39, 42, neglects the obligation to evaluate the continuing effects of those decisions years later, as many same-sex couples have married.

The principle that "legitimate" interests must be evaluated based on the powers and authority of the particular enacting governmental body further restricts the permissible rationales upon which DOMA can be defended. Notably, because "[t]he whole subject of domestic relations . . . belongs to the laws of the States," *Elk Grove Unified School District*, 542 U.S. at 12, it cannot be, as BLAG contends, a defense of DOMA that Congress might have preferred a particular set of family law rules (in which same-sex couples cannot marry) to those actually in force in states that allow marriage by such couples. *See* BLAG Br. at 43-48 (arguing that

Congress could rationally exclude married same-sex couples from federal protections for same host of reasons some states decline to issue marriage licenses to same-sex couples); *see also id.* at 37-41 (arguing that past Congresses' understanding that only heterosexual couples could marry can justify DOMA's continued exclusion of same-sex couples once they married as well). To be sure, Congress is not required to use a state-law marital status in setting eligibility criteria for federal rights or benefits. It can set such criteria on other bases that advance its legitimate interests. But a Congressional desire to define who Congress thinks should or should not be married cannot itself be a legitimate reason for such differential treatment, as it is not within the "interests" the federal government has the "authority to implement." *Garrett*, 531 U.S. at 366 (quotation marks omitted); *see also Hampton*, 426 U.S. at 115.

Finally, Congress's admitted desire to use DOMA to express moral disapproval of gay people is important to this Court's analysis. The Court's cases in the rational basis context do not necessarily make legislators' subjective intent a dispositive criterion in evaluating whether the resulting legislation is constitutional. But neither do the cases require ignoring actual evidence of an improper legislative purpose in evaluating the credibility of *other* asserted justifications. In *Moreno*, for instance, the fact that the legislative history "indicate[d]" the measure was intended to target "hippie communes," 413 U.S. at 534, was specifically called out in the Court's analysis of whether the various other interests asserted by the government made sense. *Id.* Here, the open congressional statements of hostility against gay people should cause particular skepticism about other after-the-fact explanations BLAG has attempted to generate.

III. THE "FIT" ELEMENT OF THE RATIONAL BASIS TEST IS ATTENTIVE TO PRETEXTUAL EXPLANATIONS FOR IMPERMISSIBLE DISCRIMINATION.

Rarely is legislation enacted to disadvantage an unpopular group accompanied by admissions of the law's true purpose. Indeed, the openness with which the Congress that enacted DOMA embraced "morality" as the justification for its disparate treatment represented an unusual degree of candor. *See* Part II.C *supra.*[4]

The more normal course is for a law that improperly disadvantages a disfavored group to be accompanied by some pretense that any harm to the group is merely the incidental byproduct of some other purpose. Rational basis review does not require the Court to take such fictions at face value. To the contrary, a "court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications." *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (citing *Cleburne*, 473 U.S. at 446-47, 450, and *Moreno*, 413 U.S. at 533-36).

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[4] This candor is perhaps explained by Congress's explicit reliance on the now-overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986), which the Committee cited for the proposition that it is a "rational purpose" to "express[] the presumed belief of a majority of the electorate . . . that homosexual sodomy is immoral and unacceptable." H.R. Rep. 104-664, at 31, *reprinted in* 1996 U.S.C.C.A.N. at 2937.

Detection of such pretexts is a context-dependent inquiry that will inevitably vary with the nature of the interest asserted. However, this Court's cases invalidating measures under rational basis review have recognized certain categories of pretextual explanations that share recognizable features. First, where a measure imposes multiple and varied disadvantages on a class of persons, the disadvantages are more likely to reflect intentional harm rather than reasoned policymaking. Second, where the disadvantages imposed appear overbroad or disproportionate to the interest claimed, that again suggests that the claimed interest is pretextual. Third, where a claimed interest on its face would suggest that the majority group should also bear the same costs as the group disadvantaged, yet the costs are borne exclusively by the disfavored group, that too calls the explanation into serious question. And fourth, justifications that depend for their validity on unsupported, unfavorable factual assumptions about the disadvantaged group exceed the leeway afforded the governing branches in exercising legislative judgment. DOMA bears each and every one of these features.

A. Broad Legislation Imposing Multiple, Varied and Unrelated Disadvantages Raises an Inference that No Legitimate Policy Purpose Exists.

Particularly relevant here, *Romer* recognizes that where a law imposes a multitude of varied and seemingly unrelated disadvantages upon a disfavored group, it is likely to defy legitimate explanation. The measure in *Romer*, which repealed and prohibited further antidiscrimination ordinances protecting gay people addressing a wide variety of subjects, "identifie[d] persons by a single trait and then denied them protections across the board." *Romer*, 517 U.S. at 633. This deprivation of many different kinds of rights at the same time—addressing areas ranging from housing, real estate sales, education, and employment, to health and welfare services—caused the initiative to "def[y] . . . th[e] conventional inquiry" of rational basis review. *Id.* at 632.

The lesson from *Romer* is that as the disadvantages imposed by a classification multiply, they become much more difficult to explain as anything other than an intentional effort to burden the targeted group. To decide *Romer*, the Court did not need to determine, for instance, whether there might be some legitimate reason for Colorado to ensure uniformity in its discrimination laws pertaining to a particular area (such as employment) by preventing its localities from adopting a multitude of varying ordinances on the subject. That the initiative at issue in *Romer* also deprived gay people of antidiscrimination protections in countless other areas demonstrated that no explanation other than a desire to disadvantage this group could exist for the initiative. *Id.* at 635.

B. Burdens on the Targeted Class Disproportionate or Excessive to the Claimed Interest Suggest Pretext.

Another sign of pretextual explanations for disadvantaging a group is that the burdens borne by the group are disproportionate to the interest claimed. For instance, in *Eisenstadt*, the Court dismissed as "dubious" the purported explanation that a prohibition on distribution of contraceptives to unmarried persons furthered the goal of deterring premarital sex. 405 U.S. at 448-49. Notably, the plurality did not deny that "pregnancy and the birth of an unwanted child" could in fact operate as such a deterrent. *Id.* at 448. To the contrary, it admitted that prohibiting the distribution of contraceptives to unmarried persons was "possibl[y]. . . effective" at furthering that goal. *Id.* at 449. Yet it also observed that the penalty for violating the prohibition on distributing contraceptives was substantial relative to the comparatively minor criminal offense of extramarital sex; it was "hard to believe that the legislature adopted a statute carrying a five-year penalty for its possible, obviously by no means fully effective, deterrence of the commission of a ninety-day misdemeanor." *Id.* (quotation marks omitted). Thus, rational basis review considers not only whether there is a causal nexus between a claimed interest and a classification, but also whether the burdens of the classification are proportionate to the interests purportedly advanced—and where substantial burdens address comparatively minor issues, the Court is rightly skeptical.

C. Declining to Extend to Majority or Preferred Groups the Same Burdens Borne by the Targeted Group Undercuts the Plausibility of Explanations for Disparate Treatment.

Another indicator that a benign-sounding justification for a measure masks impermissible discrimination is when the justification on its face would suggest the extension of unfavorable treatment to a wide class of persons, including members of the majority or favored groups, but the measure has instead been drafted to force a disliked group to bear its burdens exclusively. As this Court has recognized in another context, when a law's "pattern of exemptions parallels [a] pattern of narrow prohibitions," thus confining its burdens to a narrow group, it operates as a red flag that a law is likely an intentional effort to penalize or exclude the group in question. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993).

While such laws are "underinclusive," the defect goes beyond imprecise line-drawing, which can be inevitable in run-of-the-mill legislation and is not necessarily constitutionally problematic on its own. Rather, the Court has been particularly skeptical of those underinclusive measures where the majority has exempted itself from the very unfavorable consequences claimed as necessary to the achievement of the government policy.

Cleburne and *Eisenstadt* are instructive. In *Cleburne*, the city cited a number of policies related to residential density to defend the zoning ordinance requiring a special use permit for the group home for people with mental disabilities. *Cleburne*, 473 U.S. at 449-50. Yet at the same time, the ordinance required no similar permit for other group living arrangements causing the same density issues, such as "apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged," thus demonstrating that those claimed policy interests—although legitimate in the abstract—could not explain or justify the ordinance. *Id.* at 447.

Likewise, in *Eisenstadt*, although unmarried persons were prohibited certain contraceptives, married couples could obtain them "without regard to their intended use." 405 U.S. at 449. Given those circumstances, the "deterrence of premarital sex [could not] reasonably be regarded" as the purpose of keeping contraceptives from unmarried persons because the law did not "deter married persons from engaging in illicit sexual relations" using contraceptives they could legally acquire under the same statute. *Id.*

To be sure, there are cases in which the government must inevitably extend favorable treatment to some and deny it to others, such as to determine eligibility for particular governmental benefits that by necessity cannot be extended to everyone, or to define the class of entities subject to regulatory requirements that by necessity cannot apply to everyone. *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993) (cable franchise exemptions); *Schweiker v. Wilson*, 450 U.S. 221 (1981) (Social Security benefits); *Mathews v. Diaz*, 426 U.S. 67 (1976) (Medicare eligibility).[5] Because the exclusion of some classes of persons is inherent in the nature of this project, preferential treatment for some (and leeway to draw the resulting categories) does not necessarily raise an inference of improper purpose. But as *Moreno* demonstrates, that does not exempt from equal protection review instances where already-existing eligibility criteria are affirmatively altered for the purpose of excluding similarly situated persons from benefits to which they would otherwise qualify. And where a majority simply exempts itself entirely from the same burdens a policy would appear to require if taken at face value, as in *Cleburne* and *Eisenstadt*, the Court has found special skepticism warranted.

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[5] Although BLAG also cites *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974), for the proposition that the government receives substantial deference in "determinations of who or what constitutes a family," BLAG Br. at 29, the case does not stand for that proposition. It simply upheld an exemption for related persons from a zoning ordinance prohibiting more than two persons from sharing a residence. Moreover, insofar as the justification proffered in *Belle Terre* was density-related, yet the challenged zoning ordinance conferred special privileges on related persons by exempting them from the ordinance's density limitation on dwellings occupied by unrelated persons, it is not at all clear that *Belle Terre* remains good law after *Cleburne*.

D. Factual Justifications for Disparate Treatment Cannot Be Imaginary.

This Court's cases also recognize that justifications for impermissible laws can take the form of hypothesizing an alternate set of factual circumstances under which the law might advance some legitimate purpose. While the Court does not subject the lawmaking process to judicial standards of proof, and provides leeway for legislators to make reasonable predictions and judgments about unknown facts, it does not permit "facts" simply to be invented, or declared by fiat, to justify a law that would otherwise appear impermissible. As the Court put it, "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993); *accord Romer*, 517 U.S. at 632-33 (classification must be "grounded in a sufficient factual context for [the Court] to ascertain some relation between the classification and the purpose it serve[s]").

Heller itself is an example. In affirming Kentucky's differential legal standards for involuntary commitment as between persons with mental retardation and persons with mental illness, the Court did not merely rely on the state's assertion, or guesswork, that the two groups bore real differences relevant to the classification. The Court did not simply allow Kentucky to speculate that mental retardation is more likely to manifest itself earlier, and be easier to diagnose, than mental illness. Instead, it relied upon a long list of diagnostic manuals and journals to itself determine that Kentucky had legislated on the basis of reasonably conceivable facts and not stereotypes or misunderstandings. *See Heller*, 509 U.S. at 321-25.

Conversely, when unsupported and implausible factual assertions have been utilized in defense of discriminatory legislation, particularly where such assertions make unfavorable and unsupported judgments about the disadvantaged class, the Court has not been hesitant to disregard such assertions as false. Thus, in *Moreno*, the Court carefully scrutinized and rejected the government's claim that the law was justified because the targeted households of unrelated persons might be "relatively unstable," and also more likely to include individuals inclined to commit fraud. 413 U.S. at 534-35. Finding the government's explanations "wholly unsubstantiated," the Court held there was no rational basis for the status-based ban and struck it down. *Id.* at 535.[6] Thus, while not holding Congress to judicial standards of proof that persons in unrelated households were more likely to commit fraud or present instability that might undermine the purposes of the program, the Court did not treat unsupported, disparaging stereotypes of persons in such homes as sufficient to justify the discriminatory treatment.

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[6] BLAG characterizes *Moreno* as rejecting an asserted interest in fraud prevention because the rules were susceptible to circumvention by persons determined to commit fraud. BLAG Br. 23 n.5. While this was among the Court's considerations, it was by no means the only one. It also observed that the Government was making "wholly unsubstantiated assumptions concerning the differences between 'related' and 'unrelated' households," and that there were independent statutory provisions designed to address fraud, which "casts considerable doubt upon the proposition that [the classification] could

Cleburne is likewise instructive. There, the Court dismissed any suggestion that the density-related concerns that supposedly justified the zoning scheme applied any differently to persons with mental disabilities than to other persons in similarly dense housing conditions. *Cleburne*, 473 U.S. at 449-50. Rather, it recognized that those concerns reflected no more than "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable" in a legislative determination, and refused to accept them. *Id.* at 448.

E. DOMA Bears All the Classic Indicia of Pretextual Discrimination.

DOMA triggers the very same constitutional concerns regarding the nexus between its stated rationales and actual operation that have caused this Court to strike down other measures under rational basis review. Indeed, to the extent any of BLAG's claimed rationales for DOMA survive the "legitimacy" element of the rational basis test, *see* Part II.C *supra*, they fail the "fit" element as discussed below.

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rationally have been intended to prevent those very same abuses." *Moreno*, 413 U.S. at 535, 536-37.

First, like the measure in *Romer*, DOMA imposes disadvantages on gay people that are so broad, and so varied, as to defy any credible connection to a legitimate purpose. DOMA amended well over a thousand federal laws and regulations dealing with such disparate subjects as tax policy, federal employee benefits, rights under private pension plans, protections under the Family Medical Leave act, rights to invoke spousal privilege in federal court, copyright law, bankruptcy proceedings, and conflict-of-interest rules.[7] It is impossible to see what any of these disparate laws and regulations have in common other than that Congress chose, in DOMA, to subject gay people to different treatment under each of them. The sheer number and variety of policies affected renders highly implausible any assertion that some real federal policy objective lay behind DOMA other than impermissibly to symbolize the federal government's condemnation of married same-sex couples.

Second, and relatedly, DOMA suffers from difficulties of proportionality and overbreadth relative to its stated rationales, similar to the measures at issue in cases such as *Eisenstadt* and *Romer*. It is unnecessary to consider whether a claimed interest in encouraging heterosexual child-rearing, for instance, might justify some differential treatment among same-sex and heterosexual couples. *See* BLAG Br. at 44-48. Nor is it necessary to decide whether some federal classification might be defended on the basis of an interest in creating "uniformity" so as to avoid the claimed administrative difficulty of determining eligibility for any particular federal program in the event a married same-sex couple relocates to another state. *See* BLAG Br. at 33-34. While *Amici* fully agree with Ms. Windsor that these purported rationales have no merit, *see* Windsor Merits Brief at Part II.B.2, *see also Hampton*, 426 U.S. at 115 (rejecting administrative convenience rationale for discrimination in federal employment context because Court could not "reasonably infer" that the administrative work avoided by the measure was "particularly onerous task"), it is unnecessary to answer either question because the disadvantages DOMA heaps upon married same-sex couples are vastly out of proportion to, and in many cases entirely unrelated to, those claimed objectives.

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[7] *See* U.S. Gen. Accounting Office, Office of Gen. Counsel, GAO/OCG-97-16, Defense of Marriage Act (1997), *available at* http://www.gao.gov/archive/1997/og97016.pdf; U.S. Gen. Accounting Office, GAO-04-353R, Defense of Marriage Act: Update to Prior Report (2004), *available at* http://www.gao.gov/new.items/d04353r.pdf.

Third, like the measures at issue in *Cleburne* and *Eisenstadt*, many of the rationales asserted on behalf of DOMA would, if taken at face value, counsel equally in favor of extending the unfavorable treatment beyond the targeted group to members of the majority. For instance, rationales concerning a supposed federal policy to encourage unexpectedly expectant parents to marry, or a supposed federal policy to encourage child-rearing by heterosexual couples, logically apply only to a subset of those couples—unwed couples who become pregnant by accident. The extension of the full panoply of federal marital rights and benefits to the much wider class of married heterosexual couples upon whom the states have conferred the right to marry undercuts the claimed nexus between that asserted policy objective and DOMA. The "purported justifications for the [statute] ma[k]e no sense in light of how the [government] treat[s] other groups similarly situated in relevant respects," *Garrett*, 531 U.S. at 366 n.4 (citing *Cleburne*), and the law is "so riddled with exceptions that" the claimed purpose "cannot reasonably be regarded as its aim." *Eisenstadt*, 405 U.S. at 449.

In the same vein, a claimed policy interest in achieving "uniformity" in the treatment of all same-sex couples (whether married or not) to spare the federal government the supposed difficulties of discerning the marital status of couples whose marriages might be recognized in some jurisdictions but not others, *see* BLAG Br. at 33-37, loses force when comparably situated heterosexual couples (such as those in common-law marriages) are not asked to bear the same burden.[8] Likewise, a purported interest in sparing the public fisc the expense of federal marital benefits, *see* BLAG Br. at 37-41, cannot justify denying benefits only to the far smaller set. of same-sex married couples while granting them to different-sex couples. The systematic misalignment between these claimed policies and the actual rule assigned by DOMA suggests that the exclusion of same-sex couples from federal marital rights and protections was the purpose, not the side effect, of the statute.

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[8] The legitimacy of this rationale is suspect as well. Colorado could have made the identical argument in *Romer*, and contended that it had an interest in ensuring that antidiscrimination laws remain "uniform" throughout the state such that landlords, employers, and operators of public accommodations not be subject to varying antidiscrimination standards from municipality to municipality (and such that gay people in some parts of Colorado not enjoy different legal protections than those in other parts of the state). *Romer* nowhere suggests that the initiative could rationally have been defended on this basis. In addition, given that the federal government does not treat all heterosexual couples the same

Finally, as with the federal statute at issue in *Moreno*, some purported defenses of DOMA rely on disparaging and unsupported factual assumptions that suggest an absence of reasoned contemplation or a deliberate ignorance about the group being targeted. Hypotheses that same-sex couples make poor parents whose marriages should be discouraged by penalizing them under federal law reflect disparaging and unsupported views about a disliked group that cannot pass for reasoned legislative judgment. This Court's jurisprudence does not allow such disparaging hypotheses simply to be invented, and then used as support for discriminatory measures that cannot stand without them.

(but in fact does the opposite, by affording rights and privileges to married couples not afforded to unmarried heterosexual couples), it is not at all clear why there should be a federal interest in treating all same-sex couples the same irrespective of whether they are married or unmarried.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Nos. 12-144, 12-307

IN THE
Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL., *Petitioners*,

v.

KRISTIN M. PERRY, ET AL., *Respondents*.

UNITED STATES, *Petitioner*,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Ninth and Second Circuits

AMICI CURIAE BRIEF OF ROBERT P. GEORGE, SHERIF GIRGIS, AND RYAN T. ANDERSON IN SUPPORT OF HOLLINGSWORTH AND BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS AND SUPPORTING REVERSAL

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QUESTIONS PRESENTED

Hollingsworth, et al. v. Perry, et al.

1. Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.

United States v. Windsor, et al.

1. Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. At stake in DOMA and Proposition 8 is the definition of marriage. 5

II. It is reasonable to affirm that marriage is a union of man and woman. 7

III. The conjugal view explains and serves the state's interest in marriage. 10

IV. Redefining marriage would not extend its stabilizing norms, but undermine them across society. 15

   A. If sexual complementarity is merely incidental to marriage, then so are other marital norms, including permanence, monogamy, exclusivity, and even sexual union. 16

   B. Promoting the revisionist vision of marriage makes conjugal union harder to live out. 17

C. By obscuring the rational basis of the stabilizing norms of marriage, redefining marriage would increase marital instability, harming spouses and children. 19

D. Redefining marriage would obscure the distinctive contributions of mothers and fathers and the importance of biological parents generally, to children's detriment. 20

E. Many LGBT activists agree—even embrace the result—that eliminating the norm of sexual complementarity will weaken other norms of marriage. 23

F. Preliminary social science, too, suggests that opposite-sex and same-sex relationships tend to follow different norms. 27

V. Beyond weakening marriage and its stability, enshrining the revisionist view would burden rights of conscience. 30

VI. It is rationally consistent for the state to recognize infertile opposite-sex couples but not same-sex couples. 32

1. Infertile conjugal unions are still true marriages 33

2. Recognizing infertile conjugal unions has none of the costs of redefining marriage. 33

3. Recognizing such unions has many of the benefits of recognizing fertile unions. 34

4. Recognizing such unions has at least one additional benefit. 34

VII. Upholding DOMA and Proposition 8 is fully consistent with this Court's ruling in *Lawrence v. Texas*. 35

A. The majority opinion and concurrence in Lawrence are consistent with upholding Proposition 8 and DOMA. 35

B. The Lawrence dissent should not be construed to suggest that Lawrence creates a constitutional right to state or federal recognition of same-sex bonds as marriages. 38

CONCLUSION 39

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INTEREST OF AMICI[1]

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Amici have studied and published on the moral, political, and jurisprudential implications of redefining marriage to eliminate the norm of sexual complementarity and have expertise that would benefit this Court. Their article, "What Is Marriage?" appeared in the *Harvard Journal of Law and Public Policy*. Their book, *What Is Marriage? Man and Woman: A Defense,* further develops their philosophic defense of marriage as a conjugal union. This brief is being filed with the parties' consent.

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[1] The parties have issued letters consenting to the filing of this brief, which are being contemporaneously filed with the Clerk of the Court. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no counsel for a party or party made any monetary contribution intended to fund the preparation or submission of this brief. Printing costs for the brief were paid for by The Witherspoon Institute.

SUMMARY OF ARGUMENT

At stake in these cases is not who is and is not eligible to marry but what marriage is. Today's debates offer rival answers to that question, two substantive marriage definitions. This Court's task is not to judge the desirability of the Defense of Marriage Act ("DOMA") and California Proposition 8's definition, but only to decide whether citizens and legislators may embody in law the belief in marriage as a conjugal union, as they have historically done.

There are excellent reasons from philosophy and social science to think that marriage is a conjugal relationship—the type of union that only a man and woman can form—rather than just the sort of emotional union that any two (or more) adults can form. And recognizing marriage as such serves important public interests.

Indeed, the most important free community, on which all others depend, is the marriage-based family. But to thrive, it requires a supporting framework of understandings and expectations. A main purpose of marriage law in any society is to promote such a culture. Sound marriage policy therefore serves the common good (especially the institutions of civil society) and helps keep government limited.

Redefining civil marriage can cause corresponding social harms. It weakens the rational foundation (and hence social practice) of the stabilizing marital norms on which social order depends: norms such as permanence, exclusivity, monogamy. Conferring benefits on same-sex relationships itself does not do this, but *redefining marriage in the public mind* does. And undermining the norms of marriage will in turn damage the many cultural and political goods that draw the law into the marriage business. We list them in summary form here.

Real marital fulfillment. To form a true marriage, one must freely choose it, which requires at least a rough idea of what it actually is. Redefining marriage will harm people (especially future generations) by distorting their idea of what marriage is. It will teach that marriage is essentially about emotional fulfillment, without any inherent connections to bodily union or procreation and family life. As people internalize this view, their ability to realize genuine marital union will diminish.

Child and spousal well-being. Marriage tends to make spouses healthier, happier and wealthier. And it is marriage itself—conjugal marriage—that does this, especially through its distinctive norms of permanence, exclusivity and orientation to family life. As the state's redefinition of marriage makes these norms harder to understand, cherish, justify and live by, spouses will benefit less from the advantages of stability.

Moreover, if marriage is redefined, no civil institution will reinforce the notion that men and women tend to bring different gifts to child-rearing. In all these ways, redefinition will lower the pressures and incentives for men and women to stay with their spouses and children, or for couples to marry before conceiving. This would harm children's development as children do best when raised by their married biological mother and father. The welfare and correctional state will have to expand to fill the developmental vacuum.

Leading LGBT scholars and activists increasingly agree that redefining marriage would undermine its norms.

Religious liberty. If marriage understood as the union of man and woman comes to be seen as irrational ("bigotry"), freedom to express and live by this idea will be eroded. Individuals and institutions who espouse the conjugal view have been denied government licenses, or educational and professional opportunities, for living by (or even publicizing) their views. The consequences for observant Christians, Jews, Muslims and others are clear.

Moreover, none of these harms is caused by recognizing infertile (opposite-sex) marriages, which cohere with the conjugal view. And finally, enshrining this view of marriage in law is fully consistent with this Court's ruling in *Lawrence v. Texas*.

Because there are good reasons for citizens and lawmakers to conclude that marriage is a union of man and woman—even before considering the harms that redefinition might bring—this Court should uphold DOMA and Proposition 8 as constitutional exercises of policy-making power by Congress and the citizens of California, respectively.

ARGUMENT

I. At stake in DOMA and Proposition 8 is the definition of marriage.

What we have come to call the gay marriage debate is not a debate about homosexuality, but about marriage. It is not about whom to treat as eligible to marry, but about what marriage is. It marks a pivotal stage in a decades-long struggle between two views of the meaning of marriage.

The *conjugal* view of marriage has long informed the law—along with the literature, art, philosophy, religion, and social practice—of our civilization. Marriage so understood is a *comprehensive* union: Joining spouses in body as well as in mind, it is begun by commitment and sealed by sexual intercourse. So completed in the acts by which new life is made, it is especially apt for and deepened by procreation, and calls for that broad sharing uniquely fit for family life. Uniting spouses in these all-encompassing ways, it calls for all-encompassing commitment: permanent and exclusive. Comprehensive union is valuable in itself, but its link to children's welfare makes marriage a public good that the state should recognize and support.

A *revisionist* view has informed certain marriage policy changes of the last several decades. On the revisionist understanding, marriage is essentially an emotional union, accompanied by any consensual sexual activity. Such romantic unions are seen as valuable while the emotion lasts.

The revisionist view informs some male-female bonds, not just same-sex ones. But it brooks no real difference between the two: both involve intense emotional bonding, so both can (on this view) make a marriage. But comprehensive union is something only a man and woman can form.

For this reason, enacting same-sex marriage would not expand the institution of marriage, but redefine it. Finishing what policies like "no-fault" divorce began, and thus entrenching them, it would finally replace the conjugal view with the revisionist. This would multiply the marriage revolution's moral and cultural spoils, and make them harder than ever to recover.

There is therefore no direct line from the principle of equality, to redefining marriage to exclude the norm of sexual complementarity. Equality requires treating like cases alike. To know what counts as "alike," we have to know what marriage is and how recognizing it helps society.

And because any marriage policy enshrines *some* view of what marriage is—the conjugal, revisionist, or another—no marriage policy is neutral. Each relies on controversial judgments.

Yet in the cases at hand, the Court is charged with judging not the *soundness* of either view, but only whether the conjugal view has a rational basis.

What we show is that citizens have excellent reasons to affirm that view, and that redefining civil marriage to exclude the norm of sexual complementarity can be expected to cause social harm. The first point alone is sufficient to show a rational basis for DOMA and Proposition 8; the second only reinforces this.

II. It is reasonable to affirm that marriage is a union of man and woman.

Any community is created by common action—by certain activities, defined by common goods, in the context of commitment. The activities and goods build up the bond, and determine the commitment it requires.

For example, a scholarly community exists whenever people commit to cooperate in activities ordered toward gaining knowledge. These activities and the truths they uncover build up their bond, and determine the sort of commitment (to academic integrity) that they owe each other.

The kind of union created by *marriage* is uniquely *comprehensive* in just these ways: in (a) how it unites persons, (b) what it unites them with respect to, and (c) how extensive a commitment it demands.

It unites two people (a) in their most basic dimensions, in mind *and* body; (b) with respect to procreation, family life, and its broad domestic sharing; and (c) permanently and exclusively.[2]

First, marriage unites persons in their *bodies* as well as their minds. The bodily union of two people is much like the bodily union of organs in an individual. Just as one's organs form a unity by coordinating for the biological good of the whole (one's survival), so the bodies of a man and woman form a unity by coordination (coitus) for a biological good (reproduction) of their union as a whole. In choosing such biological coordination, spouses unite bodily, and do not merely touch or interlock, in a way that has generative significance. This generative kind of act physically embodies their specific, marital commitment. Non-marital bonds are, by contrast, unions of heart and minds, but not bodies.

Second, marriage is oriented to procreation, family life, and thus a comprehensive range of goods. Why? The kind of act that makes marital love is also the one that makes new life: new participants in *every* type of good. Having committed to sharing in the generative acts that unite them organically (as "one flesh"), spouses cooperate in other areas of life (intellectual, recreational, etc.) in the broad sharing uniquely apt for fostering children's all-around development. Ordinary friendships—the unions of hearts and minds embodied in conversations and various joint pursuits—can have more limited and variable scope.

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[2] We expand on this argument about marriage in our book, chapter 2 "Comprehensive Union."

Third, in view of its comprehensiveness in these other senses, marriage inherently calls for comprehensive commitment: permanence and exclusivity. Like the union of organs into one healthy whole organism, marriage is properly total and lasting for the life of the parts. (Indeed, comprehensive union can be achieved *only* by two people, because no act can organically unite three or more people bodily.)

Again, marriage is uniquely apt for having and rearing children, an inherently open-ended task calling for unconditional commitment. So its norms fittingly create the stability and harmony suitable for rearing children. Sociology and common sense agree that such stability is undermined by divorce, which deprives children of an intact biological family, and by infidelity—which betrays and divides one's attention to spouse and children, often with children from other couplings.

Indeed, only the conjugal view explains why spouses should pledge *sexual* exclusivity at all. If instead marriage is essentially an emotional union, this is hard to explain. After all, sex is just one of many pleasing activities that foster tenderness, and for some partners, sexual "openness" is regarded as fostering deeper and longer-lasting emotional union. But the conjugal view is not arbitrary in picking out sexual activity as central to exclusivity, since it distinguishes marriage by the type of cooperation, defined by the common ends, that it involves: bodily union and its natural fulfillment in children and family life.

While people in other bonds may wish for, promise, and live out permanent sexual exclusivity, only marriage, understood as a conjugal union, objectively requires such a commitment if it is to be realized fully. Only in conjugal marriage is there a principled basis for these norms apart from what spouses happen to prefer. As we show below (Part IV) this is borne out by reasoned reflection, revisionists' own arguments, the progress of recent policy proposals, and preliminary social science.

Because the conjugal view best explains the other norms of marriage, citizens and lawmakers have excellent reasons to affirm it.

III. The conjugal view explains and serves the state's interest in marriage.

Why does the state recognize marriage but not other close bonds? It has an interest in supporting the stabilizing norms of marriage because marriage is uniquely apt for family life. Only male-female sexual relationships produce new human beings—highly dependent people who have the best chance of reaching maturity and contributing socially when reared by their own committed mother and father. But family stability does not happen by chance. It requires a strong marriage *culture*: norms meant to guide people's choices toward their (and others') long-term interests.

As the eminent social scientist James Q. Wilson wrote, "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."[3] The law addresses this problem by shaping what people think marriage is—and thus how they act ***toward and within*** marriage. In so doing, it vindicates a *right*—children's right to know their own mother and father's committed love. It also limits the impact of negative externalities on innocent parties, for a culture shaped by large numbers of failed marriages and out-of-wedlock births burdens all with a train of social pathologies, and increase demand for policing and state-provided social services.

Studies that control for other factors, including poverty, show that children reared in intact homes do best on the following indices:[4]

- *Educational achievement:* literacy and graduation rates
- *Emotional health:* rates of anxiety, depression, substance abuse, and suicide
- *Familial and sexual development:* strong sense of identity, timing of onset of puberty, rates of teen and out-of-wedlock pregnancy, and rates of sexual abuse
- *Child and adult behavior:* rates of aggression, attention deficit disorder, delinquency, and incarceration

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[3] James Q. Wilson, *The Marriage Problem: How Our Culture Has Weakened Families* 41 (New York: HarperCollins 2002).

[4] For the relevant studies, see *Marriage and the Public Good: Ten Principles* 9–19 (Princeton, N.J.: The Witherspoon Institute 2008), http://www.winst.org/family_marriage_and_democracy/WI_Marriage.pdf.

Consider the conclusions of the left-leaning research institution Child Trends:

> [R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents. . . . [I]t is not simply the presence of two parents, . . . but the presence of *two biological parents* that seems to support children's development.[5]

Several other literature reviews corroborate the importance of intact households for children.[6]

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[5] Kristin Anderson Moore, Susan M. Jekielek, & Carol Emig, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do about It?*, Child Trends Research Brief 1–2 (June 2002), http://www.childtrends.org/files/MarriageRB602.pdf.

[6] See Sara McLanahan, Elisabeth Donahue, & Ron Haskins, *Introducing the Issue*, Future Children, Fall 2005, at 3-12, *available at* http://futureofchildren.org/futureofchildren/publications/docs/15_02_01.pdf; Mary Parke, *Are Married Parents Really Better for Children?: What Research Says about the Effects of Family Structure on Child Well- Being*, CLASP Policy Brief no. 3 (May 2003), *available at* http://www.clasp.org/publications/Marriage_Brief3.pdf; W. Bradford Wilcox, William J. Doherty, Helen Fisher, et al., *Why Marriage Matters: Twenty-Six Conclusions from the Social Sciences* (New York:

A second public benefit of marriage is its tendency to help spouses financially, emotionally, physically, and socially. After marrying, for example, men tend to spend more time at work, less time at bars, more time at religious gatherings, less time in jail, and more time with family.[7] Yet as we show below (Part V), it is the conjugal understanding of marriage that makes sense of these stabilizing norms and supports them in practice; attempting to spread them by replacing that understanding of marriage with a competing vision is likely to have just the opposite effect.

Third, given the economic benefits of marriage, marriage decline most hurts the least well-off—especially lower-income communities, as Kay Hymowitz argues in *Marriage and Caste in America*.[8] In fact, a leading indicator of whether someone will know poverty or prosperity is whether she knew growing up the love and security of her married mother and father.

Finally, since a strong marriage culture is good for children, spouses, indeed our whole economy, and

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Institute for American Values, 2nd ed. 2005), *available at* http://americanvalues.org/pdfs/why_marriage_matters2.pdf.

[7] Steven Nock, *Marriage in Men's Lives* (New York: Oxford University Press 1998). Nock is discussing marriages in the traditional sense: the union of husband and wife.

[8] Kay S. Hymowitz, *Marriage and Caste in America: Separate and Unequal Families in a Post-Marital Age* (Chicago: Ivan R. Dee 2006). See also W. Bradford Wilcox, *The Evolution of Divorce*, *National Affairs*, Fall 2009, at 81, 88–93, *available at* http://www.nationalaffairs.com/doclib/20091229_Wilcox_Fall09.pdf.

especially the poor, it also serves the cause of limited government. Where marriages never form or easily break down, the state expands to fill the domestic vacuum by lawsuits to determine paternity, visitation rights, child support, and alimony; and by increased policing and social services. Sociologists David Popenoe and Alan Wolfe's research on Scandinavian countries shows that as marriage culture declines, the size and scope of state power and spending tend to grow.[9]

In fact, a study by the Left-leaning Brookings Institution finds that $229 billion in welfare expenditures between 1970 and 1996 can be attributed to the breakdown of the marriage culture and the resulting exacerbation of social ills: teen pregnancy, poverty, crime, drug abuse, and health problems.[10] A 2008 study found that divorce and unwed childbearing cost taxpayers "*at least* $112 billion" each year.[11] And Auburn University scholar David Schramm has estimated that divorce alone costs local, state, and federal government $33 billion each year.[12]

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[9] David Popenoe, *Disturbing the Nest: Family Change and Decline in Modern Societies* xiv–xv (New York: A. de Gruyter 1988); Alan Wolfe, *Whose Keeper? Social Science and Moral Obligation* 132–42 (Berkeley: University of California Press 1989).

[10] Isabel V. Sawhill, *Families at Risk*, *in Setting National Priorities: The 2000 Election and Beyond* 97, 108 (Henry J. Aaron & Robert D. Reischauer eds., Washington, D.C.: Brookings Institution Press 1999); see also *Marriage and the Public Good*, *supra* note 4, at 15.

[11] Benjamin Scafidi, *The Taxpayer Costs of Divorce and Unwed Childbearing: First-Ever Estimates for the Nation and for All Fifty States* 5 (New York: Institute for American Values 2008), http://www.americanvalues.org/pdfs/COFF.pdf (emphasis in original).

In short, several aspects of the common good depend on a strong marriage culture.

IV. Redefining marriage would not extend its stabilizing norms, but undermine them across society.

Redefining civil marriage will obscure the true nature of marriage as a conjugal union and undermine the rational basis of marital norms, and hence eventually adherence to them. This in turn will harm spouses, children, and others. Our arguments in this Part depend on three simple ideas:

1. Law tends to shape beliefs.
2. Beliefs shape behavior.
3. Beliefs and behavior affect human interests and human well-being.

In discussing harms, we do not propose changing the controlling constitutional standard, under which Proposition 8 and DOMA are valid if they rationally advance legitimate ends. For that standard, harms (whether to those affected by the legal distinction or by its removal) are strictly beside the point. We discuss them here because they *reinforce* the sufficient reasons already discussed in previous Parts for holding, and legally enshrining, the conjugal view.

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[12] David G. Schramm, *Individual and Social Costs of Divorce in Utah*, 27 J. Fam. & Econ. Issues 133, 146 (2006).

A. If sexual complementarity is merely incidental to marriage, then so are other marital norms, including permanence, monogamy, exclusivity, and even sexual union.

Some argue that redefined marriage would only spread stability. But there is nothing magical about the word "marriage" that promotes marital norms, however applied. Rather, the law encourages these norms by promoting an understanding of marriage that justifies them as a coherent whole.

Yet marital norms make no sense as requirements of *principle* and not mere subjective preferences, if marriage is just whatever same- and opposite-sex couples can have in common, namely, intense emotional regard. There is no reason of *principle* why emotional union should be permanent. Or limited to two persons, rather than including larger ensembles. Or sexually exclusive, rather than "open." Or sexual at all, rather than integrated around other activities (say, where sex is legally impermissible, as between relatives). Or inherently oriented to family life and shaped by its demands. Couples may live out these norms where temperament or taste motivates them, but there is no reason of principle for them to do so, and no basis for using the law to encourage them to do so.

In other words, if sexual complementarity is optional for marriage, present only where preferred, then so is almost every other norm that sets marriage apart. If conjugal marriage laws unjustly "discriminate" against same-sex relationships because the latter can have loving emotional bonds, then we must be unjust in excluding people in polyamorous (multiple-partner) emotional bonds. As a logical matter, sexual complementarity and other historic norms of marriage rise or fall together.

B. Promoting the revisionist vision of marriage makes conjugal union harder to live out.

No one acts in a void. We all take cues from cultural norms, shaped by the law. For the law affects our ideas of what is reasonable and appropriate. Prominent Oxford philosopher Joseph Raz, who does not share the conjugal view, explains the inevitable and sweeping consequences of changing marriage laws:

> [O]ne thing can be said with certainty [about recent changes in marriage law]. They will not be confined to adding new options to the familiar heterosexual monogamous family. They will change the character of that family. If these changes take root in our culture then the familiar marriage relations will disappear. They will not disappear suddenly. Rather they will be transformed into a somewhat different social form, which responds to the fact that it is one of several forms of bonding, and that bonding itself is much more easily and commonly dissoluble. All

> these factors are already working their way into the constitutive conventions which determine what is appropriate and expected within a conventional marriage and transforming its significance.[13]

Redefining civil marriage would change its meaning *for everyone*. Legally recognized opposite-sex unions would increasingly be defined by what they had in common with same-sex relationships.

This change would make marriage itself, the human good, harder to achieve. For one can realize marriage only by choosing it; and one can choose it only if one has at least a rough idea of what it really is. By altering the fundamental understanding of marriage, the revisionist proposal would make people less capable of realizing this basic way of thriving.[14] People forming what the state calls "marriage" would increasingly be forming bonds that merely resembled the real thing in certain ways, as a contractual relationship might resemble a friendship. The revisionist view would distort their priorities, actions, even motivations, in ways detrimental to true marriage.

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[13] Joseph Raz, *Autonomy and Pluralism*, *in The Morality of Freedom* 393 (Oxford: Clarendon Press 1988).

[14] Patrick Lee, Robert P. George, & Gerard V. Bradley, *Marriage and Procreation: Avoiding Bad Arguments*, *Public Discourse*, March 30, 2011, http://www.thepublicdiscourse.com/2011/03/2637.

C. By obscuring the rational basis of the stabilizing norms of marriage, redefining marriage would increase marital instability, harming spouses and children.

Permanence and exclusivity—the rational basis, and internal and social motivations to live them out—depend on the conjugal understanding (Part III). By the same token, these norms are undermined by the revisionist view (Part IV.A). Yet law affects behavior. So as more people absorb the new law's message, we can reasonably expect marriages to take on still more of emotion's inconstancy.[15]

Because there is no *reason* that emotional unions—any more than the emotions that define them, or friendships generally—should be permanent or limited to two, these norms of marriage would make less sense. People would thus feel less bound to live by them whenever they simply preferred to live otherwise. And, being less able to understand the value of marriage itself as a certain sort of union, even apart from its emotional satisfactions, they would miss the reasons they had for marrying or staying with a spouse as feelings waned, or waxed for others.[16]

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[15] See also Andrew J. Cherlin, *The Marriage-Go-Round: The State of Marriage and Family in America Today* (New York: Knopf 2009), for a discussion of the link between the rise of expressive individualism and the divorce revolution.

[16] See, e.g., W. Bradford Wilcox & Jeffrey Dew, *Is Love a Flimsy Foundation? Soulmate versus Institutional Models of Marriage*,

But children and spouses benefit in many concrete material ways from the stability of marriage (Part IV). Thus, the many concrete interests of spouses and children that justify recognizing marriage at all, count against redefining it.

D. Redefining marriage would obscure the distinctive contributions of mothers and fathers and the importance of biological parents generally, to children's detriment.

Conjugal marriage laws reinforce the idea that a conjugal union is, on the whole, the most appropriate environment for rearing children, as the best available social science suggests.

Recognizing same-sex relationships as marriages would legally abolish that ideal. No civil institution would reinforce the notion that men and women typically have different strengths as parents; that boys and girls tend to benefit from fathers and mothers in different ways. Indeed, our law, public schools, and media would teach that mothers and fathers are fully interchangeable, and that only bigots think otherwise (Part VI.C).

And here is the central problem with that: it would diminish the social pressures and incentives for husbands to remain with their wives and

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39 Soc. Sci. Res. 687, 687-699 (2010). For research showing that same-sex unions tend more often to eschew sexual exclusivity, see Scott James, *Many Successful Gay Marriages Share an Open Secret*, N.Y. Times, Jan. 28, 2010, *available at* http://www.nytimes.com/2010/01/29/us/29sfmetro.html?ref=us.

biological children, or for men and women having children to marry first. Yet the resulting arrangements—parenting by divorced or single parents, or cohabiting couples; and disruptions of any kind—*are* demonstrably worse for children. So *even if it turned out that studies showed no differences between same- and opposite-sex adoptive parenting*, redefining marriage would destabilize marriage in ways that we know hurt children.

That said, there is significant evidence that mothers and fathers have different parenting strengths—that their respective absences impede child development in different ways. Girls, for example, are likelier to suffer sexual abuse and to have children as teenagers and out of wedlock if they do not grow up with their father.[17] For their part, boys reared without their father tend to have much higher rates of aggression, delinquency, and incarceration.[18]

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[17] Sara McLanahan & Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* (Cambridge, Mass.: Harvard University Press 1994); Bruce J. Ellis, John E. Bates, Kenneth A. Dodge, et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 Child Dev. 801, 801-21 (2003); Wilcox, Doherty, Fisher, et al., Why Marriage Matters, *supra* note 6, (cited in chap. 3, n. 11); Lorraine Blackman, Obie Clayton, Norval Glenn, et al., *The Consequences of Marriage for African Americans: A Comprehensive Literature Review* (New York: Institute for American Values 2005).

[18] Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, Future Children, Fall 2005, at 75, 75–96, *available at* http://futureofchildren.org/futureofchildren/publications/docs/15_02_05.pdf; Cynthia C. Harper & Sara S. McLanahan,

As Rutgers University sociologist David Popenoe concludes, social science evidence suggests "that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is [...] irreplaceable."[19] He continues: "The two sexes are different to the core, and each is necessary—culturally and biologically—for the optimal development of a human being."[20]

In a summary of the "best psychological, sociological, and biological research to date," University of Virginia sociologist W. Bradford Wilcox finds that on the whole, "men and women bring different gifts to the parenting enterprise, that children benefit from having parents with distinct parenting styles, and that family breakdown poses a serious threat to children and to the societies in which they live."[21]

In short: it is at least reasonable to fear that redefining civil marriage would make it more socially acceptable for fathers to leave their families, for unmarried parents to put off firmer public commitment, or for children to be created for a household without a mother or father. But whatever

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Father Absence and Youth Incarceration, 14 J. Res. on Adolescence 369–97 (2004).

[19] David Popenoe, *Life without Father: Compelling New Evidence That Fatherhood and Marriage Are Indispensable for the Good of Children and Society* 146 (New York: Free Press 1996).

[20] *Id.* at 197.

[21] W. Bradford Wilcox, *Reconcilable Differences: What Social Sciences Show about the Complementarity of the Sexes and Parenting*, Touchstone, November 2005, at 32, 36.

the cause, there will be a cost to depriving children of the love and knowledge of their married mother and father.[22]

E. Many LGBT activists agree—even embrace the result—that eliminating the norm of sexual complementarity will weaken other norms of marriage.

The point that the revisionist view erodes the basis for permanence and exclusivity in *any* relationship is increasingly confirmed by the rhetoric and arguments of revisionists themselves, by the policies that they are increasingly led to embrace, and even by preliminary social science.

University of Calgary philosophy professor Elizabeth Brake, for example, supports "minimal marriage," in which "individuals can have legal marital relationships with more than one person, reciprocally or asymmetrically, themselves determining the sex and number of parties, the type of relationship involved, and which rights and responsibilities to exchange with each."[23]

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[22] Of course, the question of which arrangements our policies should privilege is normative; it cannot be settled by the cause-and-effect descriptions of social science alone. But that point scarcely matters here, because it is impossible to generalize from available studies purporting to find no differences between same-sex and married biological parenting. See also the amicus brief, filed in support of petitioners in *Hollingsworth* and the Bipartisan Legal Advisory Group of the U.S. House of Representatives in *Windsor*, discussing in depth the social science concerning parenting.

Judith Stacey, a prominent New York University professor, in testifying before Congress against the Defense of Marriage Act, expressed hope that the revisionist view's triumph would give marriage "varied, creative, and adaptive contours . . . [leading some to] question the dyadic limitations of Western marriage and seek . . . small group marriages."[24] In their statement "Beyond Same-Sex Marriage," more than three hundred "LGBT and allied" scholars and advocates—including prominent Ivy League professors—call for legally recognizing sexual relationships involving more than two partners.[25]

Nor are such relationships unheard of: *Newsweek* reports that there are more than five hundred thousand in the United States alone.[26] In Brazil, a public notary has recognized a trio as a civil union.[27] Mexico City has considered expressly temporary marriage licenses.[28] The Toronto District School Board has taken to promoting polyamorous relationships among its students.[29]

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[23] Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 Ethics 302, 303 (2010).

[24] See Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. St. Thomas L.J. 33, 62 (2004).

[25] *Beyond Same-Sex Marriage: A New Strategic Vision For All Our Families and Relationships*, BeyondMarriage.org, July 26, 2006, http://beyondmarriage.org/full_statement.html.

[26] Jessica Bennett, *Only You. And You. And You: Polyamory—Relationships with Multiple, Mutually Consenting Partners—Has a Coming-Out Party*, Newsweek, July 28, 2009, http://www.newsweek.com/2009/07/28/only-you-and-you-and-you.html.

What about the connection to family life? E. J. Graff celebrates the fact that recognizing same-sex unions would change the "institution's message" so that it would "ever after stand for sexual choice, for cutting the link between sex and diapers."[30] Enacting same-sex marriage "does more than just fit; it announces that marriage has changed shape."[31]

And exclusivity? Andrew Sullivan, a self-styled proponent of the conservative case for same-sex marriage, has extolled the "spirituality" of "anonymous sex," and welcomes the fact that the "openness" of same-sex unions might erode sexual exclusivity among opposite-sex marriages.[32]

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[27] *Three-Person Civil Union Sparks Controversy in Brazil*, BBC News, Aug. 28, 2012, http://www.bbc.co.uk/news/world-latin-america-19402508.

[28] *Mexico City Proposes Temporary Marriage Licenses*, Telegraph, Sept. 30, 2011, http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/mexico/8798982/Mexico-City-proposes-temporary-marriage-licences.html.

[29] *Toronto School District Board Promotes Polygamy, Group Sex to Children*, http://blazingcatfur.blogspot.com/2012/09/tdsb-promotes-polygamy-group-sex-to.html.

[30] E. J. Graff, *Retying the Knot*, *in Same-Sex Marriage: Pro and Con: A Reader* 134, 136 (Andrew Sullivan ed., New York: Vintage Books 1997).

[31] *Id.* at 137.

[32] Andrew Sullivan, *Virtually Normal: An Argument about Homosexuality* 202-03 (New York: Vintage Books 1996).

Similarly, in a *New York Times Magazine* profile, same-sex marriage activist Dan Savage encourages spouses to adopt "a more flexible attitude" about sex outside their marriage.[33] A piece in *The Advocate*, a gay-interest newsmagazine, supports our point still more candidly:

> Anti-equality right-wingers have long insisted that allowing gays to marry will destroy the sanctity of "traditional marriage," and, of course, the logical, liberal party-line response has long been "No, it won't." But what if—for once—the sanctimonious crazies are right? Could the gay male tradition of open relationships actually alter marriage as we know it? And would that be such a bad thing?[34]

Other revisionists have also embraced the goal of weakening the institution of marriage *in these very terms*. "[Former President George W.] Bush is correct," says revisionist advocate Victoria Brownworth, ". . . when he states that allowing same-sex couples to marry will weaken the institution of marriage. . . . It most certainly will do so, and that will make marriage a far better concept than it previously has been."[35] Michelangelo

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[33] Mark Oppenheimer, *Married, With Infidelities*, N.Y. Times, June 30, 2011, *available at* http://www.nytimes.com/2011/07/03/magazine/infidelity-will-keep-us-together.html?pagewanted=all.

[34] Ari Karpel, *Monogamish*, Advocate, July 7, 2011, http://www.advocate.com/Print_Issue/Features/Monogamish/.

[35] Victoria A. Brownworth, *Something Borrowed, Something Blue: Is Marriage Right for Queers?*, *in I Do/I Don't: Queers on*

Signorile, a prominent advocate of redefining marriage, urges people in same-sex relationships to "demand the right to marry not as a way of adhering to society's moral codes but rather to debunk a myth and radically alter an archaic institution."[36] They should "fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely, because the most subversive action lesbians and gay men can undertake . . . is to transform the notion of 'family' entirely."[37]

These views represent a trend among revisionist advocates, who increasingly agree that redefining marriage would undermine its stabilizing norms.

F. Preliminary social science, too, suggests that opposite-sex and same-sex relationships tend to follow different norms.

Preliminary social science also suggests that opposite-sex and same-sex relationships observe and thrive on different norms. In the 1980s, David McWhirter and Andrew Mattison set out to disprove popular beliefs about same-sex male partners' lack of adherence to sexual exclusivity. Of those that they surveyed, whose relationships had lasted from one to thirty-seven years, more than 60 percent had begun

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Marriage 53, 58–59 (Greg Wharton & Ian Philips eds., San Francisco: Suspect Thoughts Press 2004).

[36] Michelangelo Signorile, *Bridal Wave*, Out 42, December–January 1994, at 68, 161.

[37] *Id.*

the relationship expecting sexual exclusivity, but not one couple stayed sexually exclusive longer than five years.[38]

More recently, the *New York Times* reported on a San Francisco State University study: "[G]ay nuptials are portrayed by opponents as an effort to rewrite the traditional rules of matrimony. Quietly, outside of the news media and courtroom spotlight, many gay couples are doing just that."[39]

One study even suggests that exclusivity affects men's satisfaction in opposite-sex relationships more than in same-sex ones. [40] According to another, sexually open gay relationships last longer.[41] By contrast, 99 percent of opposite-sex spouses demand of each other and anticipate sexual exclusivity,[42] and violations of it are "the leading cause of divorce across 160 cultures and are one of the most frequent reasons that couples seek marital therapy."[43]

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[38] David P. McWhirter & Andrew M. Mattison, *The Male Couple: How Relationships Develop* 252–53 (Englewood Cliffs, N.J.: Prentice-Hall Trade 1984).

[39] James, *Many Successful Gay Marriages Share an Open Secret*, *supra* note 16.

[40] Trevor A. Hart & Danielle R. Schwartz, *Cognitive-Behavioral Erectile Dysfunction Treatment for Gay Men*, 17 Cognitive & Behav. Prac. 66, 66-76 (2010).

[41] James, *Many Successful Gay Marriages Share an Open Secret*, *supra* note 16.

[42] Alfred DeMaris, *Distal and Proximal Influences on the Risk of Extramarital Sex: A Prospective Study of Longer Duration Marriages*, 46 J. Sex Res. 597, 597-607 (2009).

[43] Julie H. Hall & Frank D. Fincham, *Psychological Distress: Precursor or Consequence of Dating Infidelity*, 35 Personality & Soc. Psychol. Bull. 143-59 (2009).

Numbers of partners and relationship longevity also tend to vary. A 1990s U.K. survey of more than five thousand men found that the median numbers of partners over the previous five years for men with exclusively heterosexual inclinations was two, with bisexual inclinations was seven, and with exclusively homosexual inclinations was ten.[44] A U.S. survey found that the average number of sexual partners since the age of eighteen for men who identified as homosexual or bisexual was over two and a half times as many as the average for heterosexual men.[45] And a study of same-sex civil marriages in Norway and Sweden found that "divorce risks are higher in same-sex partnerships than opposite-sex marriages and . . . unions of lesbians are considerably less stable, or more dynamic, than unions of gay men."[46]

Incipient social science thus suggests that same- and opposite-sex bonds tend to live by different norms.

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[44] C. H. Mercer, G. J. Hart, A. M. Johnson, & J. A. Cassell, *Behaviourally Bisexual Men as a Bridge Population for HIV and Sexually Transmitted Infections? Evidence from a National Probability Survey*, 20 Int'l J. STD & AIDS 87, 88 (2009).

[45] Edward O. Laumann, J. H. Gagnon, R. T. Michael, & S. Michaels, *The Social Organization of Sexuality: Sexual Practices in the United States* 314–16 (Chicago: University of Chicago Press 1994).

[46] Gunnar Andersson, Turid Noack, Ane Seierstad & Harald Weedon-Fekjaer, *The Demographics of Same-Sex Marriages in Norway & Sweden*, 43 Demography 79, 95 (2006).

V. Beyond weakening marriage and its stability, enshrining the revisionist view would burden rights of conscience.

Americans are impatient with those we regard as enemies of equality. Often barred from respectable jobs, they enjoy little social tolerance. The First Amendment does not keep us from revoking certain of their civil privileges or variously suing them for living by their views.[47]

Yet the revisionist view depends on the idea that it is irrational to see important differences between same- and opposite-sex relationships. If the state accepted this idea, it would come to see conjugal marriage supporters as champions of invidious discrimination. This would undermine moral and religious freedom, and parents' rights to direct their children's education.

From the wedding on through the honeymoon and into common life, couples transact *as a couple* with countless people. Photographers, caterers, innkeepers, adoption agency officials, parochial school administrators, counselors, foster-care and adoption providers, and others will be forced to comply with the revisionist view or lose their jobs—or licenses and government contracts. [48]

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[47] For example, the Internal Revenue Service revoked the tax-exempt status of Bob Jones University because of its racially discriminatory practices, and the Supreme Court upheld this action as compatible with the university's First Amendment rights. *Bob Jones University v. United States*, 461 U.S. 574 (1983).

We are not crying wolf, but taking revisionists at their word. If support for conjugal marriage is like racism, we need only ask how society treats racists. We marginalize and stigmatize them. Thus, in Canada, Damian Goddard was fired from his job as a sportscaster for expressing on Twitter support for conjugal marriage.[49] In Massachusetts, Catholic Charities was forced to give up its adoption services rather than violate its principles by placing children with same-sex cohabitants.[50] When public schools began teaching students about same-sex marriage, precisely on the ground that it was now the law of the commonwealth, a Court of Appeals ruled that parents had no right to exempt their children. [51] The Becket Fund for Religious Liberty reports that over "350 separate state anti-discrimination provisions would likely be triggered by recognition of same-sex marriage."[52]

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[48] Marc D. Stern, *Same-Sex Marriage and the Churches*, *in Same-Sex Marriage and Religious Liberty: Emerging Conflicts* 1–57, 1, 11–14 (Douglas Laycock, Anthony Picarello, & Robin Fretwell Wilson eds., Lanham, Md.: Rowman & Littlefield 2008). This collection of essays includes the views of scholars on both sides of the same-sex marriage question, who conclude that conflicts with religious liberty are inevitable when marriage is extended to same-sex couples.

[49] *TV Host Fired over Sean Avery Debate*, ESPN.com, May 13, 2011, http://sports.espn.go.com/new-york/nhl/news/story?id=6532954.

[50] Maggie Gallagher, *Banned in Boston: The Coming Conflict between Same-Sex Marriage and Religious Liberty*, Weekly Standard, May 15, 2006, http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp.

[51] See, e.g., *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008).

If the people judge that the conjugal view of marriage is reasonable, they may also reasonably judge that state efforts to suppress it harm the common good, by curbing freedoms of speech, religion, and conscience for nothing more than empty ideological uniformity.

VI. It is rationally consistent for the state to recognize infertile opposite-sex couples but not same-sex couples.

Many of our arguments—about what marriage is, and why it matters socially—depend on a subtle connection between marriage and children. This leads some to argue that the conjugal understanding of marriage leaves a state no principled basis for recognizing infertile couples' unions but not same-sex couples.

This challenge is easily met. (1) An infertile man and woman can still form together a comprehensive (bodily as well as emotional) union, which differs only in degree, not type, from fertile ones before or after their first birth. So recognizing such unions has (2) none of the costs of recognizing same-sex bonds; (3) most of the benefits of recognizing fertile ones; and (4) an *additional* benefit.

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[52] Becket Fund for Religious Liberty, *Same-Sex Marriage and State Anti-Discrimination Laws* 2 (Washington, D.C.: Becket Fund for Religious Liberty, Jan. 2009), *available at* http://www.becketfund.org/wp-content/uploads/2011/04/Same-Sex-Marriage-and-State-Anti-Discrimination-Laws-with-Appendices.pdf.

1. Infertile conjugal unions are still true marriages

To form a true marriage, a couple needs to establish and live out the (i) comprehensive (i.e., mind-and-body) union that (ii) would be completed by, and be apt for, procreation and domestic life and so (iii) inherently calls for permanent and exclusive commitment.

Every male-female couple capable of consummating their commitment can have all three features. With or without children, on the wedding night or ten years later, these relationships are all comprehensive in the three senses specific to marriage, with its distinctive sort of value. Without exception, same-sex and multiple-partner unions are not.

2. Recognizing infertile conjugal unions has none of the costs of redefining marriage.

Since infertile couples can form a true marriage, recognizing them has none of the *costs* of recognizing same-sex, polyamorous, or other nonmarital unions. It does not make it harder for people to realize the basic good of marriage, for it does not undermine the public's grasp of the nature of true marriage. Nor does it undermine marital *norms*, which are grounded in that nature, or make fathers or mothers seem superfluous. It prejudices no one's religious or moral freedom.

Besides, failing to recognize infertile couples' unions may really violate the principle of equality to which revisionists appeal, since infertile as well as fertile couples can form unions of the same *kind*: comprehensive unions. Absent strong reasons, such differential treatment would be unfair.

3. Recognizing such unions has many of the benefits of recognizing fertile unions.

Many couples believed to be infertile end up having children, who are served by their parents' marriage; and trying to determine fertility would require unjust invasions of privacy.

Furthermore, even an obviously infertile couple can for reasons of principle, and not merely subjective preference, live out the features of true marriage, and so contribute to a strong marriage culture. This makes couples who might conceive more likely to form a marriage and abide by its norms. And that, in turn, ensures that more children are reared by their married biological parents.

4. Recognizing such unions has at least one additional benefit.

Finally, recognizing only fertile marriages would suggest that marriage is valuable only as a means to children—and not good in itself, as it is. So recognizing infertile marriages serves at least one purpose *better* than recognizing fertile unions does: to recall for us the truth, crucial for healthy and stable marriages generally, that marriage, considered precisely as a comprehensive or conjugal union, has value in itself.

Thus, though the conjugal view does not restrict marriage to spouses with children, its success would tend to limit children to families led by committed spouses. The more spouses (including infertile ones) reflect by their lives the truth about what marriage requires, the more saturated we will all be in those truths, so that more families *with* children will stay intact.

VII. Upholding DOMA and Proposition 8 is fully consistent with this Court's ruling in *Lawrence v. Texas*.

Laws defining marriage as a union of man and woman are *not* relevantly similar to the Texas anti-sodomy law; the considerations cited in *Lawrence v. Texas,* 539 U.S. 558 (2003), against that law do *not* apply to marriage; and its majority opinion and concurrence expressly *deny* any analogy between the two.

A. The majority opinion and concurrence in Lawrence are consistent with upholding Proposition 8 and DOMA.

Lawrence held that a statute criminalizing homosexual sodomy violated the Due Process Clause. Writing for the majority, Justice Kennedy denied that citizens "may use the power of the State to enforce [moral disapproval of sodomy] on the whole society through operation of the criminal law." 539 U.S. at 571. *But DOMA and Proposition 8 leave the criminal law untouched.* They merely define civil marriage as the union of a man and woman. Unlike, say, anti-bigamy laws, they criminalize nothing. Individuals are free to form same-sex relationships, and religious and other institutions remain free to recognize those relationships as marriages.

Does *Lawrence* exclude DOMA and Proposition 8 by *analogy*? Is *criminalizing* the conduct of certain relationships analogous to *not recognizing* them as marriages? No, it is not.

The majority opinion cites the American Law Institute's 1955 Model Penal Code, which discourages bans on private consensual sexual activity on the grounds that such provisions: undermine respect for the law by outlawing widespread practices, criminalize what is harmless, and are arbitrarily enforced. *Id.* at 572. None of these considerations is relevant to the non-recognition of same-sex partnerships, which shows no signs of undermining adherence to or respect for the law, criminalizes nothing, and is from the moment of passage uniformly enforced.

The majority opinion points to "the stigma this [Texas anti-sodomy] criminal statute imposes . . ." and decries the fact that "[t]he petitioners will bear on their record the history of their criminal convictions." *Id.* at 575. Such statutes "demean [homosexual persons'] existence or control their destiny *by making their private sexual conduct a* *crime.*" *Id.* at 578 (emphasis added). Not being in a union recognized by government as a marriage implies none of these things.

Likewise, DOMA and Proposition 8 do not involve (as *Lawrence* held that anti-sodomy laws do) the slightest "intrusion into the personal and private life" of anyone. *Id.* Thus, *Lawrence*'s identification of a constitutionally protected "realm of *personal* liberty which the government *may not enter*" leaves intact DOMA and Proposition 8—which concern a *public* institution, and *limit* the government's interference in the personal sphere by constricting the scope of legally regulated relationships. *Id.* at 578 (emphasis added) (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992)).

Indeed, the majority opinion explicitly disavows any implications for marriage, saying that the petitioners' case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," *id.* at 578, and suggesting that one of the few reasons for which the state *may* "define the meaning of [a] relationship or [...] set its boundaries" is to prevent "abuse of an institution the law protects." *Id.* at 567. Justice O'Connor's concurrence goes even farther by expressly affirming that "preserving the traditional institution of marriage" is a "legitimate state interest" and that "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Id.* at 585.

B. The Lawrence dissent should not be construed to suggest that Lawrence creates a constitutional right to state or federal recognition of same-sex bonds as marriages.

Dissenting in *Lawrence*, Justice Scalia warned that, despite Justice Kennedy's insistence, the logic of *Lawrence* undermines the restriction of civil marriage to unions of sexually complementary spouses. For, Justice Scalia argues, *if* "preserving the traditional institution of marriage" is a legitimate state interest, then so is "preserving the traditional sexual mores of our society." *Id.* at 601 (Scalia, J., dissenting). But *Lawrence* declares unconstitutional only a certain *means* of preserving the traditional sexual mores of our society—i.e., *criminalization*—whereas DOMA and Proposition 8 criminalize *nothing*.

There is no contradiction in holding that while the state may introduce legal structures to encourage adherence to certain norms and ideals (to promote ways of life that in its judgment serve the welfare of children and the more vulnerable parent), it may not use the heavy hand of criminal law—with its deprivations of *liberty* or *property*—in service of the same goals. Indeed, the majority opinion and Justice O'Connor's concurrence in *Lawrence* offer several reasons for maintaining just this distinction.

Finally, traditional marriage law admits many justifications that would not apply to anti-sodomy laws. The state's promotion of marriage as a union of husband and wife itself entails nothing about the morality of non-marital bonds. It can remain agnostic about these while insisting on the social value of the institution of marriage for establishing as a norm and ideal, and to some extent ensuring, that men and women unite as husbands and wives and thus remain committed fathers and mothers to any children their union may produce.

CONCLUSION

For the foregoing reasons, this Court should uphold DOMA and Proposition 8 as constitutionally valid exercises of policy-making power.

Respectfully submitted,

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January 29, 2013

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 12-307

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, and
BIPARTISAN LEGAL ADVISORY GROUP
OF THE HOUSE OF REPRESENTATIVES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY (GAY AND LESBIAN MEDICAL ASSOCIATION) CONCERNING THE IMMUTABILITY OF SEXUAL ORIENTATION IN SUPPORT OF AFFIRMANCE ON THE MERITS

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF *AMICUS CURIAE* GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

- I. IMMUTABILITY IS NOT A REQUIRED ELEMENT TO APPLY HEIGHTENED SCRUTINY 4
- II. THE COURT HAS NOT VIEWED SEXUAL ORIENTATION AS BEHAVIORAL 8
- III. SEXUAL ORIENTATION IS AN INNATE HUMAN CHARACTERISTIC 12
  - A. Twin Studies Confirm the Biological Component of Sexual Orientation 13
  - B. Pedigree Studies Have Found that Sexual Orientation is Heritable in Families 16
  - C. Fraternal Birth Order Effect Confirms Biological Origin of Sexual Orientation 17
  - D. Pre-Natal Hormone Levels Affect Sexual Orientation 19
    - 1. Congenital Adrenal Hyperplasia 21
    - 2. Xenoandrogens 23
  - E. Analysis of Male Genetic Material Indicates that Sexual Orientation is Heritable 24

TABLE OF CONTENTS – Continued

Page

F. Brain Studies Show the Biologic Roots of Sexual Orientation 25

G. The Overwhelming Majority of Humans Self-Describe Their Sexual Orientation as Innate 26

IV. MISGUIDED EFFORTS TO CHANGE SEXUAL ORIENTATION PROVE THE INNATENESS OF THE TRAIT 27

V. THE STUDIES CITED BY SUPPORTERS OF DOMA FAIL TO DEMONSTRATE THAT SEXUAL ORIENTATION IS BEHAVIORAL 32

A. Petitioners' Repeated Reliance on the Work of Lisa Diamond Actually Demonstrates that Sexual Orientation is Innate, Not the Reverse 32

B. Petitioners' Other Studies Do Not Support the Conclusion that Sexual Orientation is Behavioral 38

CONCLUSION 39

TABLE OF AUTHORITIES

Page

CASES

Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) 10

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Page

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TABLE OF AUTHORITIES – Continued

Page

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Page

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Page

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Page

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TABLE OF AUTHORITIES – Continued

Page

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STATEMENT OF INTEREST OF *AMICUS CURIAE* GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY

Amicus Curiae[1] GLMA: Health Professionals Advancing LGBT Equality ("GLMA") is the largest and oldest association of lesbian, gay, bisexual and transgender ("LGBT") healthcare and health professionals of all disciplines, including physicians, nurses, physician assistants, behavioral health specialists and researchers. GLMA's mission is to ensure equality in healthcare for LGBT individuals and healthcare professionals, using the medical and health expertise of GLMA members in public policy and advocacy, professional education, patient education and referrals, and the promotion of research. GLMA was founded in 1981 as the American Association of Physicians for Human Rights (changing its name to the Gay and Lesbian Medical Association in 1994), in part as a response to the call to advocate for policy and services to address the growing health crisis that would become the HIV/AIDS epidemic. Since then, GLMA's mission has broadened to address the full range of health issues affecting LGBT people, including ensuring that all healthcare providers provide a welcoming environment to LGBT individuals and their families and are competent to address specific health disparities affecting LGBT people.

---

[1] Counsel for all parties consented to the filing of this brief by letters on file with the Clerk of the Court, and have received directly notice of the *Amicus Curiae*'s intention to file this brief pursuant to Rule 37 of this Court. No counsel for any party authored this brief in whole or in part, and neither any such counsel nor any party nor any person or entity other than *Amicus Curiae* or their members or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

GLMA's 2008 publication, *Same-Sex Marriage and Health* (O'Hanlan, K., et al.),[2] documents the large body of scientific research indicating that the denial of marriage rights to gay men and lesbians can negatively impact their health and well-being and that of their children. The denial of marriage rights to same-sex couples is a form of discrimination that perpetuates stigma. Because marriage can help protect and promote the mental and physical health of lesbians and gay men and their children, GLMA supports efforts to secure marriage equality for same-sex couples.

---

[2] Kate O'Hanlan M.D., a Gynecologic Oncology surgeon, and past President of GLMA, has made significant contributions to the field of sexual orientation and marriage equality, contributions that added greatly to GLMA's submission as *Amicus Curiae*. Dr. O'Hanlan wrote a comprehensive equal employment policy that was implemented at Stanford University in 1992, and co-authored *Homophobia As a Health Hazard: Report of the GLMA*. She wrote the American Medical Women's Association policy endorsing same-gender civil marriage in 1994. In 2007, she authored the American College of Obstetricians and Gynecologists District IX endorsement of marriage equality, and published a review of policies about civil marriage equality. She is a Fellow of the Rockway Institute, and gives invited lectures about the science of gender identity and sexual orientation at grand rounds in universities and medical schools. O'Hanlan K.A., *Health Policy Considerations For Our Sexual Minority Patients*, OBSTET. GYNECOL. (Mar. 2006); O'Hanlan K.A., *Do We Really Mean Preventive Medicine for All?* AM. J. PREV. MED. (1996); O'Hanlan K.A., *Domestic Partnership Benefits at Medical Universities*, JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION (1999). The study cited above is available at http://glma.org/document/docWindow.cfm?fuseaction=document.viewDocument&documentid=146&documentFormatId=236.

◆

INTRODUCTION AND SUMMARY OF THE ARGUMENT

GLMA submits this brief as *Amicus Curiae* to make clear the scientific and clinical record concerning sexual orientation. Put simply, sexual orientation is an innate human characteristic that is treated unequally in the discrimination against same-sex marriage by the Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA") which, accordingly, cannot survive any constitutional scrutiny that addresses immutability. Although proving that a particular characteristic is immutable is not a required element to apply heightened scrutiny to a discriminatory statute, the Court's prior protection of immutable traits is particularly apt in the case of DOMA, which singles out a community for one of its inherent characteristics in withholding the imprimatur of marriage-based benefits. *All* credible study of sexual orientation establishes that genetic, hereditary and biological influences are major factors in determining sexual orientation. By contrast, petitioners confuse research that shows a spectrum of sexual *attraction* with the conclusion that sexual *orientation* is fluid and changeable. This fallacy is best highlighted by petitioners' and their amici's citations to research in which respondents changed from "uncertain" to one category or another as evidence that those participants' sexual orientations changed.

Scientists have studied the determining factors of sexual orientation from a variety of perspectives. These included family studies, twin studies, sibling studies, brain studies, and surveys. None – not one – shows the post-natal, behavioral conclusion advocated by the petitioners. Moreover, misguided attempts to change individuals' sexual orientation have had results that ranged from ineffective at best to tragic at worst, further underscoring the innate nature of sexual orientation. To reinstate DOMA would be to persecute a group of Americans solely on the basis of something about themselves that is fundamentally determined.

◆

ARGUMENT

I. IMMUTABILITY IS NOT A REQUIRED ELEMENT TO APPLY HEIGHTENED SCRUTINY

Petitioners argue that to apply heightened scrutiny to DOMA, respondents were required to prove in the District Court that sexual orientation is an immutable characteristic. *See, e.g.*, *Amicus Curiae* Brief of Dr. Paul McHugh in Support of Hollingsworth and Bipartisan Legal Advocacy Group Addressing the

Merits and Supporting Reversal. This is incorrect.[3] If the government discriminates against a suspect or quasi-suspect class, courts will review the law with heightened scrutiny. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 437, 440-41 (1985). The Court views classifications based on race, national origin, and alienage as "suspect" and applies strict scrutiny where the government discriminates on these bases. *See id.* at 440-41. The Court views gender and illegitimacy classifications as "quasi-suspect," applying intermediate scrutiny. *See id.* The Court takes into account four factors when determining whether a class is suspect or quasi-suspect, and thus entitled to heightened scrutiny: historical discrimination; defining characteristics relative to the ability to contribute to society; "obvious, immutable, or distinguishing characteristics;" and minority status and/or lack of political power. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion); *Windsor v. United States*, 699 F.3d 169, 181-82 (2d Cir. 2012); *see also Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *Cleburne*, 473 U.S. at 440-41; *Golinski v. United States Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012). Discrimination is "'more clearly unfair'" when it is based on a characteristic over which people have no control, as those people are not responsible for the characteristic and have no ability to change it. *Id.* at 436 (quoting *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 909 F.2d 375, 377 (9th Cir. 1990)). Differentiating among people based on an immutable characteristic violates "'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" *Frontiero*, 411 U.S. at 686 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

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[3] Petitioners' amici are also incorrect when they assert (assuming immutability is a necessary prerequisite to suspect status) that the only "immutable characteristics" are those that result solely as an "accident of birth." *See* McHugh at 14-15. Rather, as numerous courts have held, a characteristic should be considered immutable if it is "so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it." *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000); *see also Njenga v. United States Attorney General*, 216 F. App'x 963, 966-67 (11th Cir. 2007) (immutable characteristics are fundamental to individual identities or consciences); *Zavaleta-Lopez v. Attorney General of United States*, 360 F. App'x 331, 333 (3d Cir. 2010) ("immutable characteristics [are those] such as race, gender, or a prior position, status, or condition, or characteristics that are capable of being changed but are of such fundamental importance that persons should not be required to change them, such as religious beliefs."). In other words, a trait is immutable if "changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity." *Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring).

To the contrary, the Court has frequently defined the "traditional indicia of suspectness" without reference to immutability. *See, e.g.*, *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (defining the "traditional indicia of suspectness" as those marking a class "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."). And the Court has, on several occasions, labeled groups that are defined by a changeable characteristic as a suspect class – without so much as mentioning the concept of immutability. In *Graham v. Richardson*, 403 U.S. 365 (1971), for example, the Court deemed aliens a suspect class, despite the fact that non-citizens can and often do become citizens of their own initiative. *Id.* at 372; *see also Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (rejecting the dissent's argument that "strict scrutiny is inappropriate because under § 661 (3) a resident alien can voluntarily withdraw from disfavored status"). Similarly, the Court recognizes illegitimate children as a quasi-suspect class. *Matthews v. Lucas*, 427 U.S. 495, 505-06 (1976). This despite the fact that illegitimacy, at least for legal purposes, is also a mutable characteristic. *See, e.g., Miller v. Albright*, 523 U.S. 420, 431 (1998) (recognizing that an illegitimate child can be legitimated through actions of the father); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 320 (D. Conn. 2012).

Indeed, of the four factors supporting immutability set forth in *United States v. Carolene Products Company*, 304 U.S. 144 (1938), "immutability is the one that the Court has most readily abandoned, and that scholars have most persistently criticized." Graham, T.C., *The Shifting Doctrinal Face of Immutability*, 19 VA. J. SOC. POL'Y & L. 169, 179 (Spring 2012); *see also* Marcosson, S.A., *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 647 (2001) (noting that the concept of immutability has been in decline in Supreme Court equal protection analysis and may even be considered irrelevant); Shapiro, M.R., *Treading the Supreme Court's Murky Immutability Waters*, 38 GONZ. L. REV. 409, 412 (2002-03) (asserting that the Supreme Court appears interested in "phasing out the immutability concept").[4]

In short, this Court's precedents manifest that immutability is simply not a required factor in the Court's calculus when defining a suspect or quasi-suspect class.

II. THE COURT HAS NOT VIEWED SEXUAL ORIENTATION AS BEHAVIORAL

Although the Court has never specifically addressed, in an equal protection analysis, whether laws discriminating on the basis of sexual orientation should be subject to heightened scrutiny, it has also declined the opportunity to hold sexual orientation to be behavioral. The Court's decision in *Lawrence v. Texas* stated that: "[w]hen homosexual *conduct*[5] is

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[4] *See also* Yoshino, K., *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 490-91 (1998) (criticizing the concept of immutability and arguing for its demise in constitutional analysis).

[5] Further to the points in Section III, below, Bruce Bagemihl's book BIOLOGICAL EXUBERANCE: ANIMAL HOMOSEXUALITY AND NATURAL DIVERSITY (1999) revealed that over 450 species of animals (birds, mammals, lizards, insects) engage in repeated sexual behaviors with their same sex, in the presence of opposite

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made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination both in the public and in the private spheres." 539 U.S. 558, 575 (2003) (emphasis added). Similarly, in Justice O'Connor's concurrence, decided upon equal protection grounds, she states, "[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas's sodomy law is targeted at more than conduct. It is instead directed toward gay persons *as a class*." *Id.* at 583 (O'Connor, J., concurring) (emphasis added).

In a related vein, the Court found that "[o]ur decisions have declined to distinguish between status and conduct in this context," *i.e.*, sexual orientation. The Court rejected the Christian Legal Society's ("CLS") claim that Hastings College of Law ("Hastings") violated its First Amendment rights by refusing to recognize CLS as a registered student organization for requiring agreement with the belief that sexual activity should not occur outside of marriage between a man and a woman. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 130 S. Ct. 2971, 2990 (2010).

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sex potentials, some in life-long pairings. This evidence was cited by the Court in *Lawrence*.

The sparse precedent cited by petitioners is unavailing. Petitioners place great reliance[6] on the slender shoulders of the *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990) case, in which the Ninth Circuit had held that "[h]omosexuality is not an immutable characteristic" and that discrimination against gay people did not justify heightened scrutiny. 895 F.2d at 574. That decision, however, for whatever it was once worth, was plainly overruled by the Ninth Circuit itself in the *Perry* case now before the Court, as well as by *Hernandez-Montiel v. Immigration and Naturalization Service*. Moreover, *High Tech Gays* relied on *Bowers v. Hardwick*, 478 U.S. 186 (1986) since overruled by *Lawrence*. 539 U.S. at 575. In *Hernandez-Montiel*, the Ninth Circuit held that "[s]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them." 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled in part on other*

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[6] Examples of other circuit court decisions finding homosexuality to be a behavioral characteristic are badly dated by virtue of the clinical research GLMA addresses below. *Cf. Woodward v. United States*, 871 F.2d 1068, 1076 (9th Cir. 1989) (arguing that "homosexuality is primarily behavioral in nature"); *Equal. Found. of Greater Cincinnati, Inc. v. Cincinnati*, 54 F.3d 261, 267 (6th Cir. 1995) ("[t]hose persons who fall within the orbit of legislation concerning sexual orientation are so affected not because of their orientation but rather by their *conduct* which identifies them as homosexual, bisexual, or heterosexual") (emphasis in original); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (finding the challenged regulation was a classification based on conduct, not on status).

grounds by Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005). The Ninth Circuit confirmed *Hernandez-Montiel*'s finding that sexual orientation is immutable for Equal Protection Clause purposes in *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005) (agreeing that homosexuality is a fundamental aspect of human identity and seeing "no appreciable difference between an individual . . . being persecuted for being a homosexual and being persecuted for engaging in homosexual acts").

The more persuasive authority has properly found sexuality to be an immutable characteristic. *See, e.g.*, *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring) (finding sexual orientation to be immutable in the eyes of the Equal Protection Clause because immutability is satisfied when the identifying trait is "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it]"); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 966 (N.D. Cal. 2010) ("No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation."); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 987 (N.D. Cal. 2012) ("The Court finds that a person's sexual orientation is so fundamental to one's identity that a person should not be required to abandon it. Therefore, this factor weighs in favor of the application of heightened scrutiny."); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 326 (D. Conn. 2012) (finding sexual orientation to be an immutable characteristic); *In re Marriage Cases*, 43 Cal. 4th 757, 842, 183 P.2d 384 (2008) ("Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."); *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 186-87, 957 A.2d 407, 438 (2008):

> In view of the central role that sexual orientation plays in a person's fundamental right to self-determination, we fully agree with the plaintiffs that their sexual orientation represents the kind of distinguishing characteristic that defines them as a discrete group for purposes of determining whether that group should be afforded heightened protection under the equal protection provisions of the state constitution.

III. SEXUAL ORIENTATION IS AN INNATE HUMAN CHARACTERISTIC

The innate nature of sexual orientation fits squarely within the contours of the relevance of immutability previously expressed by the Court and discriminated against by DOMA. Put another way, although petitioners try to place a burden to prove immutability on respondents that they do not have, the nature of sexual orientation is a perfect example of why certain laws require heightened scrutiny. For all citizens to enjoy the equal protection of law, none can be the target of the law for something inherent to their very humanity. Legion scientific evidence and study proves that sexual orientation is just such a trait. Moreover, the scientific evidence is equally clear that the consequences of treating sexual orientation otherwise, or, worse still, trying to change that orientation, have disastrous personal and social consequences.

No peer-reviewed published scientific studies support the hypotheses that life experience causes homosexuality, that sexual orientation is learned, that there is a psychological cause of homosexuality or that sexual orientation is chosen. This scientific consensus comes from a broad range of methodologies that includes pedigree studies (the research of family history); twin studies; molecular biology; brain anatomical studies; biophysiological studies; and hormonal linkages. These traits, while expressed together, are not expressed as absolute black and white, but along a broad spectrum of gray, with some or all individuals expressing their unique sexual traits of orientation and/or gender identity innately, as they mature.

A. Twin Studies Confirm the Biological Component of Sexual Orientation.

Twins present a unique opportunity to control for genetics and environment. Identical, or monozygotic, twins share identical genetic material. Fraternal twins are, genetically speaking, no different than siblings born in sequence, but can be compared relative to identical twins as a control for environmental factors. Moreover, in circumstances where identical twins are raised separately, examination of traits gives additional insight into whether that trait's driving force is genetic or environmental.

Overall, a homosexual identical twin is generally *twice as likely* to share that same-sex attraction with his or her identical twin as is a gay fraternal twin with his or her non-identical twin. In one study the ratio was 52% to 22%. *See* Bailey, J.M., et al., *A Genetic Study of Male Sexual Orientation*, ARCHIVES OF GENERAL PSYCHIATRY (Dec. 1991); *see also* Whitam, F.L., et al., *Homosexual Orientation in Twins: A Report on 61 Pairs and Three Triplet Sets*, ARCHIVES OF SEXUAL BEHAVIOR (June 1993) ("Whitam 1993"); Turner, W.J., *Homosexuality, Type 1: An Xq28 Phenomenon*, ARCHIVES OF SEXUAL BEHAVIOR (Nov. 1995) ("Turner 1995"). A recent comprehensive study involving a large cohort (4,901) of twins in Australia found "statistically significant support for the existence of significant genetic contributions to the trait of homosexuality." Kirk, K.M., *Measurement Models for Sexual Orientation in a Community Twin Sample*, BEHAV. GENET. (2000). Any such genetic contribution is, by definition, innate.

Looking then to studies of adopted twins raised in separate environments, approximately half of the heritability in sexual orientation appears attributable to a genetic component. Bouchard, T.J., et al., *Sources of Human Psychological Differences: the Minnesota Study of Twins Reared Apart*, SCIENCE (Oct. 12, 1990).

Critically, however, identical twins, whether raised together or raised apart, showed roughly the same outcome. Pillard, R.C., *Homosexuality From a Familial and Genetic Perspective*, TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH (1996); Pillard, R.C., *The Search for a Genetic Influence on Sexual Orientation*, SCIENCE AND HOMOSEXUALITIES (1997). Some studies show that, given one twin with a same-sex orientation, the other twin will have a similar sexual orientation in roughly 50% of both male and female identical twins, but with lower rates in fraternal twins (males: 22%, females: 16%) and non-twin siblings (males: 9%; females: 14%). Baron, M., *Genetics and Human Sexual Orientation*, BIOLOGICAL PSYCHIATRY (June 1993); *see also* Bailey, J.M., et al., *Genetic and Environmental Influences on Sexual Orientation and Its Correlates in an Australian Twin Sample*, JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY (Mar. 2000). These data confirm a strong genetic contribution to sexual orientation, and although "the precise nature of these factors [has] yet to be understood" (Whitam 1993), the point is the same: whatever the proportion of that genetic contribution, it is not changeable.

Lastly, twin studies consistently show that male sexual orientation is moderately heritable. For example, two twin studies in population-based samples both report moderate tendency to inherit characteristics, with the remaining variance being explained by non-genetic biological factors. *See* Mustanski, B.S., et al., *A Genomewide Scan of Male Sexual Orientation*, HUMAN GENETICS (2005).

B. Pedigree Studies Have Found that Sexual Orientation is Heritable in Families.

A pedigree study examines a particular family tree in an attempt to discover whether certain traits are prevalent coming down from a specific set of ancestors. Both male and female homosexuality appears to run in families. Pillard, R.C., et al., *Evidence of Familial Nature of Male Homosexuality*, ARCHIVES OF GENERAL PSYCHIATRY (Aug. 1986); Pattatucci, A.M.L., et al., *Development and Familiality of Sexual Orientation in Females*, BEHAVIOR GENETICS (Sept. 1995); Pillard, R.C., *Homosexuality From a Familial and Genetic Perspective*, TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH (1996); Bailey, J.M., et al., *A Family History Study of Male Sexual Orientation Using Three Independent Samples*, BEHAVIOR GENETICS (1999). "Powerful evidence exists that homosexuality runs in families, and no evidence contradicts it." (Pillard 1996). Family and twin studies reveal that genetic factors play an important role in the development of sexual orientation along the entire natural spectrum of sexuality, from heterosexuality to homosexuality.[7]

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[7] Mustanski B.S., et al., *A Critical Review of Recent Biological Research on Human Sexual Orientation*, ANNUAL REVIEW OF SEX RESEARCH (2002); Mustanski B.S., et al., *A Genomewide Scan of Male Sexual Orientation*, HUMAN GENETICS (Mar. 2005); Mustanski B.S., et al., *Mental Health Disorders, Psychological Distress, and Suicidality in a Diverse Sample of Lesbian, Gay, Bisexual, and Transgender Youths*, AMERICAN JOURNAL OF PUB. HEALTH (Dec. 2010); Newcomb M.E., et al., *Examining Risk and Protective Factors for Alcohol Use in Lesbian, Gay, Bisexual, and*

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C. Fraternal Birth Order Effect Confirms Biological Origin of Sexual Orientation.

Over seventeen published reports of sexual orientation reveal that homosexual orientation was statistically significantly correlated with an increasing number of older brothers but not sisters. Anthony F. Bogaert, PhD has published dozens of analyses with the conclusion that the most consistent biodemographic correlate of sexual orientation in men is the number of older brothers (fraternal birth order). *See* Bogaert, A.F., et al., *Sexual Orientation, Fraternal Birth Order, and the Maternal Immune Hypothesis*, FRONTIERS IN NEUROENDOCRINOLOGY (2011). The 2011 study also demonstrated that non-biological siblings (*i.e.*, adopted or step older brothers) had no effect on men's sexual orientation. *Id.*

Ray Blanchard, PhD has likewise found that the most broadly established finding in the area of etiological research on homosexuality is that biological older brothers increase the odds of homosexuality in later-born males, even if they were reared in different households. In contrast, sisters, step brothers or adoptive brothers have no effect on sexual orientation. *See* Blanchard, R., *Fraternal Birth Order and the Maternal Immune Hypothesis of Male Homosexuality*, HORMONES AND BEHAVIOR (Sept. 2001); Blanchard, R., *Quantitative and Theoretical Analyses of the Relation*

Transgender Youth: A Longitudinal Multilevel Analysis, JOURNAL OF STUDIES ON ALCOHOL AND DRUGS (2012).

Between Older Brothers and Homosexuality in Men, JOURNAL OF THEORETICAL BIOLOGY (Sept. 21, 2004).

Two recent discoveries, using a sample of 944 homosexual and heterosexual participants, showed that biological older brothers increase the odds of homosexuality, even if these older brothers were reared in a different household than a younger gay brother. To quantify the effect, "each additional older brother increases a male's odds of homosexuality by 33%." *See* Jannini, E.A., et al., *Male Homosexuality: Nature or Culture?* CONTROVERSIES IN SEXUAL MEDICINE (2010). Other studies have found that if one accepts an odds increase of 33% and assumes a prevalence of homosexuality of 2% for men with no older brothers, then the effect of fraternal birth order would exceed all other causes of homosexuality in groups of gay men with three or more older brothers and would equal all other causes in a theoretical group with 2.5 older brothers. *Id.*

Lastly, in a 2008 study, it was found that homosexuals had a significantly greater number of brothers compared with heterosexuals. Mean numbers of older sisters, younger brothers and younger sisters did not differ between homosexuals and heterosexuals. Iemmola, F., et al., *New Evidence of Genetic Factors Influencing Sexual Orientation in Men*, ARCHIVES OF SEXUAL BEHAVIOR (2009).

D. Pre-Natal Hormone Levels Affect Sexual Orientation.

All sexually dimorphic traits and skills occur on a spectrum. Prenatal androgenic (male-like) hormone variations have been repeatedly highly correlated with many neurological, physiological and anatomical traits as well as sexual thought patterns, sexual orientation, and gender identity. Because all these innate traits typically express together with sexual orientation and gender identity, there are significant areas of overlap in their respective (and mutual) biological causes.

The sexual determination of sexual organs happens in the first trimester, well before the sexual differentiation of the brain, which is completed in the second trimester. Swaab, D.F., et al., *Sexual Differentiation of the Human Brain in Relation to Gender Identity and Sexual Orientation*, FUNCTIONAL NEUROLOGY (Jan.-Mar. 2009). It is therefore possible for the fetal brain to be imprinted differently than the fetal genitals, resulting in diversity of gender identity, and sexual orientation. These innate abilities and traits, conferred together in the first trimester, which typically differ between males and females, are called "sexually dimorphic traits." As children mature, their innate sexually dimorphic thought patterns, abilities and natural behaviors are expressed, as is their gender identity and later on as their sexual orientation. Because the developing fetus is exposed to so many hormones, enzymes and proteins that are secreted at varying times and varying levels, all of the sexually dimorphic human features, from gender identity and sexual orientation, to bone structures, physiological abilities and behaviors, are conferred as continuous variables on a broad spectrum of possibilities, rather than falling into one of two binary categories. Thus, the concepts of strictly heterosexual or homosexual, solidly male or female represent the furthest ends of the spectrum. Based on the highly individualized inborn set of traits and features, the vast majority of humans fall somewhere along this continuum, with the vast majority clustered near the ends of the spectra. Dewing, P., et al., *Disorders of Gonadal Development*, SEMIN. REPROD. MED. (Aug. 2002).

Another example of excess prenatal androgen exposure among females is seen with girls who were gestated with a fraternal male co-twin. Some of the baby boy twin's testosterone in the amniotic fluid seeps into the baby girl's amniotic fluid, causing a cluster of androgenizing changes in the sexually dimorphic play patterns, neuroacoustic functioning, bone structure, teeth, subsequent risk of eating disorders, fetal brain anatomy, and sexual orientation. Cohen-Bendahan, C.C., et al., *Is There an Effect of Prenatal Testosterone on Aggression and Other Behavioral Traits? A Study Comparing Same-Sex and Opposite-Sex Twin Girls*, HORM. & BEHAV. 47 (Feb. 2005); Cohen-Bendahan, C.C., et al., *Prenatal Exposure to Testosterone and Functional Cerebral Lateralization: A Study In Same-Sex and Opposite-Sex*

Twin Girls, PSYCHONEUROENDOCRINOLOGY (Aug. 2004); Voracek, M., et al., *Digit Ratio (2D:4D) in Twins: Heritability Estimates and Evidence For a Masculinized Trait Expression in Women From Opposite-Sex Pairs*, PSYCHOLOGICAL REPORTS (Feb. 2007); Dempsey P.J., et al., *Increased Tooth Crown Size in Females With Twin Brothers: Evidence For Hormonal Diffusion Between Human Twins in Utero*, AMERICAN JOURNAL OF HUMAN BIOLOGY: THE OFFICIAL JOURNAL OF THE HUMAN BIOLOGY COUNCIL (Sept. 1999); Culbert, K.M., et al., *Prenatal Hormone Exposure and Risk for Eating Disorders: A Comparison of Opposite-Sex and Same-Sex Twins*, ARCHIVES OF GEN. PSYCHIATRY (Mar. 2008); Peper, J.S., et al., *Does Having a Twin-Brother Make For a Bigger Brain?*, EUR. J. ENDOCRINOLOGY (Feb. 18, 2009).

1. Congenital Adrenal Hyperplasia.

There is also compelling evidence for a contribution of prenatal hormones to the development of homosexual orientation. This is illustrated best by congenital adrenal hyperplasia ("CAH") due to 21-hydroxylase deficiency, a genetic condition in which female fetuses are exposed to unusually high levels of androgens produced by their own adrenal glands. In CAH, a defect within the CYP21A2 gene causes a disturbance in the development of an enzyme (P450c21) in the cortisol synthesis pathway, resulting in a build-up of androgens (male hormones) in the fetal blood. Money, J., et al., *Bisexually Concordant, Heterosexually and Homosexually Discordant: A Matched-Pair*

Comparison of Male and Female Adrenogenital Syndrome, PSYCHIATRY (May 1987); Ehrhardt, A.A., et al., *Psychosexual Development: An Examination of the Role of Prenatal Hormones*, CIBA FOUND. SYMP. (Mar. 14-16, 1978); Meyer-Bahlburg, H.F., et al., *Sexual Orientation in Women With Classical or Non-Classical Congenital Adrenal Hyperplasia as a Function of Degree of Prenatal Androgen Excess*, ARCHIVES OF SEXUAL BEHAVIOR (Feb. 2008). In 1976, this adrenal disease was called "adrenogenital syndrome" because infant girls were born with large clitorises and more male-like active play patterns,[8] voices,[9] and some of the skeletal structure typical for boys.[10] Many of the affected females were observed to later identify as lesbian or bisexual in adulthood, and a small proportion were observed to have transitioned to a male gender identity.[11]

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[8] Hines, M., et al., *Androgen and the Development of Human Sex-Typical Behavior: Rough-and-Tumble Play and Sex of Preferred Playmates in Children With Congenital Adrenal Hyperplasia (CAH)*, CHILD DEV. (1994); Pasterski, V., et al., *Increased Aggression and Activity Level in 3- to 11-Year-Old Girls With Congenital Adrenal Hyperplasia (CAH)*, HORM. BEHAV. (Sept. 2007).

[9] Nygren, U., et al., *Voice Characteristics in Women With Congenital Adrenal Hyperplasia Due to 21-Hydroxylase Deficiency*, CLINICAL ENDOCRINOLOGY *(Oxf.)* (Jan. 2009).

[10] Breedlove S.M., *Organizational Hypothesis: Instances of the Fingerpost*, ENDOCRINOLOGY (Sept. 2010).

[11] Meyer-Bahlburg H.F., et al., *Gender Development in Women With Congenital Adrenal Hyperplasia as a Function of Disorder Severity*, ARCHIVES OF SEXUAL BEHAVIOR (Dec. 2006);

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2. Xenoandrogens.

From 1940 to 1970, diethylstilbestrol was prescribed for women in the first trimester of pregnancy to prevent miscarriage, but was later found to be ineffective and harmful. It also raised in a statistically significant way the chances of lesbian orientation in the female offspring, and possibly also male-to-female transsexualism in the male offspring. Ehrhardt, A.A., et al., *Sexual Orientation After Prenatal Exposure to Exogenous Estrogen*, ARCHIVES OF SEXUAL BEHAVIOR (Feb. 1985). Prenatal exposure to phenobarbital and phenytoin has been linked to higher rates of undescended testes, genital anomalies, male homosexuality, and male to female transsexualism. Dessens, A.B., et al., *Association of Prenatal Phenobarbital and Phenytoin Exposure With Genital Anomalies and Menstrual Disorders*, TERATOLOGY (Oct. 2001); Dessens, A.B., et al., *Prenatal Exposure to Anticonvulsants and Psychosexual Development*, ARCHIVES OF SEXUAL BEHAVIOR (Feb. 1999).

Nordenskjold, A., et al., *Type of Mutation and Surgical Procedure Affect Long-Term Quality of Life For Women With Congenital Adrenal Hyperplasia*, J. CLIN. ENDOCRINOL. METAB. (Feb. 2008).

E. Analysis of Male Genetic Material Indicates that Sexual Orientation is Heritable.

Research into the actual genetic material carried by males also shows that sexual orientation in men is a trait housed in their very DNA. Each person has two sex chromosomes, X and Y. A female has two X chromosomes while a male has an X and a Y, and any two parents each supply one chromosome each. A mother's contribution is always an X chromosome, a father's can be either an X or a Y, and will thus determine the chromosomal sex of the child. Thus, a threshold question in considering the heritability of certain traits is whether that characteristic occurs in the X or Y chromosome.

For any male, a gene (or genes) located in the X chromosome is necessarily inherited from his mother. By means of comparative genetic studies of a number of pedigrees, William Turner's research in 1995 indicated that gene(s) for same-sex attraction of some homosexuals reside in the terminal region of the long arm of the X chromosome (denoted Xq28) (Turner 1995); *see also* Hamer, D.H., et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, SCIENCE (Jul. 1993); Pattatucci, A.M.L., *Biopsychosocial Interactions and the Development of Sexual Orientation*, LESBIAN, GAY, AND BISEXUAL IDENTITIES IN FAMILIES (1998); Pattatucci, A.M.L., *Molecular Investigations into Complex Behavior: Lessons from Sexual Orientation Studies*, THE INTERNATIONAL JOURNAL OF POPULATION BIOLOGY AND GENETICS (Apr.

1998). Turner based his conclusions on evidence derived from his pedigree studies showing that homosexual males had a significantly higher incidence of having maternal uncles who are also homosexual, implicating some component of the X chromosome.

F. Brain Studies Show the Biologic Roots of Sexual Orientation.

With analysis of human genetic material on one end of the spectrum, and outward manifestations (*i.e.*, sexual orientation) on the other, examination of subsidiary biology – in particular the brain anatomy and function – further undercuts the petitioners' position. Studies dealing with brain differences between heterosexual and homosexual men showed several significant differences. The interstitial nucleus of the anterior hypothalamus ("INAH3"), located more or less in the center of the brain, is two to three times larger in straight men than in gay men. LeVay, S.A., *Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, SCIENCE (Aug. 1991). LeVay's study is highly suggestive that hormones and fetal brain development may be interrelated, and that the INAH3 structures of gay men were more similar to those of heterosexual females than to those of heterosexual males.

Moreover, other studies of the brain involving the anterior commissure, and the suprachiasmatic nucleus also showed structural differences between gay and straight men. Allen, L.S., et al., *Sexual*

Orientation and the Size of the Anterior Commissure in the Human Brain, PROC. NAT'L ACAD. SCI. (Aug. 1992); Swaab, D.F., et al., *An Enlarged Suprachiasmatic Nucleus in Homosexual Men*, BRAIN RESEARCH (Dec. 1990). For example, experimental studies more than forty years ago at the University of Kansas showed that manipulating the levels of testosterone during fetal development of guinea pigs and rats could influence the sexual behavior of the adult. These manipulations also affected the size as well as the structural characteristics of the sexually dimorphic nucleus in the brain. *See* LeVay, S.A., *Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, SCIENCE (Aug. 1991). As Bailey and his colleagues (1999) state, "[t]he most influential biologic theory of sexual orientation is that male homosexuality results from incomplete masculinization of relevant brain structures during prenatal development." Bailey, J.M., et al., *A Family History Study of Male Sexual Orientation Using Three Independent Samples*, BEHAVIOR GENETICS (1999).

G. The Overwhelming Majority of Humans Self-Describe Their Sexual Orientation as Innate.

Taking a view of the scientific data as a whole, it can come as no surprise that they are consistent with the views of innateness of all sexual orientation shared by members of the gay and lesbian community. For example, in a national survey conducted in 2010 with a representative sample of more than 650 self-identified lesbian, gay and bisexual adults, 95% of the gay men and 83% of the lesbian women reported that they experienced "no choice at all" or "small amount of choice" about their sexual orientation. *See* Herek, G.M., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample*, SEXUALITY RES. & SOC. POL'Y (2010). *No* peer-reviewed published scientific studies support the hypotheses that life experience causes homosexuality, that sexual orientation is learned, that there is a psychological cause of homosexuality or that sexual orientation is chosen.

IV. MISGUIDED EFFORTS TO CHANGE SEXUAL ORIENTATION PROVE THE INNATENESS OF THE TRAIT

Although not directly regulated by DOMA's differential treatment of married couples, sexual orientation change efforts ("SOCE") are relevant in considering the immutability of sexual orientation. The corollary to the petitioners' argument that sexual orientation is mutable and changeable is the grim reality that follows efforts to change individuals' sexual orientation. That is to say: if the petitioners were correct that homosexuals bore the brunt of DOMA because of their own "choice" and not because of innate characteristics, what would the practical consequence be of suggesting that the law's discrimination could be avoided by making a different "choice"? The answer, unfortunately, is sobering, and entails the causation of severe depression, anxiety, and suicides. The clinical research disproves what the petitioners blithely misunderstand as merely a change in temporal expressions. Indeed, Dr. Robert L. Spitzer, the most prominent proponent of SOCE has actually retracted his position on the grounds that the effects of SOCE were severely harmful to participants.

The consensus among the established medical community is that SOCE are generally futile and potentially dangerous to an individual's well-being, suggesting that sexual orientation is innate. *See* AMERICAN PSYCHOLOGICAL ASSOCIATION REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION (2009) ("[E]fforts to change sexual orientation are unlikely to be successful and involve some risk of harm."); *see also* Richard A. Posner, SEX AND REASON (1992) (describing "failure of treatment strategies . . . to alter homosexual orientation"); Haldeman, D., *The Practice and Ethics of Sexual Orientation Conversion Therapy*, J. CONSULTING & CLINICAL PSYCHOL. (1994) (describing "lack of empirical support for conversion therapy"); *see also Perry v. Schwarzenegger*, 704 F. Supp. 2d at 966 (N.D. Cal. 2010) ("No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.").

In fact, every major mental health organization has adopted a policy statement cautioning against the use of so-called "conversion" or "reparative" therapies to change the sexual orientation of gay and lesbian people. These policy statements are reproduced in a 2008 publication of the American Psychological Association, available at http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf. In a 2012 article, the American Academy of Child and Adolescent Psychiatry ("AACAP") advised clinicians that "there is no evidence that sexual orientation can be altered through therapy, and attempts to do so may be harmful." Adelson, S.A., et al., *Practice Parameters on Gay, Lesbian, or Bisexual Sexual Orientation, Gender Nonconformity, and Gender Discordance in Children and Adolescents*, J. AACAP (Sept. 2012). In a 2009 article in PEDIATRICS, documentation supported the conclusion that "minors who experience family rejection based on their sexual orientation face especially serious health risks." Ryan, C., et al., *Family Rejection as a Predictor of Negative Health: Outcomes in White and Latino Lesbian, Gay and Bisexual Young Adults*, J. PEDIATRICS (2009). The Pan American Health Organization, a regional office of the World Health Organization, issued a statement in May, 2012 that sexual orientation change efforts "lack medical justification and represent a serious threat to the health and well-being of affected people." The American Academy of Pediatrics has found that "[t]herapy directed at specifically changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation." *Policy Statement, Homosexuality and Adolescence*, AM. ACAD. PEDIATRICS (1993). The American School Counselor

Association, American Medical Association Council on Scientific Affairs and Public Health, National Association of Social Workers, American Counseling Association Governing Council, and American Psychoanalytic Association have all issued statements opposing SOCE.

The American Psychological Association summarized this history in its 2009 Task Force paper, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION. As a starting point, the Task Force observed that "the population that undergoes SOCE tends to have strongly conservative religious views that lead them to seek to change their sexual orientation." The Task Force posed three questions: (1) are SOCE effective at changing sexual orientation; (2) are SOCE harmful; and (3) are there any additional benefits reasonably attributable to SOCE? To do so, the Task force "decided to conduct a systematic review of the empirical literature on SOCE." *Id.* at 81. The Task Force found that "negative side effects" of those efforts included "loss of sexual feeling, depression, suicidality, and anxiety." *Id.* at 83. Moreover, the Task Force found that it does not work: "scientific evidence shows that SOCE is not likely to produce its intended outcomes. . . ." *Id.*

These empirical findings are borne out by tragic and personal experiences. *Amici Curiae* in the matter of *Welch v. Brown* before the Ninth Circuit (addressing a statute that proposed to ban SOCE in California) stated their perspective: "the serious harms that [survivors of SOCE], their families, and others suffered because they were submitted to dangerous practices, illustrating the serious risk" involved. The personal testimony described the lengths to which SOCE tried to go (because the innate characteristic was naturally unresponsive to mere suggestion), including teaching participants that they were the result of "inadequate parenting," and being "sinful," all of which led to "periods of drug abuse and homelessness." Notably, the National Association for Research & Therapy of Homosexuality ("NARTH"), a vocal *Amicus Curiae* (see below), was the host for much of this misbegotten "therapy." Tragically, one of the Welch amici took his own life.

The misguided view that SOCE proponents take is perhaps best illustrated by the experience of Dr. Robert L. Spitzer. An early proponent of destigmatizing the "disorder" classification of homosexuality, Dr. Spitzer nonetheless argued for years that SOCE could be effective. Dr. Spitzer presented a study in 2001 that claimed a majority of its participants had reported change "from a predominantly or exclusively homosexual orientation to a predominantly or exclusively heterosexual orientation." Benedict Carey, *Psychiatry Giant Sorry for Backing Gay 'Cure'*, NEW YORK TIMES (May 18, 2012). After years of corrective analysis, however, Dr. Spitzer was appropriately forceful in his retraction.

These comprehensive and specific results obliterate the anecdotal and conclusory statements offered by petitioners and their amici that sexual orientation is somehow changeable. Were they correct, the heartbreaking consequences of SOCE could have been avoided. That is not, unfortunately, the reality.

V. THE STUDIES CITED BY SUPPORTERS OF DOMA FAIL TO DEMONSTRATE THAT SEXUAL ORIENTATION IS BEHAVIORAL

Against the backdrop of scientific consensus that innate factors are an essential component of sexual orientation, petitioners rely on misinterpretation of published studies that actually prove the opposite point.

A. Petitioners' Repeated Reliance on the Work of Lisa Diamond Actually Demonstrates that Sexual Orientation is Innate, Not the Reverse.

Probably the studies most distorted from their original conclusions are those of Dr. Lisa Diamond. Although petitioners' current brief is silent about Dr. Diamond's work, petitioners took a different strategy in the Court of Appeals, and their amici here cite Dr. Diamond liberally out of context (*see, e.g.*, McHugh *Amicus Curiae* Br. at 8, 10, 21, 22, 25, 27), as have other amici who oppose marriage equality (*see, e.g.*, Frederick Douglass Foundation as amicus in the matter of *Golinski v. Office of Personnel Mgmt.*, Nos. 12-15388 and 12-15409 (9th Cir. June 11, 2012)). Dr. Diamond's work has been cited for arguments it does not support, to the point that Dr. Diamond herself has felt compelled to speak out.

Diamond conducted a 2-year study and published her conclusions in *Sexual Identity, Attractions, and Behavior Among Young Sexual-Minority Women Over a 2-Year Period*, 36 DEVELOPMENTAL PSYCHOLOGY 241, 247 (2000). That study was cited in defense of DOMA (to argue against immutability) by the Frederick Douglass Foundation as amicus in the matter of *Golinski v. Office of Personnel Mgmt.*, Nos. 12-15388 and 12-15409 (9th Cir. June 11, 2012), ECF No. 59. The amicus argued that Diamond had found that "[h]alf of the young women in this sample relinquished the first sexual-minority identity they adopted." This is an oversimplification to the point of rendering Diamond's work unrecognizable. In fact, Diamond's 2000 paper starts from the premise that "sexual attractions appear fairly stable" once developed. 36 DEVELOPMENTAL PSYCHOLOGY at 246. Diamond acknowledges some fluidity in sexual identity as youth explore their sexual thoughts in a family, educational system and society that encourages one orientation over the other. Dr. Diamond, also notes that it "may be an inevitable consequence of the fact that most young women in this sample . . . experience attractions for both sexes. This non-exclusivity leaves open the possibility for multiple identities and behaviors over time, even when attractions remain stable." *Id.* at 246-47. In addition, Diamond points out that "numerous researchers have argued that there is extensive overlap between lesbianism and bisexuality, and the findings here support this view." *Id.* at 247.

This overlap undercuts any attempt by petitioners and their amici to convert self-identification of differing attractions over the study period into a categorical change of status. Diamond says no such thing. Indeed, given the identified overlap, it would follow naturally that at least some of the respondents would call themselves by a different sexual identity, even if their sexual attraction for a particular gender remained constant.

Diamond also published her analysis of a 10-year longitudinal study in 2008. *See Female Bisexuality from Adolescence to Adulthood: Results from a 10-Year Longitudinal Study*, DEV. PSYCHOLOGY (2008). Once again, the Frederick Douglass Foundation and McHugh conflate data concerning specific incidents of attraction with wholesale renunciation of sexual orientation. Diamond observes that "[b]y the 10-year point, 67% of participants had changed their identities at least once since T1, and 36% had changed identities more than once." *Id.* at 9. These statistics are not limited solely to lesbians, but to the entire pool of participants, which includes women who identify as bisexual, lesbian, or *who, critically, are undecided*. Bisexual and unlabeled women were more likely to switch between bisexual and unlabeled identities. Such a change is not a change between heterosexual and homosexual, necessarily, or even likely. Moreover, it makes perfect sense that persons who initially identify as undecided later declare an orientation (either heterosexual or homosexual); that is not really a change at all. Sexual orientation is not binary, black and white, either or. Rather it is an innate urge that expresses on a spectrum as a result of the prenatal biology.

Finally, Diamond is again wrenched from her actual research in the amicus brief to the First Circuit in *Gill v. Office of Personnel Mgmt.*, filed by NARTH. NARTH claims that "[i]n the last decade Dr. Lisa Diamond reported significant longitudinal data that clearly shows the fluidity of the sexual orientation of women," pointing to *What We Got Wrong About Sexual Identity Development: Unexpected Findings From a Longitudinal Study of Young Women in Sexual Orientation and Mental Health: Examining Identity and Development in Lesbian, Gay, and Bisexual People*, SEXUAL ORIENTATION AND MENTAL HEALTH: EXAMINING IDENTITY AND DEVELOPMENT IN LESBIAN, GAY, AND BISEXUAL PEOPLE, 79 (A.M. Omoto & H.S. Kurtzman, eds. 2005). Once again, however, the fact that Diamond found sexual fluidity in her sample pool is partially attributed to the fact that 28% of participants were uncertain about their sexuality, and another 30% identified as bisexual. A significant percentage of those who were uncertain would be expected ultimately to adopt a sexual identity, thus resulting in a change in label but not of orientation.

Proponents of DOMA cite certain studies to suggest that if there are *any* environmental influences on sexual attraction, sexual orientation cannot be an innate characteristic. This is plainly not so as a matter of logic, and the authority that petitioners cite actually confirms findings of genetic determination as well. *See* Langstrom, N., et al., *Genetic and Environmental Effects of Same-Sex Sexual Behavior: A Population Study of Twins in Sweden*, ARCHIVES OF SEXUAL BEHAVIOR (2010) ("Langstrom"). The *Golinski* amicus brief by the Frederick Douglass Foundation at 9 cites Langstrom as "finding [that] genetic effects explained .34-.39 of the variance in men and .18-.19 of the variance in women and concluding that "'same-sex behavior arises not only from heritable but also from individual specific environmental sources.'" This concedes some genetic correlation, of course. *See* Langstrom at 77 ("Our results support the notion that same-sex behavior arises not only from heritable but also from individual-specific environmental sources"). Not only that, but the entire study's value is limited by the fact that findings of "same-sex behavior was relatively rare," *id.*, and that even in a sexually liberated country like Sweden, "the number of pairs where both twins choose to reveal same-sex behavior will remain limited." *Id.* at 79.

Not surprisingly, Dr. Diamond herself has flatly repudiated these strained interpretations. In particular, she noted "no matter how many times I endeavor to clarify what fluidity means, and what my research shows, it doesn't seem to matter." *See* HUFFINGTON POST, *The Doctor is Out . . . and Outspoken: An Interview with Dr. Lisa Diamond* (May 12, 2012). To make the point clear, Dr. Diamond submitted an affidavit to the District Court below on August 20, 2011 in response to citations to her research, in which she reminded the Court (emphasis added):

> **My quoted statement** concerns the scientific and popular debates over the defining characteristics of LGBT individuals and it **says nothing whatsoever about the immutability of sexual orientation itself**. Hence, [petitioner Bipartisan Legal Advisory Group of the House of Representatives ("BLAG")] has incorrectly characterized my research. BLAG [ ] states [ ] that "according to multiple studies, a high number of persons who experience sexual attraction to members of the same sex early in their adult lives later cease to experience such attraction." In support of this claim BLAG provides the following quote from one of my articles: "50% [of respondents] had changed their identity label more than once since first relinquishing their heterosexual identity." **This quoted statement refers to sexual identity labels (i.e., how individuals describe and interpret their sexuality), and not to sexual orientation.**

Expert Affidavit of Lisa M. Diamond, PhD, No. 3:10-cv-01750-VLB (D. Conn.), Sept. 14, 2011, ECF No. 99, at pp. 2-3. Dr. Diamond herself thus makes the point by negative implication: a change over time in the way individuals label their levels of sexual attraction – particularly where one of the labels is the overlapping category of bisexual – does not even imply, let alone demonstrate, a fluidity of sexual orientation itself.

B. Petitioners' Other Studies Do Not Support the Conclusion that Sexual Orientation is Behavioral.

Bearman, P., et al., *Opposite-Sex Twins and Adolescent Same-Sex Attraction*, 107 AM. J. OF SOCIOLOGY 1179, 1180 (2002), has been cited for the proposition that "efforts to establish genetic or hormonal effects on sexual orientation have been 'inconclusive at best.'" *See, e.g.*, McHugh Br. at 20.[12] This study involved 3,139 pairs of siblings who were in the seventh through twelfth grades, a time of sexual exploration and development. Of this pool, 784 pairs were twins. The biggest flaw with this approach is that the vast majority of individuals in the study were not involved in any same-sex sexual behavior (if any sexual behavior at all), and their youth precluded any firm establishment of orientation. In light of this limitation, the authors chose instead to focus on same-sex *attraction*, which is known to be fluid in youth as they begin to explore their sexual urges and navigate in a society that stigmatizes one orientation over the other. More to the point, the authors acknowledge that "the number of adolescents involved in homosexual relationships is too small in our sample to assess genetic influence statistically with any confidence." Bearman at 1200.

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[12] *Hollingsworth* petitioner *Amicus Curiae* McHugh cites several studies for this proposition, all of which fail for the same reasons.

BLAG cites Dr. Letitia Anne Peplau in support of its argument that the origins of sexual orientation are "not well understood," BLAG Br. 55 (quoting JA 500), and that some people "cannot 'be readily characterized as heterosexual, homosexual, or perhaps bisexual.'" BLAG Br. 56 (quoting Linda D. Garnets & Letitia Anne Peplau, *A New Paradigm for Women's Sexual Orientation: Implications for Therapy*, 24 WOMEN & THERAPY 111, 113 (2001). But the fact that scientists have not yet discovered exactly how sexual orientation is determined does not mean that there is any scientific debate about whether it is changeable. Similarly, as Dr. Peplau explained in a declaration submitted in this case, "the significant majority of adults exhibit a consistent and enduring sexual orientation." ¶ 23. Not only is sexual orientation stable for the significant majority of adults, but, as Dr. Peplau stated, BLAG is wrong to assert that sexual orientation is an amorphous category: "in national surveys in the U.S., nearly all participants are able to indicate their sexual orientation category." ¶ 15.

◆

CONCLUSION

Sexual orientation is an innate human characteristic that deserves the full and equal protection of the law. GLMA respectfully requests that the Court affirm the Second Circuit.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

[illegible]
AND
BRIEFS

No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR, AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF ON THE MERITS OF *AMICI CURIAE* UNITED STATES SENATORS ORRIN G. HATCH, SAXBY CHAMBLISS, DAN COATS, THAD COCHRAN, MIKE CRAPO, CHARLES GRASSLEY, LINDSEY GRAHAM, MITCH McCONNELL, RICHARD SHELBY AND ROGER WICKER IN SUPPORT OF RESPONDENT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

A. Passage of DOMA 2

B. The Windsor Litigation 6

C. Amici's Argument 8

ARGUMENT 10

I. Ample Federal Interests Supported the Enactment of DOMA 10

A. Pre-DOMA federal law did not recognize same-sex marriages 11

B. Section 3 of DOMA promotes a significant government interest in uniformity and certainty in the application of federal law 16

C. Section 3 of DOMA protects the ability of states to preserve traditional marriage 21

II. Support for Traditional Marriage is not Unconstitutional "Animus" 23

CONCLUSION 30

TABLE OF AUTHORITIES

CASES Page(s)

Adams v. Howerton, 486 F. Supp. 1119 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982).......... 12-13

Baehr v. Lewin, 852 P.2d 44 (Haw. 1993)..2, 3, 5, 16

Burnet v. Harmel, 287 U.S. 103 (1932).......... 19

Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995).......... 13

Eccles v. Comm'r, 19 T.C. 1049, *aff'd*, 208 F.2d 796 (4th Cir. 1953), *nonacq. withdrawn*, *acq.* 1957-2 C.B. 3 (1953).......... 14

Fleming v. Nestor, 363 U.S. 603 (1960).......... 26

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) .. 27

Godfrey v. Spano, 13 N.Y.3d 358 (2009).......... 21

In re Marriage Cases, 183 P.3d 384 (Cal. 2008).......... 24

Lawrence v. Texas, 539 U.S. 558 (2003).......... 10, 28

Lyeth v. Hoey, 305 U.S. 188 (1938).......... 19

Massachusetts v. U.S. Dep't of HHS, 682 F.3d 1 (1st Cir. 2012).......... 28, 29

Murphy v. Ramsey, 114 U.S. 15 (1885).......... 13

Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).......... 24, 25

Romer v. Evans, 517 U.S. 620 (1996).........24, 25, 26

Sosna v. Iowa, 419 U.S. 393 (1975).......... 15

U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).......... 25, 26

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Constantine, 296 U.S. 287 (1935) 28

Windsor v. United States, 699 F.3d 169 (2d Cir. 2012) 6, 7, 24

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 7, 9, 24, 30

U.S. Const. amend. XIV, § 1 29

U.S. Const. art. IV, § 1 4

STATUTES

26 U.S.C. § 2056(a) 6, 13

26 U.S.C. § 6013 13-14

28 U.S.C. § 530D 6

38 U.S.C. § 101(31) 13

42 U.S.C. § 416(b) 13

Defense of Marriage Act, § 2, 28 U.S.C. § 1738C 2, 5, 9, 22

Defense of Marriage Act, § 3, 1 U.S.C. § 7 .... *passim*

Haw. Rev. Stat. Ann. § 572B (West 2013) 21

Revenue Act of 1948, Pub. L. No. 80-471, 62 Stat. 110 (1948) 19-20

OTHER AUTHORITIES

2 Joseph Story, Commentaries on the Constitution of the United States (1st ed. 1833) 27

Page(s)

32 Weekly Comp. Pres. Doc. (Sept. 30, 1996) .. 2

142 Cong. Rec. 16796 (1996) 12

142 Cong. Rec. 17076 (1996).......................... 12

142 Cong. Rec. 17094 (1996).......................... 2

142 Cong. Rec. 22446 (1996).......................... 12

142 Cong. Rec. 22452 (1996) 29

142 Cong. Rec. 22459 (1996).......................... 16

142 Cong. Rec. 22467 (1996).......................... 2, 29

142 Cong. Rec. 23186 (1996).......................... 12

The American Heritage Dictionary (2d ed. 1985)... 15, 18

Black's Law Dictionary (5th ed. 1979) 12, 14, 18

Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. (1996) 4, 5, 16, 17, 18

The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary, 104th Cong. (1996) ....*passim*

Employment Nondiscrimination Act of 1995, S. 932, 104th Cong. (1995) 29

H.R. Rep. No. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905 ....3, 5, 12

Letter from Eric H. Holder, Jr., Att'y Gen., to Hon. John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2012) ... 6

Page

Revenue Act of 1948, S. Rep. No. 80-1013 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1163 .... 14, 20, 23

Staff of Joint Comm. on Taxation, 97th Cong., Background and Description of Administration Proposal Relating to Estate and Gift Taxes (Joint Comm. Print 1981) 14

U.S. Gen. Accounting Office, GAO-04-353R, Defense of Marriage Act (Jan. 23, 2004) 11

Webster's Third New International Dictionary (3d ed. 1986) 12, 14, 18

INTEREST OF *AMICI CURIAE* [1]

Amici Orrin G. Hatch, Saxby Chambliss, Dan Coats, Thad Cochran, Mike Crapo, Charles Grassley, Lindsey Graham, Mitch McConnell, Richard Shelby and Roger Wicker are sitting United States Senators who served in the 104th Congress House or Senate and voted for passage of the Defense of Marriage Act (DOMA) in 1996. As such, they have an interest in the constitutionality of Section 3 of DOMA, which defines the terms "marriage" and "spouse" for purposes of federal law, and in informing the Court of the important government interests that it was enacted to serve.

One of the Amici, Senator Orrin G. Hatch, chaired the Senate Judiciary Committee, which had jurisdiction over the DOMA legislation. In considering DOMA in 1996, the committee heard from witnesses regarding the potential recognition of same-sex marriage by the highest court in the State of Hawaii and the impact that this would have on federal law. The committee also heard testimony from constitutional scholars supporting the constitutionality of DOMA,[2] and Senator Hatch received written assurance from the Department of Justice that it saw no constitutional infirmity in the statute.[3]

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[1] Written consent to the filing of this brief has been received from all parties and filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than Amici and their counsel, made any monetary contribution to the preparation or submission of this brief.

[2] Two witnesses, Professor Lynn D. Wardle and Mr. David Zweibel, testified that Section 3 of DOMA, which is at issue in this case, was clearly within Congress's constitutional power. *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 37-39, 54 (1996) ("Senate Hearing"). Another witness, Professor Cass R. Sunstein, testified in opposition to DOMA; however, Professor Sunstein's

Amici are particularly concerned that the Department of Justice, having repeatedly assured Congress of DOMA's constitutionality during the legislative process, now seeks to have the law judicially invalidated. If the Department believed that there was an inadequate federal interest to justify DOMA, the time to speak was in 1996, when Congress gave careful consideration to the need for DOMA. Rather than urging the courts to give appropriate deference to an Act of Congress, as befits its proper role in our system of government, the Department now groundlessly impugns the motives of the overwhelming bipartisan majority that supported DOMA.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

A. Passage of DOMA. DOMA was enacted in 1996 after passing each house of Congress with more than 80% of the votes in favor, an overwhelming and bipartisan majority.[4] President Clinton signed DOMA into law on September 21, 1996. 32 Weekly Comp. Pres. Doc. 1891 (Sept. 30, 1996).

The enactment of DOMA was in large part a direct legislative response to *Baehr v. Lewin*,[5] a 1993 deci-

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testimony related solely to Section 2, and he noted that he did not believe that Section 3 was unconstitutional. *Id.* at 44 n.1.

[3] Senate Hearing at 2.

[4] The House approved the bill by a vote of 342-67, while the Senate passed it by a vote of 85-14. 142 Cong. Rec. 17094, 22467 (1996).

[5] 852 P.2d 44 (Haw. 1993).

sion of the Hawaii Supreme Court. The *Baehr* decision had found that denials of marriage licenses to same-sex couples were subject to strict scrutiny under the Hawaii Constitution, and it had remanded the case to the lower courts to determine whether the state could meet that burden. At the time Congress considered DOMA, it appeared that the Hawaii courts were "on the verge of requiring that State to issue marriage licenses to same-sex couples." H.R. Rep. No. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906 ("House Report").

Congress's concern was not with Hawaii's marriage laws. *See* House Report at 5 (House Judiciary Committee "expresses no opinion on the propriety of the ruling in *Baehr*"). Instead, Congress was concerned with the impact that recognition of same-sex marriage in one or more states would have on other states and on the federal government. House Report at 6-7. The likely effects were explored in hearings held before the House and Senate Judiciary Committees, which showed (1) *Baehr* was merely one facet of an organized litigation strategy designed to secure nationwide recognition of same-sex marriage;[a] and (2)

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[a] At a May 15, 1996 hearing before the House Judiciary Subcommittee on the Constitution, a 23-page memorandum from the Lambda Legal Defense and Education Fund, Inc. (LLDEF) was placed into the record. This memorandum laid out a strategy for using the expected legal victory in Hawaii to obtain recognition of same-sex marriages in other states and by the federal government:

> Many same-sex couples in and out of Hawaii are likely to take advantage of what would be a landmark victory. The great majority of those who travel to Hawaii to marry will return to their homes in the rest of the country expecting full legal recognition of their unions. Despite a powerful

legal experts, both for and against DOMA, agreed that recognition of same-sex marriage in one or more states would likely have unpredictable and inconsistent legal impacts on other states and the federal government.[7] Indeed, same-sex marriage ad-

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> cluster of expectations, logistics, rights, constitutional obligations, and federalist imperatives, these questions are likely to arise: Will these people's validly-contracted marriages be recognized by their home states *and the federal government*, and will the benefits and responsibilities that marriage entails be available and enforceable in other jurisdictions?
>
> We at Lambda believe that the correct answer to these questions is "Yes."

Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. 15 (1996) ("House Hearing") (emphasis added).

[7] For example, Professor Michael W. McConnell of the University of Chicago Law School opined that it was "not unlikely" that couples who entered into same-sex marriages in Hawaii would be entitled to legal recognition in other states under the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, although he allowed that it was "not certain" and "[i]t is possible that states with laws against same-sex unions will be able to resist recognition of these marriages under the so-called 'public-policy' exception." Senate Hearing at 57. Professor Cass R. Sunstein, also of the University of Chicago Law School, thought it was "unlikely" that the Full Faith and Credit Clause would require the recognition of out-of-state marriages, but he acknowledged that it was not clear how this "traditional view" could be squared with the language of the clause. *Id.* at 44-45. All legal experts agreed that if the public policy exception applied, it would mean varying results in different states.

As Professor Lynn D. Wardle of Brigham Young University, an expert in family law, testified: "[T]his is the kind of issue that is best resolved before the cases arise. Waiting until after some state legalizes same-sex marriage and a flood of cases are filed demanding that same-sex unions formed in such as state vocates hoped to use the "legal and practical nightmare" created by this situation to generate pressure for uniform nationwide recognition of same-sex marriages. *See* House Hearing at 19. The House Judiciary Committee thus "described *Baehr* as part of an 'orchestrated legal assault being waged against traditional heterosexual marriage.'" Supp. App. 37a (quoting House Report at 2-3).

To address these problems, DOMA has two simple provisions. Section 2, 28 U.S.C. § 1738C, provides a uniform national rule under which states may, but are not required to, recognize same-sex marriages entered into in other states. Section 3, which is at issue in this case, defines, for purposes of federal law, the terms "marriage" as "mean[ing] only a legal union between one man and one woman as husband and wife" and "spouse" as referring "only to a person of the opposite sex who is a husband or wife." 1 U.S.C. § 7.

By adopting Section 3, Congress sought to avoid the federal government having to litigate, on a statute by statute and state by state basis, whether (a) federal law provided benefits for same-sex marriages that were valid under state law and if so, (b) the particular marriage in question was valid under state law. As Professor Lynn Wardle testified before the Senate Judiciary Committee, "Section 3 eliminates what could be a lot of very messy and

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be treated as 'marriages' for purposes of federal laws would be very unwise. It would invite a multitude of unnecessary litigation, and create confusion, inconsistency, and unfairness. Different courts in different districts and circuits might reach contradictory conclusions adding to the uncertainty." *Id.* at 33-34.

costly litigation for the federal government." Senate Hearing at 34.

B. The Windsor Litigation. Respondent Edith Windsor and Thea Clara Spyer were issued a certificate of marriage in Canada in 2007. Ms. Windsor resided in New York at the time of Ms. Spyer's death in 2009. In 2010, she commenced this action against the United States, claiming Section 3 of DOMA unconstitutionally denied her the benefit of the marital estate tax deduction, 26 U.S.C. § 2056(a). *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), reproduced in the Appendix to the Supplemental Brief for the United States ("Supp. App.") at 1a-2a.

The United States defended the case until February 23, 2011, when Attorney General Holder informed Congress, pursuant to 28 U.S.C. § 530D,[8] the Department of Justice would no longer defend the constitutionality of DOMA. *See* Letter from the Hon. Eric H. Holder to the Hon. John A. Boehner (Feb. 23, 2011), reproduced in the Joint Appendix ("J.A.") at 183. Among the reasons assigned by the Attorney General for this abrupt and "unprecedented," Supp. App. 36a, change of position was the claim that DOMA's legislative record "contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships – precisely the kind of stereotype- based thinking and animus the Equal Protection Clause is designed to guard against." J.A.191.

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[8] This statute requires the Attorney General to provide notice to designated congressional officials, including the Senate and House leadership, the chairs and ranking members of the Senate and House Judiciary Committees, the Senate Legal Counsel and the General Counsel of the House, when the Department of Justice refuses to defend the constitutionality of a federal statute.

Following the Attorney General's announcement, the Department of Justice "switch[ed] sides to advocate that the statute be ruled unconstitutional" in *Windsor*. Supp. App. 4a. The Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG") intervened to conduct the defense of the statute.

The district court granted summary judgment in favor of Ms. Windsor, holding that Section 3 of DOMA violated equal protection because it was supported by no "rational basis." Supp. App. 3a. On appeal, the Second Circuit affirmed. The panel first held that Ms. Windsor had standing because it predicted that New York courts would recognize her Canadian marriage in 2009, although New York itself did not license same-sex marriages until 2011. *Id.* at 7a.

On the merits, a majority of the Second Circuit panel declined to consider whether Section 3 of DOMA satisfies rational basis review. *Id.* at 14a. Instead, it applied intermediate scrutiny and found Section 3 unconstitutional because BLAG could not offer "an exceedingly persuasive justification" for it. *Id.* at 26a. Dissenting on the merits, Judge Straub found that rational basis review should be applied and that Section 3 satisfied this standard for at least two reasons: (1) it promotes traditional marriage, which furthers a legitimate government interest in encouraging responsible procreation and childrearing and (2) it promotes the federal interest in preserving the uniformity of federal law and maintaining the status quo with respect to the definition of marriage. Supp. App. 76a-77a.

C. Amici's Argument. In this brief Amici explain a number of significant federal interests underlying DOMA. Although there are important interests served by DOMA, such as preserving the connection between marriage and procreation, which also underlie the decision of states to preserve the traditional definition of marriage as between one man and one woman, our focus here is on specifically federal interests that were considered and explained throughout DOMA's legislative history, but were ignored, misunderstood, or summarily dismissed below:

- Pre-DOMA federal law did not recognize same-sex marriages. Rather than dramatically changing federal law, as the Second Circuit majority assumed, Section 3 merely clarified and re-affirmed the existing federal definition of marriage. It is apparent, for example, that the pre-DOMA marital estate tax deduction at issue in this case did not apply to same-sex couples.

- Section 3 of DOMA promotes a significant government interest in uniformity and certainty in the application of federal law. As the legislative history of DOMA amply substantiates, efforts to obtain judicial recognition of same-sex marriage at the state level, as was occurring in Hawaii at the time, posed a unique and unprecedented threat to the stability and uniformity of federal law. In enacting DOMA, Congress responded to this challenge by preserving the status quo with respect to non-recognition of same-sex marriage at the federal level, thereby averting state by state and statute by statute litigation seeking federal benefits, and the likelihood of inconsistent and unfair results.

- By taking away the incentive of federal benefits, Congress protected the ability of states to preserve traditional marriage. Section 2 of DOMA recognizes the authority of each state to decide for itself whether to recognize same-sex marriage. If federal benefits were available for same-sex couples validly married under state law, however, federal law would serve as an incentive for state recognition of same-sex marriage, either by legislative or judicial action. By re-affirming that the federal definition of marriage does not include same-sex unions, Section 3 ensured that federal benefits will not be used to undermine traditional marriage at the state level.

In addition, Amici respond to the argument that DOMA violates equal protection because it was allegedly motivated by unconstitutional "animus." Notwithstanding the Attorney General's belated discovery of DOMA's allegedly unconstitutional motivation, this argument is flawed because legislative motivation is not a basis for setting aside a federal statute supported by legitimate and rational government interests. This Court's precedents do not support evaluating the constitutionality of a federal statute based on subjective characterizations of the motives of individual legislators. In any event, support for traditional marriage cannot be equated to "animus," as Justice O'Connor observed in her concurrence in *Lawrence v. Texas*, 539 U.S. 558, 585 (2003). It would be particularly inappropriate to invalidate DOMA based on the alleged motivations of individual supporters, given that the statute was passed with overwhelming bipartisan support and signed into law by President Clinton.

Amici therefore respectfully urge this Court to reverse the judgment of the court below, and uphold the constitutionality of Section 3 of DOMA.

ARGUMENT

I. Ample Federal Interests Supported the Enactment of DOMA

The Second Circuit rejected all of the proffered justifications for DOMA, finding that BLAG failed to meet the burden of establishing an "exceedingly persuasive" rationale for the law.[9] Supp. App. 26a. The court's conclusion was based in part on the following premises: (1) that pre-DOMA federal law recognized same-sex marriages for purposes of federal benefits to the extent such marriages were valid under state law; (2) that Congress had no substantial interest in promoting uniformity in the application of federal law; and (3) that there was no connection between

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[9] The Second Circuit applied intermediate scrutiny as the standard of review, implicitly conceding that it would be difficult to justify striking down DOMA under a rational basis standard. Supp. App. 14a (court "decline[s] to take issue with the dissent, which explains why Section 3 of DOMA may withstand rational basis review"). Although Amici strongly believe that rational basis is the appropriate standard of review, we address here the interests advanced by DOMA, rather than the standard of review to be applied.

Section 3 of DOMA and Congress's interest in preserving a traditional definition of marriage. As discussed below, each of these premises is demonstrably incorrect.

(A). Pre-DOMA federal law did not recognize same-sex marriages. The court below asserted that "Windsor was denied the benefit of the spousal deduction * * * solely because [of] Section 3 of the Defense of Marriage Act * * *." Supp. App. 2a. The logical implication of this assertion is that absent the passage of DOMA, Windsor would have been entitled to claim the spousal deduction. The court, however, makes virtually no effort to substantiate this proposition.

As of the enactment of DOMA, there were 1,049 federal statutory provisions in which benefits, rights and privileges were contingent on marital status or in which marital status was a factor.[10] When these provisions were enacted, same-sex marriage was not recognized in any state, and Congress clearly did not contemplate that the term "marriage" in these statutes would encompass same-sex unions. As the dissent below observed, "[t]he history of federal legislation in respect of the meaning of marriage or spouse was never even suggested to mean anything other than the lawful union of one man and woman for all federal purposes." Supp. App. 34a.

The legislative history of DOMA makes clear Congress's understanding that Section 3 merely clarified and restated the *existing* definition of "marriage" in federal law in response to the fact that the Hawaiian courts were on the verge of recognizing a right to same-sex marriage under that state's constitution. *See* House Report at 10 ("Until the Hawaii situation, there was never any reason to make explicit what has always been implicit—namely, that only heterosexual couples could get married."); *id.* ("[T]he Committee believes that it can be stated with certainty that none of the federal statutes or regulations that use the words 'marriage' or 'spouse' were thought by even a single Member of Congress to refer to same-sex couples"); 142 Cong. Rec. 22446 (1996) (Sen. Byrd) ("We are not overturning the status quo in any way, shape or form. On the contrary, all this bill does is reaffirm for purposes of Federal law what is already understood by everyone."); *id.* at 23186 (Sen. Dorgan) ("For thousands of years, marriage has been an institution that represents a man and a woman, and I do not support changing the definition of marriage or altering its meaning."); *id.* at 16796 (Rep. McInnis) ("If we look at any definition, whether its Black's Law Dictionary, whether it is Webster's Dictionary, a marriage is defined as [a] union between a man and woman * * *."); id. at 17076 (Rep. Canady) ("all we are doing * * * is reaffirming what everyone has always understood by marriage, what everyone has always understood by the term 'spouse'").

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[10] *See* U.S. Gen. Accounting Office, GAO-04-353R, Defense of Marriage Act 1 (Jan. 23, 2004).

Congress's understanding of pre-DOMA law was entirely reasonable and supported both by judicial authority[11] and by expert testimony received during the legislative process.[12] No evidence has been advanced to suggest that the terms "marriage" or "spouse" encompassed same-sex unions before DOMA was enacted, either as a matter of ordinary language or as a matter of technical statutory usage.

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[11] *See Adams v. Howerton*, 673 F.2d 1036, 1039 (9th Cir. 1982) (holding, for purposes of federal immigration laws applying to the "spouse" of a U.S. citizen, that a same-sex marriage, even though allegedly valid under state law, would not be a "marriage" within the meaning of federal law); *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) ("Congress, as a matter

That pre-DOMA federal law embraces the traditional understanding of "marriage" can be seen plainly by looking at the language of particular statutes.[13] Most significantly for the present case, it is apparent that a "surviving spouse" entitled to a deduction for federal estate taxes under 26 U.S.C. § 2056(a) is the survivor of the "husband and wife" entitled to file a joint tax return under 26 U.S.C.

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of federal law, did not intend that a person of one sex could be a 'spouse' to a person of the same sex for immigration law purposes"), *aff'd* 673 F.2d 1036 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307, 314 (D.C. 1995) (For purposes of District of Columbia's marriage statute, "'marriage' is limited to opposite-sex couples."); *see also Murphy v. Ramsey*, 114 U.S. 15, 44 (1885) (referring to the "idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony [as] the sure foundation of all that is stable and noble in our civilization").

[12] Professor Wardle testified before the Senate Judiciary Committee: "[I]f some state legalizes same-sex marriage, that would radically alter a basic premise upon which the presumption of adoption of state domestic relations law was based—namely the essential fungibility of the concepts of 'marriage' from one state to another. Section 3 clarifies the premise upon which two centuries of federal legislation using marriage terms has been predicated." Senate Hearing at 27 n.4.

[13] *See, e.g.*, 42 U.S.C. § 416(b) (For Social Security Act a "'wife' means the wife of an individual, but only if she * * * is the mother of *his* son or daughter [or] was married to *him* * * *") (emphasis added); 38 U.S.C. § 101(31) (For purposes of veteran's benefits, "'spouse' means a person of the opposite sex").

§ 6013.[14] The legislative history of the marital estate tax deduction likewise confirms that the deduction was understood to apply to the surviving spouse of a marriage consisting of one man and one woman.[15] This was entirely consistent with the ordinary meaning of the word "marriage" at all relevant times.[16]

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[14] For example, in *Eccles v. Comm'r*, 19 T.C. 1049, 1053-054, *aff'd*, 208 F.2d 796 (4th Cir. 1953), *nonacq. withdrawn,, acq.* 1957-2 C.B. 3 (1957), a case cited by the Second Circuit, see Supp. App. 5a, the Tax Court noted the "inconsistency" that would arise if the determination of whether a couple was "husband and wife" for purposes of filing joint tax returns were different than the determination of whether they were married for purposes of taking the marital estate tax deduction.

[15] *See, e.g.*, Staff of Joint Comm. On Taxation, 97th Cong., Background and Description of Administration Proposal Relating to Estate and Gift Taxes 32 (Joint Comm. Print 1981) ("Proponents of increased marital deductions argue that there should be no tax imposed on transfers between spouses since a husband and wife should be treated as a single economic unit for estate and gift tax purposes, as they generally are for income tax purposes"); Revenue Act of 1948, S. Rep. No. 80-1013, at 27 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1163, 1189 ("S. Rep. No. 80-1013") ("The most obvious instance of the failure to attain equalization results from the use of life tenancies in the common-law States. In this situation the husband transfers or bequeaths to his wife a life estate, with remainder over to the children. At his death the whole of the estate is taxed, but at the wife's death there is no tax on the cessation of her life estate. On the other hand in a community-property State, the husband may not by his will dispose of his wife's interest in community property.").

[16] For example, at the time of the Economic Recovery Tax Act of 1981, which established the current unlimited marital estate tax deduction, Black's Law Dictionary defined "Marriage" as "Legal union of one man and one woman as husband and wife." Black's Law Dictionary 876 (5th ed. 1979); *see also* Webster's Third New International Dictionary 1384 (1976) ("The state of

Without directly addressing the understanding of pre-DOMA law articulated by Congress and by the dissent, or even considering the pre-DOMA meaning of the marital estate tax deduction, the majority below simply assumed that federal law would automatically recognize any marriage valid under state law. The explanation for this assumption apparently lies in the following sentence from the court's opinion: "To the extent that there has ever been 'uniform' or 'consistent' rule [sic] in federal law concerning marriage, it is that marriage is 'a virtually exclusive province of the States.'" Supp. App. 25a (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

There is a logical chasm between this general assertion and the conclusion that federal law uses the term "marriage" as an empty vessel into which the states can pour any relationship they please. The latter is not, and never has been, true. If it were the case, it would be irrational for Congress to condition any benefits on the existence of a marital relationship because one state's definition of marriage might be completely distinct from another's. Accordingly, interpreting the term "marriage" (and related terms) in federal law requires *some* understanding of the meaning of that term apart from state law.[17]

The evidence discussed above strongly suggests that Congress was correct in concluding that the pre-DOMA federal definition of "marriage" did not extend to same-sex unions. To be sure, it may be impossible

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being united to a person of the opposite sex as husband or wife"); The American Heritage Dictionary 768 (2d ed. 1985) ("The legal union of a man and woman as husband and wife").

[17] *See supra*, note 12.

to answer with certainty the question of how courts would have interpreted every federal statute in the absence of DOMA, given that no state had recognized same-sex marriage at the time of DOMA's enactment. But avoiding such uncertainty is one of the reasons that Congress was fully justified in enacting Section 3 of DOMA.

(B). Section 3 of DOMA promotes a significant government interest in uniformity and certainty in the application of federal law. As the Second Circuit recognized, the legislative history of DOMA reflects that Section 3 was designed in significant part to ensure uniformity of eligibility for federal benefits among the states. Supp. App. 24a-25a & n.5. For example, Senator Ashcroft explained that "unless we have a Federal definition of what marriage is, a variety of States around the country could define marriage differently [and] people in different States would have different eligibility to receive Federal benefits, which would be inappropriate." 142 Cong. Rec. 22459 (1996).

The pendency of the *Baehr* litigation in Hawaii confronted Congress with the realistic possibility, for the first time, that same-sex couples would seek federal benefits on the ground that they were married under state law. Indeed, the uncontradicted evidence presented to Congress demonstrated that organized litigants such as LLDEF planned to use the recognition of same-sex marriage in a single state, such as Hawaii, as a means of obtaining federal benefits for same-sex couples nationwide. House Hearing at 15. This would be accomplished by out-of-state couples traveling to Hawaii, getting married and returning to their home states, where they would seek to be considered as "married" for purposes of both state and federal law.

Absent DOMA, the outcome of these cases would depend on (1) whether a court construed the particular federal statute to authorize benefits for same-sex couples married under state law and (2) whether the court determined that the couple in question *was* married under state law. Assuming that the court answered the first question in the affirmative (contrary to congressional intent), it would face the second.

If there was one thing upon which all of the legal experts who testified before Congress agreed, it was that determining whether State A would recognize a same-sex marriage performed in State B would be a difficult, uncertain and unpredictable task. *See supra* note 7. It would in all likelihood depend on whether State A had a "strong public policy" against same-sex marriages, which in turn would depend on a variety of factors that might differ from state to state. There was a virtual certainty of varying and inconsistent results, which would only multiply if both state and federal courts were simultaneously ruling on the issues. Results would likely vary among and within states, among judges and court systems, between types of jurisdictions and laws (state or federal) and among different statutory schemes.

It was not only opponents of same-sex marriage who recognized the chaotic and inequitable situation that would result. In a memorandum entered into the record during a May 15, 1996 hearing before the House Judiciary Subcommittee on the Constitution, LLDEF described how state-by-state adjudication of these issues would give rise to a "legal and practical nightmare" that would create enormous pressure for a uniform national solution. House Hearing at 19. By enacting DOMA, Congress sought to mitigate this national confusion by clarifying the definition of marriage for purposes of federal law, while preserving the authority of states to make determinations with regard to their own laws. By preserving the status quo (non-recognition of same-sex marriage) with respect to federal benefits, Congress reduced the incentives for "marriage tourism," forestalled the use of federal courts for LLDEF's litigation strategy, and averted the "legal and practical nightmare" that would result from disparate treatment of similarly situated same-sex couples for purposes of federal law.

The Second Circuit described Congress's interest in uniform treatment as "suspicious" because Congress has normally deferred to state law with regard to the determination of marriage and other domestic relations issues. Supp. App. 24a. The court's view is flawed for several reasons. First, it fails to distinguish between incorporating state law with respect to the legality of a particular relationship, and deferring to state law with respect to the ordinary meaning of a term used in federal law. The ordinary meaning of the term "marriage," when DOMA was enacted and before, was the "[l]egal union of one man and one woman as husband and wife." *See supra* note 16. The fact that Congress normally looks to state law to determine whether a particular union of a man and a woman is "legal" does not mean that it looks to state law to determine whether "marriage" means "one man and one woman" in the first place.[18]

Second, the touchstone for interpretation of federal statutes is congressional intent, not state law. As this Court explained in *Lyeth v. Hoey*:

> In dealing with the meaning and application of an act of Congress enacted in the exercise of its plenary power under the Constitution to tax income and to grant exemptions from that tax, it is the will of Congress which controls, and the expression of its will, in the absence of language evidencing a different purpose, should be interpreted "so as to give a uniform application to a nationwide scheme of taxation." Congress establishes its own criteria and the state law may control only when the federal taxing act, by express language or necessary implication, makes its operation dependent upon state law.

305 U.S. 188, 194 (1938) (quoting *Burnet v. Harmel*, 287 U.S. 103, 110 (1932) (internal citation omitted)).

As the *Lyeth* Court suggests, there is nothing novel or unprecedented about Congress preferring uniformity to deference to state law. Indeed, the original purpose of the marital estate tax deduction, adopted in the Revenue Act of 1948, was to equalize treatment of married couples in common law and community property states. *See* Revenue Act of 1948,

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[18] This distinguishes the case of same-sex marriage from other examples pointed to by the court of appeals, such as minimum age and consanguinity. Supp. App. 25a.The latter involve only the question of whether a relationship that otherwise falls within the ordinary meaning of "marriage" constitutes a "legal union."

Pub. L. No. 80-471, 62 Stat. 110 (1948). As the Senate Committee on Finance explained, the differences between marital property rights in these types of states "resulted in geographic inequalities in the effect of the estate and gift taxes." S. Rep. No. 80-1013, at 26. While the surviving spouse in a community property state escaped taxation on one-half of the community property, the surviving spouse in a common law property state generally was taxed on the full amount of the estate. The Revenue Act of 1948 provided a marital deduction up to one-half the value of the common law (but not community) property, thereby ensuring that differences in state law would not result in radically different federal law treatment of similarly-situated spouses.

Finally, in dismissing Congress's interest in preserving the stability and uniformity of federal law, the Second Circuit failed to take into account the unique circumstances addressed by DOMA. Congress was faced with an organized and unprecedented effort to redefine marriage in a manner, as the court acknowledged, "unknown to history and tradition." Supp. App. 31a. This situation was not comparable in any way to the minor variations among states with respect to age or consanguinity. Moreover, the court's assertion, Supp. App. 26a, that it would have been "simpler" for Congress to have asked "whether a couple was married under the law of the state of domicile," rather than maintain a uniform federal rule with regard to same-sex marriage, not only improperly substitutes its policy judgment for that of

Congress, but is contradicted by the legislative record and the very facts of the case at bar.[19]

(C). Section 3 of DOMA protects the ability of states to preserve traditional marriage. The court below implied that Section 3 of DOMA interferes with the autonomy of states with regard to domestic relations, terming it "an unprecedented breach of longstanding deference to federalism." Supp. App. 26a. At the same time (and somewhat inconsistently), it contended that DOMA could not advance a government interest in preserving traditional marriage because the decision whether same-sex couples may marry is left to the states. *Id*. at 29a.

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[19] In the present case, Ms. Windsor claims the marital estate tax deduction by virtue of her 2007 marriage in Canada to Thea Clara Spyer. She was a resident of New York at the time of Ms. Spyer's death in 2009. Although New York did not permit same-sex couples to marry prior to 2011, the Second Circuit "predicted" that the New York Court of Appeals would ultimately hold out-of-state same-sex marriages to be recognized in 2009 under New York law, an issue that the New York Court of Appeals expressly declined to reach in *Godfrey v. Spano*, 13 N.Y.3d 358 (2009). The Second Circuit refused to exercise the option of certifying the question to the New York Court of Appeals, noting that court had preferred the issue be resolved by the New York legislature and stating "[w]e hesitate to serve up to the Court of Appeals a question that it is reluctant to answer for a prudential reason." Supp. App. 6a.

It is difficult to imagine a set of facts more clearly rebutting the Second Circuit's claim that it would be "simpler" to apply the law of the state of domicile than to apply Section 3 of DOMA. It is also noteworthy that, regardless of whether the Second Circuit correctly "predicted" New York law in this regard, its decision awards a federal benefit to Ms. Windsor that would not be available to the same-sex couples in the great majority of U.S. states, even if they had been married in Canada or another jurisdiction that licenses such marriages, or even to most same-sex couples in New York itself. It is particularly noteworthy that Ms. Windsor would treated more favorably than the surviving member of civil unions that have been recognized, as an alternative to marriage, in a number of states. *See, e.g.*, Haw. Rev. Stat Ann. § 572B (West 2013).

Both of these observations are incorrect. DOMA does not interfere with the authority of the states with respect to licensing and recognizing marriage. To the contrary, Section 2 of DOMA preserves and protects the autonomy of each state in that regard.

Section 3 of DOMA, however, advances the objective of preserving traditional marriage, not by interfering with state authority, but by removing an incentive that might otherwise encourage efforts to change state law. The prospect of obtaining numerous federal benefits for same-sex couples could be a tremendous weapon in the arsenal of those who would seek to gain recognition of same-sex marriage at the state level. It would be particularly tempting for courts to recognize same-sex marriage in order to award federal benefits to sympathetic plaintiffs.

In this way, Section 3 functions much like the original marriage estate tax deduction enacted by Congress. Congress recognized that the prospect of obtaining federal tax benefits (including both income and estate/gift taxes) was driving states to shift from common law to community property, despite the otherwise serious downside to making this shift:

> The adoption of community property has been advocated widely in spite of a growing awareness of the substantial differences between community property and common law which make a transition from one system to the other extremely difficult. It is now recognized that this

> transition will be a period of extreme confusion during which the courts, the administrative officials and the legislatures will be working out the detailed application of a new and strange system of property law. Nevertheless, many responsible State officials have reached the conclusion that the difference between the impact of the Federal income tax as it applies in community-property and common-law jurisdictions is so great that the use of community property cannot be avoided.

S. Rep. No. 80-1013.

Congress's concerns regarding state adoption of community property regimes were, of course, not the same as its concerns regarding state recognition of same-sex marriage, but it was entirely rational and legitimate for Congress in both cases to remove an unwarranted federal incentive for states to change their domestic-relations law.

By enacting Section 3 of DOMA, Congress not only protected the federal treasury, but it ensured that the federal treasury would not be used as an incentive to undermine the traditional state law of marriage.

II. Support for Traditional Marriage is Not Unconstitutional "Animus"

Although the Second Circuit avoided any direct attack on the motivations of individual legislators who supported DOMA, the United States maintained below that "the statute was motivated in significant part by disapproval of gay and lesbian people and their intimate and family relations" and that therefore "Section 3 classifies gay and lesbian individuals 'not to further a proper legislative end but to make them unequal to everyone else.'" Br. for United States 37, Windsor, Nos. 12-2335 & 12-2435 (2d Cir. Aug. 10, 2012), ECF 120 (quoting *Romer v. Evans*, 517 U.S. 620, 635 (1996)). The United States does not explain whether this alleged motivation can be attributed to President Clinton, who signed the law, or the current Vice President of the United States, who as a U.S. Senator voted for it.

The position of the United States, if accepted, would mean that it is permissible for the executive branch to disavow the constitutionality of a statute based on pejorative characterizations of what motivated certain legislators (or motivated them "in significant part"), despite the fact that the Department of Justice contemporaneously advised the Congress that the statute was clearly constitutional and vigorously defended the statute's constitutionality for more than a decade after enactment. Amici note the troubling implications of this position for separation of powers, comity between the branches, and the ability of Congress to assess the constitutionality of proposed legislation.

Fortunately, the position of the United States is without merit.[20] In the first place, this Court's "animus" jurisprudence does not support invalidating an otherwise constitutional statute based on what may have "motivated" individual legislators. In *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), which involved an amendment to the Food Stamp Act withdrawing benefits from otherwise eligible individuals if they lived in a household with unrelated individuals, the Court first noted that the provision was clearly irrelevant to the purposes stated in the original Act itself (e.g., to provide a market for agricultural surpluses and to satisfy the nutritional requirements of food stamp recipients). *Id.* at 534. Noting that there was "little legislative history" to illuminate the purposes of the amendment, this Court observed that the only purpose reflected in the history was "that the amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program." *Id.* This Court held that "[t]he challenged classification clearly cannot be sustained by reference to this congressional purpose [because] * * * a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id.* at 534-35. *Moreno* does not suggest that the law in question is invalid because it was allegedly

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[20] Another example of this mode of analysis is the majority opinion in *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012), in which the Ninth Circuit held that Proposition 8, an amendment to the California Constitution adopted by a vote of the people in 2008, violated the Equal Protection Clause of the Fourteenth Amendment by withdrawing from same-sex couples the right to be married, a right that had first been afforded to such couples by a decision of the California Supreme Court earlier in 2008. *See also In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). The opinion discusses evidence that Proposition 8 "was born of disapproval of gays and lesbians," *Perry*, 671 F.3d

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at 1094-95. However, as the dissent in that case points out, this Court's precedent in *Romer v. Evans*, 517 U.S. 620 (1996) does not support the conclusion that evidence of animus, standing alone, justifies a finding of unconstitutionality. *Perry*, 671 F.3d at 1104 (Smith, J., concurring in part and dissenting in part) ("*Romer* was a case where the only basis for the measure at issue was animus. However, in a case where the measure at issue was prompted both by animus and by some independent legitimate purpose, the measure may still be constitutionally valid.").

motivated by disapproval or dislike of "hippies." A law furthering a legitimate governmental interest, such as a law making it a crime to use marijuana, would not be unconstitutional even if some or all members who voted for it expressed disapproval of "hippies" as their reason for doing so. *Moreno* merely stands for the proposition that such views alone do not constitute a legitimate government purpose or interest.

Subsequent cases are to the same effect. In *Romer*, this Court struck down a Colorado constitutional amendment which (1) repealed existing laws classifying gays and lesbians as a group protected from discrimination and (2) prohibited any future legislative, executive or judicial action to provide such protection at any level of state or local government. 517 U.S. at 624. Although the Court noted that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," *id.* at 634, this inference was based on the structure of the amendment and the absence of "any identifiable legitimate purpose or discrete objective." *Id.* at 635. It was not based on a subjective evaluation of the motives of the legislative actors, in that case the people of Colorado. Moreover, the Court did not suggest that an otherwise constitutional law would be invalidated by improper motives of some legislators.

This distinction is of critical importance because judicial scrutiny of legislative motives is fraught with peril.[21] Evaluating constitutionality based on assessment of legislative motives would mean that the same law could be constitutional or unconstitutional, depending on the particular legislature that enacted it. For example, in the case of DOMA, there can be no doubt that the overwhelming majority of Congress reasonably believed that the pre-existing federal definition of "marriage" did not, and was not intended to, encompass same-sex marriage. If constitutionality were determined by subjective motivation, the pre-existing definition of "marriage" would clearly be constitutional (since there is no suggestion that Congress enacted that definition with any "motives" related to same-sex relationships), yet DOMA's re-affirmation of the same definition might not be. Such an approach would be utterly at odds with our constitutional traditions. [22]

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[21] *See Fleming v. Nestor*, 363 U.S. 603, 617 (1960) ("Judicial inquiries into Congressional motives are at best a hazardous

Moreover, judicial scrutiny of legislative motives inevitably raises insoluble problems of proof. A court lacks information to determine the true motives of particular legislators, much less to determine whether to impute such motives to the legislature as a whole. As Chief Justice Marshall noted in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 131 (1810), a court cannot declare a legislative act to be "a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law."

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matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed.").

[22] Justice Story explained that it would be "novel and absurd" to suggest that "the same act passed by one legislature will be constitutional, and by another unconstitutional," depending on the motives for enacting it. 2 Joseph Story, Commentaries on the Constitution of the United States 533, § 1086 (1st ed.1833).

Judicial review of legislative motives also raises serious separation of powers problems. Judicial "psychoanalysis" of legislative motives, to use Justice Cardozo's phrase, is a highly subjective exercise, which threatens needless friction between the branches.[23] Scouring the congressional record for "sound-bites" to divine and disparage the motives of individual legislators also chills the freedom of legislative speech that is the hallmark of robust democratic debate.

Furthermore, with respect to DOMA in particular, there is no basis to equate support for the traditional definition of marriage with unconstitutional animus or "a bare congressional desire to harm a politically unpopular group." As Justice O'Connor noted in her concurrence in *Lawrence v. Texas*, "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."[24] It is simply not irrational or bigoted to oppose the redefinition of marriage in a manner "unknown to history and tradition," to use the language of the court below.[25] To the contrary, when faced with a proposed fundamental redefinition of the institution of marriage, it would be irrational *not* to consider

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[23] *See United States v. Constantine*, 296 U.S. 287, 298-99 (1935) (Cardozo, J., dissenting).

[24] 539 U.S. 558, 585 (2003) (O'Connor, J., concurring); *see also Massachusetts v. U.S. Dep't of HHS*, 682 F.3d 1, 16 (1st Cir. 2012) ("Traditions are the glue that holds society together, and many of our own traditions rest largely on belief and familiarity—not on benefits firmly provable in court. The desire to retain them is strong and can be honestly held.").

[25] Supp. App. 31a.

"American society's historical view of a marriage as being between a man and a woman."[26]

The fact that DOMA passed both houses of Congress with overwhelming support across the political spectrum, and was signed by into law by President Clinton, further undercuts any attempt to characterize it as the result of unconstitutional "animus."[27] Many DOMA supporters were on record as opposing discrimination against gays and lesbians. See, e.g., 142 Cong. Rec. 22452 (1996) (Sen. Mikulski) ("My support for the Defense of Marriage Act does not lessen in any way my commitment to fighting for fair treatment for gays and lesbians in the workplace."). These included, for example, 16 original Senate co-sponsors of S.932, which was introduced in 1995 to ban employment discrimination on the basis of sexual orientation.[28]

Finally, as Judge Straub pointed out below, if "states may use the traditional definition of marriage for state purposes without violating equal protection, it necessarily follows that Congress may define marriage the same way for federal purposes without violating equal protection." Supp. App. 45a. It certainly cannot represent unconstitutional "animus" to wish to define "marriage," for federal law purposes, in this constitutionally permissible manner.

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[26] Supp. App. 34a (Straub, J., dissenting in part and concurring in part).

[27] As the First Circuit has noted with respect to DOMA, "selected comments by a few individual legislators . . . cannot taint a statute supported by large majorities in both Houses and signed by President Clinton." *Massachusetts*, 682 F.3d at 16.

[28] *See* Employment Nondiscrimination Act of 1995, S. 932, 104th Cong. The primary sponsor of S. 932, Senator Jeffords, voted for DOMA, as did 15 co-sponsors (Senators Bingaman, Bradley, Chafee, Dodd, Glenn, Harkin, Kohl, Lautenberg, Leahy, Levin, Lieberman, Mikulski, Murray, Sarbanes and Wellstone). *See* 142 Cong. Rec. 22467 (1996).

It is manifest that the traditional definition of marriage, which was overwhelmingly supported by bipartisan majorities in 1996, is more controversial today, both among the public and their elected representatives. This, however, is not a reason to end the democratic debate by asking the courts to stigmatize the motives of one side. To the contrary, as Judge Straub aptly noted in his dissent, "[c]ourts should not intervene where there is a robust political debate because doing so poisons the political well, imposing a destructive anti-majoritarian constitutional ruling on a vigorous debate." Supp. App. 83a.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS
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BRIEF

No. 12-307

Supreme Court, U.S.
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In The
Supreme Court of the United States

◆

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, In Her Capacity as
Executor of the Estate of Thea Clara Spyer, et al.,

Respondents.

◆

**On Writ Of Certiorari To The United States
Court Of Appeals For The Second Circuit**

◆

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

- I. Continuity And Change Characterize The History Of Marriage In The U.S. 4
  - A. Valid Marriage Has Always Been an Integral Legal Status Created by Civil Authority. 6
  - B. The States Have Exercised Exclusive Power to Create and Dissolve Marriages 8
- II. States Have Had Several Purposes For And Interests In Civil Marriage.................. 11
  - A. States Have Used Marriage to Aid in Governing Their Populations................ 12
  - B. States Have Broad Economic Interests in Supporting Marriage......................... 15
  - C. States' Purposes in Marriage Include the Support of All Children 19
- III. Before DOMA, The Federal Government Accepted Variant State Definitions Of Marriage 23
  - A. Inter-State Differences in Marital Eligibility and Validity Have Been Present Throughout U.S. History.............. 24

TABLE OF CONTENTS – Continued

Page

B. Federal Authorities Accepted State Determinations of Marital Status Until 1996 31

IV. The Federal Government Has Taken Action Over Marriage Only Where State Authority Is Absent 35

A. Federal Control of Marriage Among Ex-Slaves Occurred When Southern State Governments Had Collapsed 35

B. The Federal Government Exercised its Plenary Power Over Marriage in Federal Territories to Eliminate Polygamy 37

CONCLUSION 40

TABLE OF AUTHORITIES

Page

CASES

Adams v. Palmer, 51 Me. 480 (1863) 7

Cunningham v. Apfel, 12 F. App'x 361 (CA6 2001) 33

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Griswold v. Connecticut, 381 U.S. 479 (1965) 22

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In re Bridget Butler, 13 P.D. 234 (March 9, 1903) 33

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Inhabitants of Milford v. Inhabitants of Worcester, 7 Mass. 48 (Mass. 1810) 7, 29

Loving v. Virginia, 388 U.S. 1 (1967) 27

Marsh v. Chambers, 463 U.S. 783 (1983) 17

Maryland v. Baldwin, 112 U.S. 490 (1884) 7, 29

Maynard v. Hill, 125 U.S. 190 (1888) 7

Meister v. Moore, 96 U.S. 76 (1877) 7, 29

Murphy v. Ramsay, 114 U.S. 15 (1885) 39

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Reynolds v. United States, 98 U.S. 145 (1879) 38

TABLE OF AUTHORITIES – Continued

Page

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CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 18

U.S. Const. amend. XIV 27, 37

Utah Const. art. III, § 1 39

STATUTES, RULES AND REGULATIONS

20 C.F.R. § 404.346 34

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Page

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3 HOWARD, GEORGE ELLIOTT, A HISTORY OF MATRIMONIAL INSTITUTIONS CHIEFLY IN ENGLAND AND THE UNITED STATES (1904) 20, 29

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Page

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Page

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Page

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Garrison, William Lloyd, *Legislative*, LIBERATOR, Jan. 8, 1831 27

GLENDON, MARY ANN, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE (1989) 13

GORDON, SARAH BARRINGER, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA (2002)...4, 37, 38, 39

Grossberg, Michael, *Crossing Boundaries: Nineteenth-Century Domestic Relations Law and the Merger of Family and Legal History*, 1985 AM. B. FOUND. RES. J. 799 (1985) 9, 31

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Page

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HARTOG, HENDRIK, SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE (2012) 4, 21

HERMAN, ELLEN, KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES (2008) 4, 12

HODES, MARTHA, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE 19TH CENTURY SOUTH (1997) 4

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KESSLER-HARRIS, ALICE, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA (2001) 5, 18, 19

KOPPLEMAN, ANDREW, SAME SEX, DIFFERENT STATES (2006) 27

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TABLE OF AUTHORITIES – Continued

Page

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Page

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Richmond, Mary E. & Fred S. Hall, Marriage and the State (1929)...........31

Riley, Glenda, Divorce: An American Tradition (1991)...........28, 31

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Shammas, Carole, A History of Household Government in America (2002)...........5

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Shanley, Mary L., Making Babies, Making Families (2001)...........5, 22

TABLE OF AUTHORITIES – Continued

Page

Shanley, Mary Lyndon, *Marriage Contract and Social Contract in Seventeenth-Century English Political Thought*, *in* THE FAMILY IN POLITICAL THOUGHT (Jean Bethke Elshtain ed., 1982) 7

SIMMONS, CHRISTINA, MAKING MARRIAGE MODERN (2009) 22

SKOCPOL, THEDA, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992) 19

STANLEY, AMY DRU, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998) 5

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STORY, JOSEPH, COMMENTARIES ON THE CONFLICT OF LAWS (London, A. Maxwell 2d ed. 1841) 9, 27

TONE, ANDREA, DEVICES AND DESIRES: A HISTORY OF CONTRACEPTIVES IN AMERICA (2002) 22

ULRICH, LAUREL, GOOD WIVES: IMAGE AND REALITY IN THE LIVES OF WOMEN IN NORTHERN NEW ENGLAND, 1650-1750 (1982) 15

WELKE, BARBARA YOUNG, LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES (2010) 5

TABLE OF AUTHORITIES – Continued

Page

Wright, Charles Edward, *Marriage and Divorce*, in 19 DECISIONS OF THE DEPARTMENT OF THE INTERIOR IN APPEALED PENSION AND BOUNTY-LAND CLAIMS (John W. Bixler ed., 1914)..................33

INTEREST OF *AMICI CURIAE*[1]

Amici are the American Historical Association ("AHA"), the largest historical society in the United States, along with historians of American marriage, family and law whose research documents how the institution of marriage has functioned and changed over time. The AHA is a nonprofit membership organization, founded in 1884 and incorporated by Congress in 1889 for the promotion of historical studies, which provides leadership for the profession, protects academic freedom, develops professional standards, and aids in scholarly pursuits. Our brief aims to provide accurate historical perspective as the Court considers state and federal purposes for marriage and the states' and the federal government's respective powers over marital status. *Amici* support Appellees' position that the Defense of Marriage Act ("DOMA")[2] is historically unprecedented: until DOMA was passed, the federal government consistently accepted each state's own determination of marital status, even while various states differed significantly in their definitions of valid marriage. Moreover, *Amici* cannot credit Appellants' contention that a single core governmental purpose of marriage (namely, procreation) can be isolated, since states have always had several key purposes in establishing, regulating and supporting marital unions.

---

[1] Written consent to the filing of this brief has been received from all parties and filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than *Amici* and their counsel, made any monetary contribution to the preparation or submission of this brief.

[2] Pub. L. No. 104-99, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2006) and 1 U.S.C. § 7 (2006)).

◆

SUMMARY OF THE ARGUMENT

Control of marital status is reserved to the states in our federal system. Marriage has always been understood as a civil contract embodying a couple's free consent to join in long-lasting intimate and economic union. In authorizing marriage, states turn a couple's vows into a legal status, thus protecting the couple's bond and aiming moreover to advance general social and economic welfare. Throughout U.S. history, states have valued marriage as a means to benefit society. Seeing multiple purposes in marriage, states have encouraged maritally-based households as advantages to public good, whether or not minor children are present, and without regard to biological relationships of descent.

Present-day state divergences on marriage for same-sex couples are not unique in U.S. history. States have often differed significantly in setting marriage rules, as our federal system allows. State legislatures and courts have reassessed and altered marriage criteria repeatedly over time. Major alterations such as the dismantling of *coverture* and the expansion of grounds for divorce may be taken for granted now, but were rancorously opposed as revolutionary when they began.

For two centuries before 1996, state marital diversity reigned, along with serious inter-state contestation, without Congress stepping in to create marital "uniformity" for federal purposes.[3] Congress never took a position on a marital eligibility question preemptively so as to discredit a policy choice that a state might make. Before DOMA, federal agencies assessed marriage validity by consulting the relevant state laws. In historical perspective, DOMA appears as an attempt by Congress to single out particular state-licensed marriages for disfavored treatment.

Past advocates for uniform national standards for marriage knew that Congress lacked suitable power to create them. Repeatedly pressing to amend the U.S. Constitution to gain uniform standards, advocates never succeeded,[4] because of states' insistence on retaining jurisdiction. In historical perspective, DOMA appears as an attempt by Congress to exercise a power it had previously been understood not to have, and that the representatives of the states repeatedly refused to grant it by constitutional amendment.

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[3] DOMA does not, in fact, create full federal marital "uniformity," since it leaves in place all the state variations in marital definition other than the gender of the couple. *See infra* Sec. IV.

[4] *See* Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q., 611, 625-41 (2004) (cataloguing past proposed Constitutional amendments).

ARGUMENT

I. Continuity And Change Characterize The History Of Marriage In The U.S.[5]

Freedom to marry and free choice of marriage partner stand as profound exercises of the individual

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[5] This brief is based on *Amici*'s decades of study and research. *Amici* are the authors of the principal scholarly work in the relevant fields, including: PETER W. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH (1995); NORMA BASCH, FRAMING AMERICAN DIVORCE (1999) and IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN 19TH CENTURY NEW YORK (1982); STEPHANIE COONTZ, THE SOCIAL ORIGINS OF PRIVATE LIFE: A HISTORY OF AMERICAN FAMILIES, 1600-1900 (1988) and MARRIAGE, A HISTORY (2006); TOBY L. DITZ, PROPERTY AND KINSHIP: INHERITANCE IN EARLY CONNECTICUT (1986); NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000); Ariela Dubler, *Governing Through Contract: Common Law Marriage in the 19th Century*, 107 YALE L.J. 1885 (1998); *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957 (2000); LAURA F. EDWARDS, GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION (1997); JOHN D'EMILIO AND ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA (2d ed. 1997); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985); SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA (2002); HENDRIK HARTOG, MAN & WIFE IN AMERICA, A HISTORY (2000) and SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE (2012); ELLEN HERMAN, KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES (2008); MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE 19TH CENTURY SOUTH (1997); LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN

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liberty central to the American polity and way of life. Like many of our liberties, these are established and guarded by positive law. Over centuries of our nation's history, state legislatures and courts have reassessed and refined marriage criteria, moving toward increasing freedom in marital choice, spousal parity, and gender-neutrality in marital roles, among other adjustments. Resulting alterations may be taken for granted now, but they seemed revolutionary and were highly contested as they were taking place.[6]

Major modifications in marriage have responded to shifts in social and ethical standards accompanying the nation's move from a rural to an industrial and now a post-industrial economy and society. State legislatures and courts, responding to broad-scale

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and the Obligations of Citizenship (1998); Alice Kessler-Harris, In Pursuit of Equity: Women, Men, And The Quest For Economic Citizenship In 20th-Century America (2001); Elaine Tyler May, Homeward Bound: American Families in the Cold War Era (2008); Barren in the Promised Land (1996); Steven Mintz, Domestic Revolutions: A Social History of American Family Life (1988); Elizabeth H. Pleck, Celebrating the Family: Ethnicity, Consumer Culture, and Family Rituals (2000); Carole Shammas, A History of Household Government in America (2002); Mary L. Shanley, Making Babies, Making Families (2001); Feminism, Marriage and the Law in Victorian England (1989); Amy Dru Stanley, From Bondage to Contract: Wage Labor, Marriage and the Market in the Age of Slave Emancipation (1998); Barbara Young Welke, Law and the Borders of Belonging in the Long Nineteenth Century United States (2010). Assertions in the brief are supported by this scholarship, whether or not expressly cited.

[6] *See infra* Sec. III.

movements in social life and mores, have made state diversity in marriage rules a constant amidst change.

A. Valid Marriage Has Always Been an Integral Legal Status Created by Civil Authority.

Marriage in all the states has historically been a civil matter. Valid marriage relies on state authorization, distinct from religious rites performed according to the dictates of any religious community. Religion, sentiment and custom may color individuals' understanding of marriage, but valid marriage is created by law. This practice derived from colonial New England. To the Pilgrim colony's first governor, William Bradford, marriage was "a civill thing, upon which many questions about inheritances doe depende."[7] John Winthrop, the first governor of the Massachusetts Bay colony, agreed, affirming "we adhere to the strict Protestant principle that marriage is purely a civil right."[8] When the United States was founded,

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[7] RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 135 (1988) (quoting WILLIAM BRADFORD, BRADFORD'S HISTORY OF PLYMOUTH PLANTATION, 1606-1646 116 (William T. Davis ed., Barnes & Noble 1964)).

[8] Frank Gaylord Cook, *The Marriage Celebration in the Colonies*, THE ATLANTIC MONTHLY, March 1888, at 350, 351. The Southern colonists initially professed allegiance to Anglicanism. As settlement proceeded, the colonies varied in their execution of marriage rites; all eventually assimilated to a common type in passing statutes differing from both the common law and Anglican requirements. As Cook concluded, "[T]he civil celebration of

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the civil principle was best suited to accommodate the new nation's diverse religions. Regulations for creating valid civil marriages were among the first laws established by the states after declaring independence.[9]

Being based on voluntary mutual consent, marriage is understood to be a contract—but it is a unique contract, because of the state's essential role in defining marital eligibility, obligations and rights.[10] Once marriage is entered, its "rights, duties and obligations" are "of law, not of contract," as the Maine Supreme Judicial Court said in 1863.[11] This is still so. For example, spouses cannot decide to abandon their

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marriage which in England obtained under Cromwell, in the time of Puritan supremacy . . . and then entirely disappeared, was from the first firmly established in America, and has here continued to exist to this day." *Id.* at 350.

[9] 2 GEORGE ELLIOTT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS CHIEFLY IN ENGLAND AND THE UNITED STATES 121-51 (colonial precedents), 388-497 (early state marriage laws) (1904); GROSSBERG, *supra* note 5, at 17-21; *cf. Inhabitants of Milford v. Inhabitants of Worcester*, 7 Mass. 48, 52 (Mass. 1810) (affirming that marriage is "unquestionably" a civil contract).

[10] *See generally Meister v. Moore*, 96 U.S. 76 (1877); *Maryland v. Baldwin*, 112 U.S. 490 (1884); *Maynard v. Hill*, 125 U.S. 190 (1888). *See also* Mary Lyndon Shanley, *Marriage Contract and Social Contract in Seventeenth-Century English Political Thought*, *in* THE FAMILY IN POLITICAL THOUGHT 80 (Jean Bethke Elshtain ed., 1982); COTT, *supra* note 5, at 10-11.

[11] *Maynard*, 125 U.S. at 211 (quoting *Adams v. Palmer*, 51 Me. 480, 483 (1863)).

obligation of mutual economic support.[12] The couple who agrees to join in mutual intimacy and obligation cannot themselves create a valid marriage; if they do marry, they cannot terminate their legal obligations by themselves, since the state is a party to their bond.

B. The States Have Exercised Exclusive Power to Create and Dissolve Marriages.

During the drafting of the U.S. Constitution, it was agreed that domestic relations, which included marriage, would remain the domain of the states. This was not only because family and household matters fell under the police powers of the states, but also because slavery was among the domestic relations. Slavery and the slave trade were among the most divisive issues at the Constitutional Convention. State jurisdiction over domestic relations enabled states with differing values to control local matters, while uniting under federal government. This core feature of federalism underlay national unity when the U.S. Constitution was created.[13]

As the nation developed, regional and cultural differences resulted in a changing patchwork of marriage rules. The federal government respected and relied on states' definitions of marital status. Congress did not step in.[14] The patchwork system worked because of a tradition of federalism within which states exercised comity. States, all favoring monogamy as a matter of public policy, had strong incentive to accept couples who had married in another state as married in their own, for not accepting other states' marriages would throw support responsibilities, inheritance, and legitimacy into question.[15]

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[12] HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS 425-27 (2d ed. 1988).

[13] No discussion of domestic relations other than slavery occurred during the Constitutional Convention, indicating that state jurisdiction was presumed. *See generally* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1995).

State and federal courts within the U.S. generally followed the international principle that a marriage valid where it was celebrated was valid everywhere, unless the receiving state's public policy directly opposed it.[16] When married couples moved from one state to another, conflicts of law about marriage did arise. State courts carefully adjudicated matters, carefully examining the factual record and the conflicting states' regulations. On contentious issues, states invoked the public policy exception and refused to credit certain marriages.[17]

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[14] *See infra* Sec. III.B.

[15] Michael Grossberg, *Crossing Boundaries: Nineteenth-Century Domestic Relations Law and the Merger of Family and Legal History*, 1985 AM. B. FOUND. RES. J. 799, 819-24 (1985); HARTOG, MAN & WIFE, *supra* note 5, at 258-72.

[16] *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 113 at 173-74, § 113a at 174, § 117 at 184, § 121 at 188-89 (London, A. Maxwell 2d ed. 1841); Grossberg, *Crossing Boundaries*, *supra* note 5, at 819-26.

Marital status was historically a legal whole, not imagined to be divisible into state and federal dimensions of recognition before 1996. Becoming validly wed according to state-prescribed regulations meant a transformation of an individual's legal *persona*. Gaining marital status meant acquiring distinctive obligations and rights and assuming a new legal standing with meanings and consequences valid from the state to the national level.

In that regard, DOMA was a complete departure. Excluding potential same-sex spouses from recognition as married in federal statutes before there were any such marriages in the U.S., DOMA preemptively communicated to the states Congress's view that same-sex couples did not qualify for marital eligibility, and also signaled that, should a state act to qualify such couples, the federal government would void their marital status at the national level.

The unique meaning of marriage owes greatly to the fact that it is not only a voluntary contract but also an assumption of a new civil status deriving from public authorization. By granting a marriage license, a state places its imprimatur on a couple's choice. With regard to couples of the same sex who might wed if their states made them eligible, however,

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[17] *See infra* Sec. III.A.

DOMA unprecedentedly declared that their marital status would be treated as divided, limited to the state level only, different from that of any previous couples.

II. States Have Had Several Purposes For And Interests In Civil Marriage.

Throughout U.S. history, marriage has served numerous complementary public purposes. Among these purposes are: to facilitate the state's regulation of the population; to create stable households; to foster social order; to increase economic welfare and minimize public support of the indigent or vulnerable; to legitimate children; to assign providers to care for dependents; to facilitate the ownership and transmission of property; and to compose the body politic.[18] These public purposes have long been recognized in American law, leading the Supreme Court of Washington, for example, to note that marriage was "closely and thoroughly related to the state."[19]

The assertion by the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG") that "the institution of marriage was a direct response to the unique tendency of opposite-sex relationships to produce unplanned and unintended offspring"[20] is highly reductive. Certainly the American states have intended marriage to legitimize children, to assign names and known providers for them, but that cannot be isolated as the only "core purpose and defining characteristic"[21] of marriage. States' willingness to include unrelated adopted children in the marital family suggests a broader view. The historical trend in states' laws has been to equalize the rights of legally adopted children with those of biological children (with no consequent distinction in inheritance and related rights). Thus the states show little interest in promoting a favored status for biologically-based parenting among the public purposes of marriage. Adoption law suggests that states intended to recognize intentional and deliberate parenting as much as "accidental procreation."[22]

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[18] Cott, *supra* note 5, at 2, 11-12, 52-53, 190-94, 221-24; Grossberg, *supra* note 5, at 204-05 (legitimization of children).

[19] Grossberg, *supra* note 5, at 85 (quoting *In re McLaughlin's Estate*, 30 P. 651, 658 (Wash. 1892)).

A. States Have Used Marriage to Aid in Governing Their Populations.

Historically, marriage has been closely intertwined with sovereigns' aim to govern their people. When monarchs in Britain and Europe fought to wrest control over marriage from ecclesiastical authorities (circa 1500-1800), they did so because the authorization of marriage was a form of power, and they used marriage as a vehicle through which to govern the population.[23]

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[20] BLAG Br. 11.

[21] *Id.* at 45.

[22] HERMAN, *supra* note 5, at 203-04 and 292-93.

Anglo-American legal doctrine, continuing into the era of American independence, made married men into heads of their households. The head of household was legally obliged to control and support his wife and all other household dependents, whether biologically related children or relatives or others including orphans, apprentices, servants and slaves.[24] In return, he became their public representative. This allotment of household authority and privilege was a major feature of public order. About 80% of the thirteen colonies' population were legal dependents of male household heads in the decade of the American Revolution.[25]

Marital status and citizenship rights were thus deeply intertwined in early American history. Laws concerning who could marry whom, in what way, and setting the specific duties of husband and wife, formed important dimensions of states' authority over their populations. Married men's full citizenship and voting rights were seen as tied to their headship of and responsibilities for their families; correspondingly, wives' inferior citizenship and lack of voting rights were understood to be suited to their subordination to their husbands. Slaves' inability to marry was one major feature of their complete lack of civil rights.[26]

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[23] MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 23-34 (1989); Sarah Hanley, *Engendering the State: Family Formation and State Building in Early Modern France*, 16 FRENCH HISTORICAL STUDIES 4, 6-15 (1989); SHANLEY, *supra* note 10, at 81.

[24] KERBER, *supra* note 5, at 11-15; COTT, *supra* note 5, at 11-12, 79-81; GROSSBERG, *supra* note 5, at 24-27.

[25] Carole Shammas, *Anglo-American Household Government in Comparative Perspective*, 52 WM. & MARY Q. 104, 123 (1995) (the figure of 80% is from 1774).

Today, when constitutional imperatives have eliminated sex and race inequalities from laws of marriage, the marital dimension of citizenship persists: in a legacy of the sustained relation between marriage and citizenship, states grant marriage rights to certain couples and not others, and award married couples benefits and rights not available to other pairs or to single persons. When Congress in 1996 refused federal recognition to potential marriages of same-sex couples, it interrupted a long history, by denying states' ability to confer on these couples the same integral status that other couples had historically received when their state allowed them to marry.

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[26] *See* Margaret Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187 (1987-1988); COTT, *supra* note 5, at 32-35.

B. States Have Broad Economic Interests in Supporting Marriage.

Marriage-based households were the fundamental economic units in early America and thus states saw economic reasons to regulate marriage. Unlike today, when occupations are open to men and women, the two sexes then were expected to play differing though equally indispensable roles in the production of food, clothing and shelter.[27] States initially adopted the doctrine of marital unity or *coverture* from the English common law. It subsumed a wife's legal and economic individuality under her husband's power and merged the couple into a single person legally. *Coverture* required a husband to support his wife and family, and a wife to obey her husband. He commanded her labor and property.[28]

Starting in the 1830s, state legislatures and courts responded to new economic pressures and women's complaints by beginning to dismantle this legal structure.[29] Such alterations were extremely divisive, to say the least. Opponents claimed that

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[27] *See generally* LAUREL ULRICH, GOOD WIVES: IMAGE AND REALITY IN THE LIVES OF WOMEN IN NORTHERN NEW ENGLAND, 1650-1750 (1982); MARY BETH NORTON, FOUNDING MOTHERS AND FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY (1996).

[28] COTT, *supra* note 5, at 11-12; KERBER, *supra* note 5, at 11-15.

[29] BASCH, IN THE EYES, *supra* note 5, at 113-61; Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1982-1983).

coverture was the essence of marriage. Anything else was blasphemous and unnatural; the marriage bargain was governed by laws of "Divine origin" and subordination was "the price which female wants and weakness must pay for their protection."[30] It was true that the marital unity doctrine had been central to what marriage meant, for many centuries. Nonetheless, state legislatures began to supersede the old doctrine with positive law. Acting at varying paces, with different approaches, states responded to local pressures with the result that their laws on the issue varied immensely for a century.[31]

Congress responded not at all, even while these changes revolutionized the economic relation between husband and wife in some states and not others.[32] BLAG defends the rightness of DOMA because "marriage as between a man and a woman is . . . 'deeply embedded in the history and tradition of this country' . . . [and] Congress rationally could have regarded any significant change in the definition of this bedrock institution as having potentially significant consequences."[33] But Congress in the early 19th century did not consider it rational to act, although *coverture* was "deeply embedded in the history and tradition of this country"; its dissolution was unquestionably a "significant change" in the "bedrock institution" of marriage which boded extremely "significant consequences." Subsequent Congresses then let the states decide; each one proceeded to keep or dismantle *coverture* at its own pace. Federal policies implemented states' changing definitions without Congressional interposition to preserve federally the pre-existing meaning of this central feature of marriage.

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[30] BASCH, IN THE EYES, *supra* note 5, at 154 (quoting prominent New York opponent).

[31] 3 CHESTER VERNIER, AMERICAN FAMILY LAWS: HUSBAND AND WIFE 24-30 (1935) (showing the durability and variability across states in *coverture*'s persistence); HARTOG, MAN & WIFE, *supra* note 5, at 287-308 (same).

[32] Carole Shammas, *Re-Assessing the Married Women's Property Acts*, JOURNAL OF WOMEN'S HISTORY, Spring 1994, at 9 (measuring extent of shift in wealth from men to women).

Today state governments retain strong economic interests in marriage, though household economies no longer dictate sex-differentiated work roles. Marriage obligates the spouses to support each other as well as any children born or adopted. Governments try to minimize public expenses for indigents by enforcing the economic obligations of marriage. State laws have purposely bundled social approbation and economic advantage into marriage, along with legal obligations, to encourage couples to create long-lasting rather than transient relationships and to build households upon them whether or not they produce children. States offer financial advantages to married couples on the premise that all marriage-based households promise social stability and economic benefit to the public.[34]

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[33] BLAG Br. 41-42 (quoting *Marsh v. Chambers*, 463 U.S. 783, 786 (1983)).

During the Great Depression of the 1930s, when federal programs such as Social Security were invented, new federal benefits were dispensed through spousal relationships.[35] Federal reliance on this model began much earlier, however, when the Continental Congress during the Revolutionary War awarded "pensions" to the widows and orphans of officers who died serving the new nation. These pensions—and all subsequent military pensions and survivors' benefits, until sex discrimination challenges in the 1970s—sustained the norm of the male head of household supporting (even posthumously) his dependents.[36]

Federal benefits channeled through spousal relationships became a persistent American practice, present today in veterans' pensions, Social Security payments, and immigration and naturalization advantages, for example.[37] This linkage makes legal marriage all the more valuable to couples. With DOMA in place, however, same-sex couples validly married in nine states and the District of Columbia are stripped of federal married status and consequently of all federally-controlled economic and other advantages.

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[34] COTT, *supra* note 5, at 221-23; KESSLER-HARRIS, *supra* note 5, *passim*, and especially 3-18.

[35] KESSLER-HARRIS, *supra* note 5, at 132-41.

[36] Pensions were soon extended to servicemen. *See* National Archives and Records Service, General Services Administration, REVOLUTIONARY WAR PENSION AND BOUNTY—LAND—WARRANT APPLICATION FILES, National Archives Microfilm Publications, Pamphlet Describing M804 (Washington, D.C., 1974), http://www.footnote.com/pdf/M804.pdf; *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (Social Security Act violates Fifth Amendment by providing survivor benefits to widows, but not widowers).

C. States' Purposes in Marriage Include the Support of All Children.

States' purposes in authorizing and regulating marriage have always related in part to children, but these purposes have never been limited to or focused only on children under the control of both biological father and mother. States' intentions, historically, have focused on securing responsible adults' support and protection for their minor dependents whether these are adopted, or step-children, or biological progeny. BLAG's emphasis on marriage being preeminently the structure for containing "unplanned and unintended" pregnancies[38] misses the larger point that government interest lies in ensuring that married

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[37] THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 103-51 (1992); KESSLER-HARRIS, *supra* note 5, at 56-159; COTT, *supra* note 5, at 172-79. *Cf. Turner v. Safley*, 482 U.S. 78, 96 (1987) (voiding restriction on prison inmate marriages in part because "marital status often is a precondition to the receipt of government benefits").

[38] BLAG Br. 11.

(and unmarried) adults are supporting and protecting minor dependents who become their responsibility, whether or not through biological descent. BLAG's emphasis on marriage as an incentive for "responsible procreation"[39] ignores the fact that state laws also require unmarried parents to be "responsible" by supporting their children.[40]

Marriage and procreation historically have had a close but not a necessary relationship. The ability or willingness of couples to conceive or produce progeny has never been required or necessary to marry under the law of any American state. No state ever barred women past menopause from marrying, or allowed a husband to divorce his wife because she was past childbearing age. Men or women known to be sterile have not been prevented from marrying. Nor could a marriage be annulled for an inability to bear or beget children.[41]

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[39] *Id.*

[40] LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.07 (2d ed. 2013); Chart 3, 45 FAM. L.Q. 498, 498-99 (Winter 2012).

[41] 3 GEORGE ELLIOTT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS CHIEFLY IN ENGLAND AND THE UNITED STATES 3-160 (1904) (reviewing states' divorce legislation through 1903); DEPT. OF LABOR, MARRIAGE AND DIVORCE IN THE UNITED STATES, 1867-86 (1889), http://pds.lib.harvard.edu/pds/view/3895542?n=5&imagesize=1200&jp2Res=.25&printThumbnails=no (restating divorce legislation). While impotence, if unknown at the time of marriage, could render a marriage voidable by an aggrieved party, sterility did not. Thus state laws recognized a justifiable expectation of

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States in the past credited and encouraged marriages whether or not biological children would result, so long as the couple met the state's criteria for entering marriage. Throughout American history, marriages in which step-parents took responsibility for non-biological children were common, because of early deaths of biological parents and widows' and widowers' remarriages. Families often adopted orphans.[42] Claims that the state's core purpose in marriage has "always" been to provide an optimal context for parents' begetting and rearing biological children are not historically-based. It could be said that the first "First Family" established a non-biological family as a sound model for the nation, since the "father of our country," George Washington was known to be sterile, while Martha Custis brought two children from her first marriage into their marriage and they also later reared the children of her son, who died in the Revolutionary War.[43]

In our post-industrial age, families have become ever more various. In 2010 only 21% of American

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sexual intimacy, but not of progeny, in marriage. GROSSBERG, *supra* note 5, at 108-10.

[42] *See generally* HARTOG, SOMEDAY, *supra* note 5, at 169-205.

[43] Washington's sterility was a political advantage because it erased fears of his making the presidency hereditary, like kingship. His inaugural address initially included the point (later deleted) that his name would not be "perpetuated by the endearing though sometimes seducing channel of personal offspring." PAUL F. BOLLER, JR., PRESIDENTIAL INAUGURATIONS 4 (2001).

households were composed of a married couple and their minor children.[44] More frequent divorce and remarriage have multiplied blended families in which children and parents are not biologically related. Likewise, new reproductive technologies are multiplying the ways of bringing wanted children into the world, with or without a biological link to the parents who intend to rear them.[45]

Just as important, the use of contraceptives has transformed the relation of marriage to parentage over the past century. Availability of contraception has made sexual satisfaction far more central to individuals' expectations in marriage, and has made enjoyment of marital sex possible with or without the intention to produce children.[46] Almost all couples voluntarily restrict the number of their progeny while continuing sexual intimacy.[47] Couples with no interest in childbearing marry, as do older adults past childbearing age. If DOMA was intended to privilege couples who can produce children accidentally,[48] it does not comport with the complex realities of states' histories with regard to marriage. States have valued marriage for purposes not necessarily tied to biological progeny in the past, and do so today.

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[44] Press Release, U.S. Census Bureau, U.S. Census Bureau Reports Men and Women Wait Longer to Marry (Nov. 10, 2010), http://www.census.gov/newsroom/releases/archives/families_households/cb10-174.html.

[45] Shanley, Making Babies, *supra* note 5, at 76-147.

[46] *See* D'Emilio & Freedman, *supra* note 5, at 233-55, 265-74; Christina Simmons, Making Marriage Modern 113-34 (2009); Rebecca L. Davis, More Perfect Unions: The American Search for Marital Bliss 21-53 (2010). Although contraception as such was not legal in all of the states until 1965, after 1918 doctors could prescribe diaphragms to protect women's health, and condoms could be commercially sold for "hygienic" purposes. *See People v. Sanger*, 118 N.E. 637, 637-38 (N.Y. 1918) (physicians may prescribe contraception to married persons for the prevention of disease); Andrea Tone, Devices and Desires: A History of Contraceptives in America 105-15 (2002); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (affirming married couples' liberty to use contraception).

III. Before DOMA, The Federal Government Accepted Variant State Definitions Of Marriage.

States have taken seriously their responsibility for marriage definition. In every state, marriage has been defined as a voluntary bond between a couple—and a couple only[49]—who share sexual intimacy and mutual economic support. States' additional requirements have varied, often significantly, sometimes in ways obnoxious to their sister states. More than once in U.S. history, the level of contention and division over marital policy rose alarmingly when one or more states innovated, and others disapproved.

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[47] *See* GUTTMACHER INSTITUTE, CONTRACEPTIVE USE IN THE UNITED STATES (July 2012) (79% of married women use contraception), http://www.guttmacher.org/pubs/fb_contr_use.html.

[48] BLAG Br. 11.

[49] Every state prohibited bigamy. *See* GROSSBERG, *supra* note 5, at 120-26. *See also infra* Sec. IV.B.

A. Inter-State Differences in Marital Eligibility and Validity Have Been Present Throughout U.S. History.

States have differed on the age a person might consent to marriage, what degree of consanguinity was allowed, whether a white and a person of color could marry, what health minima must be met, how spousal roles were defined and enforced, whether specific ceremonies were required for validation and whether and how marriage might be dissolved—and this is not an exhaustive list of the variations.[50] Individual states also changed their own marital regulations significantly over time.

Some inter-state differences caused little controversy. Others created major conflicts. The issue of first-cousin marriage, for example, may seem esoteric now, but it was a source of deep regional division in the past. First-cousin marriage was a way for elite families to consolidate wealth. Accepted in much of the South and New England, it was prohibited in the Middle and Far West, where it was rejected as incestuous.[51] Also, the American states inherited the English common-law prohibition on a widower marrying his deceased wife's sister, considering it brother-sister marriage, because *coverture* made the married couple into one person. When states moved to discard this rule, hold-outs considered them to be "countenancing incest."[52] The value placed on marital liberty eventually bested these prohibitions, but only after great disharmony prevailed for many decades.[53]

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[50] GROSSBERG, *supra* note 5, at 70-74, 103-13, 144-45; 1 CHESTER VERNIER, AMERICAN FAMILY LAWS: INTRODUCTORY SURVEY AND MARRIAGE 183-209 (1931).

[51] *Id.* at 110-13; Diane B. Paul & Hamish G. Spencer, *"It's Ok, We're Not Cousins by Blood": The Cousin Marriage Controversy in Historical Perspective*, PLoS BIOLOGY, Vol. 6, Issue 12, Dec. 2008, at 2627-28.

A prime example of intense inter-state discrepancy concerned marriages between whites and non-whites. Laws nullifying and/or criminalizing these marriages spread from the colonial Chesapeake to the large majority of the early states—but there was never unanimity or harmony on the issue.[54] In the late 1930s (when 30 of 48 states still maintained such laws), a huge and motley list of "racial" groups, including such categories as "half-breeds," "Malays," "Japanese," "Chinese," and "Octoroons" as well as "Negroes" (defined by various "blood mixtures"), were prohibited in one state or another from marrying "Whites."[55] States with such laws also differed in whether they would always void an interracial marriage celebrated in another state, some but not all of them taking evasive intent into account.[56]

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[52] GROSSBERG, *supra* note 5, at 113.

[53] *Id.* at 110-13.

[54] *See* DAVID H. FOWLER, NORTHERN ATTITUDES TOWARDS INTERRACIAL MARRIAGE 36-220, A-1 to A-104 (1987); PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 118-19 and *passim* (2009).

[55] PASCOE, *supra* note 54, at 118-19; *see also* GROSSBERG, *supra* note 5, at 136-40.

Legislators and judges in the great majority of the United States where these laws prevailed regularly defended them as rooted in natural law and thus essential to marriage. The Supreme Court of Pennsylvania, for example, opined of blacks and whites: "The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures."[57] Thus the court bent natural law to match what it believed, while diminishing the instrumentality of positive law. Joel Prentiss Bishop's treatise on marriage justified *coverture* similarly, seeing the husband's "right to command" and the wife's "duty of obedience" rooted "in the law of nature, which gave strength to the man and feebleness and dependence to the woman."[58]

An active minority fervently opposed the color bans on marriages, naming them "an invasion of one of the inalienable rights of every man" or objecting that "[t]he right of every individual to consult his own taste and feeling in matrimony ought to be sacred" and that "the government ought not to be invested with power to control the affections any more than the consciences of citizens."[59] States added, eliminated, and changed their laws of this sort repeatedly over time, until they were declared a violation of the Fourteenth Amendment.[60] While these changes in eligibility requirements sometimes expanded or contracted the pool of couples who might be validly married, Congress did not interpose its authority. The conflict was considered an inter-state rather than a federal matter.[61]

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[56] CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 249-50 nn.81-83, 86, 90 (1940) (collecting authorities).

[57] *West Chester and Philadelphia R.R. Co. v. Miles*, 55 Pa. 209, 213 (1867).

[58] 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN § 45 at 26, § 47 at 27 (Philadelphia, Kay & Brother 1871).

Varying state definitions in grounds for divorce also generated strong inter-state conflicts. States began legalizing divorce shortly after the Revolution. Over time, as some states expanded the allowable causes far more than others, even including "omnibus" clauses that allowed divorce for any cause a judge considered reasonable, reaction occurred.[62] A leading Connecticut clergyman inveighed against liberal grounds turning society into "one vast brothel."[63] The extent of variance by the latter half of the 19th century horrified divorce opponents, who felt that the increase in divorces—obvious when national statistics were published in 1890—endangered all marriages. Aghast at numerous grounds for divorce in some states, they contended that "venue-shopping" would prevail and damage marriage everywhere. Violent controversies over "migratory divorce" swirled for decades.[64]

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[59] William Lloyd Garrison, *Legislative*, LIBERATOR, Jan 8, 1831, at 7; Anonymous, Letter to the Editor, *An Unjust Law*, LIBERATOR, Jan. 29, 1831, at 5; LYDIA MARIA FRANCIS CHILD, AN APPEAL IN FAVOR OF THAT CLASS OF AMERICANS CALLED AFRICANS 209 (Boston, Allen and Ticknor 1833).

[60] *See Loving v. Virginia*, 388 U.S. 1 (1967).

[61] *See* STORY, *supra* note 16, §§ 113-13a, at 173-74; *cf. Sherrer v. Sherrer*, 334 U.S. 343, 356-77 (1948) (Frankfurter, J., dissenting) (learnedly discussing state conflicts). *See generally* ANDREW KOPPLEMAN, SAME SEX, DIFFERENT STATES 39-46 (2006).

[62] *See* HARTOG, MAN & WIFE, *supra* note 5, at 269-86; BASCH, FRAMING, *supra* note 5, at 19-42; COTT, *supra* note 5, at 46-55.

Pressures from aroused reformers led to reevaluation and reduction of several states' grounds for divorce. Also, on the assumption that marriages made too easily were more likely to dissolve, many states placed new restrictions on entering marriage, such as higher minimum ages, mandatory marriage licenses, and eugenic-inspired disease tests.[65]

The divorce panic fueled a new level of opposition to unceremonialized marriage, another issue on which the states had always differed. Such informal marriages were very common in early America, and were first credited in law when the eminent jurist Chancellor James Kent argued in 1809 that a couple's intent and consent created a valid marriage, even without conformity to state-prescribed ceremonies. He called this "common law marriage."[66] Most states, although not all, came to adopt Kent's view that while consent was always necessary for marriage, formal solemnization was not.[67]

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[63] BASCH, FRAMING, *supra* note 5, at 45.

[64] BASCH, FRAMING, *supra* note 5, at 72-93; HARTOG, MAN & WIFE, *supra* note 5, at 258-62; COTT, *supra* note 5, at 105-11. *See also* GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 108-29 (1991).

[65] GROSSBERG, *supra* note 5, at 140-52.

The countervailing view, that unsolemnized marriage was intolerable, sprang back to life in the late 19th-century alarms over divorce. What had been widely (although not uniformly) accepted in most states came to be seen as a problem, "contrary to public policy and public morals, and revolting to the senses of enlightened society," as the Supreme Court of Washington put it.[68] Influential marriage reformers wrote of its "manifold evils," called it evidence of "individualism absolutely unrestrained!," associated it—negatively—with canon law, and found its conflict with statutory legality "demoralizing."[69] Consequently, states moved to eliminate common-law marriage, but again, not all fell into line.[70]

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[66] *Fenton v. Reed*, 4 Johns. 52 (N.Y. Sup. Ct. 1809) ("No formal solemnization of marriage was requisite."); GROSSBERG, *supra* note 5, at 69-78. *See also* COTT, *supra* note 5, at 29-33 (concerning frequency of informal marriage).

[67] *See Inhabitants of Milford v. Inhabitants of Worcester*, 7 Mass. at 55-56 ("When the statute [requires a specific ceremony] . . . the parties are themselves prohibited from solemnizing their own marriages . . . . "). In *Meister*, 96 U.S. 76, and *Maryland*, 112 U.S. 490, the Court validated common-law marriage *unless* a state specifically prohibited it, thus bowing to state jurisdiction.

[68] *McLaughlin's Estate*, 30 P. at 658.

[69] 3 HOWARD, *supra* note 9, at 182-85.

In seeking to minimize the salience of innovations and variations in state marriage laws in the past, and contrasting the "enormous importance"[71] of allowing same-sex couples to marry, BLAG makes too great a distinction. Divergent state laws regarding interracial marriage, divorce, and common-law marriage aroused passionate and heated debate. They were of enormous importance in their own time. Indeed, the variations on divorce and common-law marriage so troubled some citizens that they formed a political movement to push for uniform national standards for marriage and divorce. At their behest, scores of proposals went through Congress aiming to amend the U.S. Constitution to permit federal creation of uniformity. Not one ever passed.[72] States too jealously guarded their own prerogatives to accept a uniform federal code. Even the alternative approach of the uniform statute movement, drafting model statutes for states to consider adopting voluntarily, has never made headway with marriage and divorce.[73]

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[70] GROSSBERG, *supra* note 5, at 83-102.

[71] BLAG Br. 10 (quotations omitted).

[72] *See Sherrer*, 334 U.S. at 364 n.13 (Frankfurter, J., dissenting) (noting over seventy such amendments proposed and rejected since the 1880s); Stein, *supra* note 4, at 625-41 (cataloguing past proposed Constitutional amendments).

B. Federal Authorities Accepted State Determinations of Marital Status Until 1996.

Despite the variation and tumult, the federal government looked to state laws to determine whether a couple was married. Federal agencies and courts frequently restated exclusive state jurisdiction over marital status before 1996.[74] Even amidst the many mutations in racial limitations on marrying, Congress did not step in. The states took initiatives and as long as they stayed within constitutional bounds the federal government accepted their results.[75] "It is one

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[73] MARY E. RICHMOND & FRED S. HALL, MARRIAGE AND THE STATE 192-97 (1929); Grossberg, *supra* note 15, at 824-32; RILEY, *supra* note 64, at 118-21.

[74] *See Ex parte Kinney*, 14 F. Cas. 602, 606 (C.C.E.D. Va. 1879) ("Congress has made no law relating to marriage. It has . . . no constitutional power to make laws affecting the domestic relations . . . . If it were to make such a law for the states, that law would be unconstitutional. . . ."); *Tidewater Marine Towing, Inc. v. Curran-Houston, Inc.*, 785 F.2d 1317, 1319 (CA5 1986) (state law "furnishes the rule for decision of the [marital] status issue underlying the question"); *Slessinger v. Sec'y of Health & Human Servs.*, 835 F.2d 937 (CA1 1987) (looking to state law to determine validity of divorce).

[75] GROSSBERG, *supra* note 5, at 133-40; *see Kinney*, 14 F. Cas. 602 (no federal jurisdiction to grant *habeas corpus* relief to white citizen of Virginia—where marriage between "a white person and a negro" was void and punishable by two to five years'

(Continued on following page)

of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments," Justice Louis Brandeis affirmed.[76] Congress did not prevent experiments in marriage law from registering in federal law, before DOMA. BLAG's claim that DOMA protects this state role while also "ensuring that no one state's experiment would be imposed on other states or on the federal government"[77] ignores the previous history in which states' innovations, whether or not liked by sister states, were implemented in federal policies where they pertained, rather than being rendered null.

Until 1996, federal agencies dealing with or dispensing benefits to married couples were not stymied by inter-state differences in eligibility for marriage, or differing standards on divorce. They addressed marriage validity by assessing the relevant state laws and deciding which state law controlled. Federal agencies controlling such areas as military law or taxation conducted a choice of law analysis, conferring or denying benefits depending on whether applicable state law recognized the applicant's marriage. Far from seeking to impose federal uniformity, federal

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imprisonment—imprisoned for living with the woman whom he wed legally in the District of Columbia).

[76] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[77] BLAG Br. 32.

agencies sought and accepted state law definitions, before DOMA.[78] On the issue of spouses' eligibility for federal pensions, for example, the rule was set in 1882 and continued: "The question for us is, Does the law of the place of domicil concede that they are married?. . . . Each case must rest entirely upon the law of the place in which it arises. . . . Because a marriage is lawful in one State it by no means follows that . . . it is lawful in another State."[79] Later, when the Social Security Act promised old-age pensions to surviving spouses, a legal scholar specified the need to examine common-law marriage claims carefully, because "the [Social Security] board must make two findings, *both dependent on state law*, before certification [of valid marriage] can be made"; the state in question had to allow common-law marriage, and the applicant had to meet its conditions.[80]

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[78] *See, e.g.*, *In re Bridget Butler*, 13 P.D. 234 (March 9, 1903) (applying common law of the District of Columbia to determine claimant could prove a common-law marriage existed); *see generally* 19 DECISIONS OF THE DEPARTMENT OF THE INTERIOR IN APPEALED PENSION AND BOUNTY-LAND CLAIMS 331 (John W. Bixler ed., 1914).

[79] Charles Edward Wright, *Marriage and Divorce*, in 19 DECISIONS OF THE DEPARTMENT OF THE INTERIOR IN APPEALED PENSION AND BOUNTY-LAND CLAIMS 327, 331-32 (John W. Bixler ed., 1914).

[80] James P. Lynch, *Social Security Encounters Common-Law Marriage in North Carolina*, 16 N.C. L. REV. 255, 257 (1937-1938) (italics in original). *Cf. Cunningham v. Apfel*, 12 F. App'x 361, 362 (CA6 2001) (validity of common law marriage for Social Security benefit "is governed by the laws of the state where the decedent had a permanent home when he died"); Rev. Rul. 58-66, 1958-1

(Continued on following page)

The Court in 1940 noted "the necessity for an examination of local law to determine the marital status" in regard to federal tax obligations, and saw no conflict between "a uniform construction of national application" in the federal income tax and Congress making it "dependent on state law."[81] In implementing federal policies touching married couples before DOMA, the relevant agency looked to state law. Differences among states became structural features of American law and practice, always accepted whether or not welcomed by all. Prior to DOMA, where states disagreed, Congress did not preemptively disallow certain marital policies for federal purposes in the name of federal uniformity, fiscal austerity, or other cause. BLAG maintains that DOMA was a cautious act, but in view of the long history of state differentiation preceding 1996, DOMA was a radical departure from settled federal practice.

C.B. 60 ("The marital status of individuals as determined under state law is recognized in the administration of the Federal income tax laws."). Current federal regulations allow that when a marriage's validity is imperfect under state law because of a legal impediment not known to an applicant for Social Security benefits acting in good faith, the federal agency may "deem" the marriage valid—a refinement for individual applicants not at all comparable to the action of DOMA on a class of marriages for all federal purposes. SSA Relationship Based Upon Deemed Valid Marriage Rule, 20 C.F.R. § 404.346.

[81] *Helvering v. Fuller*, 310 U.S. 69, 74-75 (1967).

IV. The Federal Government Has Taken Action Over Marriage Only Where State Authority Is Absent.

In the past, Congress involved itself directly in marriage only in situations where no state had jurisdiction. The exceptional character of these episodes contrasts sharply with Congress's action in DOMA, which ruled on the federal meaning of marriage in every state. No previous congressional action is comparable to Congress's refusal to recognize, for all federal purposes, the marital status of a whole class of persons, and thus to dissolve the prospective integrity of their marital status.

A. Federal Control of Marriage Among Ex-Slaves Occurred When Southern State Governments Had Collapsed.

Deprived of all civil rights, slaves could not freely consent, as was required for marriage, and could not fulfill marital duties because their masters could always overrule them. A slave wedding meant nothing to state government; that absence of public authorization was the essence of the union's legal invalidity. To critics of Southern slaveholding, the system's "complete *abrogation of marriage*" composed one of its vilest horrors."[82]

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[82] CONG. GLOBE 36th Cong., 1st Sess., 2590, 2591 (1860) (Sen. Sumner) (italics in original).

As the Union Army marched south, Confederate states crumbled. In the spring of 1864, a Union military edict authorized the clergy in the U.S. Army to perform marriages for slaves who had fled to freedom behind Union lines. Ex-slaves welcomed the ability to marry as a civil right long denied them. An army chaplain in Mississippi remarked that "those married by the authority and protection of Law. . . . feel that they are beginning to be regarded and treated as human beings."[63]

Direct federal involvement in marriages among ex-slaves resulted from martial law holding sway in the occupied Confederacy, where no state governments existed—a temporary phenomenon.[64] After Union victory, the short-lived U.S. Bureau of Freedmen, Refugees, and Abandoned Lands briefly regulated marriages of freed people in the occupied South. Southern state governments were quickly reconstituted, however, and the Freedmen's Bureau ceded its authority; states resumed their jurisdiction over marriage, subject to the authority of the Fourteenth Amendment, from 1868 on.[85]

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[63] Cott, *supra* note 5, at 83-84. *See also* Edwards, *supra* note 5, at 24-65.

[64] Examples of congressional action regarding marriages of "colored soldiers" in 1864 and 1865 fail to recognize the historical context. *See* Brief for *Amici Curiae* Law Professors 25-26. Congress concerned itself with these soldiers' marriages in 1864-65 because the Confederate states had collapsed (and if functioning, would not have authorized marriage for these men because their masters, rather than state government, ruled them). *See generally* The Destruction of Slavery (Ira Berlin et al. eds., 1985); The Black Military Experience (Ira Berlin et al. eds., 1982).

B. The Federal Government Exercised its Plenary Power Over Marriage in Federal Territories to Eliminate Polygamy.

Constitutionally, Congress has plenary powers over marriage in federal territories, as states do in their domains. The federal campaign to eliminate polygamy as practiced by the Church of Jesus Christ of Latter-Day Saints ("LDS Church") in the Utah Territory offers a unique example of federal action, highlighting Americans' complete rejection of polygamy while showing also that Congress respected state jurisdiction over marital status.

Congress outlawed bigamy in all federal territories in 1862, bringing them into conformity with the settled doctrine of all the states, and aiming particularly at "plural marriage" in the LDS Church.[86] The Republican Party platform of 1856 had pronounced polygamy and slavery to be "twin relics of barbarism," anathema to the progress of American civilization."[87] More generally, polygamy was associated with unfreedom in American minds. Antipolygamists called plural wives "white slaves"; the sponsor of the Morrill Act believed "bondage" to be intrinsic to polygamy.[88] Refusing the Mormons' claim of religious freedom for plural marriage, Chief Justice Waite found polygamy "odious" and intolerable in the United States because its "patriarchal principle ... fetters the people in stationary despotism."[89] Following Baron de Montesquieu, Waite posited that "according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests."[90]

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[85] *See* COTT, *supra* note 5, 83-94 (concerning marriage policies of the federal Bureau of Freedmen, Refugees and Abandoned Lands, and its cession of authority to the reconstituted Southern states). *See generally* FAMILIES AND FREEDOM (Ira Berlin et al. eds., 1997).

[86] Morrill Act, ch. 126, 12 Stat. 501, 501-02 (1862); GORDON, *supra* note 5, at 81-83.

Both the Congress and the federal courts used extreme and punitive measures in Utah, eventually expropriating the LDS Church. Their methods illustrated the strong connection understood to exist between marriage and citizenship. Finding that outlawing bigamy was not effective (because Utah did not register marriages), Congress passed an act criminalizing bigamous cohabitation, and depriving anyone practicing it of the right to vote or hold office.[81] When a case protesting this made its way to the Court, the justices unanimously denied the claim, finding it appropriate for Congress to make marital status "a condition of the elective franchise," and also commenting that a sovereign power could legitimately "declare that no one but a married person shall be entitled to vote."[82]

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[87] ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 129-30 (2d ed. 1995).

[88] GORDON, *supra* note 5, at 47-48, 63-64.

[89] *Reynolds v. United States*, 98 U.S. 145, 164-66 (1879).

[90] *Id.* at 165. American political thinking has consistently reprobated polygamy. Influenced by Montesquieu's THE SPIRIT OF THE LAWS, Revolutionary-era statesmen aligned consent-based monogamy with their republican form of government, and saw the voluntary bond of marriage as a model for the voluntary allegiance asked of American citizens. *See* COTT, *supra* note 5, at 21-23; *see generally* ANNE M. COHLER, MONTESQUIEU'S COMPARATIVE POLITICS AND THE SPIRIT OF AMERICAN CONSTITUTIONALISM (1988).

The campaign was so extraordinarily intense because Utah had applied for statehood. Understanding the constitutional limits on its own powers, Congress knew that it would have no role in defining marriage in Utah once the territory became a state. Only after the LDS Church had disavowed polygamy was statehood for Utah possible. Also, before Utah was admitted to the Union, Congress further required its state constitution to stipulate that polygamy was "forever prohibited."[83]

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[81] Edmunds Act § 3, ch. 47, 22 Stat. 30, 30-31 (1882).

[82] *Murphy v. Ramsay*, 114 U.S. 15, 43 (1885).

[83] UTAH CONST. art. III, § 1. See GORDON, *supra* note 5, at 164-81, GROSSBERG, *supra* note 5, at 120-26, and COTT, *supra* note 5, at 111-20 on the anti-Mormon campaign.

CONCLUSION

Throughout American history, the states have instituted many innovations in the legal lineaments of marriage—including changes in features once seen as essential and indispensable. These innovations have kept the institution vital, capable of serving the public good and protecting the couple who decide to marry. Popular reverence for marriage has endured in great part because marriage has been adjusted by state courts and legislatures in accord with changing ethical standards and social mores. It has been the job of state courts and legislatures to ensure that marriage continues to reflect public values and serve the public interest.

For sound reasons fundamental to our federal system, marital status definition has been left to the states, operating within constitutional bounds. Significant state diversity has resulted and been accommodated within our federal system. *Amici* support the position of Respondents that DOMA breaks with historical understanding of the state and federal roles with respect to marriage. The decision of the

Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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In The
Supreme Court of the United States

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UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,

Respondents.

◆

On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit

◆

BRIEF OF *AMICI CURIAE* PROFESSORS NAN D. HUNTER, SUZANNE B. GOLDBERG, KATHRYN ABRAMS, KATHERINE M. FRANKE, BURT NEUBORNE, AND ANGELA P. HARRIS ADDRESSING THE MERITS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

- I. **Multiple Forms of Invidious Classifications, Including Those Not Traditionally Deemed Suspect, Such as Those Based on Sexual Orientation, Necessitate a More Transparent Statement of the Court's Existing Equal Protection Jurisprudence** 5
  - A. **Footnote 4's Scalable Framework Reflects the Court's Understanding, Reinforced by Experience, that Invidious Classifications Can Arise in a Wide Range of Contexts** 7
  - B. **The Social Complexity of Today's America Illustrates the Enduring Wisdom of Footnote 4's Open-Ended Approach** 11
  - C. **Principles of Transparency and Judicial Accountability Also Support the Wisdom of Revisiting and Simplifying the Standard of Equal Protection Review** 14
- II. **Invidious Classifications Should and Do Trigger a More Contextual Inquiry than the Sharply Dichotomous Tiered Framework Can Provide** 15

TABLE OF CONTENTS – Continued

Page

III. When a Classification Exhibits the Indicia of Invidiousness, Courts Examine Whether It Is Discontinuous with, or Creates a Burden that Is Disproportionate to, Its Purported Neutral Justification 25

  A. Meaningful Review of a Classification with the Indicia of Prejudice or Stereotypes Requires Inquiry into the Law's Purpose and the Relationship Between Legislative Goals and the Basis for the Classification under Challenge 26

  B. Laws That Impose a Burden out of Proportion to the Legislative Goal, Based on Classifications with the Markings of Invidiousness, Also Violate the Equal Protection Clause 28

IV. DOMA Fails Any Level of Equal Protection Review 31

CONCLUSION 39

APPENDIX .... App. 1

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995)..17

Allegheny Pittsburgh Coal Co. v. County Commission of Webster County,
488 U.S. 336 (1989)..25

Armour v. City of Indianapolis,
132 S. Ct. 2073 (2012)..20

Bartels v. Iowa, 262 U.S. 404 (1923)....................6, 8, 9

BMW of North America, Inc. v. Gore,
517 U.S. 559 (1996)..31

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001)...............................18

Boddie v. Connecticut, 401 U.S. 371 (1971)...............30

Bowers v. Hardwick, 478 U.S. 186 (1986)..................32

Bray v. Alexandria Women's Health Clinic,
506 U.S. 263 (1993)..18

Bullock v. Carter, 405 U.S. 134 (1972)........................29

Bush v. Gore, 531 U.S. 98 (2000) 26

Califano v. Goldfarb, 430 U.S. 199 (1977).................18

Citizens for Equal Protection v. Bruning,
455 F.3d 859 (8th Cir. 2006) 5

City of Boerne v. Flores, 521 U.S. 507 (1997).......28, 30

City of Cleburne v. Cleburne Living Center, Inc.,
473 U.S. 432 (1985)..*passim*

TABLE OF AUTHORITIES – Continued

Page

Craig v. Boren, 429 U.S. 190 (1976)..............................3

Cruzan v. Director of Missouri Department of Health, 497 U.S. 261 (1990)....................................32

Dandridge v. Williams, 397 U.S. 471 (1970) 27, 28

Douglas v. California, 372 U.S. 353 (1963) 30

Evans v. Romer, No. 92-CV-7223, 1993 WL 518586 (Colo. Dist. Ct. Dec. 14, 1993).....................37

Farber v. City of Paterson, 440 F.3d 131 (3d Cir. 2006).......................................18

Farrington v. Tokushige, 273 U.S. 284 (1927).....6, 8, 9

FCC v. Beach Communications, Inc., 508 U.S. 307 (1993)...22, 23

Graham v. Richardson, 403 U.S. 365 (1971).............38

Griffin v. Breckenridge, 403 U.S. 88 (1971)...............18

Griffin v. Illinois, 351 U.S. 12 (1956)..........................30

Heller v. Doe, 509 U.S. 312 (1993) 38

Hernandez v. Texas, 347 U.S. 475 (1954)....................17

Hollingsworth v. Perry, 133 S. Ct. 786 (2012) 5

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985)...20

Kelo v. City of New London, 545 U.S. 469 (2005)....... 26

Lawrence v. Texas, 539 U.S. 558 (2003)...........5, 19, 32

M.L.B. v. S.L.J., 519 U.S. 102 (1996).........................30

Martinez v. Bynum, 461 U.S. 321 (1983)...................20

TABLE OF AUTHORITIES – Continued

Page

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 20

McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976) 20

McCulloch v. Maryland, 4 Wheat. 316 (1819) 7

Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985) 20

Meyer v. Nebraska, 262 U.S. 390 (1923) 6, 8, 9, 10

National Coalition for Gay & Lesbian Equality v. Minister of Home Affairs, 1999 (2) SA 1 (CC) 35

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Nixon v. Condon, 286 U.S. 73 (1932) 6, 8

Nixon v. Herndon, 273 U.S. 536 (1927) 6, 8

Nordlinger v. Hahn, 505 U.S. 1 (1992) 26

Oyler v. Boles, 368 U.S. 448 (1962) 17

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991) 38

Palmore v. Sidoti, 466 U.S. 429 (1984) 26

Pedersen v. Office of Personnel Management, 881 F. Supp. 2d 294 (D. Conn. 2012) 5

Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) 5

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 16

Page

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 6, 9, 10, 11

Planned Parenthood of Southeast Pennsylvania v. Casey, 505 U.S. 833 (1992) 35

Plessy v. Ferguson, 163 U.S. 537 (1896) 15

Plyler v. Doe, 457 U.S. 202 (1982) 28, 38

Quinn v. Millsap, 491 U.S. 95 (1989) 29

Rinaldi v. Yeager, 384 U.S. 305 (1966) 25

Romer v. Evans, 517 U.S. 620 (1996) .... *passim*

Salgueiro da Silva Mouta v. Portugal, IX Eur. Ct. H.R. 309 (1999) 13

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 3, 20, 29

Schiavo ex rel. Schindler v. Schiavo, 404 F.3d 1270 (11th Cir. 2005) 24

Schweiker v. Wilson, 450 U.S. 221 (1981) 26

Shapiro v. Thompson, 394 U.S. 618 (1969) 38

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) 29

Sosna v. Iowa, 419 U.S. 393 (1975) 37

South Carolina State Highway Department v. Barnwell Brothers, 303 U.S. 177 (1938) 7, 8, 9, 10

State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003) 31

TABLE OF AUTHORITIES – Continued

Page

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U.S. Department of Agriculture v. Moreno, 413 U.S. 528 (1973) 16, 23, 24, 27, 34

United States v. Carolene Products Co., 304 U.S. 144 (1938) .... *passim*

United States v. Richardson, 418 U.S. 166 (1974) 13

United States v. Virginia, 518 U.S. 515 (1996) 16

Vance v. Bradley, 440 U.S. 93 (1979) 22, 23

Village of Willowbrook v. Olech, 528 U.S. 562 (2000) 21

Washington v. Glucksberg, 521 U.S. 702 (1997) 20

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) 35, 36

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 35

Welch v. Henry, 305 U.S. 134 (1938) 18

Williams v. Vermont, 472 U.S. 14 (1985) 20

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) 16

Windsor v. United States, 699 F.3d 169 (2d Cir. 2012) 5, 21, 22

Zobel v. Williams, 457 U.S. 55 (1982) 20

Page

STATUTES

29 U.S.C. §§ 621-634 (2006) 12

42 U.S.C. § 1985(3) (2006) 17

42 U.S.C. §§ 2000ff to 2000ff-11 (2011) 12

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Page

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici curiae are legal scholars with expertise in equal protection jurisprudence. Although *amici* support heightened scrutiny for sexual orientation-based classifications under the extant, tiered framework, they believe that the framework proposed here will enhance the clarity and accuracy of equal protection review, given the ever-increasing demographic and social complexity of the United States in the twenty-first century.

SUMMARY OF ARGUMENT

This Court is at a crossroads in its equal protection jurisprudence. The problem lies not in what the Court has done in analyzing legislative classifications of groups of persons, but in the murkiness that has surrounded the articulation of which analytical principles apply when invidious classifications are not traditionally suspect. As our Nation becomes ever more diverse, the confusion for lower courts and the political branches generated by this lack of clarity will only worsen.

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[1] All parties have consented to the filing of all *amicus curiae* briefs by letters filed with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. In addition, no persons or entities other than *amici curiae*, or their counsel made a monetary contribution to the preparation or submission of the brief.

Names of individual *amici* appear in the Appendix to this brief.

Building on precedents dating back to *Carolene Products* Footnote 4,[2] there is a clear path forward for situations in which courts must examine group-based classifications that correlate with social stigma. Like Footnote 4, the analysis must be grounded in the particular facts surrounding a classification, recognizing that context often determines meaning. And by examining a classification in context, the review can be flexible enough to accommodate increasing social pluralism in American life as it evolves in ways that we cannot foresee.

Amici agree that deferential equal protection review is often appropriate because classification is intrinsic to governance, and most distinctions made in the context of economic and social policy merit judicial restraint. As is evident from precedent, however, the decisive factor for determining the stringency of review is not whether a policy is "economic or social" but whether the classification itself is tainted with prejudice or is patently arbitrary. When social prejudice *is* present, Footnote 4 and its progeny necessitate an appropriately searching judicial inquiry into whether the burdens imposed on a politically vulnerable minority are discontinuous with, and disproportional to, the neutral public goals, if any, that are asserted as the purposes of the legislation.

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[2] *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

In many respects, Justices Stevens and Marshall were surely correct that there is only one Equal Protection Clause, under which judicial review inevitably operates along a spectrum.[3] But a sliding scale, without more, does not provide a workable method for adjudication. The Court has the opportunity now to make explicit what has become muddied: that all classifications with the indicia of invidiousness trigger a more searching inquiry than the standard of "deference" would imply. Traits that have already been marked for either strict or heightened scrutiny easily fit within this broader principle; indeed, the very design of the upper tiers aims to capture those classifications most likely to be invidious.

The sharp "all or nothing" dichotomy between classifications that are always or never suspicious no longer works in contemporary America as social dynamics and demographics have become increasingly complex. In response, *amici* propose a unifying, coherent two-part equal protection test, which distinguishes between classifications that have the indicia of invidiousness and those that do not. The proposed test asks:

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[3] *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) ("[This Court] has applied a spectrum of standards . . . [that] clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending . . . on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis . . . [of] the particular classification.").

> Is the classification based on a trait that is associated with a broad or historical pattern of social prejudice, animus, or stereotyping or a trait that, as evidenced by the surrounding political context, is associated with acute political or social vulnerability?; and
>
> If yes, does the classification impose a burden that is discontinuous with, or disproportionate to, its purported neutral justification?

Per Footnote 4, more searching review follows for classifications that are likely to be invidious, while more deferential review applies to the rest.

The Defense of Marriage Act (DOMA) fails equal protection review under both the current and proposed tests. But because the more contextual approach presented here will be more capable of application to new situations, while also enhancing transparency and judicial accountability, *amici* urge its consideration in this case.

◆

ARGUMENT

I. Multiple Forms of Invidious Classifications, Including Those Not Traditionally Deemed Suspect, Such as Those Based on Sexual Orientation, Necessitate a More Transparent Statement of the Court's Existing Equal Protection Jurisprudence.

The lower federal courts and the parties to this case disagree on many points, but none is so central as the identification of which standard of review should apply to classifications based on sexual orientation.[4] The choice between deferential rational basis review, with its presumption that the statute at issue is constitutional, and heightened scrutiny, with its presumption that the challenged form of discrimination is illegitimate, has not only become a doctrinal sorting mechanism but is also often seen as a proxy for moral judgment. Especially in cases, such as this one, that involve highly contentious social issues that tend to intensify public perceptions about what is at stake, it is important that the analytic process be forthright, with a framework that provides objective referents for assessing classifications.

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[4] Since this Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 583-85 (2003) (O'Connor, J., concurring) (plurality opinion), which found laws criminalizing sexual conduct between same-sex partners unconstitutional, federal courts have struggled with identifying the correct standard for sexual orientation classifications. Some have applied heightened scrutiny, *see, e.g.*, *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir.), *cert. granted*, 133 S. Ct. 786 (2012), or stated they believe it applies, *see, e.g.*, *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 333 (D. Conn. 2012). Many have utilized a more searching rational basis standard under which DOMA and other laws have been found unconstitutional, *see, e.g.*, *Perry v. Brown*, 671 F.3d 1052, 1081 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 133 S. Ct. 786 (2012). Finally, other federal courts have used a rational basis standard under which sexual orientation classifications have been upheld. *See, e.g.*, *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006) (referring to equal protection standard for sexual orientation classifications as "murky").

The Court has long recognized that the rich diversity of the American population necessitates an equal protection standard that can accommodate forms of discrimination that were not specifically envisaged by the Reconstruction Framers. In *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Court articulated enduring principles for when the judiciary analyzes

> whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U.S. 510, or national, *Meyer v. Nebraska*, 262 U.S. 390; *Bartels v. Iowa*, 262 U.S. 404; *Farrington v. Tokushige*, 273 U.S. 284, or racial minorities, *Nixon v. Herndon* . . .: *Nixon v. Condon* . . .: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.

Id. at 153 n.4. These situations, the Court wrote, "may call for a correspondingly more searching judicial inquiry. Compare *McCulloch v. Maryland*, 4 Wheat. 316, 428; *S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184, n.2, and cases cited." *Id.*

While Footnote 4 is most often invoked for its concern with "discrete and insular minorities," a close reading reinforces that its reach is far broader. *Id.* Examining Footnote 4's text, in its context, establishes that today's Court, in our context, must apply "a correspondingly more searching judicial inquiry" whenever invidious classifications target a trait reflecting either historical or acute contemporary stigma for burdens that are discontinuous with, and disproportional to, the neutral public goals, if any, that are asserted as the purposes of the legislation. *Id.*

A. Footnote 4's Scalable Framework Reflects the Court's Understanding, Reinforced by Experience, that Invidious Classifications Can Arise in a Wide Range of Contexts.

Footnote 4 establishes a scalable framework for analyzing invidious classifications that recent history has only made more necessary and that this Court has embraced, both explicitly for classifications now recognized as suspect and implicitly for more complex forms of discrimination.

In its first modern explication of the standards for judicial scrutiny of legislative classifications, this Court highlighted examples involving discrimination based on characteristics that were disfavored in their particular time and place, in addition to characteristics, such as race,[5] that have been the enduring subjects of disfavor and were later labeled as suspect or quasi-suspect.[6] Those other examples included persons who were geographic outsiders in a particular state even though not members of an otherwise stigmatized group,[7] Americans of German descent in the wake of World War I,[8] and Asian-Americans in the Hawaiian Islands.[9] In each instance, the need for close judicial attention arose from a context in which unpopular minorities were saddled with disproportionate burdens.

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[5] Two of the cited cases involved African-Americans whose voting rights were blocked in Texas Democratic Party primary elections. *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

[6] *Carolene Prods.*, 304 U.S. at 152 n.4.

[7] *S.C. State Highway*, 303 U.S. 177. In *Barnwell*, the Court wrote:

> State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted.

Id. at 184-85 n.2.

[8] *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. Iowa*, 262 U.S. 404 (1923).

[9] *Farrington v. Tokushige*, 273 U.S. 284 (1927).

The cases cited in Footnote 4 regarding ethnic minorities grew out of a campaign against those groups that occurred in the United States between the world wars, a tool of which was to "bring foreign language schools under a strict governmental control." *Farrington*, 273 U.S. at 298. In *Meyer*, the Court struck down a 1919 Nebraska statute forbidding the teaching of German to students before the eighth grade, overriding "[t]he desire of the Legislature to foster a homogeneous people," 262 U.S. at 402, but the state then enacted a near-identical statute in 1921. In *Bartels*, the Court ruled that the newer Nebraska law, in addition to similar laws from Ohio and Iowa, was unconstitutional. 262 U.S. at 409-11. When a 1922 Oregon statute prohibiting all private schools was challenged, state officials declined to defend it. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 533 (1925). In the last case in the series, the Court in *Farrington* invalidated a law that would have prohibited significant instruction in Asian languages, primarily Japanese. 273 U.S. at 297-99.

By contrast, *Barnwell*, 303 U.S. 177 (1938), addressed the issue of legislative action imposing a burden on interstate commerce. The Court clarified that even in an ordinary commercial regulation, an invidious distinction disadvantaging geographic and political outsiders could be invalid. As the Court explained, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." *Id.* at 185 n.2. In *Barnwell*, the Court also cited numerous other cases that similarly underscored the need for courts to be attentive when reviewing legislative burdens that "fall[] principally" upon a group that, for whatever reasons, is relatively vulnerable in the political process. *Id.*[10]

These and other Footnote 4 citations illustrate the 1938 Court's understanding that oppressive laws could vary in their specific manifestations of invidiousness. For some, such as the cases addressing restrictions on foreign language education, their placement in Footnote 4 foreshadows the more stringent scrutiny applied when invidiousness and an important interest co-exist. Indeed, *Meyer* and *Pierce* are now understood primarily as liberty, rather than equality, decisions establishing the rights of parents to control the education of their children, even though the context of their citation in Footnote 4 reveals that the Court invoked them to illustrate the need to curb discriminatory laws.[11] For others, such as *Barnwell*, their inclusion in Footnote 4 reinforces the Court's recognition that invidious prejudice can exist independently of demographic minorities.[12]

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[10] The portion of Footnote 4 that cited *Barnwell* articulated the political process concern of the Court's Dormant Commerce Clause jurisprudence:

> The Commerce Clause of Article I, Section 8 provides simply that Congress shall have the power to regulate commerce among the states. But early on the Supreme Court gave this provision a self-operating dimension as well, one growing out of the same need to protect the politically powerless . . . . By thus constitutionally binding the interests of out-of-state manufacturers to those of local manufacturers represented in the legislature, it provided political insurance that the taxes imposed on the former would not rise to a prohibitive or even an unreasonable level.

John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 83-84 (1980).

B. The Social Complexity of Today's America Illustrates the Enduring Wisdom of Footnote 4's Open-Ended Approach.

The importance of heeding the wisdom of Footnote 4's approach has become more, not less, urgent with time. The United States in 1938 had a far less diverse population than it has today, as is evident even from the data regarding only the most prominent demographic groups, which shows exponential shifts in the breadth of racial and religious identifications of Americans.[13] Nor is the trend toward a multicultural nation, with an accompanying wide range of interests and identities, likely to diminish.[14]

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[11] The text of Footnote 4 identifies the law at issue in *Pierce* as an example of discrimination against religious minorities, although the language of the opinion does not make explicit that aspect of the case.

[12] *See* Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 Yale L.J. 965, 1005 (1997) ("In a long list of later cases [after *Carolene Products*], the Court continued to consider the impact of 'interest group participation' in assessing legislation under the dormant Commerce Clause."); *see also* Lisa Heinzerling, *The Commercial Constitution*, 1995 Sup. Ct. Rev. 217, 251-52 (1995) ("The political process leading to the enactment of laws that discriminate against outside commerce is an important theme of the Court's decisions . . . .").

This growth in demographic diversity at a time when social movements have been similarly expansive has generated a wider range of cross-cutting identities and interests than ever before. Indeed, antidiscrimination laws provide evidence of some of these shifts, with new laws enacted in recent decades to respond to discrimination based on numerous aspects of identity not traditionally designated as suspect. At the federal level, for example, laws now prohibit employment discrimination based on age, disability, and information about genetic predispositions.[15] Some state legislatures have taken even broader note of types of discrimination not envisioned in 1938. In Edith Windsor's home state of New York, for example, the human rights law also covers "sexual orientation, military status, . . . marital status, [and] domestic violence victim status."[16]

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[13] *Compare, e.g.*, U.S. Census Bureau, *Statistical Abstract of the United States: 1948*, at 19 (69th ed. 1948) with Karen R. Humes, Nicholas A. Jones & Roberto R. Ramirez, U.S. Census Bureau, *Overview of Race and Hispanic Origin: 2010*, at 7 tbl.3 (2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf; *see also* Pew Forum on Religion & Pub. Life, *U.S. Religious Landscape Survey* 5 (Feb. 2008), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf.

[14] *See* Laura B. Shrestha & Elayne J. Heisler, Cong. Research Serv., RL 32701, *The Changing Demographic Profile of the United States* 12 tbl.2 (2011), *available at* http://www.fas.org/sgp/crs/misc/RL32701.pdf.

[15] *See, e.g.*, Genetic Information Nondiscrimination Act of 2008, 42 U.S.C.A. §§ 2000ff to 2000ff-11 (2011); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12300 (2006); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2006).

Yet while many governments have expanded the bases for statutory protection as just described, laws such as these cannot keep pace with the exponential increase in diversity, the dynamics of contemporary social formation, and, as a result of these changes, the burgeoning array of equal protection claims that come before the federal courts.[17] *Cf. United States v. Richardson*, 418 U.S. 166, 179 (1974) ("As our society has become more complex, our numbers more vast, our lives more varied, and our resources more strained, citizens increasingly request the intervention of the courts on a greater variety of issues than at any period of our national development.").

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[16] N.Y. Exec. Law § 296 (McKinney 2010).

[17] Other Western democracies are experiencing the same kinds of change, and they, too, face challenges in revising antidiscrimination law to continue to fulfill its purposes. The European Convention on Human Rights, for example, denominates more categories for protection against discrimination than have been designated for strict or heightened scrutiny under the Constitution, but courts nonetheless continue to employ reasoning by analogy in order to retain the relevance of the antidiscrimination principle. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221 (prohibiting discrimination "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"), interpreted in *Salgueiro da Silva Mouta v. Portugal*, IX Eur. Ct. H.R. 309 (1999), to also include sexual orientation.

C. Principles of Transparency and Judicial Accountability Also Support the Wisdom of Revisiting and Simplifying the Standard of Equal Protection Review.

Clarifying the framework that underlies equal protection review will enhance, not undermine, the jurisprudence of restraint. A test like the one proposed here, which makes explicit the inquiries that are implicit in the Court's cases, will streamline equal protection review in a way that is more responsive than the existing tiered framework to the surrounding environment of classifications. Lower courts particularly will benefit as they face an increasing stream of classifications that are not traditionally suspect but may warrant more searching review consistent with the longstanding commitments articulated in Footnote 4.

Clearer guidance will also reinforce the importance of judicial restraint. The great fear associated with equal protection review is that courts will arbitrarily impose normative and policy preferences, rather than evaluate classifications based on principled consideration of objective referents. The process of articulating reasons why a classification may or may not be invidious in a particular factual context that is attentive to both stigma and burden, as required by the framework proposed by *amici* here, will itself help screen out problematic rationalizations.

Justice Stevens' forceful statement in *Cleburne* of the logic behind approaching equal protection review as a spectrum is consistent with, but less precise than, the approach presented here. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring). *Amici* suggest framing the inquiries in a way that will implement the normative aspirations of the Equal Protection Clause, while also providing administrative workability.

II. Invidious Classifications Should and Do Trigger a More Contextual Inquiry than the Sharply Dichotomous Tiered Framework Can Provide.

No obligation of the sovereign is more fundamental than the duty to govern impartially, relying on legitimate and neutral criteria, *Cleburne*, 473 U.S. at 452 (Stevens, J., concurring), and to eschew assignment of burdens and benefits based on status – based on "who someone is." Our "Constitution 'neither knows nor tolerates classes among citizens.'" *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Therefore, regardless of the standard applied or the designated tier of review, this Court has repeatedly found that the markings of invidious discrimination must trigger meaningful examination. Indeed, invidious line drawing is the *exception* to the principle of deference to legislative bodies in all equal protection review. *Compare Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (sustaining a law on legislative deference grounds), *with U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973) (refusing to defer to the legislature where an illegitimate interest underlay the classification at issue). And the jurisprudence makes clear that legislatures cross that threshold when they differentiate among constituents "for the purpose of disadvantaging the group burdened by the law," *Romer*, 517 U.S. at 633.

Over time, this Court has catalogued the clearest and most odious kinds of prejudicial classifications into the tiered approach to equal protection analysis. Race, for example, "is the paradigm" of "classifications [that] in themselves supply a reason to infer antipathy," *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979), hence its designation as suspect. The uppermost tiers express our Nation's evolved sense of repugnance at the use of particular characteristics, such as race, to differentiate among Americans. They also implement that sense of repugnance with heightened scrutiny, which streamlines review of challenges to disparate treatment based on those antipathy-laden classifications. This more rigorous form of review promotes administrative workability by creating the presumption that distinctions based on suspect and quasi-suspect characteristics reflect stereotypes about or hostility toward the burdened class. *United States v. Virginia*, 518 U.S. 515, 549-51 (1996). As the Court has explained regarding racial classifications, for example, they "are simply too pernicious to permit any but the most exact connection between justification and classification." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 220 (1995) (citation and internal quotation marks omitted).

The characteristics such as race and sex that are recognized as self-evidently suspicious do not exhaust the potential instances of invidious legislation, however.[18] As noted almost sixty years ago, although "differences in race and color" have historically served as markers of discrimination, "community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection." *Hernandez v. Texas*, 347 U.S. 475, 478 (1954); *cf. Oyler v. Boles*, 368 U.S. 448, 456 (1962) (selective enforcement violates the Constitution if "the selection was deliberately based upon an unjustifiable standard such as race, religion, *or other arbitrary classification*" (emphasis added)).

While this shifting social reality has precluded the formulation of one talismanic formula for equal protection review, the Court has maintained a focus on discerning and barring invidiousness in classifications. In interpreting 42 U.S.C. § 1985(3)'s prohibition against intentional deprivations of equal protection of the laws, for example, the Court found that the statute's intent requirement "means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the [defendant's] action[s]." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). The Court then elaborated the meaning of "invidious" in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 274 (1993), citing with approval the dictionary definition as "[t]ending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating." *Id.* (alteration in original) (internal quotation marks omitted) (citing *Webster's Second International Dictionary* 1306 (1954)).[19] The corollary term with which "invidious" is paired in *Griffin* – "animus" – may in addition reflect the insensitivity that arises from stereotyping or from the "simple want of careful, rational reflection." *Bd. of Trs. of the Univ. of Ala. v.*

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[18] *See* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481, 512-13, 528-31 (2004) (reviewing cases invalidated on invidiousness grounds and highlighting the Court's longstanding concern with invidious class legislation).

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[19] This Court and lower courts also have linked invidiousness to an array of terms connoting unfair discrimination. *See Cleburne*, 473 U.S. at 440 (noting that the presumption of validity "gives way" when statute classifications "reflect "prejudice and antipathy"); *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 609 (1979) (White, J., dissenting) (noting that, if irrational, a classification "must fall"); *Califano v. Goldfarb*, 430 U.S. 199, 218 (1977) (Stevens, J., concurring) (noting the implications of inferiority when a classification "add[s] to the burdens of an already disadvantaged discrete minority"); *Welch v. Henry*, 305 U.S. 134, 144 (1938) (noting that hostility toward a group may be impermissible). Because proof of invidiousness is an element of a plaintiff's case in claims brought under § 1985(3), lower courts are accustomed to the term. *See, e.g.*, *Farber v. City of Paterson*, 440 F.3d 131, 135-43 (3d Cir. 2006).

Garrett, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

The first inquiry in the framework proposed here emerges directly in response to the Court's concern with invidiousness. It asks: *Is the classification based on a trait that is associated with a broad or historical pattern of social prejudice, animus or stereotyping or a trait that, as evidenced by the surrounding political context, is associated with acute political or social vulnerability?*

This inquiry, with its aim to discern the potential for invidiousness, does not require the Court to jettison its existing structure of categories of heightened scrutiny. Those categories exist because they reliably reflect manifestations of invidiousness that, over long periods of time, we have come to recognize as unacceptable in our constitutional democracy. Invoking an anti-invidiousness principle, rather than a list of specific characteristics, however, would provide a better explanation of the need for meaningful review when indicia that have traditionally been deemed suspect are not present. Justice O'Connor reinforced this point: "When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review . . . ." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

Invidious classifications will often be marked by some of the same indicia currently associated with heightened or strict scrutiny, such as being based on a trait that has been subjected to "a 'history of purposeful unequal treatment'" or having the effect of imposing disadvantages based on "stereotyped characteristics not truly indicative of [group members'] abilities," *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). But greater flexibility will allow for more principled adjudication – based on what the Court has already done in many cases – of situations in which classifications may be justifiable in one context but not in another. People with developmental disabilities, for example, may elicit contradictory legislative responses of "irrational prejudice"[20] or solicitude,[21] depending on the situation. Residency requirements, likewise, may establish legitimate eligibility criteria[22] or may reflect "discriminat[ion] against out-of-state commerce or new residents." *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (characterizing *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); and *Zobel v. Williams*, 457

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[20] *Cleburne*, 473 U.S. at 450.

[21] *Washington v. Glucksberg*, 521 U.S. 702, 730-32 (1997).

[22] *Martinez v. Bynum*, 461 U.S. 321, 333 (1983) (upholding bona fide residency requirements for free primary and secondary schooling); *McCarthy v. Phila. Civil Serv. Comm'n*, 424 U.S. 645, 647 (1976) (per curiam) (upholding continuing residency requirements for municipal employment against equal protection challenge).

U.S. 55 (1982)).[23] With a growing number of social minorities, whose memberships increasingly overlap, this flexibility is essential.

There are other, rare instances when a classification may be so arbitrary as to raise concerns about a possible equal protection violation even though it is not related to a socially stigmatized characteristic or a characteristic that is otherwise disadvantaged in the political process.[24] The flexibility of the proposed framework can also accommodate these outliers. But the situation that has produced the greatest constitutional uncertainty has been where courts are asked to evaluate classifications based on characteristics, such as sexual orientation, that have not formally been designated as suspicious but which are known to be frequently linked to stigma.[25] *See supra* note 2. As the

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[23] The form of invidiousness in these cases may be described as "protectionism – a desire to protect in-staters at the expense of out-of-staters." Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 14, 59 (1996).

[24] *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000) (per curiam) ("[The] complaint can fairly be construed as alleging that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners."); *see also id.* at 566 (Breyer, J., concurring) (revealing that the factual context included allegations of "'vindictive action,' 'illegitimate animus,' and 'ill will'" (citation omitted)).

[25] Alternatively, *amici* agree with a more narrow argument that sexual orientation classifications should be subjected to heightened scrutiny. *Windsor*, 699 F.3d at 185 (finding quasi-suspect class criteria satisfied "based on the weight of the

(Continued on following page)

Court of Appeals in the instant case noted with some understatement, "it is safe to say that there is some doctrinal instability in this area." *Windsor*, 699 F.3d at 181.

Petitioner Bipartisan Legal Advisory Group (Petitioner or BLAG) would disable this Court from acknowledging the social realities behind varying forms of class-based legislation by seeking an unthinking and unvarying application of the most deferential equal protection standard. Citing cases in which either no indicia of invidiousness were present in the context at issue[26] or in which a trait-based classification was in fact struck down as violative of the Equal Protection Clause,[27] BLAG strings together a series of quotes to argue that, absent strict scrutiny, "'the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process,'"[28] "'judicial intervention is generally unwarranted no matter how unwisely we may think a

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factors and on analogy to the classifications recognized as suspect and quasi-suspect").

[26] Brief in Opposition at 4, *Windsor v. United States*, No. 12-307 (U.S. cert. granted Dec. 7, 2012) (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-15 (1993); *Vance v. Bradley*, 440 U.S. 93, 96-97 (1979)).

[27] *Cleburne*, 473 U.S. at 450.

[28] Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 28, *Windsor v. United States*, No. 12-307 (U.S. cert. granted Dec. 7, 2012) (quoting *Cleburne*, 473 U.S. at 440).

political branch has acted'"[29] and "Congress' decision where to draw the line is 'virtually unreviewable.'"[30] If these decontextualized platitudes were true, this Court's decisions in *Moreno*, *Cleburne*, and *Romer* would not – could not – exist.

To properly interpret the Equal Protection Clause, the Court should continue its refusal to engage in such willful blindness. Contrary to the arguments of BLAG and its supporting *amici*, it need not fear that taking account of the stigmatization and stereotyping associated with a trait that is subjected to legislative disadvantage will jeopardize the capacity of government to function in the future, as it has not in the past. Markers of invidiousness rarely occur in the mine run of legislation involving "ordinary commercial transactions." *Carolene Prods.*, 304 U.S. at 152.

The reformulated equal protection standard proposed here will not produce routine second-guessing of legislative authority to regulate a wide variety of economic and social matters. But the jurisprudential guideline favoring restraint does not bar the Court from taking a closer look when the classification itself reveals that a disfavored, often small, group has been scapegoated as the cause of broader social anxieties, or used as fodder for the creation of a wedge issue. Simply put, no floodgates for challenges to legislative line-drawing between landlords and tenants, mortgagors and mortgagees, or cable facilities that serve units under common or separate ownership will swing open if this Court engages in a meaningful inquiry into the constitutionality of the invidious exclusion created by DOMA.

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[29] *Id.* (quoting *Vance*, 440 U.S. at 97).

[30] *Id.* at 30 (quoting *Beach*, 508 U.S. at 316).

Instead, where groups are politically unpopular, either nationally or locally – as gay people were when Congress passed DOMA and when voters approved Amendment 2 in Colorado; as people with developmental disabilities were when a small town in Texas imposed uniquely burdensome zoning rules on them; and as hippies were when the Department of Agriculture adopted its restrictive food stamp rule – the risk of invidious classification masked by benign-sounding rationales runs high and the most deferential forms of review are no longer appropriate. *See*, *e.g.*, *Romer*, 517 U.S. 620; *Moreno*, 413 U.S. 528; *Cleburne*, 473 U.S. 432.

There are times, as here, when the most salient concern is that legislative processes may not have operated impartially. In such situations, courts must serve their essential function in our constitutional democracy as the sole branch of national government that is unelected. "[W]hen the fervor of political passions moves the Executive and the Legislative branches to act in ways inimical to basic constitutional principles, it is the duty of the judiciary to intervene." *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1276 (11th Cir. 2005) (Birch, C.J., concurring). That same duty attaches here, where Congress has excluded one subset of married couples from the federal scheme of marriage recognition and regulation based on a trait that has long been subjected to social and political disfavor.

III. When a Classification Exhibits the Indicia of Invidiousness, Courts Examine Whether It Is Discontinuous with, or Creates a Burden that Is Disproportionate to, Its Purported Neutral Justification.

Examination of the legislative purpose and the nexus between that purpose and the classification, as well as the relationship between the purpose and the burden imposed by the classification, will often reveal whether the government's reliance on a socially disfavored trait must be invalidated.[31] A justification that may be legitimate in the abstract, but does not explain why the trait in question had been singled out for legislative burden in the particular context at issue, will not suffice. To pass muster under the Equal Protection Clause, a "classificatory scheme must 'rationally advanc[e] a reasonable and *identifiable* governmental objective.'" *Nordlinger v. Hahn*, 505 U.S. 1, 1516 (1992) (alterations in original) (quoting *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981)).

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[31] In a handful of cases, the Court has found that the total absence of a legitimate purpose or a radical disconnect between ends and means can render a law unconstitutional because a classification is patently arbitrary, even without the indicia of invidiousness. *See, e.g.*, *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty.*, 488 U.S. 336, 345 (1989) (noting "intentional systematic undervaluation by state officials" led to gross disparity in property tax rates (citation and internal quotation marks omitted); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (finding that a law requiring only those indigent persons whose appeals were unsuccessful to repay court costs failed to meet the standard that there must be "some rationality in the nature of the class singled out"). Such cases are analogous to those in which the invidiousness of a particular trait is so clear from the face of a statute and so unrelated to ability or merit that consideration of its relationship to the particular legislative goal is unnecessary.

Thus the second inquiry in the framework proposed here asks: *Does the classification impose a burden that is discontinuous with, or disproportionate to, its purported neutral justification?*

A. Meaningful Review of a Classification with the Indicia of Prejudice or Stereotypes Requires Inquiry into the Law's Purpose and the Relationship Between Legislative Goals and the Basis for the Classification under Challenge.

This Court has required that classifications reflect genuinely "legitimate public concerns," *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *see also Bush v. Gore*, 531 U.S. 98, 104-05 (2000), rather than antipathy toward a minority. When the signs of prejudice or stereotyping are present, as they are in the case at bar, the Court has been especially vigilant in examining the proffered rationales for the classification. *See, e.g., Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (regarding the need to "strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications").

In *Romer*, 517 U.S. at 635, for example, the Court found that a ban on antidiscrimination protections for gay people could not be justified by benign-sounding references to cost-saving and protecting associational rights when its actual purpose was far more likely to have been instantiation of an inferior status. Similarly, in *Cleburne*, 473 U.S. at 447-50, the Court found that concerns about a flood plain could not explain why homes for people with mental retardation were restricted while other group homes were not. And in *Moreno*, 413 U.S. at 537-38, the Court rejected superficially neutral rationales for refusing food stamps to people living with unrelated others – a purported government interest in stimulating agriculture and minimizing fraud – finding that they masked an underlying and impermissible hostility toward hippies.

Conversely, a direct relationship between a legislative goal and the classification will bolster the constitutionality of a law. In *Dandridge v. Williams*, 397 U.S. 471, 473-75 (1970), for example, the Court reviewed a Maryland statute that classified based on family size in setting the amount of welfare payments by capping the amount due any one family rather than by calculating the amount on a per-child basis. The Court found that the classification by family size was "free from invidious discrimination," *id.* at 487, and legitimately grounded in the state's interest in encouraging employment and avoiding an end result that would discriminate against "families of the working poor." *Id*. at 486.

B. Laws That Impose a Burden out of Proportion to the Legislative Goal, Based on Classifications with the Markings of Invidiousness, Also Violate the Equal Protection Clause.

Even where a proper fit exists between legislative ends and means, a gross disparity between the burden created by the classification and the public benefit that is the ostensible legislative purpose may nonetheless doom the law. The Court has noted this link between a disproportionate burden on a group of people and the risk that invidious discrimination has occurred: "If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive." *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997).

The disproportionality principle explains cases that otherwise appear difficult to catalog because they involve non-suspect classifications that can be, depending on the context, invidious, and where a burden is imposed on a liberty interest that is important but not fundamental. In *Plyler v. Doe*, 457 U.S. 202, 202, 223 (1982), for example, the Court noted that the immigration status of undocumented resident children was a legitimate basis for classification, yet their exclusion from public schools would produce "a lifetime [of] hardship" with the "stigma of illiteracy [that] will mark them for the rest of their lives," and struck down a law barring this group of children from schools.

The Court has similarly found equal protection violations when laws have imposed a disproportionate burden on low-income persons, although poverty itself is not a suspect classification. *Rodriguez*, 411 U.S. at 25. Four years after *Carolene Products*, the Court struck down a statute that allowed sterilization of habitual larcenists, but not habitual embezzlers, stressing both the heavy burden on the right to bear children and the invidiousness of a classification so linked to economic class. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment," the Court wrote. *Id.* When participation in government was at stake, the Court struck another wealth-linked classification: "[I]t is a form of invidious discrimination to require land ownership of all appointees to a body authorized to propose reorganization of local government." *Quinn v. Millsap*, 491 U.S. 95, 107 (1989); *see also Bullock v. Carter*, 405 U.S. 134, 149 (1972) (striking down requirement of a filing fee for candidates in local primary elections).

In several other cases, a classification that allocated burdens in a way that further disadvantaged low-income persons was invalidated in light of its impact on the criminal or civil justice system. As the Court has explained, "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin v. Illinois*, 351 U.S. 12, 17 (1956); *accord Douglas v. California*, 372 U.S. 353, 355, 357-58 (1963). Although there is no absolute constitutional right to appeal, for example, the Court struck down economic barriers to pursuing an appeal in both criminal and civil cases that involved important liberty interests. In *Griffin*, the Court required states to furnish indigent criminal defendants with free trial transcripts on appeal. The same obligation was imposed for indigent appellants in parental termination cases. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996); *cf. Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971) (finding it unconstitutional for a state not to permit waiver of filing fees for indigent persons in divorce cases).

The underlying principle that greater burdens require more persuasive justifications provides one of the anchors of constitutional jurisprudence, and is found across multiple doctrines. In the realm of equal protection, for example, the Court has developed a concept of "proportionality and congruence between the means adopted and the legitimate end to be achieved" in assessing whether Congress has exceeded its authority in enacting remedial legislation. *Boerne*, 521 U.S. at 533. The limitation on Congress' power to enforce the Equal Protection Clause must surely be at least matched by a comparable boundary to mark when Congress has violated the same provision. Similarly, under the Due Process Clause, states have flexibility in permitting the use of punitive damages to penalize and deter tortious conduct, but a punitive damages award may run afoul of basic fairness concerns if it can "fairly be categorized as 'grossly excessive' in relation" to those goals. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). The guideposts that lower courts use to determine whether an award is grossly excessive include the reprehensibility of the defendant's conduct and the proportionality between the award and the harm suffered by plaintiff. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003).

In sum, the Court has brought to bear a more searching inquiry into the logic and appropriateness of how a legislature uses its power to classify groups of people when there are indicia of invidiousness, including a missing nexus between the ends and means of a law or the imposition of a burden that is disproportionate to the benefit that the law is likely to convey. In doing so, the Court has recognized the importance of calibrating the degree of stringency in its review to importance of the constitutional values at issue.

IV. DOMA Fails Any Level of Equal Protection Review.

DOMA mandates the singling out of a subclass of lawfully married persons for disqualification as married for purposes of any federal law. It is grounded in the invidious targeting of a socially stigmatized minority. And the burden it imposes by depriving married same-sex couples and their children of all federal recognition is both discontinuous with and disproportionate to any legitimate, neutral public purpose. DOMA thus fails any level of equal protection review, including under the standard proposed here.

There can be no serious question about the degree of stigma historically associated with homosexuality. *See Bowers v. Hardwick*, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring) ("Condemnation of [homosexual] practices is firmly rooted in Judeao-Christian moral and ethical standards."); *cf. Lawrence*, 539 U.S. at 571 ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral."). As in *Romer*, where the Court found that the primary purpose of the law was discrimination per se, in this case, one way to reveal the invidiousness at work is to ask whether DOMA's exclusion would have been enacted if *any* group of married heterosexual couples were subject to it: for example, couples beyond child-bearing age or in which one or both partners had been sterilized. This inquiry does not probe whether the law could be more perfectly attuned to the stated purpose, but rather *whether the law would have ever been enacted at all without its invidious distinction*. "Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan v. Dir. of*

Mo. Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). The extreme *un*likelihood that such a law regulating recognition of marriages would affect anyone except same-sex couples demonstrates the extreme *like*lihood that the primary purpose behind this exclusion was simply to exclude this particular group.

Nor can BLAG identify genuinely neutral purposes served by DOMA's exclusion of this one group of couples. Rather, DOMA's effect is to impose harsh and unnecessary burdens that are not justified by a legitimate purpose but instead simply deny these persons access to the federal programs that track the obligations of interdependency to which they are already being held under state law.

BLAG's primary assertion appears to be that the federal government can limit its recognition of existing marriage to relationships most associated with procreative capacity – even if only hypothetically. Yet DOMA's broad scope sweeps across hundreds of statutes (and perhaps thousands of regulations) that shape a wide range of substantive policy areas. Consequently, there is striking discontinuity between DOMA's breadth and its purported interests, whether in procreation and parenting, uniformity, or any of BLAG's other implausibly hypothesized purposes. Its enormous impact also highlights how out of proportion its burden is to any likely public benefit.

For example, the desire to police the definition of marriage because of its association with procreation bears little relationship to the many social welfare laws affected by DOMA. There is simply no link between child-raising and many of the federal programs that DOMA forecloses, such as immigration categories, surviving spouse benefits, and health insurance and pension benefits for the spouses of federal employees, as well as countless collateral programs unrelated to procreation in which DOMA itself is generating new instances of gratuitous discrimination.[32]

In general, the structure of benefits programs is not a proper venue for federal resolution of a competition among states over differing definitions of marriage or beliefs as to socially acceptable family structures for childrearing. "'[T]he relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do with [the purposes of the Food Stamp Act,] their abilities to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements." *Moreno*, 413 U.S. at 534 (quoting *U.S. Dep't of Agric. v. Moreno*, 345 F. Supp. 310, 313 (D.D.C. 1972)).

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[32] For example, a military wives group at Fort Bragg, North Carolina, was told that it could not admit the wife of a lesbian officer because DOMA forbids recognition of same-sex marriages by any federal government entity. The Associated Press, *Wife of Female Army Officer Can Join Spouses Club*, USA Today (Jan. 26, 2013), *available at* http://www.usatoday.com/story/news/nation/2013/01/26/army-military-bragg-gay/1866019/.

Moreover, the animating impulse behind DOMA, even when families with children are at issue, is not consonant with the purposes and functions of many of the federal programs that it affects. For example, DOMA distorts the Social Security survivor benefits program, "the primary purpose [of which] is to pay benefits in accordance with the probable needs of the beneficiaries," based on the "years worked and amount earned by a covered employee." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 644, 647 (1975); *see also Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 169 (1972) ("[T]he fact of a child's birth out of wedlock bore no reasonable relation to the purpose of wrongful-death statutes which compensate children for the death of a mother.").

Petitioner's attempt to reframe the motivation behind DOMA into a neutral one designed to incentivize heterosexual couples to marry, rather than to demean married same-sex couples, smacks of rationalizing an attempt "to mandate [Congress'] own moral code." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992). The exclusion of same-sex couples from recognition as married will not affect whatever incentives may succeed in influencing the behavior of heterosexual couples.[33] As this Court

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[33] *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Home Affairs* 1999 (2) SA 1 (CC) para. 56 (S. Afr.) (finding "there is no rational connection between the exclusion of same-sex life partners from the benefits under [South African law] and the government interest sought to be achieved thereby, namely the

(Continued on following page)

noted in response to a similarly illogical argument: "Nor can it be thought . . . that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation." *Weber*, 406 U.S. at 173.

DOMA's impact on children is even more discontinuous with BLAG's asserted aims, as its only effect is to harm the children of married same-sex couples by denying them the benefits to which they would otherwise be entitled. Of lesbian, gay, bisexual, and transgender (LGBT) persons, 49% of women and 19% of men are raising a child.[34] Same-sex couples with children are nearly twice as likely as non-LGBT persons with children to report household incomes near the poverty threshold of $24,000 per year.[35] Some portion of these children are rendered ineligible by DOMA for benefits that they would otherwise receive, because their parents' marriage is not recognized under federal law.

BLAG's claim that DOMA is justified by an interest in federal uniformity regarding marriage recognition also suffers from discontinuity with DOMA's actual effects. That is, the purported interest in uniformity fails equal protection's baseline requirement

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protection of families and the family life of heterosexual spouses").

[34] Gary J. Gates, *LGBT Parenting in the United States*, The Williams Institute (2013), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf.

[35] *Id.*

that a legitimate explanation exists for burdening some people but not others. Notably, the invocation of a benign-sounding concern for uniformity in an attempt to justify restricting the rights of lesbians and gay men is not new. In *Romer*, the defenders of Colorado's ban on civil rights laws for gay people similarly argued that they were merely trying to achieve a uniform approach to sexual orientation laws in the state. *See Evans v. Romer*, No. 92-CV-7223, 1993 WL 518586, at *3 (Colo. Dist. Ct. Dec. 14, 1993). But, just as "uniformity" could not adequately explain why Colorado restricted only gay rights measures, so too it cannot explain why the federal government accepts the variability and dis-uniformity among state marriage laws except vis-à-vis same-sex couples. *Cf. Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (describing marriage as "a virtually exclusive province of the States").

The same is true for cost-savings. While the government no doubt has a legitimate interest in saving money, the question for equal protection purposes is whether that interest can explain the refusal to recognize same-sex couples' marriages or whether that goal is too discontinuous with the burden DOMA imposes. Cost-savings could arguably justify any government action, but, as with uniformity, there is no nexus between this rationale and the trait targeted by DOMA. Without that linkage, the designation of same-sex couples to serve the government's fiscal interest lacks any neutral justification. Saving money "'cannot justify an otherwise invidious classification,'" this Court has explained. *Graham v. Richardson*, 403 U.S. 365, 375 (1971) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)). Nor can it transform a sweeping federal ban on recognition of same-sex couples' marriages, replete with numerous laws that have no relation to federal spending, into a measure tailored to prevent the extension of certain financial benefits for married couples who had not previously enjoyed them. *Cf. Romer*, 517 U.S. at 635 ("find[ing] it impossible to credit" the state's "interest in conserving resources" as an explanation for why it had banned legal protection only for gay people); *Plyler*, 457 U.S. at 227 (similarly rejecting cost-savings argument).

Tradition, too, lacks the explanatory power required by equal protection. If tradition for its own sake could justify the government's burdening of particular classes, particularly when there is a history of governmental discrimination against the group that is now recognized as improper, virtually all historically-rooted classifications could be sustained. For this reason, the Court has repeatedly rejected the tradition rationale. *Cf. Heller v. Doe*, 509 U.S. 312, 327 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . . ." (alterations in original) (citation and internal quotation marks omitted)).

In the end, DOMA "classifies [lawfully married] homosexuals not to further a proper legislative end but to make them unequal to everyone else. This [Congress] cannot do." *Romer*, 517 U.S. at 635.

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CONCLUSION

For the foregoing reasons, *amici curiae* urge this Court to affirm the decision of the United States Court of Appeals for the Second Circuit.

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Respectfully submitted,

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UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF ADDRESSING THE MERITS OF THE STATE OF INDIANA AND 16 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICI* STATES 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. Ordinary Rational-Basis Scrutiny Applies to Congress's Traditional Marriage Definition 4

  A. Section 3 of DOMA classifies on the basis of a couple's general procreative capacity, not their sexuality as such 4

  B. The traditional role of states in regulating marriage does not justify heightened scrutiny of Congress's regulation of federal marriage benefits 7

II. The Second Circuit Erred in Rejecting the Responsible Procreation Rationale for DOMA and Marriage Laws Generally........ 13

  - A. The decision below undermines all laws predicated on a traditional definition of marriage 13
  - B. Marriage serves interests inextricably linked to the procreative nature of opposite-sex relationships 16

- III. Constitutionalizing Same-Sex Marriage Would Poison the Political Well 21

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 1

Bd. of Trs. of Univ. of Alabama v. Garrett,
531 U.S. 356 (2001) 6

Bond v. United States,
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INTEREST OF THE *AMICI* STATES

Congress and four-fifths of the states define marriage as the union of one man and one woman, consistent with the historical definition of marriage. Section 3 of DOMA defines the basic attributes of marriage for federal purposes and affects the availability of over 1,000 federal rights, privileges, and benefits tied to marital status. *See* 1 U.S.C. § 7; U.S. Gen. Accounting Office, GAO-04-353R, *Defense of Marriage Act: Update to Prior Report* 1 (2004). Similarly, few states promote marriage through labels alone; most join official recognition with access to particular rights, privileges, and benefits. *See Turner v. Safley*, 482 U.S. 78, 96 (1987) ("[M]arital status often is a precondition to the receipt of government benefits (*e.g.*, Social Security benefits), property rights (*e.g.*, tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.*, legitimation of children born out of wedlock).").

Because the same equal protection principles generally apply to state and federal laws, *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213-18, 226-27 (1995), it requires no great leap of logic to conclude that a judicial rejection of DOMA would erode constitutional support for similar state laws. Although DOMA does not license marriages or dictate marriage policy for states, the decision below invalidated the very definition of marriage long employed by most (until recently, *all*) states. If the federal government may not adhere to a traditional definition of marriage as it confers exclusive benefits based on marital status, considerations of tradition or gradualism are unlikely to save state marriage laws. *See* Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 Md. L. Rev. 471, 477 & n.25 (2012).

The *Amici* States, therefore, have two interests at stake: (1) protecting their own power to define marriage in the traditional manner, and (2) clarifying equal protection principles that apply to marriage laws.

SUMMARY OF THE ARGUMENT

In the decision below, the Second Circuit invalidated a federal law that affirms marriage as it has been understood for centuries by every American colony and state. It agreed with the theory that DOMA targets a protected class (homosexuals) and cannot survive heightened scrutiny. Neither DOMA nor traditional state marriage laws, however, *target* homosexuals. Traditional marriage laws, of course, have a particular *impact* on homosexuals, but as this Court has long held, disparate impact is not the same as disparate treatment for purposes of equal protection doctrine. What is more, the traditional definition of marriage has always been about the need to encourage potentially procreative couples to stay together for the sake of the children their sexual union may produce, not about animus toward homosexuals. Accordingly, ordinary rational basis is the proper level of scrutiny here.

Moreover, the traditional role of states in defining marriage does not justify heightened scrutiny of DOMA as applied to states that recognize same-sex marriages. *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 11-13 (1st Cir. 2012). It is improper to conflate the structural protections of liberty inherent in federalism with the individual rights and freedoms secured by the Fifth Amendment as the justification for a new, more rigorous level of equal protection scrutiny applicable to DOMA. No piece of our intricately plotted government of limited and enumerated powers divided among three branches should be carelessly used as a means to an end. In the long run, a novel use of federalism to leverage equal protection standards risks negation of structural constitutionalism as a separate guarantor of individual liberty.

The fundamental equal protection issue here asks whether there is anything wrong with adhering to the traditional definition of marriage. As long as some legitimate governmental purpose exists for conferring exclusive benefits on qualified opposite-sex couples, DOMA is valid in all applications. Such a legitimate rationale is crystal-clear: opposite-sex couples are the *only* procreative relationships that exist, which means that such couples are the only ones the government has a need to encourage. No other limiting principle for marriage exists; if this innately biological rationale is dismissed, the government has no coherent argument for denying marriage status to any number of persons who desire a committed relationship with each other.

Finally, divining a constitutional mandate for same-sex marriages would cause irredeemable harm to the Nation as a deliberate, democratic society. As has been shown by the entrenched discord inflicted by *Roe v. Wade*, judicial decisions that remove issues from the political branches of government can hinder, instead of facilitate, national consensus on contentious topics. Whether to reconstitute civil marriage so that its definition includes same-sex couples is currently the subject of robust nationwide debate. Arguments in support of scrapping the meaning of marriage that has existed for all time should be allowed to find fertile ground, or not, as part of the democratic process, not as untouchable constitutional law.

ARGUMENT

I. Ordinary Rational-Basis Scrutiny Applies to Congress's Traditional Marriage Definition

A. Section 3 of DOMA classifies on the basis of a couple's general procreative capacity, not their sexuality as such

The Second Circuit subjected Section 3 of DOMA to "intermediate scrutiny" where "a classification must be 'substantially related to an important government interest,'" meaning that "the explanation must be 'exceedingly persuasive.'" Supp. App. 23a (citations omitted). It did so based on its conclusion that DOMA discriminates against homosexuals, a "quasi-suspect" class. Supp. App. 23a. The *amici* states take no position on whether homosexuals constitute a specially protected class in the abstract. They reject, however, the view that Section 3 of DOMA, and by extension traditional state definitions of marriage, constitute facial discrimination against homosexuals.

Traditional marriage laws do not target homosexuals. *See Sevcik v. Sandoval*, No. 2:12-cv-00578, 2012 WL 5989662, at *7 (D. Nev. Nov. 26, 2012) ("[T]he distinction is not by its own terms drawn according to sexual orientation. Homosexual persons may marry in Nevada, but like heterosexual persons, they may not marry members of the same sex."). Rather, they draw a classification based on the relationship of two individuals to each other. Traditional marriage definitions are not by their terms concerned with any single trait of an individual seeking to marry, but instead with the relationship of traits between the two individuals. It is not the sexual orientation of the participants that counts, but the general capacity of the couple to reproduce through sexual intercourse.

While traditional marriage laws *impact* heterosexuals and homosexuals differently, that is not enough to treat such laws as creating classifications based on sexuality, particularly in view of the benign history of traditional marriage laws generally. A law's disparate impact on a suspect class is insufficient to justify strict scrutiny absent evidence of discriminatory purpose. *Washington v. Davis*, 426 U.S. 229, 239, 241-42 (1976); *see also Bd. of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 372-73 (2001) ("Although disparate impact may be relevant evidence of . . . discrimination . . . such evidence alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny."); *Lewis v. Casey*, 518 U.S. 343, 375 (1996) (Thomas, J., concurring) ("We rejected a disparate-impact theory of the Equal Protection Clause altogether . . . .").

In enacting DOMA, Congress was merely preserving the traditional definition of marriage for purposes of federal programs in the face of a new national movement to undermine that definition. 142 Cong. Rec. H7441-03 (July 11, 1996) (Rep. Canady) ("[L]awyers are soon likely to win the right for homosexuals to marry in Hawaii, and . . . attempt to 'nationalize' that anticipated victory under force of the Full Faith and Credit Clause of the U.S. Constitution."); 142 Cong. Rec. H7480-05 (July 12, 1996) (Rep. Sensenbrenner) ("Because this United States Code does not contain a definition of marriage, a State's definition of marriage is regularly utilized in the implementation of Federal laws and regulations. Such deference is possible now . . . because the difference in State marriage laws, although numerous, are relatively minor. . . . If Hawaii legalizes same-sex marriage, which the gentlewoman from Hawaii says is going to happen, then the basic qualification is altered."); 142 Cong. Rec. S10100-02 (Sept. 10, 1996) (Sen. Lott) ("What the Hawaiian court decides could also affect the operations of the Federal Government. It could have an impact upon programs like Medicare, Medicaid, veterans' pensions, and the Civil Service Retirement System.").

It is surely implausible to infer that marriage was invented thousands of years ago as a device to discriminate against homosexuals. Nor does a decision to adhere to that longstanding traditional definition of marriage betray a purpose to discriminate on the basis of sexual orientation. Accordingly, there is no basis for applying any sort of heightened scrutiny.

B. The traditional role of states in regulating marriage does not justify heightened scrutiny of Congress's regulation of federal marriage benefits

In a separate DOMA section 3 challenge, *Massachusetts v. United States Department of Health & Human Services*, 682 F.3d 1 (1st Cir. 2012), the First Circuit invoked a different rationale for applying something other than ordinary rational-basis scrutiny. According to that court, a test more rigorous than rational basis is warranted because with DOMA Congress was regulating in an area—marriage—traditionally reserved for states. *Id.* at 8, 10-11 (professing "not to create some new category of 'heightened scrutiny' for DOMA under a prescribed algorithm," but to "undertake[] a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review"). The First Circuit's purported concern for areas of traditional state regulation echoes Tenth Amendment doctrine, yet that court separately (and properly) *rejected* Massachusetts' actual Tenth Amendment challenge to Section 3 of DOMA. *See id.* at 11-13. The First Circuit did not explain how federalism had any residual connection to the equal protection standard applicable to the federal government.

While the *Amici* States respect and appreciate efforts to police the proper boundaries between state and federal power, they object to the idea of leveraging individual rights claims using the Constitution's structural safeguards. For if concern for state prerogatives justifies heightened Fifth Amendment equal protection scrutiny even where there is no Tenth Amendment violation, it would seem to follow that general concern for the limits of state authority in light of dormant Commerce Clause doctrine could ratchet up Fourteenth Amendment scrutiny even when there is no Commerce Clause violation.[1] Or, similarly, the mere assertion of a colorable preemption theory might be enough to justify "intensified scrutiny" of state laws under the Fourteenth Amendment even where state and federal statutes are ultimately deemed compatible.

Constitutional structure and individual rights protections both protect individual liberty, but they are properly kept distinct in order to preserve their independent vitality. The Constitution contains both safeguards to prevent different political excesses, and a doctrine that conflates them risks losing some measure of the liberty protection each was meant to achieve.

The Founders were acutely aware of the danger of concentrated power, particularly in the hands of a distant, unresponsive government. Their primary solution to this threat was structural: a national government of limited and enumerated powers divided among three branches. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577-78 (2012) (Roberts, C.J.); *The Federalist No. 84* (Alexander Hamilton) (arguing that the Constitution was itself a bill of rights). Guarantees of individual rights, Alexander Hamilton argued, were "unnecessary" and "dangerous" as they might imply Congress possessed powers not granted. *The Federalist No. 84* (Alexander Hamilton); *see also* 1 Annals of Cong. 436-40 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison).

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[1] This would be especially troubling when states are alleged to discriminate against out-of-state commerce, but where Commerce Clause doctrine would permit such overt classifications. *See, e.g., Dep't of Revenue v. Davis*, 553 U.S. 328 (2008) (upholding a state income tax exemption for interest earned from bonds issued by the taxing state); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (upholding a state policy that prohibited sales of cement produced by a state-owned cement plant to out-of-state residents); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (upholding a state law providing bounties to in-state scrappers with indemnity agreements but requiring more extensive documentation from out-of-state scrappers).

But as the Anti-Federalists argued, distance from the local electorate, collusion among the branches, and broad grants of power could undermine the effectiveness of structural guarantees. *See* Centinel, *To the Freemen of Pennsylvania* (Oct. 5, 1787), *reprinted in* 1 *The Debate on the Constitution* 52, 52-62 (Bernard Bailyn. ed., 1993) [hereinafter *The Debate*]; Cincinnatus, *Reply to James Wilson's Speech* (Nov. 1, 1787), *reprinted in* 1 *The Debate, supra*, 92-94; Brutus, *To the Citizens of the State of New York* (Oct. 18, 1787), *reprinted in* 1 *The Debate, supra*, 164, 168-69, 171-72; Brutus, *To the Citizens of the State of New York* (Jan. 31, 1788), *reprinted in* 2 *The Debate, supra*, 129, 133-35; Patrick Henry, *Speech at the Virginia Ratifying Convention* (June 7, 1788), *reprinted in* 2 *The Debate, supra*, 623, 635-36; *see also* Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. Rev. 217, 239-46 (2004). The Anti-Federalists' opposition to ratification yielded guarantees that the first Congress would enact a Bill of Rights designed to address these political threats to liberty. *See* Smith, *supra*, at 246.

Experience has proved the genius of dual safeguards. On the one hand, federalism enhances individual liberty by limiting central authority, putting states into competition with one another, and bringing the organs of government into closer contact with the people. *See, e.g.*, *Bond v. United States*, 131 S. Ct. 2355, 2364-65 (2011); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3-5 (1988). On the other hand, American difficulties with attacks on the fundamental rights of political, racial and other minorities at both the federal and state levels proved that structuralism could not prevent majority oppression entirely, as Madison warned. *See The Federalist No. 10* (James Madison); Barry Friedman, *Valuing Federalism*, 82 Minn. L. Rev. 317, 367 (1997). The Bill of Rights (alone and through the Fourteenth Amendment) provides yet more protection of liberty.

The complementary relationship between structural protections and specific individual-rights guarantees is critical: any one mechanism to preserve liberty may be incomplete or even contain dangers that must be counteracted by another. Intermixing doctrines that animate structure and individual rights may thus obscure the value and erode the effectiveness of these independent protections.

Because the role of structure in preserving freedom is easily overlooked—*see, e.g.*, *Florida v. U.S. Dep't Health & Human Servs.*, 648 F.3d 1235, 1361-65 (11th Cir. 2011) (Marcus, J., dissenting) (seeing the plaintiffs' individual liberty concerns as relevant to due process but not Tenth Amendment arguments), *aff'd in part & rev'd in part sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012)—courts should avoid implying that structural provisions affect individual liberty only insofar as they enhance or limit the operation of individual rights guarantees. If federalism supports the cause of individual liberty in this case, the Tenth Amendment is the natural mode of giving effect to structural principles. Rerouting federalism arguments, which the First Circuit rejected, *Massachusetts*, 682 F.3d at 11-13, into a new equal protection standard only reinforces the dangerous misconception that only specific rights guarantees are important for individual liberty.

II. The Second Circuit Erred in Rejecting the Responsible Procreation Rationale for DOMA and Marriage Laws Generally

A. The decision below undermines all laws predicated on a traditional definition of marriage

Although it addressed only the definition of marriage for purposes of federal law, the decision below casts doubt on *all* laws embodying the traditional definition of marriage. The panel concluded that "homosexuals compose a class that is subject to heightened scrutiny," Supp. App. 23a, and that DOMA could not survive intermediate scrutiny on the basis, among others, of encouraging responsible procreation. Supp. App. 24a. It held that preserving this traditional objective of marriage is insufficient: "DOMA does not provide any incremental reason for opposite-sex couples to engage in 'responsible procreation.' Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before." Supp. App. 29a-30a.

The panel asked the wrong question: the correct constitutional query is simply whether DOMA *upholds* the rationales for traditional marriage. Implicit in the panel's decision is the idea that the status quo is somehow deficient and that DOMA is impermissible because acknowledging same-sex marriages—the "remedy"—would not harm opposite-sex marriages. *See* Supp. App. 30a (citing *Pedersen v. Office of Pers. Mgmt.*, No. 3:10-cv-1750, 2012 WL 3113883, at *40-43 (D. Conn. July 31, 2012)). The panel gave short shrift to the long-accepted understanding of marriage as being fundamentally connected to the procreative nature of opposite-sex couples.

Asking how excluding same-sex couples benefits opposite-sex couples ignores the fact that DOMA was not an isolated legislative act. It expressly codified a preexisting understanding of marriage that occurs over 1,000 times in federal law. When originally conferring marriage rights and benefits, Congress undoubtedly assumed that it was incenting eligible couples—which at the time would have meant opposite-sex couples only—to marry. *See, e.g.*, *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006) (recognizing as rational the practice of giving benefits to incentivize marriage); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (plurality opinion) (same); *Feliciano v. Rosemar Silver Co.*, 514 N.E.2d 1095, 1096 (Mass. 1987) (observing that extending a right to recover for loss of consortium to a cohabitating partner would "subvert[]" the state purpose of promoting marriage). Therefore, the panel below simply needed to ask why Congress sought to incentivize traditional marriages, and whether that rationale extends to same-sex couples.

The constitutionality of DOMA thus turns on whether Congress may expressly perpetuate its long-assumed distinction between same-sex and opposite-sex couples even when some states have rejected it. To state the obvious, if there is a sufficient reason for Congress to distinguish between opposite-sex and same-sex relationships, it is fitting to enact laws that promote marriages among opposite-sex couples alone. *See Citizens for Equal Prot.*, 455 F.3d at 867-68; *see also Johnson v. Robison*, 415 U.S. 361, 383 (1974) ("When . . . the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory."); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 540 (1942) ("[T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940))).

Conferring exclusive benefits on opposite-sex couples promotes a legitimate governmental purpose if any relevant differences exist between same-sex and opposite-sex couples. In striking down such benefits the decision below necessarily rejected the existence of a legitimate distinction between them and, in so doing, cast doubt on all traditional marriage laws.

B. Marriage serves interests inextricably linked to the procreative nature of opposite-sex relationships

As explained in more detail in the Brief of Amici Curiae Indiana, Virginia, and 17 other States in *Hollingsworth v. Perry*, No. 12-144, the choice to promote traditional marriages is based on an understanding that civil marriage recognition arises from the need to encourage biological parents to remain together for the sake of their children. It protects the *only* procreative relationship that exists and makes it more likely that unintended children, among the weakest members of society, will be cared for.

1. Civil recognition of marriage historically has not been based on a state interest in adult relationships in the abstract. Marriage instead is predicated on the positive, important, and concrete societal interests in the procreative nature of opposite-sex relationships. Only opposite-sex couples can naturally procreate, and the responsible begetting and rearing of new generations is of fundamental importance to civil society. *See Skinner*, 316 U.S. at 541 ("Marriage and procreation are fundamental to the very existence and survival of the race.").

Traditional marriage protects civil society by encouraging opposite-sex couples to remain together to rear the children they conceive. It creates the norm that potentially procreative sexual activity should occur in a long-term, cohabitative relationship. It is the institution that provides the greatest likelihood that both biological parents will nurture and raise the children they beget, which is optimal for children and society at large. "[M]arriage's vital purpose in our societies is not to mandate man/woman procreation but to ameliorate its consequences." Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 Can. J. Fam. L. 11, 47 (2004).

This ideal does not disparage the suitability of arrangements where non-biological parents have legal responsibility for children. But these alternative relationships are exactly that—alternatives to the model. States may rationally conclude that, all things being equal, it is better for the biological parents also to be the legal parents, and that marriage promotes that outcome.

2. The fact that opposite-sex couples may marry even if they do not plan to have children or are unable to have children does not undermine this norm or invalidate the states' interest in traditional marriage. *See Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (holding that marriage is justified by reference to procreation "even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married"). Such couples

reinforce and exist in accord with the traditional marriage norm. "By upholding marriage as a social norm, childless couples encourage others to follow that norm, including couples who might otherwise have illegitimate children." George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581, 602 (1999).

Furthermore, it would be a tremendous intrusion on individual privacy to inquire of every couple wishing to marry whether they intended to or could procreate. States are not required to go to such extremes simply to prove that the purpose behind civil recognition of marriage is to promote procreation and child rearing in the traditional family context.

3. Fundamentally, even if childless married couples, no-fault divorce laws, or any other phenomena of contemporary society undermine the responsible procreation rationale, that still does not logically require recognition of same-sex marriages. A constitutional doctrine that requires the same benefits for same-sex and opposite-sex couples must supply a coherent rationale for government recognition of both, not simply attack traditional marriage as antiquated or somehow ill-considered. Proponents of same-sex marriage must either articulate a rationale for government recognition of *their* preferred relationships or be satisfied with arguing against *any* recognition of civil marriage.

Yet there is no alternative coherent justification for marriage as a limited institution. Procreative potential provides the core utilitarian basis for state interest in marriage while providing at the same time a coherent limit on the definition of marriage. Absent this principle, there is no apparent reason why the state should care about mutual commitments among adult sexual partners any more than it cares about other voluntary relationships of two or more people. *See Morrison v. Sadler*, 821 N.E.2d 15, 29 (Ind. Ct. App. 2005) (lead opinion).

One rationale put forth is that, through same-sex marriage, government can support mutual commitment for purposes of raising children over which couples share joint parental rights. Yet such commitment rationale does not assume a sexual, much less a procreative, component to the marriage relationship, so it could encompass a variety of platonic relationships—even those that states may unquestionably prohibit from being sexual, such as incestuous or kinship relationships. A brother and sister, a father and daughter, an aunt and nephew, two business partners, or simply two friends could decide to form an "exclusive and permanent" household partnership featuring no sex whatever. Nor does commitment provide any inherent basis for limiting marriage to *couples*. Groups of three or more adults may desire to form a household and to remain exclusive and committed to one other based on mutual affection, or simply a desire to "co-parent" children. Once the link between marriage and procreation is severed, there is no reason for government to prefer couples over larger groups.

Similarly, if the purpose of marriage is to promote stability and other social goods, there is still no governmental objective vindicated by limiting marriages to sexual partners, couples or unrelated individuals. Polyamorous or platonic kinship relationships might provide the same level of family stability and care for members of the family unit as that provided by same-sex couples. And government can facilitate governance, public order, and property ownership by recognizing social units of more than two adults perhaps even more efficiently than by recognizing couples only.

If the purpose of marriage is to recognize adult commitment or secure a broad array of social goods, a limitless number of rights claims could be set up that evacuate the term "marriage" of any meaning. The theory of traditional marriage, by contrast, focuses on the unique qualities of the male-female couple, particularly for purposes of procreating and rearing children under optimal circumstances. As such, it not only reflects and maintains the deep-rooted traditions of our Nation, but also furthers public policy objectives, while containing an inherent limitation on the types of relationships warranting civil recognition.

III. Constitutionalizing Same-Sex Marriage Would Poison the Political Well

Although this case targets only Congress's definition of marriage for purposes of federal law, invalidation of that definition on equal protection grounds would imply collateral invalidity of identical state definitions. The Court should not cut short the robust democratic debates occurring across the country by deeming same-sex marriage to be a matter of federal constitutional law.

Keeping decisions about fundamental social issues within the ambit of state political processes helps inculcate democratic habits and values; the greater availability of political resolution encourages citizen participation, fosters political accountability, and enhances acceptance of the outcomes. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 2, 7-8 (1988); *see also FERC v. Mississippi*, 456 U.S. 742, 789-90 (1982) (O'Connor, J., concurring in part and dissenting in part).

The benefits of our federalist system resonate with especial clarity regarding the same-sex marriage debate—it is "[s]o well suited" to the issue "that it might almost have been set up to handle it." Jonathan Rauch, *A More Perfect Union: How the Founding Fathers Would Have Handled Gay Marriage*, The Atlantic, April 2004, *available at* www.theatlantic.com/magazine/archive/2004/04/a-more-perfect-union/2925. Some states have chosen to experiment with legal recognition of same-sex unions, while others have chosen to retain the centuries-old definition of marriage. The citizens of each state can observe the effects of the differing policies. They can attempt to persuade their fellow citizens as to the appropriate choice and vote for their desired policy and, if they are unhappy with the outcome of the democratic process, they retain the option of moving to a jurisdiction with laws more to their liking. "On certain social issues, such as abortion and homosexuality, people don't agree and probably never will—and the signal political advantage of the federalist system is that they don't have to. Individuals and groups who find the values or laws of one state obnoxious have the right to live somewhere else." *Id.*

Preemptively short-circuiting the democratic process by announcing only one permissible policy choice by *any* government under the Constitution destroys these benefits and should not occur unless the Constitution clearly mandates the legitimacy of only one outcome. The Nation's experience in the wake of *Roe v. Wade* bears this out. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 376 (1985) [hereinafter *Thoughts on Autonomy*] (remarking that *Roe* has "sparked public opposition and academic criticism, in part . . . because the Court ventured too far in the change it ordered and presented an incomplete justification for its action");

J. Harvie Wilkinson, III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. Rev. 253, 293-95 (2009) (observing that *Roe* "shut down this process of legislative accommodation, polarizing the debate and making future compromise more difficult," leading "[m]any scholars" to comment on the "*Roe* backlash" and the intense partisan divide that has resulted).

Outrage in the wake of *Roe* occurred despite increasing public support for abortion and a "marked trend in state legislatures 'toward liberalization of abortion statutes.'" Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1205 (1992) [hereinafter *Judicial Voice*] (quoting *Roe v. Wade*, 410 U.S. 113, 140 (1973)); *see also Thoughts on Autonomy*, *supra*, at 385 ("The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting."). But the Court's "[h]eavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." *Thoughts on Autonomy*, *supra*, at 385-86. Unlike the Court's previous decisions concerning gender classifications, *Roe* provoked backlash because it "invited no dialogue with legislators" and "seemed entirely to remove the ball from the legislators' court." *Judicial Voice*, *supra*, at 1205.

Not only did *Roe* produce conflict, it was also an ineffective engine of social change. The Court's abrupt adjustment of national policy "may have prevented state legislatures from working out long-lasting solutions based upon broad public consensus." Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 Cal. L. Rev. 751, 766 (1991). Professor Sunstein observed that *Roe*'s effectiveness "has been limited, largely because of its judicial source." *Id.* at 766-67.

The Court's bold substantive-rights approach in *Roe* invites comparison with *Lochner v. New York*, 198 U.S. 45 (1905). The decision reminded Professor John Hart Ely "of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.'" John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 937-39 (1973) (quoting *Dandridge v. Williams*, 397 U.S. 471, 484 (1970)). For "*precisely* the point of the *Lochner* philosophy," Ely remarked, is to "grant unusual protection to those 'rights' that somehow *seem* most pressing, regardless of whether the Constitution suggests any special solicitude for them." *Id.* at 939.

Particularly with regard to the creation of individual rights that would preclude legislative policymaking at all levels, appropriate judicial restraint cautions courts to recognize that "they participate in a dialogue with other organs of government, and with the people as well." *Judicial Voice, supra*, at 1198; *see also* Jack M. Balkin, Roe v.

Wade: *An Engine of Controversy*, *in* What *Roe v. Wade* Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision 3, 24 (Jack M. Balkin ed., 2005) ("Courts do recognize rights and defend them from legislative abridgement. But those rights also arise out of politics; they are tested by politics, and they are modified by courts as a result of politics."). Leaving room for legislatures to exercise their policymaking authority is particularly important amidst a dynamic process of citizen dialogue and legislative response. *See Judicial Voice*, *supra*, at 1206.

Shifting poll numbers on marriage policy and frequent political activity bearing on state marriage laws reveal a robust national debate on this very fundamental issue. Far from resolving anything, a judicial mandate without warrant in constitutional text or history that centralizes the controversy is likely to entrench social differences, undermine public confidence in courts as policy-neutral guardians of both republican governance and well-understood core political rights, and trigger a political backlash that could be with us for decades.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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Dated: January 29, 2013

AMICUS
CURIAE
BRIEF

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No. 12-307

In The
Supreme Court of the United States

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UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH S. WINDSOR, ET AL.,

Respondents.

◆

On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit

◆

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF RESPONDENT EDITH S. WINDSOR ADDRESSING THE MERITS

◆

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

- I. THIS COURT DOES NOT NEED TO RESOLVE QUESTIONS ABOUT "TIERED SCRUTINY" IN THIS CASE 5
- II. EVEN IN RATIONAL-BASIS CASES, THIS COURT ROUTINELY EXAMINES FACTS AND REJECTS MADE-UP JUSTIFICATIONS FOR GOVERNMENT ACTIONS 9
  - A. This Court considers facts indicating a lack of connection between the classification and a plausible rational basis offered in support of it 10
  - B. This Court considers facts indicating that the harm caused by the classification vastly outweighs any plausible public benefit 13
  - C. This Court considers facts indicating that a statutory classification seeks to advance an illegitimate government interest 15
  - D. This Court does not contrive imaginary rationales for government actions 16

TABLE OF CONTENTS – Continued

Page

E. These principles apply to all rational-basis cases 20

CONCLUSION.. 24

TABLE OF AUTHORITIES

Page

CASES

Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n, 488 U.S. 336 (1989) 13, 14

Armour v. City of Indianapolis, ___ U.S. ___, 132 S. Ct. 2073 (June 4, 2012) 18

Chappelle v. Greater Baton Rouge Airport Dist., 431 U.S. 159 (1977) 13

City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) 5, 6, 12, 15, 17

City of Indianapolis v. Armour, 946 N.E.2d 553 (Ind. 2011) 18

Craig v. Boren, 429 U.S. 190 (1976) 6

FCC v. Beach Commc'ns, Inc., 508 U.S. 307 (1993) 18, 20, 21, 22

Fuentes v. Shevin, 407 U.S. 67 (1972) 19

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 19

Heller v. Doe, 509 U.S. 312 (1993) 23, 24

Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612 (1985) 15

James v. Strange, 407 U.S. 128 (1972) 14

Korematsu v. United States, 323 U.S. 214 (1944) 6

Lawrence v. Texas, 539 U.S. 558 (2003) 15

Lindsey v. Normet, 405 U.S. 56 (1972) 14

TABLE OF AUTHORITIES – Continued

Page

Loving v. Virginia, 388 U.S. 1 (1967)............................6

Mayer v. Chicago, 404 U.S. 189 (1971)......................13

Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985)....... 15

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981)..8, 16, 22

Plyler v. Doe, 457 U.S. 202 (1982)...............................13

Quinn v. Millsap, 491 U.S. 95 (1989)..........................12

Reed v. Reed, 404 U.S. 71 (1971)................................14

Romer v. Evans, 517 U.S. 620 (1996).........6, 15, 16, 23

Turner v. Fouche, 396 U.S. 346 (1970).......................13

United States v. Bayshore Assocs., Inc., 934 F.2d 1391 (6th Cir. 1991) 19

United States v. Carolene Products Co., 304 U.S. 144 (1938)..5, 17

United States v. Pisani, No. 98-298, 1998 U.S. Dist. LEXIS 11637 (S.D.N.Y. July 30, 1998)..........19

U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973)..13, 15

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 8, 16

Williams v. Vermont, 472 U.S. 14 (1985)....................12

Willowbrook v. Olech, 528 U.S. 562 (2000) 6

Zobel v. Williams, 457 U.S. 55 (1982) 10, 11, 12, 15

CODES AND STATUTES

Defense of Marriage Act, § 3, 1 U.S.C. § 7.............1, 24

TABLE OF AUTHORITIES – Continued

Page

OTHER PUBLICATIONS

Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945 (2004) 6

Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984)..........15

Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491 (2011) 5

Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984) 6

Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951 (2002)....................6

Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008)....................6

Judge Definition, Merriam-Webster.com, www.merriam-webster.com/dictionary/judge (last visited February 27, 2013) 8

INTEREST OF THE AMICUS CURIAE

The Institute for Justice (IJ) is a nonprofit, public-interest law firm that litigates in support of greater judicial protection for individual rights, including rights that are not presently deemed fundamental and that are therefore subject to rational-basis review. As part of this advocacy, IJ defends individual rights in contexts that have not been accorded "heightened" scrutiny and therefore has an interest in ensuring that lower courts properly apply this Court's rational-basis jurisprudence. The Institute is filing this brief in support of Respondent Edith Windsor.

All parties in this case have consented to the filing of this amicus brief.[1]

◆

SUMMARY OF ARGUMENT

Thus far, the debate over the constitutionality of Section 3 of the Defense of Marriage Act has largely revolved around this Court's tiered-scrutiny jurisprudence and how it applies to laws that treat gays and lesbians differently from heterosexuals. In its opinion below, the Second Circuit concluded that laws singling out gays and lesbians for differential treatment must be reviewed with intermediate scrutiny. Supp. App. 15a. Respondent Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) maintains that this was incorrect, and that these laws should be reviewed only with rational-basis scrutiny. Br. on the Merits for Resp. BLAG at 24-28. And with regard to the rational-basis test, there is further debate among the parties and amici over which of two purported versions of the rational-basis test applies, with some briefs arguing that this Court should apply a rational-basis standard with "bite," and others arguing that this Court should embrace a version of "rational basis" review that, in practice, amounts to nothing more than "the government always wins."

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[1] Counsels of record have consented to the filing of this brief. Amicus has given the parties timely notice of its intention to file in this matter and has provided the parties with an electronic copy of this filing. Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than amicus curiae Institute for Justice, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

This brief argues that this debate is unnecessary. This Court does not need to create another ad hoc category of intermediate scrutiny in order to resolve this case. Nor does this Court need to decide which of the multiple supposed versions of the rational-basis test applies to Respondent Edith Windsor's claims because that question is based on a false premise. There is only one rational-basis test: the test this Court actually applies when adjudicating rational-basis cases. Notwithstanding some extravagant *dicta* about how deferential this test is, it remains a real test – one that requires this Court, in keeping with its judicial role, to look at actual facts and to reject implausible rationales for government action. Simply put, there exists no standard of review under which the federal courts are required to abandon their core function as *judges* – no standard of review under which they must close their eyes to facts or accept fanciful justifications for unequal treatment.

To be sure, there exists a great deal of *dicta*, heavily cited by BLAG and its amici, emphasizing the deferential nature of the rational-basis test. But that *dicta*, taken seriously, describes a test that is so utterly supine, so divorced from reality, that plaintiffs could never possibly win. That does not describe this Court's rational-basis jurisprudence: Since 1970, this Court has issued nearly 20 separate rational-basis decisions in favor of the plaintiffs. Careful analysis of these cases shows that this Court consistently looks to actual facts in deciding cases under rational-basis review, and consistently refuses to fabricate post hoc justifications for differential treatment. The result is a deferential but real form of judicial review, under which government classifications are required to bear an actual, factually plausible relationship to a legitimate government end.

In other words, the lower court correctly found that there was no factually plausible basis for the distinction the federal government is drawing. It was incorrect, however, in assuming it could only reach this conclusion by applying heightened scrutiny. Instead, it should have applied the real rational-basis test – the one that can actually be squared with the holdings of all this Court's rational-basis opinions, including those where the plaintiffs have won. Applying *that* rational-basis test, as it actually exists in this Court's precedents, the Second Circuit's decision must be affirmed.

◆

ARGUMENT

The parties and amici on both sides of this case have largely proceeded from the assumption that, to decide this case, this Court must first determine whether the Section Three of the Defense of Marriage Act is subject to "heightened" or merely "rational-basis" scrutiny. These arguments assume that the only way to uphold the lower court's decision in this case is to take facts seriously, and they further assume that the only way to take facts seriously is to apply some heightened form of judicial scrutiny. This last assumption is wrong.

As an initial matter, this Court's adventures into "tiered" scrutiny – in which it accords some people and some laws more or less serious standards of review – have yielded, at best, mixed results. Whatever its historical pedigree, "tiered" scrutiny has ultimately failed to provide a solid justification for this Court's decisions in various cases, and it has required this Court to explicitly relegate certain classes of citizens to a deliberately diminished standard of review. In order to resolve this case, however, this Court need not delve into the depths of its tiered-scrutiny jurisprudence. Instead, it merely needs to recognize what has always been true: that, under *any* standard of review, it takes facts seriously. It therefore can engage directly with the substantive arguments made by Respondent Windsor and her amici without needing to wrestle with the thorny question of whether laws that discriminate against state-recognized same-sex marriages are more or less like laws that discriminate on the basis of race, or educational attainment, or any other characteristic. In all of those cases, this Court would engage seriously with the facts. It can and should do the same here.

I. THIS COURT DOES NOT NEED TO RESOLVE QUESTIONS ABOUT "TIERED SCRUTINY" IN THIS CASE.

For decades, this Court has struggled with the layers of "tiered scrutiny" bequeathed to it in a single footnote of *United States v. Carolene Products Co.*[2] The results of that struggle have attracted criticism from members of this Court and from the legal academy.[3] Under the evolving jurisprudence of these

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[2] 304 U.S. 144, 152 n.4 (1938).

[3] *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 451 (1985) (Stevens, J., joined by Burger, C.J.) ("I have never been persuaded that these so-called 'standards' [or tiered scrutiny] adequately explain the decisional process."); Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. Rich. L. Rev. 491, 491 (2011) ("[A]s currently practiced . . . , the tiered scrutiny formulation of substantive due process is illusory. It is followed only in easy

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"tiers," some Americans – women, racial minorities, the foreign-born – have found themselves beneficiaries of heightened judicial protections.[4] Others – homosexuals, people with mental retardation, or the simply politically powerless – have not.[5] There is

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cases, and abandoned in hard ones."); Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008) (criticizing the method by which the post-*Carolene Products* Court has decided which standard of tiered scrutiny applies in cases involving alleged "fundamental" rights); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 980 (2004) ("Tiered scrutiny has always had a somewhat artificial air of precision to it, because the criteria for sorting classifications and liberties into the appropriate bins has been flexible (to put it charitably), or so amorphous as to approach the illusory (to phrase it cynically)."); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 954 (2002) ("[E]xisting accounts of equal protection leave the decision whether to treat a classification as suspect – and most other decisions as well – to almost completely unguided normative judgment."); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 182 (1984) ("At this point in American constitutional history, it is fair to say that the multilevel system of judicial review has outlived its usefulness.").

[4] *See Craig v. Boren*, 429 U.S. 190 (1976) (holding that gender discrimination subject to intermediate scrutiny); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that racial discrimination subject to strict scrutiny); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (holding that discrimination on basis of national origin subject to strict scrutiny).

[5] *See Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (holding that discrimination against a "class of one" is reviewed with rational-basis scrutiny); *Romer v. Evans*, 517 U.S. 620 (1996) (same, discrimination against homosexuals); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (same, discrimination against the mentally disabled).

nothing in the Constitution demanding this state of affairs, and there is little if anything in this Court's jurisprudence suggesting that these disparities represent principled distinctions among groups. The system of tiered scrutiny, whatever its intentions, has obscured more than it has illuminated. It has subjected millions of Americans – all of whom are admittedly the victims of unequal treatment at the hands of their government – to a deliberately reduced standard of judicial care.

Despite the widely acknowledged limitations of this doctrine, the parties and many amici urge this Court to dive back into thorny questions of which categories of Americans deserve which level of constitutional protection.[6] This Court need not do so. Resolving this case does not require the Court to fix – or exacerbate – any of the problems with its tiered-scrutiny jurisprudence.

The fight over whether to apply "intermediate" or "rational-basis" scrutiny in this case is largely a misplaced fight about the role that facts should play in determining the outcome of this case. May this Court consider facts in making its decision? Must this Court credit imaginary, fanciful, or implausible justifications for the government's actions? The implicit assumption in all the arguments about intermediate scrutiny and rational-basis scrutiny is that the answers to these questions vary depending on the standard of review that applies. But the simple truth is this: This Court *always* considers facts, regardless of the standard of review.[7] This Court *never* credits wholly imaginary justifications, regardless of the standard of review.

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[6] *See, e.g.*, Br. on the Merits of Resp. Bipartisan Legal Advisory Group at 24-28, 49-59; Br. of the United States on the Merits at 18-36.

The debates over standard of review obscure the fact that this Court – consistent with its judicial obligations; consistent with the very definition of "judging"[8] – always strives to base its decisions in reality, not fantasy. Whatever may be said for the merits or demerits of applying intermediate (or strict) scrutiny in this case, this Court does not need heightened scrutiny to take facts seriously.

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[7] *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) ("In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation.") (internal quotation marks and citation omitted); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.").

[8] *Cf. Judge Definition*, Merriam-Webster.com, www.merriam-webster.com/dictionary/judge (last visited February 27, 2013) ("to form an opinion based about through careful weighing of evidence and testing of premises").

II. EVEN IN RATIONAL-BASIS CASES, THIS COURT ROUTINELY EXAMINES FACTS AND REJECTS MADE-UP JUSTIFICATIONS FOR GOVERNMENT ACTIONS.

The reason this Court does not need to answer the standard-of-review question to resolve this case is that facts always matter, regardless of the applicable standard of review. Despite some broad statements in *dicta* over the years, this Court's actual holdings in rational-basis cases consistently show that the rational-basis test, while deferential, does not require the Court to turn a blind eye to facts, nor does it require the Court to blindly accept implausible after-the-fact justifications for unequal treatment.

Facts matter in all constitutional cases, even those decided under the rational-basis test. As explained below, analysis of this Courts rational-basis caselaw demonstrates at least three categories of fact that this Court routinely considers: facts indicating a lack of connection between a statutory classification and the rational basis offered to support it; facts indicating that the harm caused by the classification vastly outweighs any plausible public benefit; and facts indicating that the classification seeks to advance an illegitimate government end. And, importantly, in conducting this analysis, this Court strives to evaluate the government's actual ends; it does not simply fabricate its own hypothetical justifications for a defendant's actions.

This is the analysis performed by this Court in every rational-basis case; even when rational-basis plaintiffs ultimately lose, the Court nonetheless weighs facts and actual justifications in reaching its conclusions.

A. This Court considers facts indicating a lack of connection between the classification and a plausible rational basis offered in support of it.

A statutory classification will fail rational-basis review when there is no logical connection between the classification and the government interest (or interests) proffered in support of it. In such circumstances, invalidation of the classification is appropriate – deference to legislatures notwithstanding – because an utter absence of logic renders a statutory scheme arbitrary. The authority to legislate, whether exercised by Congress or a village council, has never been understood to include the power to legislate arbitrarily.

A clear illustration of this principle is found in *Zobel v. Williams*, 457 U.S. 55, 61-62 (1982). *Zobel* involved an equal-protection challenge to an Alaska program that distributed oil revenue each year to citizens based on the length of their state residency. For every year of Alaska residency since 1959, residents were entitled to one share of the dividends of the state's oil fund. *Id.* at 56-57. In other words, people who had moved to Alaska earlier would receive a special windfall payment – forever. A group of latter-day Alaskans brought suit, alleging that this permanent classification between bona fide residents violated the Equal Protection Clause. *Id.* at 57-58.

Alaska proffered two possible rationales in defense of its unequal treatment of earlier and later residents that the Court rejected on logical grounds. The State argued that the windfall of oil money to earlier residents: (1) encouraged others to move to sparsely populated Alaska; and (2) gave residents a stake in the prudent management of oil reserves. *Id.* at 61.[9]

The Supreme Court held that neither reason provided any logical support for the law. *Id.* at 62. First, if the goal were to encourage *new* people to move to Alaska, it was illogical to distribute oil money under a scheme that awarded far more money to long-term residents than newcomers. *See id.* A prospective policy of rewarding all Alaskans going forward from 1980 would have been logical, but not retrospectively rewarding residents based on the duration of their pre-1980 residency. Second, if the goal were to preserve resources going forward, a prospective policy of making all residents stakeholders would have been rational, but not a backwards-looking distinction based on past residency. *See id.* at 62-63. In other words, the government's *asserted* interests were entirely prospective (it wanted to encourage new people to come to Alaska) but, in fact, its chosen classification was entirely retrospective (it was based on people's actions before 1980). The Supreme Court invalidated the classification because it rejected this fundamental logical disconnect between what Alaska said it was trying to accomplish and the distinction it was actually drawing.

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[9] The State also asserted that the distinction served "to reward citizens for past contributions" to the State, which the Supreme Court had previously held was not in itself a legitimate state interest. *Id.* at 63.

The no-logical-connection principle is also evidently at work in other rational-basis decisions of this Court. In *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), for example, this Court acknowledged that a home's being too big could be a valid reason for denying a permit, but found no logical connection between that principle and the City's actions because the facts in the case showed that homes of identical size were routinely granted permits. *Id.* at 449. Similarly, in *Williams v. Vermont*, 472 U.S. 14, 24-25 (1985), the State of Vermont asserted its legitimate interest in encouraging Vermont residents to purchase cars within the state, but this Court found no logical connection between that interest and the State's attempt to levy a tax on a car purchased out of state before its owner had even moved to Vermont. *Id.* at 24-25.[10]

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[10] *See also Quinn v. Millsap*, 491 U.S. 95, 108 (1989) (finding no logical connection between an individual's actual ability to

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B. This Court considers facts indicating that the harm caused by the classification vastly outweighs any plausible public benefit.

This Court also rejects statutory classifications where the government's proffered justifications – such as saving money – are so wildly out of proportion with the harm caused by the classification that no rational legislator would countenance them. In *Plyler v. Doe*, for example, the government asserted that denying public education to the children of illegal immigrants could help save government funds, which the Court rejected as a "wholly insubstantial [benefit] in light of the costs involved to these children, the State, and the Nation" of creating a subclass of illiterates. 457 U.S. 202, 230 (1982).

This Court applied similar principles in *Allegheny Pittsburgh Coal Co. v. County Commission*, 488

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understand politics and an individual's ownership or non-ownership of land); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977) (per curiam) (same); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (finding no logical connection between stimulating the agricultural economy and the realistic consequences of providing food stamps only to households containing people who are related to one another); *Mayer v. Chicago*, 404 U.S. 189, 196 (1971) (finding, where the government had adopted a policy that inability to pay was not a sufficient reason to deny a transcript to a felony defendant, there was no logical reason that policy should not extend to a misdemeanor defendant); *Turner v. Fouche*, 396 U.S. 346, 363-64 (1970) (finding no logical connection between fitness for political office and property ownership).

U.S. 336 (1989). In *Allegheny*, the government used the most recent purchase price of land to assess property taxes, but because some property had not changed hands for decades this resulted in recent purchasers paying taxes as much as 35 times more than neighbors who had purchased long ago. *Id.* at 340-41. The county argued that, as a general proposition, purchase price was the most precise measure of property value, and that the wild disparities that resulted in some circumstances should be accepted as a necessary evil. *Id.* at 343. This Court, however, rightly refused to allow the county to impose gross disparities simply because doing so was in some vague sense easier for county officials. *Id.* at 345-46. Thus, the mere fact that some small benefits (like modest cost savings) could plausibly be attributed to an unequal classification will not save it from invalidation if it achieves those small benefits at the price of imposing grossly disproportionate burdens.[11]

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[11] *See also James v. Strange*, 407 U.S. 128, 141-42 (1972) (holding that the state funds saved by denying indigent defendants exceptions to the enforcement of debt judgments was grossly disproportionate to the harms it inflicts on debtors); *Lindsey v. Normet*, 405 U.S. 56, 77-78 (1972) (holding that the cost savings from deterring a few frivolous appeals were insufficient to justify a surety requirement that allowed many frivolous appeals, blocked many meritorious appeals, and showered a windfall on landlords); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (holding that attempting to reduce the workload of the probate courts by excluding women from service as administrators in certain cases would be unconstitutionally arbitrary).

C. This Court considers facts indicating that a statutory classification seeks to advance an illegitimate government interest.

Finally, this Court rejects statutory classifications that seek to advance illegitimate ends like animus or sheer favoritism (or hostility) for its own sake. The constitutional impermissibility of this kind of naked, unjustified preference is well illustrated in *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973). In that case, this Court held that the government could not justify withholding benefits from households made up of unrelated people on the basis of a general animus towards "hippies." *Id.* at 534. In other words, government must justify its classifications by pointing to something beyond a simple desire to make that classification – it may not simply treat people worse for the sheer sake of treating those people badly.[12] *Cf.* Cass R. Sunstein, *Naked Preferences and*

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[12] *See also Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding no legitimate interest in criminalizing consensual adult homosexual acts); *Romer v. Evans*, 517 U.S. 620, 634 (1996) (finding no legitimate interest in anti-gay animus); *Cleburne*, 473 U.S. at 448 (rejecting sheer dislike of people with mental retardation as legitimate government interests); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985) (finding no legitimate interest in creating different classes of bona fide residents); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985) (finding no legitimate interest in discriminating against out-of-state companies); *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (finding no legitimate interest in creating permanent classes of bona fide residents).

the Constitution, 84 COLUM. L. REV. 1689, 1689 (1984) (coining the term "naked preference" to describe "the distribution of resources and opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want").

D. This Court does not contrive imaginary rationales for government actions.

In applying the principles laid out above, this Court routinely looks at and weighs record evidence. This means, for example, that it accepts proffered rational bases only if it is factually plausible that the suggested rationale could actually have motivated the action in question. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632-33 (1996) (explaining that the government prevails in rational-basis cases where government classifications are "narrow enough in scope and grounded in a sufficient factual context for [the Court] to ascertain some relation between the classification and the purpose it served"); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) ("In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they "could not have been a goal of the legislation." (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975)). Similarly, where evidence is available, the Court will rely on actual evidence, not mere speculation, to determine whether there is a logical connection between the government's action and an asserted rational basis. *See, e.g., Cleburne*, 473 U.S. at 449 (citing district court's post-trial findings of fact, as well as appellate court's reliance on those findings of fact, to evaluate factual plausibility of asserted government interest).

The willingness to examine evidence in the above cases is in no way anomalous. Indeed, even in its earliest articulations of the test, this Court has always recognized its core responsibility to take seriously a plaintiff's evidence disproving a purported rational basis. *See, e.g., United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." (internal citations omitted)).

An important corollary to this principle is that the Court does not actually permit rational bases to be fabricated out of whole cloth on appeal. Notwithstanding dicta about upholding classifications based on "any conceivable basis," in none of the Court's rational-basis decisions has its decision hinged on a rationale devised out of whole cloth by an appellate judge. Instead, the Court (when deciding in favor of a government defendant) has always been able to point to a rational basis of which the parties were aware –

or, at minimum, clearly should have been aware. *Cf. FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 317 (1993) (suggesting that Congress could have rationally adopted the explanation articulated by the FCC for its prior administrative scheme in passing a law that tracked these earlier regulations).

Indeed, even where the opportunity to fabricate a justification for government action is squarely presented, this Court declines. In last term's *Armour v. City of Indianapolis*, this Court faced an Equal Protection challenge to the City of Indianapolis's decision to impose different sewer-tax burdens on certain of its residents. The Indiana Supreme Court, in upholding the city's actions, hypothesized a theoretically plausible (but wholly fabricated) justification for the government's actions: perhaps, it speculated, the property owners who paid lower taxes were, for some reason not apparent from the record, actually poorer than the property owners who paid higher taxes. *See City of Indianapolis v. Armour*, 946 N.E.2d 553, 562-63 (Ind. 2011). Every member of this Court rightly ignored this fact-free speculation from the lower court – instead, this Court's analysis focused solely on whether the justifications actually advanced by the government could be squared with the facts actually in the record. *See generally Armour v. City of Indianapolis*, ___ U.S. ___, 132 S. Ct. 2073 (June 4, 2012).

And there is good reason that this Court does not actually uphold laws based on the post hoc speculation of appellate judges: doing so would present serious due-process concerns. The central meaning of due process, as this Court has stressed for over a century, is that parties are entitled to notice and a meaningful opportunity to be heard. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)). And, as lower courts have had repeated occasion to point out, litigation by surprise is not a meaningful opportunity to be heard. *United States v. Bayshore Assocs., Inc.*, 934 F.2d 1391, 1401 (6th Cir. 1991) (noting that a defendant must have notice of the nature of a proceeding to which he is subject); *United States v. Pisani*, No. 98-298, 1998 U.S. Dist. LEXIS 11637, at *2-*3 (S.D.N.Y. July 30, 1998) ("[T]o avoid unfair surprise and accord defendant due process, the Government is directed to furnish to defense counsel . . . a binding particularization of the facts and theories that the Government will rely on at trial to prove venue on the tax charges." (citation omitted)).

Allowing classifications to be upheld based on explanations first invented at the appellate level would fly in the face of these bedrock principles. To be sure, the government is entitled to rely on a rational basis that is not directly supported by record evidence (provided that basis is not undermined or shown to be implausible by record evidence), and the government is similarly entitled to rely on a rational basis that may not have actually been the subjective motivation of each individual legislator. But plaintiffs are entitled to introduce evidence demonstrating a lack of rational connection between a challenged classification and the government interest it allegedly advances, and allowing new post hoc justifications to be fabricated on appeal would make it impossible for even the most conscientious of plaintiffs to build a complete record on summary judgment.

In short, facts matter in rational-basis cases, and rational-basis plaintiffs are allowed to introduce evidence to show courts what those facts are. Because of this, this Court has always evaluated the classifications before it in light of the possible rational bases actually articulated by (or reasonably attributable to) the government, rather than in light of any conceivable justification that could be imagined by an appellate judge.

E. These principles apply to all rational-basis cases.

Even in rational-basis cases where the government wins, this Court does not depart from the principles outlined above. Rather, the basic truths of the rational-basis test are consistently applied in all this Court's rational-basis cases.

Even in *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993) – arguably the most-cited case for the basic proposition that rational-basis analysis is extremely deferential – the Court did not base its decision on wholesale conjecture. Instead, it relied on policy goals articulated by the government and examined the underlying logic of the government's actions.

The plaintiffs in *Beach Communications* had challenged the exemption from cable-television regulations of facilities that provided service to one or more buildings under common ownership without using a public right-of-way. *Id.* at 309. The Court identified two rational bases for this distinction. Most importantly, it identified the policy statement articulated by the FCC, which first promulgated the exemption in regulations before it was adopted by Congress, which had justified the exemption by contending that commonly owned facilities of this sort would tend to be smaller and therefore less in need of regulation. *Id.* at 317. Importantly, the plaintiff-respondents in that case did not refute the underlying factual premises of this distinction – and, indeed, expressly acknowledged that commonly owned facilities (where a single owner would have the incentive to advocate on behalf of his tenants to an outside cable provider) might need less regulation. *Id.* at 318-19. The fact that these premises were plausible – or, in the Court's phrasing, "arguable" – was enough to support a logical connection between the government's classification and the interests it had identified. *Id.* at 320.[13]

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[13] As an alternative possible rational basis, the Court added in a single paragraph that cable distribution across buildings without a common owner could also have been justified by a concern about monopoly power, since the first owner to purchase a satellite dish would be able to connect nearby buildings for only the cost of connecting wire, and nearby owners would be unable to compete without making the hefty investment in a

(Continued on following page)

To be sure, this Court's opinion in *Beach Communications* is the source of some of the most sweeping *dicta* about the rational-basis test, most notably for its statement that "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315. But, read in context, this statement merely stands for the uncontroversial proposition that courts will not engage in factual investigation of what "actually motivated" a legislature or require the government to meet an affirmative evidentiary burden "explaining the distinction on the record." *Id.* (internal citations and quotation marks omitted). It does not purport to invalidate the line of cases reaffirming that courts can and should examine facts and evidence in rational-basis cases, even if the burden of providing that evidence is entirely on the plaintiffs. Indeed, the Court cited *Minnesota v. Clover Leaf Creamery Co.* without finding it necessary to disavow that case's assertion that the Court will reject asserted legislative objectives when "an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation . . . ." 449 U.S. at 463 n.7 (internal quotation marks and citation omitted); *cf. Beach Commc'ns*, 508 U.S. at 315 (citing *Clover Leaf Creamery*, 449 U.S. at 464). And, indeed, in the wake of *Beach Communications*, this Court has continued to examine facts in the rational-basis context.

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dish of their own. *Id.* at 319-20. This alternative, however, was *dicta* and not essential to the Court's core holding.

See, e.g., Romer v. Evans, 517 U.S. 620, 632-33 (1996) (explaining that the government prevails in rational-basis cases where government classifications are "narrow enough in scope and grounded in a sufficient factual context for [the Court] to ascertain some relation between the classification and the purpose it served.").

The disagreement between the Court and Justice Souter's dissenting opinion in *Heller v. Doe*, 509 U.S. 312 (1993) is also instructive. In that case, the Court upheld Kentucky's rules under which a person with mental retardation could be involuntarily committed based on "clear and convincing evidence" while a mentally ill person could only be committed based on a showing "beyond a reasonable doubt." *Id.* at 315. The Court upheld this distinction, accepting Kentucky's argument that mental retardation (unlike mental illness) is a developmental disability that becomes evident in childhood, and that it imposed the lower burden of proof because there was less risk of erroneously committing someone for mental retardation than for mental illness. *Id.* at 322. Justice Souter dissented, arguing that the Court was misunderstanding the "principal object in setting burdens of proof," which was not just to avoid error but to balance all the relevant interests at stake in a hearing. *Id.* at 339-40 (Souter, J., dissenting).

This dispute further clarifies what the rational-basis test is – and is not. The dissenting opinion in *Heller* erred because it disputed the legislature's *ends*, and, unless the ends the legislature is pursuing are illegitimate, this Court does not substitute its own policy judgment for a legislature's. Since Kentucky's policy was to use burdens of proof to equalize the risks of erroneous confinement (rather than to use them as part of a broader balancing test) and since its "basic premise that mental retardation is easier to diagnose than is mental illness ha[d] a sufficient basis in fact," the state's classification survived rational-basis scrutiny. *Id.* at 322; *see also id.* at 322 n.1.

The opinions in *Heller v. Doe*, therefore, illustrate the Court's principled approach to the rational-basis test. Because the test is deferential, the Court did not second-guess Kentucky's policy judgments – it accepted the State's end goal of equalizing the risk of erroneous confinement. In doing so, however, the Court examined the facts to see whether the premises underlying the State's actions were plausible *and* the Court evaluated whether the State's actions were logical in light of its asserted ends. Sometimes applying these principles yields a victory for the government; sometimes it does not. But the Court consistently applies the same meaningful test in every case.

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CONCLUSION

Even under this Court's most deferential standard of review, Section 3 of DOMA can survive only if this Court is able to identify a factually plausible rational basis for it that does not violate any of the principles discussed above. While the lower court correctly discerned the absence of such a rational basis, it incorrectly assumed it was only allowed to make such a factual determination if it was allowed to apply intermediate scrutiny. Because facts matter under any level of scrutiny, the lower court's judgment should be affirmed.

Respectfully submitted,

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NOS. 12-144, 12-307

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, et al., *Petitioners,*

v.

KRISTIN M. PERRY, et al., *Respondents.*

UNITED STATES, *Petitioner,*

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth and Second Circuits

***AMICUS CURIAE* BRIEF OF INTERNATIONAL JURISTS AND ACADEMICS IN SUPPORT OF PETITIONER HOLLINGSWORTH AND RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS AND SUPPORTING REVERSAL**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. The approaches of California and the United States Congress to the legal recognition of same-sex unions are well within the mainstream of other nations' treatment of these unions. 5

A. The decision of the people of California to retain the State's longstanding definition of marriage as the union of a husband and wife while extending benefits associated with marriage to same-sex couples is an approach common to family law internationally. 10

B. The reasons other nations have adopted approaches similar to those of California and the United States Congress on the question of marriage reflect important state interests and are entirely unrelated to any invidious purpose. 15

II. The overwhelming weight of legal opinion from other nations and from supranational bodies rejects the judicial redefinition of marriage.................................... 24

A. Same-sex marriage is not required by international human rights norms............ 24

B. Extensive international authority holds that same-sex marriage should be addressed by democratic institutions, not by the courts..................... 29

CONCLUSION.. 35

TABLE OF AUTHORITIES

Cases

A.D.T. v. the United Kingdom, App. No. 35765/97 (ECtHR, 31 July 2000) 26

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Corinne C. et al. [Prohibition of marriage between persons of the same sex], Conseil constitutionnel, Décision no. 2010-92 QPC de 28 janvier 2011 (France) 19, 29, 30

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Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 28. Februar 1980 .... 9, 14

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Judgment No. 138 of 2010, Corte costituzionale (Italy) 20, 29, 30
K.B. v. National Health Service Pensions Agency, Case No. C-117/01 (2003) 25
Karner v. Austria, App. No. 40016/98 (ECtHR, 24 July 2003) 10
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Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) ... 5, 15
Quilter v. Attorney General (1998) 1 NZLR 523 (N.Z. Court of Appeal) 13
Roper v. Simmons, 543 U.S. 551, 578 (2005) 6
Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96 (ECtHR, 21 December 1999) 26
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Canada Civil Marriage Act, S.C. 2005, c. 33....... 7, 31

Civil Code Article 143 (Law of 30 January 2003) (Belgium).. 7

Civil Partnership Act 2004 chapter 33 (United Kingdom).. 7, 12

Civil Partnership and Certain Rights and Obligations of Cohabitants Act no. 24/2010 (Ireland) 7, 11

Civil Registration Act 2004 (3/2004) (Ireland)........ 12

Civil Union Act 2004 (New Zealand).................. 7, 13

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Civil Unions Bill, B 26B-2006 (South Africa) ... 31, 32

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Laki rekisteröidystä parisuhteesta 950/2001 of 9 November 2001 (Finland) 10

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Lei No. 9/2010 de 31 de maio 2010 (Portugal) 7

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INTEREST OF *AMICI CURIAE*[1]

The following individuals—distinguished jurists and academic experts in international and comparative law—have joined as *amici curiae* to share their broad experience concerning the importance of global legal patterns that continue to protect the institution of heterosexual marriage and related values of family, procreation, and the best interests of children around the world. Institutional affiliation is listed for purposes of identification only; all *amici* are acting in their individual capacities.

- Antonio Baldassarre, former Judge and Emeritus President of the Italian Constitutional Court.
- Giuseppe Mifsud Bonnici, former Judge, European Court of Human Rights, 1992–1998; Visiting Professor, University of Malta.
- Alexey Ivanov, Judge, Sofia Appellate Court, Bulgaria.
- Milan Karabin, former President of the Slovak Supreme Court.
- Ján Klučka, Slovak Republic, Judge of the European Court of Justice of the European

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[1] As required by Rule 37 of the Rules of this Court, all parties have consented to the filing of this brief. *Amici curiae* also represent that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The Marriage Law Foundation, an independent organization not connected with any of the parties, paid for the cost of printing this brief. Otherwise, no person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Union (2004-2009); former Justice of the Slovak Constitutional Court; Professor of International Law at Safarik University Law School in Kosice, Slovakia.

- Paolo Maddalena, Emeritus Vice President of the Italian Constitutional Court.
- Lord Mackay of Clashfern, KT PC QCs, former Lord Chancellor; active member, House of Lords, former Dean of the Faculty of Advocates (leader of the Scots bar).
- Georg Ress, former Judge, European Court of Human Rights (1998 – 2004); Emeritus Professor of Law, Universität des Saarlandes, Germany.
- Ombretta Fumagalli Carulli, Director, Department of Law, Università Cattolica del Sacro Cuore; Member, Pontifical Academy of Social Sciences; former State Secretary to the Prime Minister and Vice Minister; former member of the Italian Parliament and Supreme Council of Magistrates.
- Frans A.M. Alting von Geusau, Professor Emeritus of International Law, Tilburg University and Leiden University; former Director of the John F. Kennedy Institute, Center for International Studies, Tilburg University, Netherlands.
- W. Cole Durham, Jr., Susa Young Gates University Professor of Law and Director, International Center for Law and Religion Studies, J. Reuben Clark Law School, Brigham Young University.
- David F. Forte, Professor of Law, Cleveland-Marshall College of Law; Former Consultor Pontifical Council for the Family, Vatican.

- Donald P. Kommers, Professor Emeritus of Political Science and Concurrent Professor of Law, University of Notre Dame.
- Radoslav Prochazka, Member of Parliament and former Chair of the Judiciary Committee of the Slovak Parliament (National Council); Slovakia's Agent to the Court of Justice of the European Union; Professor of Jurisprudence at Trnava University Law School.
- Jeremy A. Rabkin, Professor, George Mason University School of Law; Board of Directors of the United States Institute of Peace.
- Balazs Schanda, Dean, Faculty of Law, Pázmány Péter Catholic University, Budapest.
- Roger Trigg, Emeritus Professor of Philosophy, University of Warwick, and Senior Research Fellow, Ian Ramsey Centre, University of Oxford.

SUMMARY OF THE ARGUMENT

The overwhelming weight of international authority—including a majority of liberal western democracies with established traditions of concern for the rights of gays and lesbians—is that reserving the formal institution of "marriage" to opposite-sex couples while supporting same-sex couples through other rights and legal mechanisms is sound public policy. This authority confirms that differences among various national, state and federal jurisdictions on the subject are fully compatible with international norms. The accumulated wisdom reflected in the countless legislative, judicial and administrative judgments is based not on irrationality, ignorance, or animus toward gays and lesbians but on considered judgments about the unique nature and needs of same-sex couples and children. Of course, foreign law and practice cannot and should not determine the meaning of U.S. Constitutional guarantees. But the vast experience in other countries is nevertheless instructive when considering whether—as the Ninth Circuit has held—California's decision to reserve marriage to opposite-sex couples while at the same time extending the rights of marriage to same-sex couples could only have arisen from irrationality, ignorance, or rank prejudice. International experience contradicts the Ninth Circuit's conclusion. International practice confirms the wisdom of allowing legislative flexibility in the pace and structure of legal change.

Accordingly, most foreign jurisdictions have concluded that decisions on the culturally sensitive issues of marriage and marriage-like rights for same-sex couples should be reached through democratic processes based on careful policy making and compromise rather than through judicial mandates. National and international courts have overwhelmingly refused to trump the democratic process in the name of gay and lesbian rights when adjudicating claims analogous to those at issue here.

In short, international authorities confirm that there are rational, non-invidious reasons based in secular public policy considerations for the choice that the people of California made when enacting Proposition 8 and that Congress made when enacting the Defense of Marriage Act (DOMA). The Ninth Circuit's holding that the people of California had no rational basis for adopting Proposition 8 is at odds with the substantive consensus that is evident in a majority of other jurisdictions. That decision demeans the political processes that reached these outcomes. The lesson for both *Hollingsworth* and *Windsor* is that particularly where, as here, profoundly divisive issues are at stake, the dominant international pattern of resolving such issues through normal democratic processes rather than through extraordinary judicial intervention is much the wiser course.

ARGUMENT

I. The approaches of California and the United States Congress to the legal recognition of same-sex unions are well within the mainstream of other nations' treatment of these unions.

The majority opinion below asserted that the decision of the people of California to retain the definition of marriage as the union of a husband and wife in their constitution was singular. The Ninth Circuit held that California's definition of marriage violated the Equal Protection Clause in that the "unique and strictly limited effect" of California's marriage amendment was to "take away" from same-sex couples "the official designation of 'marriage'" while "leaving in place all of its incidents." *Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012). Likewise, the Second Circuit found it a violation of the Equal

Protection Clause to have a uniform Federal definition of marriage because, among other reasons, "DOMA's sweep arguably creates more discord and anomaly than uniformity." *Windsor v. United States*, 699 F.3d 169, 186 (2d Cir. 2012).

These conclusions conflict not only with the laws of the vast majority of U.S. jurisdictions but with the weight of international legal authority. To be sure, we are not suggesting that international legal opinion is in any way determinative on the question presented. But this Court has, in another context, "acknowledge[d] the overwhelming weight of international opinion" not to determine the meaning of the U.S. Constitution's guarantees but to "provide respected and significant confirmation" of the Court's conclusions about those guarantees. *Roper v. Simmons*, 543 U.S. 551, 578 (2005). Here, the Ninth Circuit's condemnation of Proposition 8 as irrational and born of prejudice is belied by extensive international authority, including that of most western liberal democracies. The rationality of California's approach is confirmed by the fact that the majority of countries that recognize some form of same-sex union have, like California, reserved the designation of marriage solely for opposite-sex couples.[2] Further, the Second Circuit's conclusion that DOMA creates "discord" and "anomaly" is

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[2] Fifteen states recognize same-sex unions without the designation of marriage. Andorra (Qualificada de les unions estables de parella [Termed Stable Marriage Unions] 17 BOPA No. 25 (Law 4/2005)), Australia (Family Law Act 1975 sec. 60EA), Austria (Eingetragene Partnerschaft-Gesetz (EPG) Act of 30 December 2009), Ecuador (Constitución de 2008 art. 68), Finland (Lag 950 of 28 September 2001 Amended by Lag 59 of 4 February 2005), France (Loi relative au pacte civil de

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solidarité [Law on the Civil Solidarity Act] No. 99-944 (1999)); Germany (Gesetz zur Beendigung der Diskriminierung Gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften [Act to End Discrimination Against Same-Sex Unions: Civil Partnerships], 2001 BGBl. No. 9 S. 266 (2001), as amended by Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts [Law on the Revision of Civil Partnership Law], 2004 BGBl. No. 29 S. 3996 (2004)), Ireland (Civil Partnership and Certain Rights and Obligations of Cohabitants Act no. 24/2010), Liechtenstein (Lebenspartnerschaftsgesetz (2011)), Luxembourg (Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats), New Zealand (Civil Union Act 2004, 2004 S.N.Z. No. 102), Slovenia (Zakon o registraciji istospolne partnerske skupnosti [Act on Registered Partnerships] (2009)), Switzerland (Loi fédérale sur le partenariat enregistré entre personnes du même sexe du 18 juin 2004 [LSP] [Federal Law on registered partnerships between persons of the same sex] no. 210, art. 95), Uruguay (Ley N° 18.246 Unión Concubinaria) United Kingdom (Civil Partnership Act 2004, c. 33).

Same-sex unions are permitted to have the designation of marriage in twelve states: Argentina (Ley No. 26.618 de 22 de julio 2010 (CXVIII) B.O. 31.949); Belgium (Civil Code Article 143); Canada Civil Marriage Act, S.C. 2005, c. 33; Denmark (Lov nr. 532 af 12 June 2012 Gældende); Iceland (Lög Nr. 65/2010, 836 - 485th issue, 23 March 2010); The Netherlands (Act on the Opening Up of Marriage 2001); Norway (Besler. O. nr. 91 (2007-2008)), Portugal (Lei No. 9/2010), South Africa (Civil Union Act 17 of 2006), Spain (Ley 13/2005 el día 1 de julio de 2005); and Sweden (Svensk författningssamling 2011:891). Canada and South Africa have both enacted laws giving marriage status to same-sex couples following court order. *See Halpern v. Canada* (Att'y Gen.), [2003] 6[illegible] O.R. 3d 161 (Can. Ont. C.A.); *Hendricks v. Quebec*, [2002] R.J.Q. 2506 (Can. Que.); *Barbeau v. British Columbia* (Att'y Gen.), [2003] 12. B.C.L.R. 4th 1 (Can. B.C.); *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC). Of the 12, Brazil is the only country to have instituted same-sex marriage simply by judicial decision. Superior Tribunal of Justice – R.E. 1.183.378 RS (2010/0036663-8) (1 February 2012).

inconsistent with precedent from countries and multi-country jurisdictions, such as the European Court of Human Rights, which have recognized the reasonableness and legitimacy of legal approaches that seek *both* to define marriage as a heterosexual union *and* at the same time to protect the rights of gay and lesbian couples.[3]

At the outset, it is important to recognize that the vast majority of nations define marriage as solely the union of man and woman. Only twelve non-U.S. jurisdictions recognize same-sex unions as marriages.[4] *All* of the rest retain the understanding of marriage as the union of a man and a woman. That is, taking the number of member states of the United Nations as the reference point, fifteen times more countries disallow same-sex marriage than allow it. Additionally, many nations have adopted constitutional provisions defining marriage, explicitly or implicitly, as the union of a husband and wife—more nations than have recognized any form of same-sex union. A 2010 article lists thirty-five such nations.[5] Since then, Hungary has adopted a constitution that expressly limits marriage to opposite-sex couples.[6] The German Constitutional

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[3] *See, e.g.*, *Schalk and Kopf v. Austria*, App. No. 30141/04 (ECtHR, 24 June 2010) (holding that Austria's refusal to allow judicial recognition of same-sex marriage was within Austria's "margin of appreciation," but noting with approval the passage of civil partnership legislation).

[4] *See supra* note 2.

[5] Lynn D. Wardle, *Who Decides? The Federal Architecture of DOMA and Comparative Marriage Recognition*, 4 CAL. WEST. INT'L. L. J. 143, 186-187 note 251 (2010).

[6] "Hungary protects the institution of marriage between man and woman, a matrimonial relationship voluntarily

Court has interpreted its constitution to the same effect.[7] In 2011, a new Civil Code went into effect in Romania including a definition of marriage that provides a statutory interpretation of the relevant constitutional provision: "Marriage is the freely consented to union between a man and a woman, established as provided by law."[8]

A smaller number of jurisdictions have sought to give recognition to same-sex relationships and provide them with legal incidents associated with marriage. In doing so, a few have redefined marriage to include same-sex couples. But most have instead crafted compromises that stop short of changing the definition of marriage or even providing all marriage incidents to same-sex couples. In this light, California's approach ranks among the most liberal and accommodating in the world. The distinction between state and federal marriage rights allows the people of each state in our diverse nation to follow different paths. A minority of nine U.S. states have

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established, as well as the family as the basis for the survival of the nation." L cikk, A Magyar Köztársaság Alkotmánya (Hungary).

[7] Article 6 of the German Constitution also protects marriage. The Federal Constitutional Court has interpreted this provision to refer to "the union of a man and a woman." Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court of Germany] 28. Februar 1980, 53, 245. Similarly, the Romanian Constitution contains a general protection of marriage. Constitution of Romania art. 48.

[8] Codul Civil (2009) (Romania) art. 259(a); *see* Daniel Buda, *The Administrative Reform in Romania: The New Civil Code and the Institution of Marriage* 36 TRANSYLVANIAN REV. OF ADMIN. SCIENCES 27, 33 (2012).

(along with twelve foreign nations) permitted same-sex marriage. The majority of states have chosen to enact constitutional amendments, statutes, or cultural norms defining marriage as between one man and one woman, as is the case in the remaining 180 sovereign states recognized by the United Nations.

A. The decision of the people of California to retain the State's longstanding definition of marriage as the union of a husband and wife while extending benefits associated with marriage to same-sex couples is an approach common to family law internationally.

Like California, a number of nations have extended legal recognition to same-sex unions while retaining the virtually universal understanding of marriage as the union of a husband and wife. In Europe, the combination of a law defining marriage as the union of a man and a woman and a legal status extending incidents traditionally associated with marriage to same-sex couples is common.

For example, since 2003, Austria has granted same-sex cohabiting couples the same legal incidents accorded to opposite-sex cohabiting couples.[9] In 2009, the Austrian Parliament approved a bill creating a registered partnership status through which same-sex couples can access many of the incidents of marriage, though others related to children such as adoption and access to in vitro fertilization are not available.[10]

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[9] *Karner v. Austria*, App. No. 40016/98 (ECtHR, 24 July 2003).

The Czech Republic enacted registered partnership legislation for same-sex couples in 2006, providing registered couples with some limited incidents of marriage related chiefly to decision-making on behalf of the other party.[11]

In 2002, Finland created a registered partnership status with significant marriage incidents extended to same-sex couples.[12]

In 1999, France enacted a legal status called a *pacte civil de solidarite* (PACs). Parties to the pact, who can be of the same or opposite-sex, register it with a court clerk and can access some of the incidents of marriage.[13] The available incidents have been increased since the initial enactment of the law to encompass inheritance rights.[14]

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[10] Eingetragene Partnerschaft-Gesetz [EPG] Bundesgesetzblatt [BGBl] no. 135/2009 (Austria).

[11] Act no. 115/2006 Coll. on Registered Partnership (Czech Republic); *see* Macarena Saez, *Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why "Same" Is So Different*, 19 J. GENDER, SOC. POL'Y. & L. 1, 30 (2011).

[12] Laki rekisteröidystä parisuhteesta 950/2001 of 9 November 2001 (Finland).

[13] Loi 99-944 du 15 novembre 1999 relative au pacte civil de solidarité (France), Journal Officiel de la République Française [J.O.], 16 November 1999, p. 16959.

[14] Joëlle Godard, *PACS Seven Years On: Is It Moving Towards Marriage?*, 21 INT'L J.L. & FAMILY 310, 317 (2007). In 2011, the new French government announced support for legislation to redefine marriage but has since stalled enacting such a law because of significant opposition in the nation, including a

Ireland approved a Civil Registration Act in 2004 which specifically provides that "there is an impediment to marriage if ... both parties are of the same-sex."[15] In 2010, however, the Irish government created a civil partnership status for same-sex couples allowing registrants to access some marriage incidents.[16]

Slovenia enacted a registered partnership law in 2005 to provide gay and lesbian couples incidents of marriage related to property, support obligations and inheritance.[17]

In 2005, a popular referendum in Switzerland approved a registered partnership status for same-sex couples, creating property rights, support obligations and inheritance rules for registrants.[18]

The United Kingdom recognizes marriage as the union of a man and a woman but nevertheless accords all of the benefits of marriage to same-sex couples.[19]

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recent march of 70,000 people in favor of retaining the nation's legal definition of marriage as the union of a husband and wife. *French Protests Against Gay Marriage Bill*, BBC, 17 November 2012, at http://www.bbc.co.uk/news/world-europe-20382699.

[15] Civil Registration Act 2004 (Act No. 3/2004) (Ireland).

[16] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Act No. 24/2010) (Ireland).

[17] Zakon o registraciji istospolne partnerske skupnosti (Slovenia).

[18] Loi fédérale sur le partenariat enregistré entre personnes du même sexe du 18 juin 2004 (Switzerland).

[19] Civil Partnership Act 2004, c. 33 (United Kingdom). On 24 January 2013 the UK Culture Secretary ordered publication of the Marriage (Same Sex Couples) Bill 126. The prospect of such

Australia and New Zealand also have laws providing some marriage incidents to same-sex couples while retaining the husband-wife definition of marriage. The Parliament of Australia enacted specific legislation in 2004 defining marriage as "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life" and prohibiting recognition of same-sex marriages contracted in other jurisdictions.[20] Separately, Parliament has amended various laws to ensure same-sex cohabiting couples and opposite-sex cohabiting couples are treated alike.[21]

In New Zealand, the Court of Appeal interpreted its marriage act to refer to male-female unions.[22] Many of the incidents of marriage in New Zealand have been extended to same-sex couples in civil unions, although not the presumption of paternity or ability to jointly adopt children.[23]

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action has met with significant protest, and on 25 January the Bishop of Leicester released a statement noting that the Church of England "continues to hold the view, set out in doctrine and Canon law, that marriage is a union between one man and one woman. It is a social institution that predates both church and state and has been part of the glue that has bound countless successive societies together." Available at http://churchofengland.org/media-centre/news/2013/01/bishop-of-leicester-responds-to-marriage-(same-sex-couples)-bill.aspx.

[20] Marriage Amendment Act 2004 (Cth) §§ 1, 3 (Australia).

[21] Australia Government Attorney-General's Department, *Same Sex Reforms: Overview of the Australian Government's same-sex law reforms*, at http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Samesexreforms.aspx.

[22] *Quilter v. Attorney General* (1998) 1 NZLR 523 (New Zealand Court of Appeal).

[23] Civil Union Act 2004 (New Zealand).

Germany and Hungary grant constitutional protection to marriage as the union of a husband and wife while providing marriage-related benefits to same-sex couples. Germany's Constitution specifies that marriage shall enjoy the special protection of the state.[24] As noted above, the Federal Constitutional Court has interpreted this provision to refer to "the union of a man and a woman."[25] In 2001, Germany's legislature created a legal status for "life partnerships" that offered many marriage incidents to same-sex couples (though not joint adoption).[26] In 2004, parliament amended the law to allow for stepparent-like adoptions of one partner's biological child by the other partner.[27] Hungary's marriage amendment is more explicit and was adopted since Proposition 8 in California. In a legal status separate from marriage, Hungary provides most marriage incidents to registered partners, though not joint adoption or access to artificial insemination.[28]

To summarize, California family law mirrors the approach of at least ten European nations, Australia,

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[24] Grundgesetz für die Bundesrepublik Deutschland [GG], 23. Mai 1949, Bundesgesetzblatt [BGBl.] VI (Germany).

[25] Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 28. Februar 1980, 53, 245 (Germany).

[26] Gesetz über die Eingetragene Lebenspartnerschaft [LpartG] [Life Partnership Act] 16 February 2001, Bundesgesetzblatt [BGBl] I, 266 (Germany).

[27] *Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts*, 20 December 2004, Bundesgesetzblatt [BGBl] I, 69 (Germany).

[28] Zsolt Körtvélyesi & András L. Pap, *National Report: Hungary*, 19 AM. U. J. GENDER SOC. POL'Y & L. 211, 212 (2011).

New Zealand, and others[29] by defining marriage as the union of a husband and wife while extending marriage incidents to same-sex couples. Indeed, the California approach—extending all marriage incidents—is more expansive than that of most European nations. The fact that California has extended substantially broader benefits to same-sex couples than have been granted by many reform initiatives in Europe and the Pacific can scarcely be taken as evidence that its policies are benighted and less than rational. To the contrary, the appropriate interpretation is that the California electorate sought to effectuate a compromise that would respect the rival dignity claims of groups with profoundly different lifestyle commitments. One of the primary values of protecting legislative flexibility is precisely that it opens up possibilities of nuanced compromise.

B. The reasons other nations have adopted approaches similar to those of California and the United States Congress on the question of marriage reflect important state interests and are entirely unrelated to any invidious purpose.

The panel below found that the purported uniqueness of California's marriage amendment necessitated a finding that it was motivated by animus. *Perry*, 671 F.3d at 1018. As the marriage amendment's official proponents have demonstrated, this is an entirely unfounded supposition. Here again, comparative and international law help explain the important state interests reflected in retaining opposite-gender marriage.

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[29] See *supra* note 2.

Courts and legislative bodies in a number of nations and supranational entities have, like this Court, had to address claims for same-sex marriage. These nations' constitutions, decisions and debates make clear that retaining the understanding of marriage as the union of husband and wife can be motivated and justified by important social considerations unrelated to invidious discrimination against gay men and lesbians.

The most significant and widespread argument for retaining the male-female definition of marriage relates to the importance of maintaining a link between marriage and procreation.

In numerous countries—including those whose constitutions implicitly or explicitly define marriage as a relationship between one man and one woman—family, children and parenting are all linked in the constitutional text. Examples include Azerbaijan, Belarus, Bolivia, Hungary, Germany, Latvia, Lithuania, Moldova, Paraguay, Poland, Suriname, Turkmenistan, and Ukraine.[30] For example, the

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[30] Constitution of the Republic of Belarus [Konstituitsiia Respubliki Belarus] art. 32 ("Marriage, the family, motherhood, fatherhood, and childhood shall be under the protection of the State"); Constitution of the Republic of Latvia [Satversme] art. 110 ("The state protects and supports a marriage, the family, the rights of parents and children."); Constitution of the Republic of Lithuania [Lietuvos Respublikos Konstitucija] art. 38 ("The family shall be under the protection and care of the

German constitution states that "[m]arriage and family shall enjoy the special protection of the state," that "the care and upbringing of children is the natural right of parents," and that "[e]very mother shall be entitled to the protection and care of the community."[31]

The German Constitutional Court has held that these provisions "guarantee the essential structure of marriage."[32] Even while upholding the right of the legislature to create same-sex civil partnerships, the

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state. ... Marriage shall be concluded upon the free mutual consent of man and woman."; República de Paraguay Constitución Política art. 52 ("The union in marriage by a man and woman is one of the fundamental factors in the formation of a family."); Constitution of the Republic of Poland [Konstytucja Rzeczypospolitej Polskiej] art. 18 ("Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland."); Constitution of Suriname [Grondwet van Suriname] art. 35 (enumerating six fundamental rights associated with marriage, three of which relate to the value of procreation and children in marriage: that "[e]very child shall have the right to protection[,]" that "[p]arents shall have the same responsibilities towards legal or natural children[,]" and that "[t]he State recognizes the extraordinary value of motherhood"); Constitution of Ukraine [Konstytutsiia Ukrainy] art. 51 ("Marriage shall be based on free consent between a woman and a man. Each of the spouses shall have equal rights and duties in the marriage and family. ... The family, childhood, motherhood, and fatherhood shall be under the protection of the State."); Hungary, *supra* note 6.

[31] Grundgesetz für die Bundesrepublik Deutschland [GG], 23. Mai 1949, BGBl. VI (Germany).

[32] Civil Partnership Case, 105 BverfGE 313 (2002) [Germany], English translation in Donald P. Kommers and Russell A. Miller, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (3d ed. 2012), 608.

German Constitution Court has ruled that that "part of the content of marriage, as it has stood the test of time ... is that it is the union of one man with one woman to form a permanent partnership ... ."[33] The constitutional protection of marriage means that "marriage alone, like the family, enjoy constitutional protection as an institution. No other way of life ... merits this protection. Marriage cannot be abolished nor can its essential structural principles be altered without an amendment to the constitution."[34] The Court emphasized that marriage is not only a "sphere of freedom" but also a "social institution" and that the "structural principles that characterize marriage give it the form and exclusivity in which it enjoys constitutional protection as an institution."[35]

Other countries' parliaments or constitutional courts have specifically identified the realities of procreation and children as important state interests in retaining marriage as a heterosexual union. Examples include the parliaments of UK, Ireland, and Australia and constitutional courts of France, Italy, and Ireland. [36]

The example of France is instructive. In 2011, the Constitutional Council of France held "that the difference in situation between couples of the same sex and couples composed of a man and a woman can warrant a difference in treatment in regards to the rule of family law."[37] It understood this difference in situation between same-sex and opposite-sex couples as being in "direct relation to the purpose of the [French marriage] law,"[38] permitting the tribunal to reject the equality claims of two women who sought a marriage license.

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[33] *Id.*

[34] *Id.* at 609.

[35] *Id.* at 609-10.

[36] See *infra* notes 37-54 and accompanying text.

Earlier, in a 2005 case assessing the validity of a marriage license issued to a same-sex couple, the court of appeal in Bordeaux rejected the notion that failure to issue licenses to same-sex couples is discrimination.[39] It reasoned that the existing marriage law merely recognizes "the fact that nature has made potentially fertile only opposite-sex couples" and the law "take[s] this biological reality into account" in determining the forms of marriage "encompassing the couple and the predictable consequences which are commonly children, in a specific institution called marriage."[40] Thus, for French law, marriage is "a social platform for a family" and same-sex couples "that nature did not create potentially fruitful are therefore not implicated in this institution" so "their legal treatment is different because their situation is not analogous."[41]

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[37] *Corinne C. et al.*, Decision No. 2010-92 QPC, French Constitutional Council, 28 January 2011, ¶10 as quoted in William C. Duncan, ***Why French Law Rejects a Right to Gay Marriage: An Analysis of Authorities***, 2 INT'L. J. JURISPRUDENCE FAM. 215, 223 (2011)

[38] *Id.*

[39] *Arrêt de la cour d'appel de Bordeaux*, 6e ch., 19 April 2005, 04/04683, *appeal dismissed*, Cass. 1e civ., ar. 3, 2007, 05-16.627, Decision No. 511, as quoted in Duncan, 2 INT'L. J. JURISPRUDENCE FAM. at 220.

[40] *Id.*

In a 2006 report of the Mission of Inquiry on the Family and the Rights of Children, a French parliamentary commission also relied on the significance of procreation to marriage. It rejected the idea of marriage as no more than a "contractual recognition of a couple's love. It is a demanding framework with rights and obligations designed to welcome the child and provide for his or her harmonious development."[42] The Mission of Inquiry concluded that it "is not possible to consider marriage and filiation separately, since the two entities are closely related, marriage being built around children."[43] The fact that same-sex couples sometimes raise children was not dispositive for the commission because "since children conceived in that way require a third party donor, if not a surrogate ... same-sex couples are objectively not in the same situation as heterosexual couples."[44]

Similarly, the Constitutional Court of Italy upheld the constitutionality of that nation's marriage laws in a 2010 decision that also relied on an understanding of the potential procreative nature of marriage.[45] The court noted that Article 29 of the

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[41] *Id.*

[42] Rapport fait au nom de la mission d'information sur la famille et les droits des enfants, No. 2832, l'Assemblée nationale le 25 janvier 2006 (English translation at http://www.preservemarriage.ca/docs/France_Report_on_the_Family_Edited.pdf 65).

[43] *Id.* at 68).

[44] *Id.* at 76).

[45] *Judgment No. 138 of 2010*, Corte costituzionale (Italy).

Italian Constitution provides recognition to marriage and the family, and then Article 30 makes provision for the protection of children. The court explained the significance of this fact: "it is not by chance that, after addressing marriage, the Constitution considered it necessary to deal with the protection of children." The court noted that Article 30 protects the rights of children "born outside marriage." It declared: "The necessary and fair protection guaranteed to biological children does not undermine the constitutional significance attributed to the legitimate family and the (potential) creative purpose of marriage which distinguishes it from homosexual unions."[46] The court explained that the nation's marriage law "is grounded on Article 29 of the Constitution" and "the legislation itself does not result in unreasonable discrimination, since homosexual unions cannot be regarded as homogenous with marriage."[47]

In the United Kingdom, during the debate over Civil Partnerships in the House of Lords in 2004, government minister Baroness Scotland of Asthal explained that the legislation was intended to offer "a secular solution to the disadvantages which same-sex couples face in the way they are treated by our laws" but not to "undermine or weaken the importance of marriage." She said: "it is important for us to be clear that we continue to support marriage and recognise that it is the surest foundation for opposite-sex couples raising children."[48]

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[46] *Id.* at 26-27.
[47] *Id.* at 27.

When the Australian Parliament debated the 2004 law to enshrine the definition of marriage, the Attorney General introduced the measure noting that marriage "is vital to the stability of our society and provides the best environment for the raising of children." He referred to marriage as "a central and fundamental institution."[49] In the Senate, the major opposition Labor Party announced its support of the measure.[50] A Senate Committee report from 2009 recommending rejection of a bill to create same-sex marriage based its recommendation, in part, on submissions to the Committee that "argued in favour of preserving the narrower and common definition on the basis of 'natural procreation' and on the potential effect of same-sex parenting on children."[51] In 2012, Parliament again considered a proposal to redefine marriage. The key speech in opposition in the Senate argued "marriage is ... ultimately about the next generation and its socialisation, with the benefit of having, if at all possible, mother and father role models."[52] The proposal was rejected 98-42 in the House of Representatives and 41-26 in the Senate.[53]

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[48] Civil Partnership Bill [H.L.], House of Lords Debate, 22 April 2004, Hansard vol. 660 cc. 388-433, available at http://hansard.millbanksystems.com/lords/2004/apr/22/civil-partnership-bill-hl.

[49] Australia House of Representatives, Marriage Amendment Bill 2004, Second Reading Speech, 24 June 2004 (Philip Rudock, MP).

[50] Australia Senate, Marriage Amendment Bill 2004, Second Reading Speech, 12 August 2004 (Senator Joe Ludwig).

[51] Australia Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2009* (November 2009).

In a High Court decision in Ireland involving a challenge to the government's failure to treat same-sex couples as married for tax purposes, the court heard extensive evidence on the potential effects of same-sex marriage for child well-being. In rejecting the claim for recognition of same-sex marriage, the court said: "Until such time as the state of knowledge as to the welfare of children is more advanced, it seems to me that the State is entitled to adopt a cautious approach to changing the capacity to marry albeit there is no evidence of any adverse impact on welfare."[54]

Notably, even some of the nations that have redefined marriage to include same-sex couples recognize the salience of these procreation concerns. The first nation to give legal recognition to same-sex marriage, the Netherlands, still does not apply the presumption of parentage associated with marriage to male same-sex couples.[55] Belgium, which redefined marriage in 2003, and Spain, which did so in 2005, do not extend the presumption of parentage to same-sex married couples.[56] Thus, these nations have attempted to recognize biological realities that have long been linked to the legal regulation of marriage even as they have redefined it. This, of course, is only possible when the law is created by political bodies which can make these kinds of distinctions, rather than courts charged with an up-or-down vote on constitutionality.[57] Legislators need to be left free to take into account the rich and complex ways that the connections of marriage and the best interests of children are woven together in the fabric of society.

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[52] Australia Senate, Marriage Amendment Bill (No. 2) 2012, Speech, 18 September 2012 (Senator Eric Abetz).

[53] Peter Westmore, *Australian People Win on Marriage*, NEWS WEEKLY (13 October 2012).

[54] *Zappone v. Revenue Commissioners*, [2006] IEHC 404 (Ireland High Court 2006), p. 130.

[55] Saez, *supra* note 11 at 4.

[56] *Id*. at 5-6.

II. The overwhelming weight of legal opinion from other nations and from supranational bodies rejects the judicial redefinition of marriage.

A. Same-sex marriage is not required by international human rights norms.

As will be discussed in this section, the European Court of Justice, the European Court of Human Rights, the United Nations Human Rights Committee, the French Constitutional Court, the Italian Constitutional Court, the German Federal Constitutional Court, and the New Zealand Court of Appeal have all rejected the notion that same-sex marriage is a constitutional or human right. Particularly instructive is the opinion of the European Court of Human Rights which examines the consensus of member states to determine whether they have established a certain norm in their practice. It is instructive that they have found no such consensus in Europe. In contrast with the decision of the Second Circuit, it is also significant that the European Court of Human Rights has not required uniformity on marriage law among the 47 states it oversees.

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[57] *Cf.* Duncan, 2 INT'L. J. JURISPRUDENCE FAM. 222 (arguing that in framing same-sex marriage as an issue of rights and equality, some U.S. courts have ignored the interests of children recognized by French tribunals).

The Ninth Circuit's holding that California's retention of the designation "marriage" for heterosexual unions was unique is not only erroneous, but to the contrary, it is the panel's conclusion that the U.S. Constitution mandates a judicial redefinition of marriage that is out of step with international legal patterns.

International tribunals consistently have been unwilling to impose same-sex marriage through judicial interpretation of international human rights norms.

One of the earliest decisions along these lines was handed down in 2003 by the European Court of Justice. It held the Convention on Human Rights "protects only traditional marriage between two persons of opposite biological sex."[58] A subsequent proceeding concurred, citing a European Court of Human Rights decision to the effect that "the barrier to marriage arising from the fact that English law does not allow a transsexual who has undergone gender reassignment to amend his or her birth certificate does not constitute an infringement of Articles 8, 12 or 14 of' the Convention.[59]

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[58] *K.B. v. National Health Service Pensions Agency*, Case No. C-117/01 (2003) ¶55.

Even the European Court of Human Rights, which has been supportive of sexual orientation claims in a large number of other settings,[60] has declined to recognize a right to same-sex marriage. In *Schalk and Kopf v. Austria*,[61] the Court rejected the claim, similar to that presented here, that an Austrian law permitting same-sex couples to contract registered partnerships but not marriages violated the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court held the right to marry protected in Article 12 of the Convention "does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage."[62]

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[59] *Id.* at ¶24. .

[60] See, e.g., *Dudgeon v. the United Kingdom*, App. No. 7525/76 (ECtHR, 22 October 1981) (barring prohibition of homosexual activity by consenting adults); *Lustig-Prean and Beckett v. the United Kingdom*, App. Nos. 31417/96 and 32377/96 (ECtHR, 27 September 1999) (extensive investigation into lives of homosexual military officials violated privacy rights); *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96 (ECtHR, 21 December 1999) (holding that sexual orientation discrimination falls under Article 14's general ban on discrimination); *A.D.T. v. the United Kingdom*, App. No. 35765/97 (ECtHR, 31 July 2000) (states may not ban private taping of homosexual acts); *E.B. v. France*, App. No. 43546/02 (ECtHR, 22 January 2008) (sexual orientation discrimination in application of adoption law violates Article 14's nondiscrimination ban);

[61] App. No. 30141/04 (ECtHR, 24 June 2010).

[62] *Id.* at ¶63.

The *Schalk* decision explicitly rejected a claim analogous to plaintiffs' Equal Protection claim here: that the failure to redefine marriage constituted sexual orientation discrimination. Even holding that "differences based on sexual orientation require particularly serious reasons by way of justification," the Court rejected the claim of discrimination because "a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy."[63] The court also noted that while "there is an emerging European consensus towards legal recognition of same-sex couples ... this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes."[64] The court also held that Austria could make its own determinations about the precise incidents of marriage extended to same-sex couples even if they did not create precise equality with those accorded married couples.[65]

In 2012, in a case involving France's adoption law, the European Court of Human Rights confirmed this holding, noting "Article 12 of the Convention does not impose on the governments of member

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[63] *Id.* at ¶97.

[64] *Id.* at ¶105.

[65] *Id.* at ¶108.

States the obligation to extend the right of marriage to a same-sex couple."[66]

Later in 2012, the European Court also had occasion to address the question of whether Finnish law could permissibly require that an individual undergoing a gender change transform her marriage into a civil partnership. In that case, the court explained: "While it is true that some Contracting States have extended marriage to same-sex partners, this reflects their own vision of the role of marriage in their societies and does not flow from an interpretation of the fundamental rights as laid down by the Contracting States" in the European Convention.[67]

In 1998, the New Zealand Court of Appeal also rejected a claim for same-sex marriage. The majority held that the Bill of Rights Act did not require redefinition because "there was no discrimination since there was no differential treatment (gay and lesbian people can marry just as much as non-gay and non-lesbian people can—neither gay nor straight people can marry partners of the same sex)."[68]

As discussed above, the Italian Constitutional Court, German Federal Constitutional Court and French Constitutional Council also rejected claims that national constitutions mandated recognition of same-sex marriage or similar statuses.[69]

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[66] *Gas and Dubois v. France*, App. No. 25951/07 (ECtHR, 15 March 2012) ¶66.

[67] *H. v. Finland*, App. No. 37359/09 (ECtHR, 13 November 2012) ¶38.

[68] Kenneth McK. Norrie, *National Report: New Zealand*, 19 AM. U. J. GENDER SOC. POL'Y & L. 265, 269 (2011).

Finally, the United Nations Human Rights Committee, the official treaty body charged with interpreting the International Covenant on Civil and Political Rights, has held that the Covenant created a treaty obligation "to recognize as marriage only the union between a man and a woman wishing to marry each other" and that a "mere refusal to provide for marriage between homosexual couples" did not breach the Covenant.[70]

B. Extensive international authority holds that same-sex marriage should be addressed by democratic institutions, not by the courts.

With the exception of Brazil, Canada, and South Africa, international judicial bodies have consistently declined to redefine marriage, considering this an issue to be determined in legislatures.

The European Court of Human Rights rejected a claim that the Convention for the Protection of Human Rights and Fundamental Freedoms required member nations to create same-sex marriage: "the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of the national authorities, who are best placed to assess and respond to the needs of society."[71]

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[69] *Judgment No. 138*, *supra* note 45 at 25; Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 17. Juli 2002, 1 BvF 1/01, ¶111; *Corinne C. et al.*, *supra* note 37.

[70] *Joslin v. New Zealand*, Comm. No. 902/1999, U.N. Doc. CCPR/C/75/D/902/1999 (U.N. Hum. Rts. Cmte. 2002).

The Italian Constitutional Court similarly concluded that "it is for Parliament to determine—exercising its full discretion—the form of guarantee and recognition for the aforementioned unions" referring to same-sex cohabiting relationships.[72] In rejecting a challenge to the country's civil partnership law, Germany's Federal Constitutional Court also stated that for the legislature "it is not forbidden in general to establish new opportunities for couples of opposite sex or for other relationships … . But there is no constitutional command to create such opportunities."[73]

The French Constitutional Council has held that it is not the prerogative of the court "to substitute its appreciation to that of the legislator in considering, in this manner, the difference in situation" between same and opposite-sex couples.[74]

Of the twelve countries that have redefined marriage to include same-sex couples, nine have done so without the involvement of judicial bodies relying on constitutional or human rights provisions;

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[71] *See Schalk and Kopf, supra* note 3 at ¶62.

[72] *Judgment No. 138, supra* note 45 at 25.

[73] Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 17. Juli 2002, 1 BvF 1/01 ¶111.

[74] *Mrs. Corinne C. et al., supra* note 37 at ¶10.

Argentina, Belgium, Denmark, Iceland, the Netherlands, Norway, Portugal, Spain, and Sweden all redefined marriage by legislative action rather than court mandate.[75]

Even in Canada and South Africa, where courts were the initial impetus for the acceptance of same-sex marriage, adoption of same-sex marriage was ultimately referred to the legislative branch or involved significant legislative input. In Canada, where a provincial appellate court had ruled the Charter of Rights and Freedoms necessitated creation of same-sex marriage,[76] the final resolution of the issue was by an act of Parliament.[77]

So too, while South Africa's Constitutional Court gave Parliament a year to create same-sex marriage after interpreting that nation's constitution as requiring such a step,[78] the resolution was in Parliament.[79] In responding to the court's direction, however, Parliament declined to amend the existing marriage act. Instead, it created an additional, alternative status of civil unions which includes both civil partnership and marriage. Thus, opposite-sex couples can marry under the Marriage Act of 1961, under the Civil Union Act of 2006, or they can register a civil partnership under the latter Act while same-sex couples can marry or register a civil partnership only under the 2006 law.[80]

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[75] See *supra* note 2.

[76] *Halpern v. Att'y Gen. of Can.*, 65 OR3d 161, 172 OAC 276, P 71 (2003).

[77] Canada Civil Marriage Act, S.C. 2005, c. 33.

[78] *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC) (South Africa).

[79] South Africa Civil Unions Bill, B 26B-2006.

Brazil stands alone as the only country to have same-sex marriage established solely by courts. [81]

In sum, only three courts in foreign jurisdictions (Brazil, Canada, and South Africa) have held that national or supranational charters require same-sex marriage. By contrast, the United Nations Human Rights Committee, the European Court of Human Rights, the European Court of Justice, the French Constitutional Council, the German Federal Constitutional Court, the Italian Constitutional Court, and the New Zealand Court of Appeal have all rejected such claims.

The vast majority of countries that now permit same-sex marriage did so not as a matter of court order but through legislative action. Further, most nations that do recognize some form of same-sex union do not give them the designation of marriage.

Protection of marriage as a distinctive form of relationship is a recurring pattern around the world, and this is not seen to be inconsistent with finding nuanced ways of assuring that those in same-sex relations are not prejudiced as a result. The fact that some support for these global legal patterns may have emanated from religious or moral considerations does not alter this conclusion. Particularly in democratic nations committed to freedom of expression and freedom of religion,[82] the range of discourse that can and should be brought to bear on sensitive social issues needs to be wide-ranging and robust.[83] Disparaging moral and religious reasons as sub-rational and excluding them from the public square—as occurred in the decisions below—denies them the weight and respect they deserve,[84] and over time risks impoverishing some of the deepest wellsprings of value in our common social life.[85] *A fortiori* where, as here, a range of secular reasons have also contributed to the shaping of legal responses, courts should defer to normal democratic processes.[86]

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[80] *See* Civil Unions Bill, B 26B-2006 (South Africa); Francois du Toit, *National Report: The Republic of South Africa* 19 J. GENDER, SOC. POL'Y. & L. 277, 280 (2011).

[81] Superior Tribunal of Justice – R.E. 1.183.378 - RS (2010/0036663-8).

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[82] Jeffrey Stout, *Religious Reasons in Political Argument*, in DEMOCRACY AND TRADITION (Princeton: Princeton University Press, 2004) 63-92 ("The free expression of religious premises is morally underwritten not only by the value we assign to the freedom of religion, but also by the value we assign to free expression, generally.")

[83] *See generally* Richard John Neuhaus, THE NAKED PUBLIC SQUARE (Grand Rapids: William B. Eerdmans Publishing Co., 1984); Douglas G. Smith, *The Illiberalism of Liberalism: Religious Discourse in the Public Square*, 34 SAN DIEGO L. REV. 1571 (1997).

[84] Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475 (1997); Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663, 679, 682 (2001) ("... to construe the nonestablishment norm to forbid legislators to base a political choice on a religiously grounded moral belief unless the belief also has a plausible, independent secular ground would be to unfairly deprivilege religious faith (relative to secular belief) as a ground of moral judgment .... Such deprivileging would discriminate against religious grounds for moral belief, thereby subverting the equal citizenship of religious believers who, unlike citizens who are not religious believers, would be prevented from having their most important moral beliefs transformed into law (absent a plausible, independent secular grounding for those beliefs)."); Steven D. Smith, *Separation and the 'Secular': Reconstructing*

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the Disestablishment Decision, 67 TEX. L. REV. 955, 1008-15 (1989).

[85] *See, e.g.*, Jean Elshtain, *The Question Concerning Authority*, in Paul J. Weithman, ed. RELIGION AND CONTEMPORARY LIBERALISM (Notre Dame: University of Notre Dame Press, 1997) 253, 253-54 ("if we operate under an epistemological urgency that dictates translating religious language into one dominant philosophic language ... we erode over time the authoritative grounding of the American democracy itself ... ."); Paul J. Weithman, *Introduction*, Weithman, *supra*, 26-37 (discussing "civic democracy" theories that underscore the importance of the role that civil society organizations including religion play in cultivating the capacities of citizens needed for healthy democratic societies); John A. Coleman, *Deprivatizing Religion and Revitalizing Citizenship*, in Weithman, *supra*, 264-90 (privatization of religion is linked to decline of interpersonal trust and social capital requisite for effective democracy).

[86] Kent Greenawalt, 2 RELIGION AND THE CONSTITUTION (Princeton and Oxford: Princeton University Press, 2008) 535-537 (because of the typical mixture of religious and nonreligious reasons individuals and legislators may bring to bear in support of public policy decisions, the appropriate grounds for invalidating laws relying on religious premises "are too narrow to have much practical significance"); Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B. C. L. REV. 781, 843-849 (2007) (noting the need for "respect, flexibility, and humility on all sides in the clash between religious groups and advocates for rights for gays, lesbians, and transgendered people" and the value of "giving latitude for those whose views [one] reject[s] in order to advance a larger commitment to freedom and coexistence.")

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the decisions of the courts below.

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28 January 2013

AMICUS
CURIAE
BRIEF

No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR, in Her Capacity
as Executor of the Estate of THEA CLARA SPYER,
Respondent,
and
THE BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF HON. LAWRENCE J. KORB, RADM THOMAS F. ATKIN, BG ROOSEVELT BARFIELD, DR. COIT D. BLACKER, GEN WESLEY K. CLARK, RICHARD CLARKE, HON. WILLIAM COHEN, CDR BETH COYE, HON. RUSSELL D. FEINGOLD, BG EVELYN FOOTE, LTG ROBERT G. GARD, JR., ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT WINDSOR ON THE MERITS QUESTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. SUPPORT FOR ALL MILITARY FAMILIES IS INTEGRAL TO NATIONAL SECURITY 5

II. BY REQUIRING THE MILITARY TO DISCRIMINATE AGAINST CERTAIN SERVICEMEMBERS, DOMA UNDERMINES NATIONAL SECURITY AND IS CONTRARY TO THE MILITARY'S CORE VALUES 10

A. DOMA Harms The Post-DADT Military By Prohibiting Certain Servicemembers And Their Families From Securing Benefits That The Military Has Long Recognized Are Essential To Effective Service 12

B. DOMA Undermines The Military's Recruiting And Retention Initiatives 22

C. DOMA Is An Affront To Core Military Values And Requires The Military To Break Promises To Its Personnel 29

CONCLUSION 34

APPENDIX: List of *Amici Curiae*

TABLE OF AUTHORITIES

Page

CASES

Brown v. *Glines*, 444 U.S. 348 (1980) 5
Haig v. *Agee*, 453 U.S. 280 (1981) 5
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STATUTES

Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2011) 12
1 U.S.C. § 7 10
8 U.S.C. § 1430(d) 20
10 U.S.C. § 655(a) 21
§ 1071 14
§§ 1071 *et seq.* 13
§§ 1071-1110b 9
§ 1072 13
§ 1447 19

Page
10 U.S.C. §§ 1447-1455 19
§§ 1781-1790 9
§ 1784 18
§ 1784a 19
§§ 2821-2838 9
36 U.S.C. § 140503 19
37 U.S.C. § 402a 17
§ 403 16
§ 403b 17
§ 427 17
§§ 474-492 17
§ 481f 19
38 U.S.C. § 101 .... 18, 19, 20
§ 1102 20
§ 1114 17
§ 1115 17
§ 1121 19
§ 1135 17
§ 1141 19
§ 1310 19
§ 1541 20
§ 2402(a) 19
§ 3319 .... 9, 18, 28
§§ 3500 *et seq.* 18
§ 3501 18
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app. § 502 18
app. § 511 17
app. § 527 17

LEGISLATIVE HISTORY Page

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Page

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Page

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Page

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INTEREST OF *AMICI CURIAE*[1]

Amici are former high-ranking officers of the Army, Navy, Air Force, Marine Corps, and Coast Guard, former civilian leaders with responsibility for overseeing our nation's defense, and authorities on national security. They include former Secretaries of Defense, Department of Defense officials, United States Senators and Congressmen, Flag and General Officers, advisors for national security, and groups representing tens of thousands of veterans. They have led and overseen the military while the Defense of Marriage Act (DOMA) has been in effect, including after the repeal of the "Don't Ask, Don't Tell" (DADT) policy, and/or have experience with the military that provides unique insights into how DOMA currently harms the military and what its future untoward consequences will be to our national security. They have a significant interest in this case because they understand that, if the military is unable to give effect to marriages that are legal under state law, it will undermine the military's morale, readiness, cohesion, and effectiveness. It will also undermine the military's significant efforts, particularly since the repeal of DADT, to recruit and retain gay and lesbian individuals to ensure that servicemembers are drawn from the full pool of the best and brightest candidates. Accordingly, *amici* urge this Court to affirm the judgment holding DOMA unconstitutional.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution towards the preparation and submission of this brief. The United States and the respondent Bipartisan Legal Advisory Group of the United States House of Representatives filed blanket consents to the filing of *amicus curiae* briefs, which were docketed on January 10, 2013 and January 2, 2013, respectively. Respondent Windsor consented to the filing of this brief.

Amici's views are based on decades of experience and accomplishment at the highest positions in our country's military leadership and our civilian leadership charged with oversight of national security. Biographical sketches of each *amicus* are included in the appendix to this brief.

SUMMARY OF ARGUMENT

Charged with the paramount mission of protecting national security, the military's leadership long ago concluded that supporting servicemembers' families is central to tactical effectiveness and strategic victory. The strength of our servicemembers comes from the strength of their families. "Family readiness"—achieved by providing a strong, supportive environment where servicemembers and their families can thrive—is an essential element of military readiness. Indeed, "[t]he President has made the care and support of military families a top national security priority." President of the U.S., *Strengthening Our Military Families: Meeting America's Commitment* 1 (Jan. 2011) ("*Strengthening Our Military Families*"). Without the commitment of our nation to protect and support those left behind, all who are asked to serve either in preparation for deployment or actual deployment are necessarily distracted from their vital missions on behalf of our national security.

Today, after the repeal of "Don't Ask, Don't Tell," the reality is that military families include openly gay, legally married men and women. The compelling military need to protect these families is indistinguishable from that which leaders have recognized about military families generally for decades.

The Defense of Marriage Act, however, prohibits the military from providing all servicemembers and their families with necessary care and support. DOMA discriminates against certain legally married servicemembers and their families by denying them numerous benefits, including healthcare, equal pay, educational assistance, and survivorship benefits.

The question then is whether the military should be permitted to provide equal treatment to all legally married servicemembers and their families, or if it must discriminate against certain servicemembers and their families in a manner that research, experience, and common sense show is harmful to individual servicemembers and to the military collectively. For those experienced in military leadership and familiar with military values, the answer is easy. As Secretary of Defense Leon Panetta recently stated, "[d]iscrimination based on sexual orientation no longer has a place in the military." Memorandum from the Secretary of Defense, *Extending Benefits to Same-Sex Partners of Military Members* 1-2 ("*Extending Benefits Memo*").

As detailed below, DOMA threatens the core of the military's mission and culture. *First*, in light of military families' well-established central role in mission readiness and military effectiveness, if DOMA is permitted to stand, it will harm morale and the performance of individual servicemembers and their units. The extensive support offered to military families exists precisely because military and civilian leaders consistently have recognized that the services' readiness and effectiveness depend upon *all* servicemembers' confidence that their families are supported and cared for, particularly during inevitable periods of separation.

Second, DOMA's mandatory discrimination undermines efforts that the military has taken since the repeal of "Don't Ask, Don't Tell" to recruit and retain the most talented servicemembers, regardless of sexual orientation. Because research and experience have shown that the availability and quality of benefits, including family benefits, are central to recruitment and retention, DOMA is a formidable obstacle to fulfilling these goals. In the environment of voluntary armed service, any action that arbitrarily deters thousands of potential candidates from service presents serious obstacles to ensuring that the nation's fighting forces are unparalleled throughout the world.

Third, that every man and woman who serves in the United States military deserves to be treated equally and with honor, respect, and dignity is unassailable. DOMA, however, undercuts these principles at every turn. It mandates that the military leadership replace the ethos of equality that they aspire to instill in the service—and the equal treatment that servicemembers expect and deserve—with discrimination. Moreover, it requires that leaders breach the core military values of honesty and dignity. The highest ranking military leaders have sworn to each servicemember that our Nation will "provid[e] the best care and support to our wounded, ill, and injured Soldiers—along with their Families. And our commitment extends to the Families who have lost a Soldier in service to our nation. We will never forget our moral obligation to them." Hon. P. Geren & Gen. G.W. Casey, *A Statement on the Posture of the United States Army 2009*, at May 7, 2009 letter (May 2009). Yet, DOMA compels military leaders to break those commitments and obligations to many military families.

To protect the extraordinarily vital interests of the Nation embodied in its need to recruit, retain, and ensure the dedication of commitment of all of its military personnel, the Second Circuit's judgment should be affirmed.

ARGUMENT

I. SUPPORT FOR ALL MILITARY FAMILIES IS INTEGRAL TO NATIONAL SECURITY

1. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker* v. *Sec'y of State*, 378 U.S. 500, 509 (1964)). Since the founding of this country, there has been no doubt that "[s]ecurity against foreign danger is . . . . an avowed and essential object of the American Union." *The Federalist No. 41* (J. Madison). Tasked with protecting this paramount governmental interest, the U.S. military solemnly embraces its essential role in national security matters.

Crucial to the military's success in protecting the nation are each servicemember's morale, readiness, and effectiveness. See, *e.g.*, *Brown* v. *Glines*, 444 U.S. 348, 356 (1980) (describing "morale, discipline, and readiness" as "essential attributes of an effective military force"); *United States* v. *Voorhees*, 16 C.M.R. 83, 108 (C.M.A. 1954) ("the spirit and morale of others . . . are vital to military preparedness and success"). Morale and cohesion also play a critical role in retention. See generally, *e.g.*, J. Shay, *Cohesion, Confidence, Command Climate: Keys to Preventing Psychological and Moral Injury in Military*

Service, in Leadership: Theory and Practice 408 (G.R. Andersen ed., 1999).

2. The military and civilian leadership long have recognized that the physical and emotional well-being of servicemembers' families is critical to the military's efforts to ensure and increase morale, readiness, cohesion, and ultimately the operational success of our armed forces. Research, experience, and common sense dictate that individuals who are preparing for deployment or have been deployed to areas of actual or potential fighting should have as few distractions as possible. Thus, making sure that loved ones are not suffering any more than humanly possible by the absence of someone stationed in the military is a mission critical objective.

After the military became an all-volunteer force, leadership (civilian and military alike) increasingly came to view military success as dependent upon the strength of military families. See generally, *e.g.*, S. Albano, *Military Recognition of Family Concerns: Revolutionary War to 1993*, 20 Armed Forces & Soc'y 283, 289-90 (1994) (explaining that the military recognized that "the needs of hundreds of thousands of military family members" were central to "the readiness equation"); L.W. Oliver, U.S. Army Research Inst. for the Behavioral & Soc. Scis., Research Report 1582, *Readiness and Family Factors: Findings and Implications from the Literature* 6 (1991) ("families contribute to readiness").

In 1983, for example, Army leaders launched an initiative—still thriving today—to study and strengthen family supports, repeatedly expressing that the military family is inseparable from military readiness. See Chief of Staff, U.S. Army, *White Paper 1983: The Army Family* (Aug. 1983) ("*The Army Family*"). In a letter to soldiers and their families regarding this effort, the Chief of Staff explained that, in order "to execute the missions entrusted to it" for the national defense, "the Army can and must assure within available resources and commitments adequate care for families of its members." *Id.* at introductory letter. He explained that "[s]ervicemembers and their families should be able to enjoy the benefits of the society they are pledged to defend," and that the nature of the military's commitment to its mission and its servicemembers "dictates . . . a moral obligation to support their families." *Id.* at 1, 13. He further emphasized that the military's strength "lies in its people," that families directly affect the military's "ability to accomplish its mission," and that families are "an organizational concern." *Id.* at introductory letter & 1; see *id.* at 14 ("[F]amily stability promotes greater individual effectiveness."); see also, *e.g.*, Albano, *supra*, at 291 (in 1979, the Air Force "formally recognized the role of the family in mission readiness").

Today, the highest levels of leadership recognize that these principles are incontrovertible:

"The President has made the care and support of military families a top national security priority," recognizing that "[t]he well-being of military families is an important indicator of the well-being of the overall force." *Strengthening Our Military Families* 1. The Chairman of the Joint Chiefs of Staff has stressed, "[t]he All-Volunteer Joint Force is our Nation's decisive advantage, and its lifeline is our military family." Office of the Chairman of the Joint Chiefs of Staff, *Keeping Faith with our Military Family* 1 (Nov. 2012). The Defense Department similarly "consider[s] 'family readiness' as an essential element of our Readiness strategy." Dr. K. Guice, Principal Deputy Assistant Sec'y of Def.

(Health Affairs) & Dr. R. Posante, Deputy Dir., Office of Cmty. Support for Military Families with Special Needs, *Prepared Statement of Before the Senate Armed Services Committee Subcommittee on Military Personnel* 6 (June 20, 2012); see U.S. Dep't of Def., Instruction No. 1342.22, *Military Family Readiness* § 4.a (July 3, 2012) (incorporating family life into "recruitment, retention, morale, and operational readiness of the military force").

The service branches' leadership agrees. For instance, the Air Force recognizes that "caring for families has a direct impact on mission readiness . . . . When families are taken care of, Airmen are free from distractions and are better able to focus on the mission at hand." *Recruiting, Retention and End Strength Overview: Hearing Before the Military Personnel Subcomm. of the H. Comm. on Armed Services*, 111th Cong. 120–21 (2009) (statement of Lieutenant General Richard Y. Newton, III, Deputy Chief of Staff, Manpower, and Personnel, United States Air Force) ("*Testimony of Lieutenant General Newton*"). Likewise, the Army has recognized that "Soldiers and their families are the Army's greatest asset," U.S. Dep't of Def., *Welcome to the Army Family: A First Guide for Military Spouses and Family Members* 2 (June 2005), so "[o]ur policies must recognize that soldiers cannot perform efficiently while distracted by overwhelming family concerns," *The Army Family* 13-14 ("taking care of our families enhances both retention and readiness"). Given the extraordinarily complicated technology used by our nation's military and the staggering consequences of mistakes, every needless distraction creates an unacceptable risk to our security and to the safety of our fighting forces.

3. Because of these universal recognitions that military families are inseparable from military readiness and effectiveness, military and civilian leaders have gone to great lengths to protect and support servicemembers and their families, particularly when military personnel are deployed. See, *e.g.*, S. Rep. No. 93-235 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1579, 1585 ("'Success in modern warfare demands the full utilization of every ounce of both the physical and mental strength and stamina of its participants. No soldier can be and remain at his best with the constant realization that his family and loved ones are in dire need of financial assistance.'"); 127 Cong. Rec. 21,378 (1981) (Statement of Sen. Hatfield).

To that end, numerous government programs provide benefits to servicemembers to strengthen their families, see, *e.g.*, 10 U.S.C. §§ 1781-1790 (military family programs); *id.* §§ 2821-2838 (military family housing), and indeed servicemembers' families receive many direct benefits, *e.g.*, *id.* §§ 1071-1110b (medical and dental care); 38 U.S.C. § 3319(c) (educational assistance benefits for a servicemember's spouse or children); see also *infra* § II.A. Furthermore, the military leadership has prioritized initiatives to study and support (materially and emotionally) military families, advocating repeatedly for retaining and expanding benefits that strengthen servicemembers' families and committing itself to providing whatever additional benefits it can. See, *e.g.*, *The Army Family* 13-14 ("[o]ur policies must recognize that soldiers cannot perform efficiently while distracted by overwhelming family concerns"); *id.* at 17-21 (advocating for, *inter alia*, "[i]mproved medical and dental care, more and better on- and off-post housing . . . financial assistance for higher education"); see also *Extending Benefits Memo* 1-2. For instance, the Army Family Covenant commits to "[p]roviding our Families a strong, supportive environment where they can thrive," including a commitment to "Improving Family Readiness" by "funding existing Family programs and services," "[i]ncreasing accessibility and quality of health care," "[i]mproving Soldier and Family housing," "[e]nsuring excellence in schools, youth services and child care," and "[e]xpanding education and employment opportunities for Family members."[2] As detailed *infra* § II, DOMA directly contravenes these efforts by military leadership.

II. BY REQUIRING THE MILITARY TO DISCRIMINATE AGAINST CERTAIN SERVICEMEMBERS, DOMA UNDERMINES NATIONAL SECURITY AND IS CONTRARY TO THE MILITARY'S CORE VALUES

DOMA violates the military's above-discussed commitment to provide for all servicemembers and their families. There is no question that DOMA discriminates against certain legally married servicemembers and veterans and their families. *Accord* Br. for the United States on the Merits Question 17 ("Br. for U.S."). The Secretary of Defense recently explained that vital military benefits "such as health care and housing allowances, are by statute [*i.e.*, DOMA] currently only available to spouses" as the term "spouse" is defined by federal law. *Extending Benefits Memo* 2; see 1 U.S.C. § 7 ("'spouse' refers only to a person of the opposite sex who is a husband or wife"). Therefore, such benefits "cannot be made available" to legally married gay and lesbian servicemembers and their families. *Extending Benefits Memo* 2.

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[2] *At* U.S. Army, *Soldier Life, Army Family Covenant*, http://www.goarmy.com/content/dam/goarmy/downloaded_assets/pdfs/Army%20Family%20Covenant.pdf; *see also, e.g.*, *Testimony of Lieutenant General Newton* 121 (stating that the Air Force is "committed to ensure our Airmen can rest easy, knowing the Air Force family is taking care of their family").

This is simply untenable given the reality of today's military, where following the repeal of "Don't Ask, Don't Tell" (DADT) gays and lesbians are permitted to serve openly in the military, and some of those individuals are legally married and have families. See *infra* § II.A. There is no military justification for this discrimination. See, *e.g.*, Br. for U.S. 28-29. On the contrary, DOMA harms the military by depriving a subset of legally married servicemembers and their families of the very benefits—including healthcare, housing, equal pay, and survivorship benefits—that common sense, military experience, and research have demonstrated to be essential to *all* military families and more fundamentally to military effectiveness. *Supra* § I; *infra* § II.A. DOMA also undermines the military's post-DADT recruitment and retention initiatives. *Infra* § II.B. Finally, through such mandatory discrimination, DOMA infringes on the military's core value of equality and requires that the military violate its most sacred promises to its servicemembers. *Infra* § II.C.

Based on their experience leading, overseeing, and analyzing the military, *amici* are confident that discriminating against certain servicemembers and their families in this manner is contrary to the military's best interests and therefore undermines national security.

A. DOMA Harms The Post-DADT Military By Prohibiting Certain Servicemembers And Their Families From Securing Benefits That The Military Has Long Recognized Are Essential To Effective Service.

In 2011, the military implemented the repeal of the former DADT policy. Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3515, 3516 (2011) (repealing 10 U.S.C. § 654); Br. for U.S. 24 n.5; see also *Extending Benefits Memo* 1 (DADT's repeal "has been led effectively by leaders throughout the chain of command and is now essentially completed"). As a result, the estimated 65,000-plus gay and lesbian servicemembers already serving now can do so openly. See *The Report of the Department of Defense Working Group that Conducted A Comprehensive Review of the Issues Associated with a Repeal of Section 654 of Title 10, U.S.C., Policy Concerning Homosexuality in the Armed Forces: Hearing Before the S. Comm. on Armed Servs.*, 111th Cong. 899 (2010) ("*S. Hearing 111-899*").

Some of these gay and lesbian servicemembers are legally married. See, *e.g.*, J. Gould, *Wife of 1st Openly Gay General to Attend State of the Union, Outside the Wire,* Army Times, Feb. 12, 2013, http://militarytimes.com/blogs/outside-the-wire/2013/02/12/wife-of-1st-openly-gay-general-to-attend-state-of-the-union/ (discussing legally married Brigadier General). These legally married servicemembers, like all married servicemembers, need military benefits and protections to support their families while they serve and to maintain a decent quality of life. See *supra* § I. Obviously, sexual orientation does not affect the importance of loved ones to a servicemember deployed, nor does it change his or her worries and distractions because those left behind to mind the home and children are facing deprivations that are no different for any member of a military family.

But, as the Secretary of Defense and the Solicitor General have recognized, DOMA prohibits the military from extending many important benefits to servicemembers and their families, *supra* at 10-11, and from "ensur[ing] that all Service members are treated equally regardless of sexual orientation." *Extending Benefits Memo* 2; see Br. for U.S. 17, 28-29. Indeed, the Secretary of Defense has stated that but for DOMA, the Department of Defense would grant full military benefits to married couples and their dependents without regard to sexual orientation. *Extending Benefits Memo* 2. As detailed below, because the benefits that DOMA prohibits the military from providing these servicemembers and their families are among the most significant ones available to personnel, the Act impedes crucial military objectives.

Healthcare. In one of its most direct affronts to military strength and well-being, DOMA prevents the families of gay and lesbian servicemembers from receiving medical and dental care; "dependent" eligibility rests on the term "spouse" as defined by DOMA. See 10 U.S.C. §§ 1071 *et seq.*; *id.* § 1072; *Extending Benefits Memo* 2; Br. for U.S. 17. Moreover, if a married gay or lesbian servicemember is relying on his or her state-law marriage as the basis for parentage rights (as married parents typically do) or has not yet adopted his or her spouse's child, then DOMA also denies the child access to medical or dental benefits. 10 U.S.C. § 1072(6) (defining "child" to mean an unmarried "legitimate" child, adopted child, stepchild, or a foster child); see also, *e.g.*, *In re Sebastian*, 25 Misc. 3d 567, 573, 584-86 (N.Y. Sur. Ct. 2009) (granting parent's petition to adopt her own child because, although New York would recognize parentage rights because child was born to legally married lesbian parents, an order of adoption was necessary to ensure that other jurisdictions would recognize legal parentage).

Denying health benefits plainly impedes morale, and therefore undermines the fundamental purposes of providing medical benefits to military members and families. See, *e.g.*, *The Army Family* 1, 13-14. Indeed, the statute granting medical benefits expressly states that its "purpose . . . is to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members . . . and for their dependents." 10 U.S.C. § 1071. Every branch of government has recognized the centrality of healthcare to military families. See *e.g.*, *The Military Health System: Health Affairs/TRICARE Management Activity Organization: Hearing Before Military Personnel Subcomm. of the H. Comm. on Armed Services*, 111th Cong. 8 (2009) (statement of Lt. Gen. Schoomaker) ("[f]or an Army at war, care of our families is critical"). Servicemembers likewise have indicated that healthcare is a key indicator as to whether they and their spouses decide to remain in the military until retirement. U.S. Dep't of Def., *Support to the DoD Comprehensive Review Working Group Analyzing the Import of Repealing "Don't Ask, Don't Tell," Volume I: DADT Report Findings From the Surveys* 58 tbl.4.25, 95, 99 (Nov. 2010). The courts and congressional studies have recognized the same. See, *e.g.*, *Sierra Military Health Servs, Inc.* v. *United States*, 58 Fed. Cl. 573, 585 (2003) (noting the "public interest in maintaining the morale of our military personnel by providing improved health care benefits to dependents"); D. Jansen, CRS Report, *Military Medical Care* 1-2 (May 14, 2009) ("[t]he military health system helps to maintain the health of military personnel so they can carry out their military missions" and supports "recruitment and retention").

It is difficult to imagine anything more emotionally debilitating than knowing that a loved one is suffering from a treatable medical condition but lacks the access to medical care that every other dependent in a servicemember's unit receives. The impact of the lost access is doubly discouraging because it is blatantly discriminatory.

Housing. Housing benefits are also critical in the military. Other than basic pay, housing allowances comprise the largest cash payment in a military member's overall compensation. Office of the Under Sec'y of Def. for Personnel & Readiness, *Report of the Eleventh Quadrennial Review of Military Compensation* 17 fig.2-1 (2012). Moreover, the Army considers "improving [s]oldier and [f]amily housing" a core aspect of its "Covenant." Geren & Casey, *supra*, at "Army Family Covenant." Similarly, the Air Force recently emphasized that a lesbian servicemember should be able to "perform her mission and not have to worry about her partner and children living in shabby off-base housing because they were ineligible for on-base military housing." U.S. Dep't of Def., News Transcript, *Pentagon Lesbian, Gay, Bi-Sexual, and Transgender Pride Month Event* (June 26, 2012) ("*Pentagon Pride Month Event*") (statement of Principal Deputy General Counsel Gordon Tanner).

DOMA, however, prevents legally married gay and lesbian couples from receiving equal housing benefits. See Br. for U.S. 17. For example, with respect to housing allowances, a Private assigned to the

1 Battalion 69th Infantry unit in New York City who was treated as "unmarried" under DOMA would receive $9,216 less per year than a "married" counterpart—more than half of his or her base annual salary ($18,194). See U.S. Dep't of Def., *BAH Calculator*, https://www.defensetravel.dod.mil/site/bahCalc.cfm (last updated Jan. 22, 2013); U.S. Army, *Benefits, Basic Pay: Active Duty Soldiers*, http://www.goarmy.com/benefits/money/basic-pay-active-duty-soldiers.html (last visited Feb. 28, 2013); 37 U.S.C. § 403.[3]

Given the importance of housing, this is intolerable. In addition to its monetary value, housing is a vital military benefit because of its ability to foster military communities and support military families. Conversely, reducing housing options and allowances can mean that servicemembers have to live further away from their base, colleagues and spouses, and can put additional stresses on their professional and personal lives. B.R. Karney & J.S. Crown, *Families Under Stress: An Assessment of Data, Theory, and Research on Marriage and Divorce in the Military* 59 (2011). Common experience teaches that personal crises that can be resolved face-to-face often are all but impossible to sort out long distance.

Compensation. DOMA effectively lowers the salaries of legally married gay and lesbian servicemembers. For example, the same Private living in New York City who was treated as "unmarried" under DOMA would receive $864 less annually in cost of living adjustments (almost five percent of his annual base salary). See U.S. Dep't of Def., *CONUS COLA Calculator*, https://www.defensetravel.dod.mil/site/conusCalc.cfm (last updated Dec. 28, 2012); 37 U.S.C. § 403b (cost-of-living allowance in the continental United States). If the Private's spouse cannot live with him or near his permanent duty station, DOMA stops him from receiving up to $250 per month in family separation allowance. 37 U.S.C. § 427. If the Private might otherwise qualify for assistance for low-income servicemembers with dependents (spouses), which can total up to $1100 per month, DOMA prevents this. *Id.* § 402a.

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[3] Several branches of the military require unmarried, junior enlisted personnel to live in barracks on base. *See, e.g.*, U.S. Marines Corps, MARADMIN 429/11, *Freeze on Further Approval of BAH* (Jul. 29, 2011). Because DOMA does not recognize gay and lesbian servicemembers' legal marriages, these directives categorically prevent the servicemembers from living with their spouses.

If the Private suffers a service-connected disability, is 100% disabled, and is married with children, he would receive $167 per month less because of DOMA. U.S. Dep't of Veterans Affairs, *Veterans Compensation Benefits Rate Tables*, http://www.benefits.va.gov/COMPENSATION/resources_comp01.asp (last updated Jan. 30, 2013); 38 U.S.C. § 1115 (wartime disability compensation for dependents); *id.* § 1135 (peacetime disability compensation for dependents); *id.* § 1114 (rates of maritime disability compensation). DOMA additionally bars myriad other monetary allowances, such as for travel and transportation. See 37 U.S.C. §§ 474-492.

Civil Protections. Further, DOMA limits the application of the Servicemembers Civil Relief Act (SCRA), which provides soldiers important financial protections as well as other procedural, tax and voting rights. See 50 U.S.C. app. §§ 501-596; *id.* app. § 511 (defining "dependent" to include "spouse"). Many of these protections apply jointly to servicemembers and spouses. See, *e.g.*, *id.* app. § 527 (limiting interest rates for "the servicemember and the servicemember's spouse jointly"). The explicit purpose of SCRA is "to provide for, strengthen, and expedite the national defense [by allowing servicemembers] to devote their entire energy to the defense needs of the Nation." *Id.* app. § 502. As this Court recognized about SCRA's predecessor, these benefits should be "read with an eye friendly to those who dropped their affairs to answer their country's call." *Le Maistre* v. *Leffers*, 333 U.S. 1, 6 (1948). Notwithstanding the SCRA's important aims, DOMA excludes gay and lesbian servicemembers and their spouses from these full protections.

Educational and Career Opportunities. DOMA prevents servicemembers from transferring to their spouse or children key educational benefits of the Post-9/11 Veterans Educational Assistance Act, which President George W. Bush signed into law in 2008. See 38 U.S.C. § 3319; see generally *supra* at 13-14 (noting potential parentage issues). This legal disability undermines what the Secretary of Veterans' Affairs hailed as "'landmark legislation'" and "'an important part of fulfilling our promise to [those] who have served our country so honorably.'" ***Strong Response to Yellow Ribbon Program***, *Vanguard* (U.S. Dep't of Veterans Affairs, Wash., D.C.), July/Aug. 2009, at 23. DOMA also forecloses eligibility for educational assistance to surviving spouses and their children through other provisions. 38 U.S.C. §§ 3500 *et seq.*; *id.* § 3501 (defining "eligible person" to include "surviving spouse"); *id.* § 101 (defining "child").

Additionally, DOMA limits career opportunities and job training for military spouses, which can otherwise be particularly difficult to secure given the rapid deployments and frequent moves associated with military life. See 10 U.S.C. §§ 1784 (employment opportunities for military spouses), 1784a (education and training opportunities for military spouses to expand employment and portable career opportunities).

Survivorship Benefits. When a servicemember loses his or her life in the line of duty, survivorship benefits often are a substantial source of income for a surviving spouse. Bureau of Naval Personnel, *Navy Pay and Benefits Guide* 11 (July 2010); 10 U.S.C. §§ 1447-1455; *id.* § 1447(9) (defining "surviving spouse"). DOMA also prevents surviving spouses from receiving many other forms of compensation and allowances related to a servicemember's death. See, *e.g.*, 37 U.S.C. § 481f (travel allowances to attend burial ceremony); 38 U.S.C. § 1121 (wartime death compensation); *id.* § 1141 (peacetime death compensation); *id.* § 1310 (dependency and indemnity compensation for service-connected deaths); *id.* § 101(3), (31) (defining "surviving spouse" and "spouse"); see also Br. for U.S. 17.

Burial Rights and Honors. DOMA denies typically applicable burial rights and honors to spouses of a gay and lesbian servicemembers. See 38 U.S.C. § 2402(a)(5) (spouses eligible for interment in national cemeteries); *id.* § 2402(a)(6) (only the Secretary of Veterans Affairs may designate other persons). Worse yet, if a servicemember is killed in action and posthumously receives the Purple Heart, DOMA prevents his or her spouse from receiving membership in the Military Order of the Purple Heart. 36 U.S.C. § 140503. Denial of these benefits is greatly disrespectful and deeply hurtful. See, *e.g.*, T. Johnson, *War Widow Deemed Unequal by DOMA*, Stars & Stripes, Feb. 13, 2013 (although couple was legally married, spouse "was denied the ceremonies, rituals and spousal survivor's benefits that usually go to widows") ("*War Widow Deemed Unequal*"). This also contravenes Department of Defense practice, which generally opposes legislation that could foster unequal treatment of service-members and their surviving loved ones. See, *e.g.*, H.R. Rep. No. 106-270, at 7 (1999) (discussing the Department's opposition to bill on grounds that it "would create inequities in the treatment of survivors of service members dying on active duty").

Immigration and Naturalization. DOMA imposes severe immigration penalties on the legal spouses of gay and lesbian servicemembers. Immigration law provides a pathway to naturalization for the spouse of a servicemember who is a U.S. citizen and dies on active duty. 8 U.S.C. § 1430(d). This includes servicemembers who are awarded U.S. citizenship posthumously. But DOMA eliminates this pathway to naturalization for gay and lesbian spouses. This is particularly problematic since the military recently reinitiated a special program to "recruit legal immigrants with special language and medical skills." J. Preston, *Pentagon Reopens Program Allowing Immigrants with Special Skills to Enlist*, N.Y. Times, Oct. 28, 2012, at A21. The program's "powerful lure is that it allows [recruits] to naturalize as United States citizens quickly." *Id.* But DOMA creates a directly contrary effect by ***eliminating*** opportunities for a subset of military spouses to naturalize, to the detriment of recruits' peace of mind and the care of their families and children.

Veterans' Benefits. DOMA prevents veterans from conferring benefits to their spouses, such as pensions and certain types of death and disability compensation. 38 U.S.C. §§ 1102, 1541; see also *id.* § 101 (defining "surviving spouse"). It creates barriers to spousal notification when a servicemember is missing. See 10 U.S.C. § 655(a) (permitting servicemembers to "specify in writing the person or persons, if any, other than that person's primary next of kin or immediate family" (such as a "spouse") "to whom information on the whereabouts and status of the member shall be provided"—but distinguishing such designated persons from "primary next of kin or immediate family" members, thus creating a separate notification framework); see also, *e.g.*, *War Widow Deemed Unequal* (although couple was legally married, spouse was not personally informed by a casualty officer or provided with grief counseling when her wife was killed during deployment in October 2012). This weakens military families and undermines the Veterans Administration's mission to "[t]o fulfill President Lincoln's promise '[t]o care for him who shall have borne the battle, and for his widow, and his orphan.'" U.S. Dep't of Veterans Affairs, *Mission, Vision, Core Values & Goals*, http://www.va.gov/about_va/mission.asp (last updated Oct. 3, 2011) ("*VA Mission Statement*").

Again, each of these legal barriers imposes heightened anxiety for a gay servicemember with a legally joined spouse that Congress, by adopting the benefit, plainly recognized was crucial to ensuring that members of the military were spared as much as possible distractions caused by the plight of loved ones. The very fact that certain members of the military uniquely suffer these consequences, when otherwise identically situated fellow servicemembers do not, makes the situation intolerable in a way that can only threaten the military's overall mission to protect our country.

B. DOMA Undermines The Military's Recruiting And Retention Initiatives.

In discriminating against gay and lesbian servicemembers and their families, DOMA hurts the military's ability to recruit and retain gay and lesbian servicemembers. DOMA does direct violence to many of the most important features of the military system that support recruitment and retention, and therefore will obstruct the leadership's ongoing work to improve the military, which plainly was intended by DADT's repeal.

1. The DADT policy ended for reasons that are humanitarian, economically rational and operationally beneficial. See, *e.g.*, L.J. Korb et al., Ctr. for Am. Progress, *Ending "Don't Ask, Don't Tell": Practical Steps to Repeal the Ban on Openly Gay Men and Women in the U.S. Military* (June 2009) (describing how DADT undermined cohesion and effectiveness, harmed crucial recruitment and retention efforts, and exacted significant financial and other costs on the military). The recruitment and retention of gay and lesbian personnel implicates all of these aspects of DADT's repeal.

The military has a substantial interest in recruiting and retaining the best and brightest individuals for the service. See, *e.g.*, S. Reitz, *Coast Guard Academy welcomes 'don't ask' repeal*, Associated Press, Sept. 20, 2011 (quoting Rear Admiral Sandra L. Stosz, Superintendent of the U.S. Coast Guard Academy, that "'our focus on finding the best and the brightest from diverse parts of America and our inclusive policies is going to make this easy for us'"); T. Shanker, *Warning Against Wars Like Iraq and Afghanistan*, N.Y. Times, Feb. 25, 2011, at A7 (quoting Defense Secretary Gates' remarks that the military must "'retain, challenge, and inspire its best, brightest, and most battle-tested young officers to lead the service in the future'"). Such individuals improve the military's operational performance. Moreover, failing to retain them imposes significant financial and operational costs.

Indeed, as a result of DADT, the military squandered hundreds of millions of dollars and lost thousands of capable servicemembers—many of whom were discharged under the policy during a time of war. The U.S. Government Accountability Office (GAO) concluded that "it cost DOD approximately $193.3 million ($52,800 per separation) . . . to separate and replace the 3,664 service members separated under [DADT] from fiscal years 2004 through 2009," while acknowledging that it could not capture all of the financial effects of DADT. U.S. GAO, GAO-11-170, *Military Personnel: Personnel and Cost Data Associated with Implementing DOD's Homosexual Conduct Policy* 18 (Jan. 2011) ("*GAO 2011 Report*"); see *id.* at "Highlights" (noting limitations).[4] Indeed, 39 percent of the gay and lesbian servicemembers discharged as a result of DADT from 2004-2009 "held skills in critical occupations" placing them among the military's most highly trained personnel (*e.g.*, intelligence specialists, cryptologic technicians) and most valuable personnel (*e.g.*, Arabic linguists), see *GAO 2011 Report* 10, 12-15; see also *GAO 2005 Report* 4-5 (eight percent of servicemembers discharged under DADT between 1994 and 2003 held "critical occupations").[5]

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[4] A 2005 GAO report acknowledged that approximately 9,500 servicemembers were discharged due to DADT between 1994 and 2003, but expressed more uncertainty in calculating DADT's cost to DOD. *See* U.S. GAO, GAO-05-299, *Military Personnel Financial Costs and Loss of Critical Skills Due to DOD's Homosexual Conduct Policy Cannot Be Completely Estimated* 1-2, 13-15 (Feb. 2005) (stating that the discharges may have cost DOD $191 million between 1994-2003) ("*GAO 2005 Report*"); *but see* Blue Ribbon Comm., Palm Ctr., *Financial Analysis of Don't Ask, Don't Tell* 2 (Feb. 2006) (concluding that DADT's cost was at least $363.8 million during the same period). Indeed, had GAO applied its methodology from the 2011 report (*i.e.*, $52,800 per discharge) to the 9,000-plus discharges at issue in the 2005 report, the cost to DOD would have exceeded $500 million.

2. Accordingly, since DADT's repeal, military leadership—from the Pentagon down—has been committed to recruiting and retaining gay and lesbian servicemembers. For example, the military has launched gay- and lesbian-focused initiatives at the Pentagon and around the country. See, *e.g.*, M. Groves, *Marine Recruiters Reach Out at Gay Pride Event in Pasadena*, L.A. Times, Oct. 9, 2011; E. Bumiller, *Marines Hit the Ground Running in Seeking Recruits at Gay Center*, N.Y. Times, Sept. 21, 2011, at A1; E. Flock, *Pentagon to Hold First-Ever Gay Pride Event Tuesday*, U.S. News, June 25, 2012. Air Force bases, for instance, instituted mandatory sensitivity training, which was credited with ensuring a smooth transition post-repeal. See M. McCarty, *Wright-Patterson Transition Smooth After Repeal of* DADT, Stars & Stripes, Sept. 22, 2012. At West Point, an officer oversees Spectrum—a support club for Lesbian, Gay, Bisexual, and Questioning cadets—and, in tandem with a lesbian, gay, bisexual

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[5] The military already faced significant obstacles in recruiting: (i) highly qualified gay and lesbian individuals in the first instance because the strictures of DADT made them unwilling to serve, and (ii) individuals regardless of sexual orientation due to DADT's negative impact on ROTC and other recruiting programs. *See, e.g.*, *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 51-55 (2006) (discussing Congress' enactment of the Solomon Amendment in response to law schools' restriction of access to military recruiters due to DADT).

and transgender alumni group, has been involved with establishing a cadet mentoring program. See U.S. Military Acad., *Spectrum*, http://www.usma.edu/dca/sitepages/club_spec.aspx (last visited Feb. 27, 2013); Knights Out, *Knights Out and USMA Spectrum Launch Cadet Mentorship Program* (Feb. 8, 2013), http://www.knightsout.org/articles/knights_out_and_usma_spectrum_launch_cadet_mentorship_program; see also generally R.L. Swarns, *Out of the Closet and Into a Uniform*, N.Y. Times, Nov. 16, 2012 (discussing gay- and lesbian-focused clubs at the academies).

These measures reflect the military's recognition that disclosing one's sexual orientation is no barrier to effective service, see Br. for U.S. 28, and that there is "another qualified pool of applicants" who can and should strengthen the military. Groves, *supra* (citing marketing and public affairs representative for the Marine Corps' Recruiting Station Los Angeles). Indeed, the branches of the armed services recognize that they may achieve competitive advantages by successfully drawing from this "new" pool of talent: "With the law now changed, the Marines appear determined to prove that they will be better than the Army, Navy, Air Force and Coast Guard in recruiting gay, lesbian and bisexual service members." Marine Corps Connection, *Marines Hit the Ground Running in Seeking Recruits at Gay Center* (Sept. 20, 2011).[6]

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[6] Before repeal, approximately 69 percent of troops who were polled reported that they were already serving in a unit with someone they believed to be gay or lesbian, and 92 percent of those individuals said that their unit's "ability to work together" was either "very good," "good," or "neither good nor poor." U.S. Dep't of Def., *Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell"* 3-4 (Nov. 30, 2010) ("*DADT Report*"). Moreover, for decades, gay and lesbian

Additionally, with DADT's repeal, ROTC has returned to many elite campuses for the first time in decades. See L. Gordon, *Once a Campus Outcast, ROTC is Booming at Universities*, L.A. Times, June 1, 2011; *Colleges Reconsider ROTC After "Don't Ask" Repeal*, Associated Press, Dec. 23, 2010. Thus, the military's open access to these universities has been restored; those recruiting efforts will not be successful, however, if DOMA's arbitrary discrimination as applied to the military is permitted to continue.

3. DOMA unquestionably stands as a substantial impediment to the military's post-DADT recruiting and retention initiatives.

Since this country's infancy, military leaders have recognized that military benefits are central to recruitment and retention. For example, "George Washington intervened in [congressional] debates to argue that the provision of veterans' benefits was absolutely necessary to preserve the ability of the military to recruit and retain officers." J.D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 Veterans L. Rev. 135, 140 (2011). More recently, this Court has observed that the military's retirement benefits, for instance, are "designed to serve as an inducement for enlistment and re-enlistment." *McCarty* v. *McCarty*, 453 U.S. 210, 234 (1981), *superseded by statute*, 10 U.S.C. § 1408, *as recognized*

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servicemembers had advanced within the military and won acclaim from high-ranking military officers and within their units for their dedication and leadership. *See, e.g.*, *id.* at 4, 6; *S. Hearing 111-899* at 9 (Statement of Adm. Michael G. Mullen, Chairman, Joint Chiefs of Staff); *Lutz* v. *Sec'y of Air Force*, 944 F.2d 1477, 1479 (9th Cir. 1991); *McVeigh* v. *Cohen*, 983 F. Supp. 215, 220-21 (D.D.C. 1998).

in Barker v. *Kansas*, 503 U.S. 594 (1992). Indeed, it was "[p]roblems in retention" in the all-volunteer military that brought attention to the "family and quality of life issues" that are discussed *supra* § I.A, and which now are a central part of the military's goals. Albano, *supra*, at 289-90.

By prohibiting the military from providing equal benefits to legally married gay and lesbian servicemembers, *supra* § II.A, DOMA makes service less attractive and makes it substantially more difficult for some servicemembers to remain in the military. This threatens the military's post-DADT initiatives to recruit and retain the most talented personnel. In recruiting servicemembers, the military must compete with the private sector, which frequently offers significant benefits (*e.g.*, health insurance to spouses and children) without interference from DOMA. Particularly as today's enlisted servicemembers marry, have children, and develop specialized skills and knowledge, the benefits foreclosed by DOMA will loom larger, and the private sector will become more attractive. See generally *The Army Family* 7 (discussing the "Family Life Cycle" during which the needs of servicemembers and their families change over time).

"[O]ne of the most consistent findings in the retention literature is that spouse support is positively and significantly related to reenlistment intentions of military personnel." Oliver, *supra*, at 6; see also, *e.g.*, *id.* at 5 ("There is considerable historical documentation that soldiers have deserted, been absent without leave (AWOL), or performed less effectively during wartime because of concerns about their families."); D.K. Orthner & G.L. Bowen, U.S. Army Research Inst. for the Behavioral & Soc. Scis. Research Report 1559, *Family Adaptation in the*

Military 1 (1990) ("[i]f the family does not adapt" to the military, "then the service member . . . will probably separate from the service at the next opportunity"). Deficiencies in healthcare, housing, and educational assistance, for example, have been linked to "severe dissatisfaction with Army life" and inability to retain servicemembers. *E.g.*, *The Army Family* 20-21.

Thus, the military and the federal government have continued to improve services and benefits to families to attract and retain personnel, recognizing that adequate housing, healthcare, education, and community support are essential to keeping military families cared for and satisfied, and thereby promoting as much as possible the likelihood that the servicemember remains in the military. See, *e.g.*, *The Army Family* 11, 17-18; Orthner & Bowen, *supra*, at 6-7; Albano, *supra*, at 288-89, 292-93. For instance, the Post-9/11 Veterans Educational Assistance Act expressly states that the "purpose" of its provisions permitting a servicemember to transfer higher education benefits to his or her spouse or children "is to promote recruitment and retention in the uniformed services." 38 U.S.C. § 3319(a)(2); see *id.* § 3319(b)(1) (conditioning the ability to transfer such benefits on six years of service and an agreement to serve at least four more years). Moreover, by strengthening families and ensuring retention, the military stands to benefit operationally: "[h]igher retention rates mean less turnover, resulting in more experienced unit members and greater cohesion." Oliver, *supra*, at 6.

The military's interests following the repeal of DADT are simply incompatible with DOMA.

C. DOMA Is An Affront To Core Military Values And Requires The Military To Break Promises To Its Personnel.

Not only does DOMA threaten the military's effectiveness by depriving certain servicemembers and their families of benefits that are vital to performance, as well as recruitment and retention, but also it requires the military to violate its core principles and forces the leadership to break its promises to its servicemembers.

1. The military prides itself on providing equal opportunities and benefits to servicemembers. Historically, disparities existed between enlisted personnel and officers in the types of benefits for which they and their families were eligible. See Albano, *supra*, at 290-91, 294-95; *The Army Family* 2-4. Over time, however, the military and civilian leadership ensured that the provision of benefits was expanded to include families of enlisted personnel, not just officers, and was consistent with gender parity. Albano, *supra*, at 290-91, 294-95; *The Army Family* 2-4. In the last half-century, the military has consistently recognized the importance of equality and inclusion, including in the context of its gay and lesbian personnel. See Press Release, Chief of Naval Personnel Pub. Affairs, *"Don't Ask, Don't Tell" Repealed* (Sept. 20, 2011) ("Success of the Navy is enabled by the diversity of our Sailors"); see also, *e.g.*, M.J. MacGregor, Jr., *Integration of the Armed Forces 1940-1965*, at 355 (1980) ("maximum military efficiency demand[s] that all servicemen be given an equal opportunity"); U.S. Dep't of Justice, *Affirmative Action Review, Report to the President* § 7.1 (1995) ("success with the challenges of diversity is critical to national security").

Today, the armed services and Departments of Defense and Veterans Affairs formally recognize equality and dignity as core values.[7] Servicemembers have an "[e]xpectation of fair and equitable treatment." *The Army Family* 13. This only makes sense. Every member of the military is exposed equally to harm and personal sacrifice and thus each should receive equal treatment. Any other course is morally intolerable and undermines the military's ability to serve its mission effectively.

DOMA, by contrast, is manifestly unequal inasmuch as it reduces and eliminates benefits to certain soldiers and their families. Dividing servicemembers into two classes has no military justification. See, *e.g.*, Br. for U.S. 28-29, 12; cf. Dep't of the Navy, OPNAVINST 5354.1F, *Equal Opportunity Policy* § 4(a) (Jul. 25, 2007) (discrimination "adversely affect[s] good order and discipline, mission readiness, and prevent[s] our Navy from attaining the highest level of operational readiness"). Moreover, this divisiveness runs directly counter to commonality and fairness that is essential to cohesion. See, *e.g.*, *Pentagon Pride Month Event* (statement of Gordon Tanner: in the post-DADT military, a servicemember must "not be treated as second class because he receives lesser benefits than his straight colleague"); *Marine*

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[7] *See, e.g.*, U.S. Dep't of Def., Administrative Instruction No. 31, *Equal Opportunity (EEO) and Diversity Programs* § 4.1 (July 13, 2007) ("[p]romote equal opportunity in every aspect of civilian employment policy and practice"); U.S. Dep't of Def., Directive No. 1322.22, *Service Acadamies* § 4.5.4.1 (Aug. 24, 1994); *VA Mission Statement* ("foster a culture that values equal opportunity"); U.S. ROTC, *Army Values* 142 ("promot[e] dignity, fairness, and equal opportunity for others"); U.S. Marine Corps, MCRP 6-11B, W/CH 1, *Marine Corps Values: A User's Guide for Discussion Leaders* 15-20 (Oct. 1998) ("*Marine Corps Values*") ("displaying fairness and impartiality is critical").

Corps Values 11-7 ("The negative effect on morale and unit cohesion [of favoritism] is obvious."). Indeed, in the aftermath of DADT, the Defense Department explicitly concluded that a "new inequity" between heterosexual and gay or lesbian servicemembers "or the perception of it, runs counter to the military ethic of fair and equal treatment, and resentment at perceived inequities runs deep in military families." *DADT Report* 15. Servicemembers who happen to be gay or lesbian acutely feel DOMA's unequal treatment. See, *e.g.*, K. McCormack, *Lesbian mom who sought military benefits dies*, Army Times, Feb. 12, 2013 ("She deserves the same benefits as any other spouse," since "'[s]he went through the same stress, fear and concern during my deployment as any other spouse.'"); D. Brooks, *Same Sex Couples Struggle for Equal Treatment in Military*, Fayetteville Observer, Jan. 20, 2013 ("'We sacrifice like every military family, and a part of me resents it.'").

Thus, the Secretary of Defense has emphasized that the military must "ensure that all Service members are treated equally regardless of sexual orientation." *Extending Benefits Memo* 2; see, *e.g.*, T. Vanden Brook, *Interview: Panetta Recounts Tenure as Defense Secretary*, USA Today, Feb. 2, 2013 ("'People who are serving in the military and putting their lives on the line deserve some of the benefits that go with that.'"); Sgt. 1st Class T.C. Marshall Jr., *Defense Leaders Laud DADT Repeal, Return of "Equality"*, Am. Armed Forces Press Serv., Sept. 20, 2011 (quoting Defense Secretary Panetta: repealing DADT helps us "'move closer to achieving the goal at the foundation of the values that America's all about—equality, equal opportunity and dignity for all Americans'"), http://www.defense.gov/news/news article.aspx?id=65390; see also *id.* (quoting Admiral Mullen: DADT "'was fundamentally against everything we stand for as an institution'"). DOMA, however, prevents the military from fulfilling this central aspect of its mission.

2. DOMA also requires that military leaders violate their commitments to servicemembers as well as the principles of honesty and dignity that are essential to military service. See, *e.g.*, Dep't of Def., *The Armed Forces Officer* 42, 44-45 (Jan. 2006), http://www.dtic.mil/doctrine/education/armedforces officer.pdf (discussing an officer's duties of honesty and integrity to his or her subordinates); *S. Hearing 111-899*, at 10 (Adm. Mullen: discussing the importance of dignity). The civilian and military leadership repeatedly have told servicemembers that they will protect their best interests and those of their families. For instance, the Army leadership recently stressed that it is "committed to providing the best care and support to our wounded, ill, and injured Soldiers—along with their Families. And our commitment extends to the Families who have lost a Soldier in service to our nation. *We will never forget our moral obligation to them.*" Geren & Casey, *supra*, at May 7, 2009 letter (emphasis added).

Sadly, and beyond acceptability, DOMA requires that the military violate these solemn pledges. As detailed *supra* § II.A, DOMA ensures that some married servicemembers' deaths will pass without the military or civilian leaders being able to fulfill the financial and moral obligations to those families for which the servicemember paid his or her life. This is contrary to everything for which the military stands.

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DOMA divides legally married servicemembers into unequal classes for reasons wholly unrelated to military experience, prowess, or objectives. After DADT's repeal, the reality is that legally married gay and lesbian servicemembers serve openly and admirably. Their commanding officers depend on them as integral parts of units that are facing extraordinary challenges defending this country. A further reality is that some gay and lesbian servicemembers have legal spouses, as well as children for whom they share custody and are obligated to support. In sum, legally married gay and lesbian servicemembers have the same needs and obligations as their heterosexual peers.

From a wealth of experience and study, reinforced by common sense, *amici* know that servicemembers and their families face unique challenges when a servicemember is deployed and when he or she is stationed at home. Over time, the military and civilian leadership have developed a comprehensive set of benefits for servicemembers and their families—all designed to strengthen the armed forces' ability to effectively protect this Nation's safety. In doing so, the leadership has spent considerable time and energy ensuring that the stresses of service—while inherently significant—are sufficiently manageable to allow (i) the servicemember and the military to perform at the highest level possible, and (ii) the servicemember to make a career of defending this great nation.

As set forth above, however, DOMA strips away the very tools that experience has demonstrated are necessary to legally married servicemembers and their families if the military is to be as productive as it can be. DOMA's sanction of inequality has arbitrarily imposed deeply hurtful effects on today's military. Because DOMA injures morale, readiness, cohesion and performance, there is no constitutional justification, let alone military rationale, that weighs in favor of permitting these threats to today's military and our national security to continue. Accordingly, the Court should recognize that DOMA cannot survive constitutional scrutiny when applied in the military of the 21st Century.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment.

Respectfully submitted,

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March 1, 2013

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APPENDIX

APPENDIX

Biographies of *amici curiae*

Rear Admiral Thomas F. Atkin (U.S. Coast Guard, Ret.) retired in 2012 after 34 years of service, including as Assistant Commandant for Intelligence and Criminal Operations at Coast Guard Headquarters.

Brigadier General Roosevelt Barfield (U.S. Army, Ret.) served for 32 years, including as Deputy Director, Operations, Operations & Logistics Directorate, U.S. Africa Command and Commander, Standing Joint Force Headquarters Command Element.

Dr. Coit D. Blacker, served as Special Assistant to the President for National Security Affairs as well as a Senior Director at the National Security Council. He is a senior fellow and professor in inter-national studies at Stanford University.

General Wesley K. Clark (U.S. Army, Ret.) served for 38 years, including as Supreme Allied Commander, Europe (1997–2000), and Commander in Chief, U.S. Southern Command (1996–97).

Richard Clarke had a 19-year career in the Pentagon, the Intelligence Community, and State Department, and served the last three Presidents, including as National Coordinator for Security and Counterterrorism.

Honorable William Cohen, served as the 20th Secretary of Defense (1997–2001). As U.S. Senator from Maine (1979–1997), he chaired the Armed Services Committee's Seapower and Force Projection Subcommittee.

Commander Beth Coye (U.S. Navy, Ret.), served 21 years and has taught at the Naval War College.

Honorable Russell D. Feingold represented Wisconsin in the U.S. Senate (1993–2011), and served on the Senate's Foreign Relations Committee, Select Committee on Intelligence, and Judiciary Committee.

Brigadier General Evelyn ("Pat") Foote (U.S. Army, Ret.) served on active duty for more than 30 years, including as Vice Chair of the Secretary of the Army's Senior Review Panel on Sexual Harassment.

Lieutenant General Robert G. Gard, Jr., Ph.D (U.S. Army Ret.) served for 31 years, had combat service in Korea and Vietnam, and was Commanding General of the Army Military Personnel Center and executive assistant to two secretaries of defense.

Rear Admiral John Hutson (U.S. Navy, Ret.) served for 27 years, including as Judge Advocate General of the Navy (1997–2000). He is Dean Emeritus of the University of New Hampshire School of Law.

Brigadier General David R. Irvine (U.S. Army, Ret.) served for 40 years, including as Deputy Commander for the 96th Regional Readiness Command.

Lieutenant General Arlen D. Jameson (U.S. Air Force, Ret.) served for 34 years, including as Deputy Commander-in-Chief, U.S. Strategic Command and Commander of the 20th Air Force.

Brigadier General John H. Johns, Ph.D (U.S. Army, Ret.) served for over 26 years, including as Assistant Division Commander of the 1st Infantry Division and Director of Human Resources Development for the Army General Staff. He also was Deputy Assistant Secretary of Defense.

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Iraq and Afghanistan Veterans of America is the first and largest nonprofit, nonpartisan organization for Iraq and Afghanistan veterans. It has over 200,000 member veterans and supporters nationwide.

Service Women's Action Network is a nonprofit, nonpartisan organization providing national policy advocacy and direct services to servicewomen, female veterans, and their families.

AMICUS
CURIAE
BRIEF

FOR ARGUMENT

Supreme Court, U.S.
FILED
JAN 24 2013
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No. 12-307

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,

v.

EDITH SCHLAIN WINDSOR IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *ET AL.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES ADDRESSING THE MERITS AND SUPPORTING REVERSAL

Addressing the Issue of Whether Section Three of the Defense of Marriage Act Violates the Fifth Amendment Guarantee of Equal Protection

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QUESTIONS PRESENTED

1. Whether Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, as applied to persons of the same sex who are legally married under the laws of their State, violates the Fifth Amendment's guarantee of equal protection of the laws.

2. Whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case.

3. Whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED I

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTORY STATEMENT 2

SUMMARY OF ARGUMENT 8

ARGUMENT 11

I. **The Second Circuit Erroneously Held That Section Three of DOMA Intrudes Upon State Regulation of Marriage and Violates Principles of Federalism; However, DOMA Does Not Regulate or Apply to State Laws and Programs, But Applies Only to Federal Laws, Regulations, Programs, and Agencies** 11

II. **The Second Circuit Erred in Holding That Section Three of DOMA Violates Principles of Federalism Because Federalism Includes and Protects the Authority of Congress to Define Who Is Eligible for Federal Programs and Federal Benefits and to Determine Who Is Subject to Federal Laws and Duties** 16

TABLE OF CONTENTS—Continued

Page

III. The Second Circuit Erred in Holding That Congress Lacks Constitutional Authority To Define Marriage In Section Three of DOMA Because For Centuries Congress Has Enacted Similar Statutes Defining Domestic Relationships and Their Incidents For Purposes of Federal Law 20

IV. This Court Long Has Upheld Federal Legislation Regulating the Meaning, Incidents, and Effects of Domestic Relationships for Purposes of Federal Laws 27

CONCLUSION 32

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Page

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Page

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Page

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Page

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Page

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Page

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Page

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INTEREST OF THE *AMICI CURIAE*[1]

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[1] Pursuant to this Court's rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Further, pursuant to Rule 37.6, these *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief.

Institutional affiliations are provided for purposes of identification only. The *amici* speak for themselves, not their universities.

Bruce C. Hafen Professor of Law, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

The *amici* law professors all have professional, scholarly and personal civic interests in the integrity of the law, including the Defense of Marriage Act (herein "DOMA"), and in establishing that DOMA, Section 3, is a valid and proper exercise of Congress' constitutional authority to define "marriage" and "spouse" for purposes of federal laws, programs and agencies that does not violate the Fifth Amendment.

INTRODUCTORY STATEMENT

In 1996 Congress passed and the President signed the Defense of Marriage Act (DOMA),[2] to protect the authority of Congress (in Section 3 of DOMA) and the authority of the several states (in Section 2 of DOMA) to decide for themselves whether (and, if so, when, how, to what extent, etc.) to recognize same-sex marriages created in other jurisdictions.

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[2] Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2006) and 1 U.S.C. § 7 (2006)) [hereinafter DOMA]. *See generally* Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 DRAKE L. REV. 951, 960-62 (2010) (discussing history of DOMA); Lynn D. Wardle, *Who Decides?: The Federal Architecture of DOMA and Comparative Marriage Recognition*, 41 CAL. W. INT'L L.J. 143, 145 (2010) (discussing passage of DOMA); Lynn D. Wardle, *Involuntary Imports:* Williams, Lutwak, *the Defense of Marriage Act, Federalism, and "Thick" and "Thin" Conceptions of Marriage*, 81 FORDHAM L. REV. 771, 788-89 (2012) (discussing background of DOMA); Joshua Baker & William C. Duncan, *As Goes DOMA ... Defending DOMA and the State Marriage Measures*, 24 REGENT U. L. REV. 1, 4 (2012), (discussing federalism and justification for DOMA); William C. Duncan, *DOMA and Marriage*, 17 REGENT U. L. REV. 203 (2005); *see further* Daniel A. Crane, *The Original Understanding of the "Effects Clause" of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307 (1998) (discussing federalism generally, federalism in DOMA,

The Defense of Marriage Act is a well-crafted, "architectural" act carefully designed to preserve the structure and allocation of law-making authority under the Constitution of the United States relating to inter-jurisdictional recognition of same-sex marriage. Both operative sections of DOMA were intended to answer the "who decides whether to allow importation of same-sex marriage" questions.[3]

Section Three of DOMA, the "vertical" (state-federal) inter-jurisdictional recognition provision at issue in this case, confirms and properly exercises Congress' constitutional authority to decide whether same-sex marriage can be imported into federal laws, programs, and regulations.[4] Section Three's principle of

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and refuting federalism challenges to Section Two).

[3] Wardle, *Who Decides? supra* note 2, at 144.

[4] 1 U.S.C. § 7 (2006):

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

"who-decides" parallels that of Section Two concerning "horizontal" (state-state) inter-jurisdictional recognition of same-sex marriage, providing that each state may decide for itself whether or not to recognize same-sex marriages from other states.[5]

Section Three of DOMA confirmed that it is for Congress to determine whether (and if so when, how, and to what extent) same-sex marriages valid in the internal domestic relations law of a state will be deemed a marriage for purposes of federal law. In Section Three Congress also exercised that authority to codify the status quo—that same-sex marriages are not treated as marriages in federal laws, agencies, bureaus, regulations, or programs.

When DOMA was enacted, no American state and no nation in the world permitted same-sex couples to marry.[6] Likewise, in 1996 same-sex marriages were not recognized or treated as "marriages" in any federal law, regulation, program, agency or bureau. Thus, Section Three of DOMA merely codified the existing federal law understanding of marriage as the union of a man and a woman.[7] It does not prevent Congress from later changing that definition for any particular federal law or program or for all of them.[8]

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[5] 28 U.S.C. § 1738C (2006):

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

[6] Since DOMA was enacted, nine American states (out of 50) and eleven sovereign nations (out of 193) have legalized same-sex marriage. Wardle, *Involuntary Imports*, *supra* note 2, at 825 (Appendix) (listing nations and states that have legalized (or constitutionally forbidden) same-sex marriage). The Netherlands

However, by 1996, litigation in Hawaii raised the prospect that some state might soon legalize same-sex marriage.[9] (In fact, just months after DOMA was enacted, by the end of that same year—1996—a state court in Hawaii had ruled that the Hawaii state

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became the first nation to allow same-sex couples to marry when the national legislature legalized same-sex marriage effective in April 2001. Wet van 21 December 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (Wet openstelling huwelijk) [Act of 21 December 2000 amending Book 1 of the Civil Code in connection with the opening of marriage to persons of the same sex (Law opening marriage)], Stb. 2001, p. 9, available at https://zoek.officielebekendmakingen.nl/stb-2001-9.html (last seen January 23, 2013).] Massachusetts was the first American state to permit same-sex marriage by a 2003 ruling that became effective in 2004. *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 943, 959 (Mass. 2003).

[7] Wardle, *Section Three*, *supra* note 2, at 956 (Section Three had a "place-holder" effect.)

[8] Indeed, several bill have been introduced in Congress to include same-sex marriages as "marriages" for purposes of some or all federal laws or to repeal DOMA. *See generally id.* at 961-62; Wardle, *Involuntary Imports*, *supra* note 2, at 797.

[9] *See Baehr v. Lewin*, 852 P.2d 44 (Hawaii 1993).

constitution required that state to allow same-sex couples to marry.)[10] Many advocates of same-sex marriage, including not a few law professors and legal commentators, were asserting that if any state legalized same-sex marriage, same-sex couples from other states could go to that state, get married, and require the recognition of their marriages by their home states and under federal law.[11]

Congressional concern was so great that separate hearings were held on DOMA by subcommittees in both the House of Representatives[12] and the Senate.[13] While there was much discussion about the threat of involuntary importation of same-sex marriage from a state that allowed such marriages into other states that did not allow or choose to recognize same-sex marriage,[14] there also was grave concern that some federal judges or administrators would interpret federal laws and regulations to compel federal programs and agencies to recognize same-sex marriages in the absence of a clear expression by Congress that same-sex unions were not to be deemed "marriages" for purposes of federal law.[15] Section Three was intended to prevent federal judges and agency officials from interpreting or applying federal law to recognize same-sex marriages in federal laws, regulations, and programs before Congress decided that such recognition was appropriate.[16]

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[10] *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235, at *3, (Haw. Cir. Ct. Dec. 3, 1996). The Hawaii Supreme Court later vacated the trial court's decision and dismissed the case as moot, 1999 WL 1195319 (Haw. Dec. 9, 1999), after Hawaii voters in November 1998 approved an amendment to the state constitution that confirmed the legislature's power to "reserve marriage to opposite-sex couples." *See* HAW. CONST. art. I, § 23.

[11] *See* Wardle, *Section Three, supra* note 2, at 952, n.7.

[12] *The Defense of Marriage Act: Hearing on H.R. 3396 Before the H. Comm. on the Judiciary*, 104th Cong. 1 (1996) [hereinafter *H.R. Hearings*].

[13] *Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 1 (1996) [hereinafter *Sen. Hearing*].

The power of Congress to define what it means when the term "marriage" (and related terms) are used in federal laws, regulations, and other official federal materials, was undisputed in 1996, as it should be today. Section Three of DOMA is a clear expression of

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[14] *See generally* Wardle, *Who Decides?*, *supra* note 2, at 148-152 & 160-165; H.R. REP. No. 104-664 (1996) at 2-10, *reprinted in* 1996 U.S.C.C.A.N. 2905 [hereinafter H.R. REP. No. 104-664.]

[15] *Sen. Hearing*, *supra* note 13, at 23-35 (statement of Lynn D. Wardle); *id.* at 19–23 (statement of Gary L. Bauer, Pres., Family Research Council); *id.* at 42–48 (statement of Cass R. Sunstein, Prof., Univ. of Chicago); *id.* at 214 (statement of Jay Alan Sekulow). *H.R. Hearings*, *supra* note 12, at 62 (statement of Jay Alan Sekulow); *id.* at 158 (Statement of Lynn D. Wardle); *id.*, at 87–117 (statement of Hadley Arkes, Prof., Amherst Coll.); *id.* at 149–57 (statement of Maurice J. Holland, Prof. of Law, Univ. of Oregon Sch. of Law).

[16] *See* H.R. REP. No. 104-664, *supra* note 14, at 10-12.

Our Federalism.[17] In 1996, the Department of Justice under President Clinton twice avowed that DOMA was constitutional,[18] a conclusion that this Court should confirm today.

SUMMARY OF ARGUMENT

Federalism entered into the Second Circuit's opinion in *United States v. Windsor*, 699 F.3d 169 (2d Cir. 2012) at several points in its Equal Protection analysis of Section Three of DOMA. However, the court misstated the meaning and operative effect of DOMA, and misunderstood and misapplied the applicable federalism principles in every instance.

First, the appellate court below erred and misconstrued Section Three of DOMA when it described it as "an unprecedented intrusion 'into an area of traditional state regulation'" and as "an unprecedented breach of longstanding deference to federalism that singles out same-sex marriage as the only inconsistency (among many) in state law that requires a federal rule to achieve uniformity . . . ." (699 F.3d at

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[17] *Younger v. Harris*, 401 U.S. 37, 44 (1971).

[18] Letter dated May 14, 1996 from Andrew Fois, Assistant Attorney General, U.S. Department of Justice to Hon. Henry J. Hyde, Chairman, Committee on the Judiciary of the U.S. House of Representatives, *quoted in* H.R. REP. No. 104-664, *supra* note 14, at 33-34; Letter dated May 29, 1996 from Ann M. Harkins (For Andrew Fois, Assistant Attorney General) to Hon. Charles T. Canady, Chairman, Subcommittee on the Constitution Committee On the Judiciary of the U.S. House of Representatives, *quoted in* H.R. REP. No. 104-664, *supra* note 14, at 34.

186.[19]) In fact, Section Three of DOMA does not intrude upon state domestic relations law regarding marriage at all, nor does it attempt to regulate it or alter it in any way. Section Three applies only to federal laws, regulations, programs, and agencies. This is explained in Part I of the Argument, *infra*.

Second, the Second Circuit (699 F.3d at 185-86) in that decision displayed an erroneous understanding of the constitutional principle of federalism as applied to family law. The Constitution reserves to the states primacy of authority—"virtually exclusive" authority—to regulate domestic relations in the states, notably the creation, dissolution and local incidents of domestic relationships. The Constitution confers on Congress the authority to define and regulate the legal effects of state-created domestic relationships for purposes of federal laws such as those relating to immigration, taxation, and social security, and other federal benefits. Congress' well-established and long-exercised authority to regulate and define relationships within and for purposes of the federal sphere of regulation is no less important to constitutional federalism than is the states' authority to create and regulate domestic relationships *qua* domestic relationships and for purposes of their state law incidents. This is explained in Part II of the Argument, *infra*.

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[19] The court quoted and cited "*Massachusetts* [*v. U.S. Dep't of HHS*], 682 F.3d [1 (1st Cir. 2012)] at 13" for the phrase "into an area of traditional state regulation."

Third, the Second Circuit's brief statement of the history of federalism as applied to the definition of marriage for purposes of federal law is inaccurate and incomplete. The history there presented neglects to attend to more than two centuries of federal statutes, regulations, and programs created by Congress that have defined terms like "marriage" and "spouse" for purposes of federal law. This is explained in Part III of the Argument, *infra*.

Fourth, the opinion of the court below ignores numerous federal court rulings (including many by this Court) that have upheld Congress' actions in both establishing limitations on and definitions of marriage and governing marital incidents for purposes of federal law. This is explained in Part IV of the Argument, *infra*.

In short, in its *Windsor* opinion below (699 F.3d 169), the Second Circuit plainly implies that federal law should always defer to state law. ("Congress and the Supreme Court have historically deferred to state domestic relations laws, irrespective of their variations." *Windsor*, 699 F.3d at 185.) As will be shown below, this is not the case. If conformity to state law and usage were to be required, then it nevertheless seems that at present DOMA survives, because the vast majority of the states define "marriage," some of them by constitutional provision, to mean what DOMA says it means.

ARGUMENT

I.

THE SECOND CIRCUIT ERRONEOUSLY HELD THAT SECTION THREE OF DOMA INTRUDES UPON STATE REGULATION OF MARRIAGE AND VIOLATES PRINCIPLES OF FEDERALISM; HOWEVER, DOMA DOES NOT REGULATE OR APPLY TO STATE LAWS AND PROGRAMS, BUT IT APPLIES ONLY TO FEDERAL LAWS, REGULATIONS, PROGRAMS, AND AGENCIES

The Second Circuit discussed federalism several times in its Equal Protection analysis in *Windsor*. It characterized DOMA as "an unprecedented intrusion 'into an area of traditional state regulation.'" *Windsor*, 699 F.3d at 186.[20] The Second Circuit further declared that "DOMA is an unprecedented breach of longstanding deference to federalism that singles out same-sex marriage as the only inconsistency (among many) in state law that requires a federal rule to achieve uniformity . . . ." 699 F.3d at 186.

This discussion by the Second Circuit court betrays a lack of understanding of the meaning of Section Three of DOMA and of its operation and effect. Section Three of DOMA does *not* regulate or apply to *state* domestic relations law regarding marriage, but only applies to *federal* laws, regulations, programs, and agencies.

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[20] The court quoted and cited "*Massachusetts* [*v. U.S. Dep't of HHS*], 682 F.3d [1 (1st Cir. 2012)] at 13" for the phrase "into an area of traditional state regulation."

The text of Section Three of DOMA is unmistakable in its application to federal laws and programs only. It reads:

> In determining the meaning of *any Act of Congress*, or of any ruling, regulation, or interpretation of the various *administrative bureaus and agencies of the United States*, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[21]

The text could hardly be clearer. The first two clauses of Section Three define the scope of application of the definition of marriage (the third clause) of Section Three: it applies to (and only to) "Act[s] of Congress" and to the rulings, regulations, and interpretations "of the various bureaus and agencies of the United States." It does not apply to state law. It does not intrude in any way (let alone as an "unprecedented intrusion") into state law or apply to any state's regulation of domestic relations.

The opinion of the Court of Appeals does not cite a single case that has applied Section Three to state law, nor does it offer any other example to support its claim that Section Three intrudes upon state law. That is because there is no case or example to cite.

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[21] 1 U.S.C. § 7 (2006) (emphasis added).

The legislative history shows that Congress intended Section Three to apply to federal laws and programs only, not to the states. As the House Report explained: "Section 3 defines the terms 'marriage' and 'spouse,' *for purposes of federal law only* . . . ."[22]

The need to enact Section Three arose out of Congress' concern that "a decision by one State to authorize same-sex 'marriage' would raise the issue of whether such couples are entitled to federal benefits that depend on marital status. [DOMA] anticipates these complicated questions by laying down clear rules to guide their resolution."[23]

The House Report noted that legalization of same-sex marriage by any state "could also have profound implications for federal law" because "[t]he word 'marriage' appears in more than 800 sections of federal statutes and regulations, and the word 'spouse' appears more than 3,100 times."[24] Congress was aware that those terms seldom were defined in federal law, and that for purposes of federal law, the state meanings of "marriage" and "spouse" generally had been used. Because "none of the federal statutes or regulations that use the words 'marriage' or 'spouse' were thought by even a single Member of Congress to refer to same-sex couples,"[25] Congress intended to protect the established, intended meaning of those terms in federal law.

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[22] H. REP. 104-664, *supra* note 14, at 2 (emphasis added).

[23] *Id.*

[24] *Id.* at 10.

Moreover, because of the traditional and general practice of treating as married for purposes of federal law persons deemed married by state law, a redefinition of marriage by a state to include same-sex couples might be imported into federal law, "mak[ing] such couples eligible for a whole range of *federal rights and benefits*."[26] Indeed, the House Report cited "literally hundreds of examples" of attempts to interpret "spouse" and "marriage" in various federal laws to include same-sex couples.[27]

Thus, by enacting Section Three of DOMA, Congress intended to prevent state-dictated expansion of the scope and expense of federal laws and benefit programs.[28] Congress also intended to prevent the alteration of the structures, purposes and effects of federal laws and programs by state legalization of same-sex marriage.[29] That is consistent with one of the major concerns of the drafters of the Constitution of the United States, who in 1787 were very concerned about possible state intrusions upon federal law.[30]

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[25] *Id.*

[26] *Id.* (emphasis added.)

[27] *Id.* at 10-11.

[28] *Id.* at 18 ("they do impose fiscal certain fiscal obligations on the federal government").

[29] *Id.* at 10-11 (stating that one state's laws "could have profound practical implications for federal law" and that "Section 3 of H.R.

There is no hint in the text or legislative history of DOMA Section Three that it was intended to apply to or to alter any state's law as to marriage. Likewise, there is no evidence that Section Three has ever been applied to alter any such state law. Rather, the meaning and scope of DOMA is clear. It was intended only to regulate, and has been applied only to regulate, the meaning of "marriage" and "spouse" in federal laws, federal regulations, and the actions of federal agencies.[31]

3396 responds to these considerations").

[30] Wardle, *Section Three*, *supra* note 2 at 957 ("Today, it is easy to forget in 1787 the Founders—at least the Federalists, who supported the proposed United States Constitution—were more concerned it would 'be far more easy for the State governments to encroach upon the national authorities, than for the national government to encroach upon the State authorities'"), *citing* THE FEDERALIST NO. 7 (Alexander Hamilton) (Clinton Rossiter ed. 1967)).

[31] *See generally* Wardle, *Involuntary Imports*, *supra* note 2, at 805.

II.

THE SECOND CIRCUIT ERRED IN HOLDING THAT SECTION THREE OF DOMA VIOLATES PRINCIPLES OF FEDERALISM BECAUSE FEDERALISM INCLUDES AND PROTECTS THE AUTHORITY OF CONGRESS TO DEFINE WHO IS ELIGIBLE FOR FEDERAL PROGRAMS AND FEDERAL BENEFITS, AND TO DETERMINE WHO IS SUBJECT TO FEDERAL LAWS AND DUTIES

The Second Circuit held that because the regulation of domestic relations, and specifically of marriage, "is 'a virtually exclusive province of the States,'" Congress violated a principle of federalism by enacting Section Three of DOMA. *Windsor*, 699 F.3d at 185-86.[32]

This discussion of federalism by the Second Circuit reveals a misunderstanding of the constitutional principle of federalism in family law. Federalism does not prevent (and for two centuries has not prevented) Congress from declining to adopt state law doctrines and definitions relating to marriage and other domestic relationships. Under the Constitution, federalism regulates the relationship between the two levels of government by recognizing the federal government and each of the states as sovereign in some ways. For over one hundred fifty years this Court has emphasized that the states possess primacy of sovereign, constitutional ("virtually exclusive") authority to regulate domestic relations (the creation, dissolution, and state-law incidents of domestic relationships *qua* domestic relationships).[33] On the other side, constitutional federalism confers and preserves Congress' authority to regulate the status and legal effects of state-created domestic relationships in and for purposes of federal law (such as for immigration, taxation, federal benefits, etc.) by, *inter alia*, defining who is eligible (or ineligible) to be treated as married (or as in some other family relationship) for such purposes. Congress' authority to regulate and define relationships within and for purposes of the federal sphere is no less important to constitutional federalism in family law than the states' authority to regulate domestic relationships *qua* domestic relations in the States.

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[32] For the phrase "a virtually exclusive province of the states," the court quoted and cited "*Sosna* [*v. Iowa*, 419 U.S. 393 (1975)] at 404."

DOMA Section Three protects and reflects what Alexander Hamilton described as "the constitutional equilibrium between the general and the State governments."[34] Just as a state may decline to treat a couple as married even though the couple has been treated as married for some purposes of federal law, so also may Congress decline to recognize a couple as married even though they are deemed lawfully married under the law of some state.[35]

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[33] *See Sosna v. Iowa*, 419 U.S. 393, 404 (1975). *See also Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502 (1982); *Moore v. Sims*, 442 U.S. 415 (1979); *Barber v. Barber*, 62 U.S. (21 How.) 582 (1858).

[34] THE FEDERALIST NO. 31, at 197 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Federal laws are filled with examples of congress' definition and regulation of family relationships—for the purposes of federal law. For example, persons who are lawfully married under state law, but are legally separated, are not treated as married for purposes of federal income tax law,[36] and a couple who consistently divorced at the end of the year to obtain single status for tax filing purposes, but remarried early in the following year, is considered married even though they are deemed unmarried at the relevant time for purposes of state domestic relations laws.[37]

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[35] *Lutwak v. United States*, 344 U.S. 604, 611 (1953); id. at 620–23 (Jackson, J., dissenting); *see also Adams v. Howerton*, 673 F.2d 1036, 1040–41 (9th Cir. 1982) (even if same-sex marriage was valid under state law, it did not count as a marriage for federal immigration law purposes); *Garcia-Jaramillo v. INS*, 604 F.2d 1236, 1238 (9th Cir. 1979) (validity of marriage under state law irrelevant to INS's authority to inquire into marriage for immigration purposes).

[36] 26 U.S.C. §§ 7703(a)(2), (b) (2006) (definitions of marital status); *id.* § 71(b) (definitions of alimony). *See* Wardle, *Section Three*, *supra* note 2, at 974-76.

[37] *Id.*, *citing* Rev. Rul. 76-255, 1976-2 C.B. 40. *See generally* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue*, 42 FAM. L.Q. 713, 714–15 (2009) (*discussing Nihiser v. Comm'r*, 95 T.C.M. (CCH) 1531 (2008); *Perkins v. Comm'r*, 95 T.C.M. (CCH) 1165 (2008); *Proctor v. Comm'r*, 129 T.C. 92 (2007); 73 Fed. Reg. 37,997 (July 2, 2008)).

While Congress often intends that state marriage law be used also in federal law, on some occasions Congress has chosen to take a different approach and apply its own standards or definitions as to domestic relationships.

> Congress's authority to enact domestic relations legislation that contradicts, supersedes, and overrides state domestic relation law is clear. In fact, in both *Hisquierdo [v. Hisquierdo*, 439 U.S. 572 (1979)] and *McCarty* [*v. McCarty*, 453 U.S. 210 (1981)] the Court concluded that federal statutes and rules governing the interests of family members in federal benefits were inconsistent with state domestic relations laws, and, as a result, superseded and replaced those state domestic relations laws for purposes of determining the federal benefits.[38]

It is a question of Congress' intention. It must be clear that Congress intended to supersede the state law on the specific point or issue in question for purposes of federal law. Section Three of DOMA is crystal clear about that. Congress clearly intended that the terms "marriage" and "spouse" when used in federal law mean only the union of a man and a woman.

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[38] Wardle, *Involuntary Imports*, *supra* note 2, at 783-84.

III.

THE SECOND CIRCUIT ERRED IN HOLDING THAT CONGRESS LACKS CONSTITUTIONAL AUTHORITY TO DEFINE MARRIAGE IN SECTION THREE OF DOMA BECAUSE FOR CENTURIES CONGRESS HAS ENACTED SIMILAR STATUTES DEFINING DOMESTIC RELATIONSHIPS AND THEIR INCIDENTS FOR PURPOSES OF FEDERAL LAW

The Second Circuit opinion in *Windsor* ignored entirely over two centuries of federal statues, regulations and programs that have defined terms like "marriage" and "spouse" and the meaning and operative effects and incidents of those relationships for purposes of federal law. The opinion of the appellate court in *Windsor* below ignored the long record of Congress enacting statutes that define, shape, and craft family relationship terms for purposes of federal law.

An eruption of scholarship, much of it quite recent, has documented irrefutably that from the earliest days of the United States of America Congress and other federal officials often exercised federal law-making authority to define domestic relations and their legal incidents for purposes of federal law.[39] Examining historical sources of the pre-Civil War era, Kristin Collins has shown "how national-level actors of that period exercised their authority to regulate and adjudicate matters involving domestic relations."[40] Her research into federal law before 1861 that dealt with family relations

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[39] *See generally* Lynn D. Wardle, *Involuntary Imports*, *supra* note 2, at 776-87 (*citing* Hendrik Hartog, MAN AND WIFE IN AMERICA: A HISTORY 258–77 (2000); Theda Skocpol, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992); Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States'*

> reveal[s] two important things about the early history of federal regulations concerning domestic relations. First, ... during the pre-Civil War era all three branches of the federal government were actively engaged in creating and enforcing laws and policies that bore directly on families, whether it was the creation and administration of widows and orphans' war pensions, the regulation of married women's citizenship, or—perhaps most surprisingly—the

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Rights, 26 CARDOZO L. REV. 1761, 1764-65, nn. 14, 16 & 18 (2005) (tracing pre-Civil War federal regulation of family relationships) (*citing* Nancy F. Cott, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 258–77 (2000)); Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251 (1999); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1379–86 (1998) (arguing that the federal government has heavily regulated domestic relations since Reconstruction); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001); Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1717–29 (1991); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 998–1003 (2002); Wardle, *Who Decides?*, *supra* note 2, at 172–76.

[40] Collins, *supra* note 39, at 1765.

> resolution of an array of domestic relations issues in federal court, often pursuant to uniform federal standards . . . . [F]ederal lawmakers and jurists recognized the important connection between republicanism (as they understood that concept) and domestic relations . . . . [H]istorical sources demonstrate that national jurists and lawmakers played a role in the process, slow and halting as it was, of examining and sometimes even displacing the hierarchical principles that were part and parcel of the common law of domestic relations.[41]

Federal laws were enacted that defined and regulated federal incidents of family relations in many areas over which the federal government exercised predominant lawmaking authority including for matters of federal pensions, citizenship, and federal equity principles, and these laws often displaced state domestic relations and inheritance laws.[42] "[F]ederal actors would not shy from asserting, or even creating, federal citizenship [and pension] laws and regulations [and equity principles] that directly impacted the scope and effect of domestic relations law and policy."[43]

Thus, for about two centuries Congress has been exercising constantly its constitutional authority to define and regulate domestic relations status, incidents, and effects for the purposes of federal laws and programs. Congressional enactments dealing with veterans' pensions (from the time of the Revolutionary War), taxes, immigration, bankruptcy, homesteading, other federal land laws, the census, copyright, and polygamy in the federal territories and in the states have defined domestic relationships in not a few cases inconsistently with the laws of some states.[44] Similarly, "a long line of statutes and cases involving federal programs have rejected application of state community property law—part of domestic relations law [of the states]."[45]

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[41] *Id.* at 1767-68.

[42] *Id.* at 1777-1843.

[43] *Id.* at 1815–17. *See generally* Wardle, *Involuntary Imports*, *supra* note 2 at 786-87.

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[44] Wardle, *Section Three, supra* note 2, at 974-81 (citing federal statutes, regulations and cases interpreting them); *see also* Wardle, *Who Decides? supra* note 2, at 174-75; Claire A. Smearman, *Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKELEY J. INT'L L. 382 (2009); *see further* UTAH CONST., art. 3, §1 (prohibiting polygamy forever—a ban imposed by the federal government as a price for statehood).

[45] Wardle, *Section Three, supra* note 2, at 975, *citing Boggs v. Boggs*, 520 U.S. 833, 854 (1997) (stating that questions under the Employee Retirement Security Act (ERISA) are not controlled by state community property law); *Mansell v. Mansell*, 490 U.S. 581, 594–95 (1989) (military retirement pay waived in order to collect veterans' disability benefits governed by Uniformed Services Former Spouses' Protection Act (USFSPA), not community property law); *McCarty v. McCarty*, 453 U.S. 210, 232–33, 236 (1981) (*citing Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979), *superseded by* Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 718 (1982) (codified as amended at 10 U.S.C. § 1408 (2006)) (military retirement pay governed by federal law, not community property law)); *Hisquierdo*, 439 U.S. at 582, 590 (railroad retirement assets governed by federal law, not community property law); *Yiatchos v. Yiatchos*, 376 U.S. 306, 309

That pattern of Congressional action, defining domestic relationship terms for purposes of federal law, continues today apart from Section Three of DOMA. For example, the very next section of the federal code following 1 U.S.C. § 7 (the section of DOMA at issue herein) defines the term "child," another family relationship term, for general purposes in federal law.[46] For immigration purposes, the Immigration and Naturalization Act also specifically defines the word "child" for purposes of immigration benefits and waivers of inadmissibility to include, *inter alia*, a "child born in wedlock,"[47] "a stepchild,"[48] a "child legitimated under the law of the child's . . . or . . . father's residence or domicile,"[49] and a child adopted before age sixteen (with other limitations).[50] The Copyright Act defines "a

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(1964) (United States Savings Bonds governed by federal law, not community property law, unless fraud involved); *Wissner v. Wissner*, 338 U.S. 655, 658 (1950) (beneficiary of policy governed by National Service Life Insurance Act, not community property laws).

[46] 1 U.S.C. § 8(a) (2006). *See generally* Wardle, *Involuntary Imports, supra* note 2, at 807-08.

[47] 8 U.S.C. § 1101(b)(1)(A) (2006).

[48] 8 U.S.C. § 1101(b)(1)(B) (2006).

[49] 8 U.S. C. § 1101(b)(1)(C) (2006).

[50] 8 U.S.C. § 1101(b)(1)(E)-(G) (2006). *See generally* Scott Titshaw, *Sorry Ma'am, Your Baby Is An Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FLA. COASTAL L. REV. 47, 59 (2010)

person's children,"[51] and the Family and Medical Leave Act defines "parent" for purposes of that federal legislation.[52]

A few of the many other examples resulting from this pattern of congressional action include these, dealing expressly with the terms "marriage," "husband," and "wife":

- An Act Supplementary to an Act Entitled "An Act to Grant Pensions," Approved July Fourteenth, Eighteen Hundred and Sixty-Two, ch. 247, sec. 14, 13 Stat. 387, 389 (July 4, 1864) (codified at R.S. §4773) (widows of colored soldiers who have been killed or died or are killed or die of wounds received in battle or disease contracted in U.S. military service, and in the line of duty, may receive pensions "without other proof of marriage than that the parties had habitually recognized each other as man and wife, and lived together as such for a definite period next preceding the soldier's enlistment, not less than two years ....");
- A Resolution to Encourage Enlistments and to Promote the Efficiency of the Military Forces of the United States, ch. 29, 13 Stat. 571 (Mar. 3, 1865) (codified at R.S. §2037) (the wife and children of any man in the military or naval services of the United States are forever free, and in determining who is or was the wife of an

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[51] 17 U.S.C. § 101 (1976).

[52] 29 U.S.C. § 2611(7) (2012).

> enlistee, "evidence that he and the woman claimed to be his wife have cohabited together, or associated as husband and wife, and so continued to cohabit or associate at the time of the enlistment, or evidence that a form or ceremony of marriage, whether such marriage was or was not authorized or recognized by law, has been entered into or celebrated by them, and that the parties thereto thereafter lived together, or associated or cohabited as husband and wife, and so continued to live, cohabit, or associate at the time of the enlistment, shall be deemed sufficient proof of marriage for the purposes of this act");
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> Immigration Act of 1924 ("An act to limit the migration of aliens into the United States..." (approved May 26, 1924), The Statutes at Large of the United States of America, from December, 1923 to March, 1925. Vol. XLII, Part 1, pp. 153-169 at § 28 ("The terms 'wife' and 'husband' do not include a wife or husband by reason of a proxy or picture marriage").

Congressional enactments like the above are legion, often dealing with domestic relationships, sometimes with provisions that are inconsistent with the laws of some of the states. Thus, the appellate court ruling in *Windsor* that DOMA Section Three exceeds Congress' legislative authority in violation of the constitutional principle of federalism is mistaken.

IV.

THIS COURT, AND MANY OTHER FEDERAL COURTS, LONG HAVE UPHELD FEDERAL LEGISLATION REGULATING THE MEANING, INCIDENTS, AND EFFECTS OF DOMESTIC RELATIONSHIPS FOR PURPOSES OF FEDERAL LAWS

The court below neglected to take account of the holdings of numerous federal courts (including many holdings of this Court) that have upheld federal statutes and regulations which apply definitions of domestic relationships divergent from those in state law or which establish, for federal law purposes, divergent legal effects to domestic relationships.

For example, *McCune v. Essig*, 199 U.S. 382 (1905), involved a dispute between a mother and daughter over land settled by their husband/father under the federal homestead law. The father had died shortly after making his homestead claim, and his widow and daughter continued to reside on the land. The widow remarried, filed proof of compliance, and received a homestead patent to the property.[53] The daughter later contested her mother's claim, invoking the state law "doctrine of relation," under which a beneficial interest would have passed to her that would have been recognized under state probate law.[54] The Supreme Court of the United States rejected application of state law because "[t]he words of the [Homestead Act] are clear," and even though the Act was contrary to state law, it was controlling on the issue.[55] Citing cases going back to 1839, the Court rejected the daughter's reliance upon state family law to determine her share of the federal homestead property. The Court based its decision squarely upon federal law despite its inconsistency with state domestic relations law.[56] Many earlier decisions of the Supreme Court took the same approach, applying federal law concerning family relationships and resulting rights over state family law.[57]

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[53] *McCune*, 199 U.S. at 387.

[54] *Id.* at 388.

Likewise, in *Lutwak v. United States*[58] this Court reconfirmed that congressional intent governs the meaning of, and requirements for, valid marriages for purposes of federal law. *Lutwak* concerned the alleged

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[55] *Id.* at 389.

[56] *Id.* at 390 ("[Her argument] is but another way of asserting the law of the State against the law of the United States, and imposing a limitation upon the title of the widow which section 2291 of the Revised Statutes does not impose").

[57] *See Bernier v. Bernier*, 147 U.S. 242, 247 (1893) (homestead land passes to all children, not just minors); *Maynard v. Hill*, 125 U.S. 190, 215 (1888) (rejecting children's claim to homestead land because recognition of father's ex parte territorial legislative divorce "will carry out the intent of Congress."); *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 517 (1839) (after title under federal law passes and is established under federal law, its conveyance and related ownership questions are governed by state law).

[58] 344 U.S. 604 (1953). *See generally* Wardle, *Involuntary Imports*, *supra* note 2, at 784-86.

"green card" marriages of three Polish refugees (two brothers and the wife or former wife of one of them) who were living in France as refugees following World War II. The brothers' sister, who lived in Illinois, allegedly arranged for three honorably discharged veterans—two women and one man—to travel to Paris, contract pretend marriages with the three relatives, and bring them into the United States under the War Brides Act. The three refugees and their veteran "spouses" celebrated their marriages properly in France, but allegedly never consummated their marriages nor lived together in the United States. They were all convicted of conspiracy to defraud the United States and of violating federal immigration laws based on their apparent "sham" marriages.

The convicted defendants argued that their marriages were valid. The three dissenting Justices in the case, Justices Jackson, Black and Frankfurter, agreed: "We start with marriages that either are valid or at least have not been proved to be invalid in their inception. . . . If the parties are validly married, even though the marriage is a sordid one, we should suppose that would end the case."[59] They added: "These marriages were formally contracted in France, and there is no contention that they were forbidden or illegal there for any reason."[60]

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[59] *Id.* at 620–21 (Jackson, J., dissenting).

[60] *Id.* at 620 (Jackson, J., dissenting); *see also id.* at 610 (majority opinion) (explaining that "[a]t the trial, it was undisputed that [the parties] had gone through formal marriage ceremonies").

However, Justice Minton, writing for the majority of six members of the Court, acknowledged the petitioners "contend that even under American law these marriages are valid."[61] Thus, they argued for recognition of the validity of the French marriages both as a matter of horizontal marriage recognition law (respect for the coequal sovereignty of France required the courts of the United States to recognize the validity of those marriages) and also as a matter of vertical choice of law (that, under the law of the relevant American states, their marriages were valid, probably because those states would recognize the validity of the French marriages).[62] Like the Second Circuit in this case, they claimed recognition of the validity of their marriages as a matter of federalism.[63]

However, the Court rejected those arguments; the validity of the marriages under French or Illinois' (or other states') law was irrelevant. "We do not believe that the validity of the marriages is material. . . . We consider the marriage ceremonies only as a part of the conspiracy to defraud the United States and to commit offenses against the United States."[64] For the majority, the issue was one of federal immigration and criminal conspiracy law, not Illinois or French marriage law.[65] The definition of marriage for purposes of interpreting the federal immigration laws was entirely a matter for Congress to determine. Thus, the Court held that case turned on the intent of Congress, and the Court was obliged to follow Congress's intent regarding what kind of marriages were to be recognized for purposes of federal immigration and related criminal conspiracy laws. The Court observed:

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[61] *Id.* at 611 (majority opinion); *see also id.* at 610.

[62] *See id.* at 610–11.

[63] *See id.*

[64] *Id.* at 611.

> By directing in the War Brides Act that 'alien spouses' of citizen war veterans should be admitted into this country, Congress intended to make it possible for veterans who had married aliens to have their families join them in this country without the long delay involved in qualifying under the proper immigration quota. Congress did not intend to provide aliens with an easy means of circumventing the quota system by fake marriages . . . . The common understanding of a marriage, which Congress must have had in mind when it made provision for 'alien spouses' . . . is that the two parties have undertaken to establish a life together and assume certain duties and obligations.[66]

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[65] *See id.* ("No one is being prosecuted for an offense against the marital relation."). *But see id.* at 620–21 (Jackson, J., dissenting) (explaining that the validity of the marriage "goes to the very existence of an offense" because if the marriages "were merely voidable and had not been adjudged void at the time of the entry into this country, it was not a fraud to represent them as subsisting").

[66] *Id.* (majority opinion) (emphasis added).

Lutwak continues to be not only good law, but also a definitive affirmation and example of the power that Congress and the federal government generally have to define and regulate marriage for purposes of federal law.[67] As with the federal laws in *Lutwak*, DOMA Section Three controls the meaning of "marriage" in federal law, even though it differs from the law of the nine states that have legalized same-sex marriage.

CONCLUSION

The United States Court of Appeals for the Second Circuit based its decision in *Windsor* upon an erroneous interpretation of DOMA Section Three. That section bars the recognition of same-sex marriages for purposes of federal statutes and regulations and the policies of the federal agencies. That Section does not apply, as te court below suggested, to state domestic relations law. The court below further erred in holding that Congress violated principles of federalism by enacting Section Three of DOMA when its doing so was clearly within the constitutional authority of Congress, the history of the acts of Congress, and the prior decisions and opinions of this Court. Therefore, respectfully, *amici* request this Court to reverse the decision of the Court of Appeals and uphold as constitutional Section Three of DOMA.

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[67] *See* Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 543 n.15 (2010) (noting that *Lutwak* still controls); Marcel De Armas, Comment, *For Richer or Poorer or Any Other Reason: Adjudicating Immigration Marriage Fraud Cases Within the Scope of the Constitution*, 15 AM. U. J. GENDER SOC. POL'Y & L. 743, 753–54 (2007) (advocating the *Lutwak* test for foreign marriage validity). *But see* Joseph A. Pull, *Questioning the Fundamental Right to Marry*, 90 MARQ. L. REV. 21, 43–44 (2006) (arguing that the right to marry should override *Lutwak*).

Respectfully submitted this 24th day of January 2013.

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No. 12-307

IN THE

Supreme Court of the United States

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Executor of the Estate of THEA CLARA SPYER, et al.,
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BRIEF FOR AMICI CURIAE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, BAR ASSOCIATIONS AND PUBLIC INTEREST AND LEGAL SERVICE ORGANIZATIONS IN SUPPORT OF RESPONDENT EDITH WINDSOR

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 6

- I. *LAWRENCE* REMOVED ANY PERCEIVED IMPEDIMENT TO THE RECOGNITION OF HEIGHTENED SCRUTINY FOR SEXUAL ORIENTATION CLASSIFICATIONS 6
- II. SEXUAL ORIENTATION CLASSIFICATIONS WARRANT HEIGHTENED SCRUTINY 10
  - A. Sexual Orientation Classifications Raise The Same Concerns As Other Classifications Accorded Heightened Scrutiny 10
  - B. Gay People Have Suffered A Long History Of Prejudicial Discrimination 15
  - C. Sexual Orientation Bears No Relation To A Person's Ability To Perform In Or Contribute To Society 20
  - D. Sexual Orientation Is A Distinguishing Characteristic That Defines A Discrete Group 22
  - E. Gay People Remain Disadvantaged In The Political Arena 24

CONCLUSION 29

APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES:

Able v. *United States*, 968 F. Supp. 850 (E.D.N.Y. 1997) 18

Ben-Shalom v. *Marsh*, 881 F.2d 454 (7th Cir. 1989) 8, 15

Bowen v. *Gilliard*, 483 U.S. 587 (1987) 13, 22

Bowers v. *Hardwick*, 478 U.S. 186 (1986) .... *passim*

Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. *Martinez*, 130 S. Ct. 2971 (2010) 19, 22

Citizens for Equal Protection v. *Bruning*, 455 F.3d 859 (8th Cir. 2006) 21

City of Cleburne v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985) .... *passim*

City of New Orleans v. *Dukes*, 427 U.S. 297 (1976) 11

Clark v. *Jeter*, 486 U.S. 456 (1988) 9

Conaway v. *Deane*, 932 A.2d 571 (Md. 2007) 17

Cook v. *Gates*, 528 F.3d 42 (1st Cir. 2008) 9

Craig v. *Boren*, 429 U.S. 190 (1976) 28

Equal. Found. of Greater Cincinnati, Inc. v. *City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995) 8, 20

TABLE OF AUTHORITIES—Continued

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Frontiero v. *Richardson*, 411 U.S. 667 (1973) .... *passim*

Golinski v. *U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012) .... *passim*

High Tech Gays v. *Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) 8

High Tech Gays v. *Def. Indus. Sec. Clearance Office*, 909 F.2d 375 (9th Cir. 1990) 8

In re Marriage Cases, 183 P.3d 384 (Cal. 2008) 23

Jantz v. *Muci*, 759 F. Supp. 1543 (D. Kan. 1991) 20

Jantz v. *Muci*, 976 F.2d 623 (10th Cir. 1992) 8

Kerrigan v. *Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) .... *passim*

Lawrence v. *Texas*, 539 U.S. 558 (2003) .... *passim*

Locke v. *Davey*, 540 U.S. 712 (2004) 11

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Lyng v. *Castillo*, 477 U.S. 635 (1986) 11, 13

Mass. Bd. of *Ret.* v. *Murgia*, 427 U.S. 307 (1976) .... *passim*

Matthews v. *Lucas*, 427 U.S. 495 (1976) 12

Page(s)

Mills v. *Habluetzel*, 456 U.S. 91 (1982) 12

Nyquist v. *Mauclet*, 432 U.S. 1 (1977) 13

Padula v. *Webster*, 822 F.2d 97 (D.C. Cir. 1987) 8

Palmore v. *Sidoti*, 466 U.S. 429 (1984) 20

Pedersen v. *Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012) ....*passim*

Perry v. *Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010)........*passim*

Plyler v. *Doe*, 457 U.S. 202 (1982)................. 10, 23

Price-Cornelison v. *Brooks*, 524 F.3d 1103 (10th Cir. 2008)........ 9

Richenberg v. *Perry*, 97 F.3d 256 (8th Cir. 1996)........ 8

Romer v. *Evans*, 517 U.S. 620 (1996).................. 11

Rowland v. *Mad River Local Sch. Dist.*, 470 U.S. 1009 (1985)........ 7, 16

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Scarbrough v. *Morgan Cnty. Bd. of Educ.*, 470 F.3d 250 (6th Cir. 2006)................... 9

Snetsinger v. *Montana Univ. Sys.*, 104 P.3d 445 (Mont. 2004)........ 13

Steffan v. *Perry*, 41 F.3d 677 (D.C. Cir. 1994)........ 21

Thomasson v. *Perry*, 80 F.3d 915 (4th Cir. 1996)........ 8

United States v. *Virginia*, 518 U.S. 515 (1996)........ 12, 15

TABLE OF AUTHORITIES—Continued

Page(s)

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Witt v. *U.S. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008)........................ 9

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TABLE OF AUTHORITIES—Continued

Page(s)

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INTEREST OF AMICI CURIAE

Amici are a coalition of bar associations, civil and human rights groups, and public interest and legal service organizations committed to preventing, combating, and redressing discrimination, and protecting the equal rights of women and minorities in the United States, including African-Americans, Latinos, Asian Americans and Pacific Islanders, and lesbian, gay, bisexual, and transgender people.[1] Amici have a vital interest in ensuring that the Constitution's guarantee of equal protection effectively protects all people from invidious discrimination and have filed this brief to address an issue of overriding importance in this case: the proper standard for reviewing governmental action that discriminates on the basis of sexual orientation. Amici urge the Court to hold that classifications based on sexual orientation are subject to heightened scrutiny, so that governments cannot use invented, after-the-fact rationalizations to mask and justify discrimination based on prejudice, antipathy, or baseless stereotypes. Discrimination based on sexual orientation bears the same essential hallmarks as other kinds of discrimination that have long received heightened scrutiny, and it should be treated no differently under the law.

Amici include the following organizations: The Leadership Conference on Civil and Human Rights, 9to5, the American Association of University Women, API Equality-Northern California, Asian American Institute, the Asian American Justice Center, the Asian Pacific American Legal Center, the Asian & Pacific Islander American Health Forum, the Asian Law Caucus, the Bar Association of San Francisco, Bay Area Lawyers for Individual Freedom, the Boston Bar Association, the Center for American Progress, the Charles Houston Bar Association,

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Chinese for Affirmative Action, the Connecticut Bar Association, Inc., the Connecticut Women's Education and Legal Fund, the Courage Campaign, Empire Justice Center, the Equal Justice Society, the Feminist Majority Foundation, Hispanic National Bar Association, Human Rights Campaign, the Japanese American Citizens League, the League of United Latin American Citizens, the Legal Aid Society, Legal Services NYC, the Lesbian, Gay, Bisexual & Transgender Community Center in New York City, LGBT Bar Association of Greater New York, Marriage Equality USA, the Massachusetts Bar Association, the Massachusetts LGBTQ Bar Association, the Mattachine Society of Washington, D.C., the Mexican American Legal Defense and Educational Fund, National Action Network, the National Asian Pacific American Bar Association, the National Black Justice Coalition, National Center for Lesbian Rights, National Council of La Raza, the National Gay and Lesbian Task Force Foundation, National LGBT Bar Association, National Organization for Women Foundation, New York Legal Assistance Group, New York State Bar Association, OCA – Asian Pacific American Advocates, Permanent Commission on the Status of Women, Public Advocates Inc., Rainbow PUSH Coalition, Secular Woman, the Society of American Law Teachers, the South Asian Bar Association of Connecticut, the Southern Poverty Law Center, Transgender Law Center, and the Women's Bar Association of New York. Descriptions of the amici are set forth in the Appendix to this brief.

SUMMARY OF THE ARGUMENT

For years, lower courts erroneously declined to accord heightened scrutiny to sexual orientation classifications based on this Court's decision in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), reasoning that if it were permissible to criminalize the conduct that was viewed as defining the class, distinctions based on sexual orientation could not be presumptively illegitimate. Now that the Court has overruled *Bowers*, however, any perceived impediment to the application of heightened scrutiny has been removed. To determine whether to afford heightened scrutiny in this case, the Court should look to the settled criteria it has long applied to its equal protection jurisprudence.

Using those criteria, the Court has always afforded heightened scrutiny to discrimination against groups, like gay people,[2] that have experienced a history of purposeful discrimination based on a factor that bears no relation to their ability to perform in or contribute to society. The Court has sometimes considered other factors in its determination of the correct level of scrutiny, such as the immutability or distinctiveness of a characteristic or the relative political power of a disfavored group. But it has never employed those factors to deny heightened scrutiny to laws burdening a group that has historically faced discrimination unrelated to the ability to contribute to society. Rather, in those circumstances the Court presumes the unequal treatment is based on deep-seated prejudice or baseless stereotypes and requires a more searching review of the actual grounds for the discrimination to prevent governments from justifying it with *post hoc* rationales.

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[2] As used in this brief, the term gay people includes gay men, lesbians, and bisexual people.

Under these criteria, there is little question that sexual orientation classifications warrant heightened scrutiny. Gay people have experienced a long and painful history of deliberate discrimination and this discrimination is based on a factor unrelated to their ability to perform in or contribute to society. Indeed, this discrimination is particularly deep-seated and hostile because it has historically been based on deeply-felt moral views. Particularly after *Lawrence v. Texas*, 539 U.S. 558 (2003), private moral judgments cannot be employed to justify public governmental discrimination based on sexual orientation.

Moreover, although considerations of immutability or relative political power should not be determinative here, those considerations also support a finding of heightened scrutiny. As with other classifications that have been held to warrant such scrutiny, sexual orientation is a distinctive characteristic that remains a target of prejudicial discrimination, both public and private. Even if sexual orientation were theoretically subject to voluntary change—and the overwhelming weight of scientific evidence is to the contrary—it is a central aspect of a person's identity, just as heterosexuality is, that one should not be required to change in order to avoid discrimination. Finally, to the extent a calculation of political power has any place in the heightened scrutiny analysis, gay people remain a small and underrepresented minority who continue to face an uphill struggle in the political process.

For all these reasons, amici urge the Court to hold that sexual orientation classifications are subject to heightened scrutiny. Moreover, even though the law at issue also fails rational basis scrutiny, amici urge the Court to require heightened scrutiny because of the important deterrent effect that such a holding provides, by making clear to governmental decisionmakers that sexual orientation discrimination cannot continue absent a convincing justification. A decision that leaves the appropriate standard of scrutiny unresolved will potentially subject gay people to continued discrimination until the Court has the opportunity to address the issue again. By holding that classifications based on sexual orientation are presumptively invalid, the Court will help ensure that such distinctions will no longer form the basis for governmental discrimination.

ARGUMENT

I. *LAWRENCE* REMOVED ANY PERCEIVED IMPEDIMENT TO THE RECOGNITION OF HEIGHTENED SCRUTINY FOR SEXUAL ORIENTATION CLASSIFICATIONS.

According heightened scrutiny to governmental discrimination based on sexual orientation requires no departure from existing law. To the contrary, such a holding requires only the application of long-settled precedent, because discrimination against gay people bears the same features that earlier led to heightened scrutiny of other classifications such as those based on sex or race. This application of heightened scrutiny would likely have occurred long ago if it had not been for the Court's erroneous decision in *Bowers*. Now that *Bowers* has been overruled, the way has been cleared for the Court to confirm that discrimination against gay people is presumptively illegitimate.

For nearly two decades *Bowers* was "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575. Unfortunately, but not surprisingly, lower courts also accepted the invitation. Even though *Bowers* was decided on due process grounds, courts relied on that decision to bypass the Court's traditional equal protection analysis in refusing to apply heightened scrutiny for classifications based on sexual orientation.

Before *Bowers*, the Court developed clear principles for determining whether discriminatory classifications warrant heightened scrutiny. Those principles considered whether the impacted group faced a long history of discrimination based on a characteristic that typically bears no relation to an individual's ability to contribute to society. *See City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985). Under this framework, both members of this Court as well as scholars concluded that sexual orientation classifications warranted heightened scrutiny.[3]

Then came *Bowers*, which upheld, under the Due Process Clause, a state law that criminalized so-called "homosexual sodomy." *Bowers*, 478 U.S. at 191. Thereafter, circuit courts began summarily rejecting heightened scrutiny for sexual orientation classifications with no analysis of the factors recognized in *Cleburne* and other cases.[4] Their reasoning relied, instead, on the mere existence of *Bowers*: if the Constitution went so far as to permit the criminalization of "behavior that defines the class," *Padula*, 822 F.2d at 103, then the Constitution—whether under the Due Process or Equal Protection clause—must likewise permit discrimination against the class.

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[3] *See, e.g.*, *Rowland* v. *Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of *certiorari*) (state action based on sexual orientation should be "subjected to strict, or at least heightened, scrutiny"); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 162-64 (1980); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285 (1985).

With the invalidation of *Bowers* in 2003, however, this line of reasoning collapses. In *Lawrence*, the Court overruled *Bowers* and denounced that decision as incorrect when it was decided. 539 U.S. at 578. In doing so, the Court removed the barriers erroneously erected by *Bowers*, clearing the path for a return to the long standing principles of equal protection jurisprudence. By confirming that there is constitutional protection for the "full right to engage" in the behavior that courts perceived as defining the class, *Lawrence* eliminated *Bowers* as a basis for denying heightened scrutiny for sexual orientation classifications. *Id.*[5] While courts had interpreted *Bowers* to foreclose heightened scrutiny for the class, *Lawrence* acknowledged that "equality of treatment" and the due process right to engage in the protected conduct were "linked in important respects" and that a tenable argument existed for invalidating the statute at issue under the Equal Protection Clause. *Id.* at 574-575.

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[4] *See, e.g.*, *Richenberg* v. *Perry*, 97 F.3d 256, 260 (8th Cir. 1996); *Thomasson* v. *Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc); *Equal. Found. of Greater Cincinnati, Inc.* v. *City of Cincinnati*, 54 F.3d 261, 267-68 (6th Cir. 1995), *vacated and remanded* 518 U.S. 1001 (1996); *Jantz* v. *Muci*, 976 F.2d 623 (10th Cir. 1992); *High Tech Gays* v. *Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula* v. *Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). There were dissenting voices, *see, e.g.*, *Watkins* v. *U.S. Army*, 875 F.2d 699, 724-28 (9th Cir. 1989) (en banc) (Norris, J., concurring in the judgment); *High Tech Gays* v. *Def. Indus. Sec. Clearance Office*, 909 F.2d 375, 378 (9th Cir. 1990) (Canby, J, dissenting from denial of reh'g en banc), but they did not prevail over the invocations of *Bowers*.

After *Lawrence*, *Bowers* can no longer be relied on to create a barrier to heightened scrutiny for sexual orientation classifications. Instead, heightened scrutiny is warranted based on the same factors that have led to the recognition that other classifications merit careful review under the Equal Protection Clause. Amici urge this Court to expressly affirm that heightened scrutiny is the proper standard and thereby make clear to both governments and lower courts that such discrimination cannot be sustained unless the government can demonstrate at least a significant justification.

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[5] After *Lawrence*, circuit courts continued to deny heightened scrutiny by following pre-*Lawrence* precedents. *See, e.g.*, *Witt* v. *U.S. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Price-Cornelison* v. *Brooks*, 524 F.3d 1103, 1114 n.9 (10th Cir. 2008); *Scarbrough* v. *Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Lofton* v. *Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *see also Cook* v. *Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (mistakenly relying on *Romer* v. *Evans* as holding that rational basis review is always required).

II. SEXUAL ORIENTATION CLASSIFICATIONS WARRANT HEIGHTENED SCRUTINY.

A. Sexual Orientation Classifications Raise The Same Concerns As Other Classifications Accorded Heightened Scrutiny.

The Court accords heightened scrutiny when a discriminatory classification is based on a factor that is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others," or that "generally provides no sensible ground for differential treatment." *City of Cleburne*, 473 U.S. at 440-41. Where a discriminatory classification is "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," laws "predicated on such prejudice [are] easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law." *Plyler* v. *Doe*, 457 U.S. 202, 216 n.14 (1982).

Rational basis review is inappropriate where a law targets a historically disfavored group based on a characteristic that has no bearing on an individual's ability to contribute to society. In these circumstances, the ordinary presumption of constitutionality gives way and it is not enough to sustain discrimination for lawyers to come up with a *post hoc* rational basis. Rather, for such discrimination the Court requires a greater justification, to ensure that discrimination based on deep-seated historical prejudice or baseless stereotypes is not masked by makeweight, *post hoc* rationales.

To date, the Court has recognized that heightened scrutiny is warranted when governments discriminate based on race, sex, illegitimacy, alienage, and national origin. *See Romer* v. *Evans*, 517 U.S. 620, 629 (1996); *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988); *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976).[6] On the other hand, it has declined such scrutiny for classifications based on mental disability, age, wealth, or close family relationship. *See Lyng* v. *Castillo*, 477 U.S. 635 (1986); *City of Cleburne*, 473 U.S. at 443; *Mass. Bd. of Ret.* v. *Murgia*, 427 U.S. 307, 313 (1976); *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973).

While the Court has looked at several factors in determining whether a classification warrants heightened scrutiny, it has always accorded such scrutiny when two factors are present: (1) the disfavored group has faced a history of discrimination that is (2) based on a characteristic that does not bear upon a person's ability to contribute to society. *See Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407, 426 (Conn. 2008) (discussing precedents).

Every group the Court has found to be a protected class has suffered a history of discrimination akin to that suffered by gay people. As with racial and national origin discrimination, according heightened scrutiny to sex discrimination "responds to volumes of history." *United States* v. *Virginia*, 518 U.S. 515, 531 (1996). Similarly, although "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and [African-Americans]," *Matthews* v. *Lucas*, 427 U.S. 495, 506 (1976), the historical burdens of unwed mothers and illegitimate children, including the "disapproval of family and community," were still found to justify heightened scrutiny. *Mills* v. *Habluetzel*, 456 U.S. 91, 99-100 (1982) (O'Connor, J., concurring).

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[6] Classifications based on religion also warrant heightened scrutiny, but this standard of review is separately justified by the Free Exercise Clause of the First Amendment. *See, e.g.*, *Locke* v. *Davey*, 540 U.S. 712, 720 n.3 (2004).

In contrast, the Court has declined to apply heightened scrutiny to classifications based on wealth because, among other things, the less well-off constitute a "large, diverse, and amorphous class" that has not had a "history of purposeful unequal treatment." *Rodriguez*, 411 U.S. at 28. The Court has applied a similar analysis to the aged. *Murgia*, 427 U.S. at 313.

Moreover, classifications subject to strict scrutiny, such as race, national origin, and alienage, are deemed suspect because these traits are "seldom relevant to the achievement of any legitimate state interest." *City of Cleburne*, 473 U.S. at 440. Similarly, classifications based on sex and illegitimacy warrant heightened scrutiny because these characteristics typically bear no relation to an individual's ability to participate in and contribute to society. *Frontiero* v. *Richardson*, 411 U.S. 667, 686 (1973) (plurality); *Matthews*, 427 U.S. at 505.

In analyzing whether a classification warrants heightened scrutiny, the Court has sometimes remarked on other factors, including the relative immutability of a characteristic or the political power of the disfavored group. *See, e.g.*, *Frontiero*, 411 U.S.

at 678 (plurality); *City of Cleburne*, 473 U.S. at 440. But it has never denied heightened scrutiny where—as with sexual orientation classifications—the disfavored group has experienced a painful history of discrimination based on deep-seated prejudice unrelated to its ability to contribute to society. Indeed, "[t]he irrational nature of the prejudice directed at gay persons, who 'are ridiculed, ostracized, despised, demonized, and condemned' merely for being who they are is entirely different in kind than the prejudice suffered by other groups that previously have been denied suspect or quasi-suspect class status." *Kerrigan*, 957 A.2d at 446 (quoting *Snetsinger* v. *Montana Univ. Sys.*, 104 P.3d 445, 454 (Mont. 2004) (Nelson, J., concurring)) (internal quotation marks omitted).

With regard to a characteristic's "immutability," the Court has employed that term only occasionally, and only in the context of examining whether the victims of discrimination "exhibit obvious, immutable, *or* distinguishing characteristics that define them as a discrete group." *Lyng*, 477 U.S. at 638 (emphasis added); *accord Bowen* v. *Gilliard*, 483 U.S. 587, 602-03 (1987). As the disjunctive phrasing shows, this factor, to the extent relevant, simply looks to whether the class shares distinguishing features, not whether those features are always permanent or obvious at birth. Thus, the Court has expressly rejected the proposition that alienage classifications should not be subject to strict scrutiny because "a resident alien can voluntarily withdraw from disfavored status." *Nyquist* v. *Mauclet*, 432 U.S. 1, 9 n.11 (1977); *see also City of Cleburne*, 473 U.S. at 442 n.10 ("'[T]here's not much left of the immutability theory, is there?'") (quoting John Hart Ely, *Democracy and Distrust* 150 (1980)). Indeed, while some individuals do change their sex, it has never been suggested that this fact would have any bearing on the application of heightened scrutiny to sex-based classifications. *Watkins*, 875 F.2d at 726 (Norris, J., concurring).

Likewise, despite a few references in the Court's jurisprudence to whether a disfavored group lacked political power, that has never been a dispositive factor in denying heightened scrutiny where there has been historical discrimination based on a factor irrelevant to societal contributions. The *Frontiero* plurality expressly acknowledged that "when viewed in the abstract, women do not constitute a small and powerless minority," 411 U.S. at 686 n.17, but nevertheless determined that sex-based classifications demanded heightened scrutiny given the long history of discrimination based on a characteristic that bears little or no relationship to an individual's ability to contribute to society.

Thus, heightened scrutiny continues to apply to sex-based classifications, even though women have always outnumbered men and are an increasingly powerful political demographic. *See City of Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring and dissenting) ("The 'political powerlessness' of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates."); *Kerrigan*, 957 A.2d at 452-53. Nor can the decision to employ heightened scrutiny for a classification depend on unprovable and continually changing calculations about whether a particular group has a degree of political power deemed sufficient to protect itself in all legislative fora.

As explained below, all the factors considered in the Court's precedents warrant heightened scrutiny for sexual orientation classifications. But it is sufficient that gay people have experienced a painful history of prejudicial discrimination based on a factor that bears no relation to their ability to contribute to society. Such discrimination is presumptively illegitimate and therefore requires more than *post hoc* rationalizations to justify it.

B. Gay People Have Suffered A Long History Of Prejudicial Discrimination.

As noted, this Court has applied heightened scrutiny when a group has experienced a "history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Murgia*, 427 U.S. at 313 (internal quotation marks omitted); *see also Virginia*, 518 U.S. at 531-32 ("[O]ur Nation has had a long and unfortunate history of sex discrimination * * * ") (quoting *Frontiero*, 411 U.S. at 684) (internal quotation marks omitted). Sexual orientation discrimination plainly fits this description.

The long history of discrimination against gay people is incontestable. Many courts have acknowledged the reprehensible history of purposeful discrimination by state and local governments in areas such as public employment; denial of child custody and visitation rights; denial of the ability to associate freely; and legislative efforts including local initiatives to repeal laws that protect gay people from discrimination.[7] Simply put, it is beyond reasonable dispute—and not seriously disputed in this case—that "gay persons historically have been, and continue to be, the target of purposeful and pernicious discrimination due solely to their sexual orientation." *Kerrigan*, 957 A.2d at 434.

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[7] *See, e.g.*, *Ben-Shalom*, 881 F.2d at 465-66 ("Homosexuals have suffered a history of discrimination and still do.");

The instances of such discrimination are too numerous and widespread to catalogue here. But the actions of the federal government alone illustrate the degree to which that discrimination was based on antipathy and prejudice. As shown in a record now before this Court, gay people were long barred from federal employment because it was believed that "efficiency" would be disrupted by the "revulsion of other employees by homosexual conduct;" that other employees would fear "homosexual advances, solicitations or assaults;" that there would be "unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of the common toilet, shower, and living facilities;" that it would be an "offense to members of the public who are required to deal with a known or admitted sexual deviate to transact Government business;" and that "the prestige and authority of a Government position will be used to foster homosexual activity,

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Pedersen v. *Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 317 (D. Conn. 2012) ("[H]omosexuals have suffered a long history of invidious discrimination."); *Golinski* v. *U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985 (N.D. Cal. 2012) ("There is no dispute in the record that lesbians and gay men have experienced a long history of discrimination."); *see also Rowland*, 470 U.S. at 1014 (1985) (Brennan, J., dissenting from denial of *certiorari*) ("[H]omosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is likely to reflect deep-seated prejudice rather than * * * rationality.") (internal quotation marks omitted).

particularly among the youth." *Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921, 981-82 (N.D. Cal. 2010) (citations and quotations omitted).

It was also believed that "the presence of a sex pervert"—at that time a common term for gay people—in a government agency "tends to have a corrosive influence on his fellow employees" because "[t]hese perverts will frequently attempt to entice normal individuals to engage in perverted practices. * * * One homosexual can pollute a Government office." *Id.* at 983-84 (quoting *Employment of Homosexuals and Other Sex Perverts in Government*, S. Rep. No. 81-241, 81st Congress, 2d Sess. 4 (1950)); *see also Conaway* v. *Deane*, 932 A.2d 571, 610 (Md. 2007) (government sought to justify ban on employment on the view that gay people "lack[ed] the emotional stability of normal persons") (citation omitted). Gay welfare organizations were similarly denied federal tax exemptions on the view they promoted "perverted or deviate behavior" that is "contrary to public policy and [is] therefore, not 'charitable.'" *Perry*, 704 F. Supp. 2d at 981. And much historical animus against gay people was based on the view that they were inevitably or predominately child molesters. *See, e.g.*, *id.* at 984 (quoting 1949 statement by Special California Assistant Attorney General that "[a]ll too often we lose sight of the fact that the homosexual is an inveterate seducer of the young of both sexes * * * and is ever seeking for younger victims.").

Nor is this discrimination a recent innovation. Despite some attempts to portray discrimination based on sexual orientation as merely a 20th century phenomenon—a sordid record that itself would warrant heightened scrutiny—such discrimination has far deeper roots. Discrimination against and social disapproval of, same-sex sexual intimacy have existed in America since the time of the first settlers. Joint Appendix at 345-48 ("J.A."). These attitudes were reflected in colonial and state criminal prohibitions targeting same-sex sexual conduct. *Pedersen*, 881 F. Supp. 2d at 314. When individuals started to identify as gay from the late 19th century onward, that long-existing social stigma was transformed into discrimination against gay people as a class. *Id.* Therefore, "the affirmative legislation of anti-gay policing that arose in the twentieth century was not reflective of an absence of prior discrimination or the emergence of a new form of discrimination." *Id.*[8]

Moreover, homosexuality was long viewed as a psychological disorder. *See Golinski*, 824 F. Supp. 2d at 986; *Perry*, 704 F. Supp. 2d at 967. Until the 1970s, the United States military "treated homosexuals as unfit for service because they had a 'personality disorder' or a 'mental illness.'" *Able*, 968 F. Supp. at 855 (citing *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Sen. Comm. on Armed Servs.*, S. Hrg. No. 103-845, 103d Cong., 2d Sess. (1993)).

Thus, "for centuries there have been powerful voices to condemn homosexual conduct as immoral" and the criminalization of that conduct "demean[ed] the lives of homosexual persons." *Lawrence*, 539 U.S. at 571, 575. And as noted, the Court has made clear that when homosexual conduct is criminalized "that declaration in and of itself is an invitation to subject homosexual persons to discrimination." *Id.* at 575. Discriminating against conduct closely associated with the class is functionally the same as discriminating against the class itself.[9]

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[8] *See also Able* v. *United States*, 968 F. Supp. 850, 854 (E.D.N.Y. 1997) (noting that the "'earliest and most drastic legislation against gay people enacted by any government of the High Middle Ages' were laws passed by the European conquerors of Jerusalem imposing death by burning on homosexual men") (quoting John Boswell, *Christianity, Social Tolerance and Homosexuality* 281 (1980)), *rev'd on other grounds*, 155 F.3d 628 (2d Cir. 1998).

The discrimination experienced by gay people, moreover, is particularly ingrained in society. It is not merely predicated on unfounded stereotypes about the inability of gay people to contribute to society, but has historically been based on a deep-seated notion that gay people themselves are a moral affront to society itself. *Kerrigan*, 957 A.2d at 444 ("That prejudice against gay persons is so widespread and so deep-seated is due, in large measure, to the fact that many people in our state and nation sincerely believe that homosexuality is morally reprehensible."). Although individuals are free to hold these views, the Constitution's equal protection guarantee prevents such prejudice from being given the force of law: "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984). Given this clear historical record of prejudicial discrimination, laws that perpetuate it warrant heightened scrutiny.

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[9] *See Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law* v. *Martinez*, 130 S. Ct. 2971, 2990 (2010) (noting that the Court has "declined to distinguish between status and conduct" when faced with discrimination targeted at "homosexual conduct"); *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class.").

C. Sexual Orientation Bears No Relation To A Person's Ability To Perform In Or Contribute To Society.

It is likewise indisputable that sexual orientation bears no relation to a person's ability to perform in or contribute to society.[10] *Cf. Frontiero*, 411 U.S. at 686 (plurality) ("[W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."). Being gay or bisexual does not cause one to "have a reduced ability to cope with and function in the everyday world." *City of Cleburne*, 473 U.S. at 442. Indeed, all of the burdens that have been imposed because of sexual orientation have been artificial, as gay people, like other groups found to be protected classes, have been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Murgia*, 427 U.S. at 313. Gay people have historically suffered discrimination not because they cannot contribute to society but because of moral disapproval and the view that their mere presence will cause discomfort to those around them. *See, e.g.*, *Steffan* v. *Perry*, 41 F.3d 677, 682-83 (D.C. Cir. 1994) (en banc) (quoting military's rationale for ban on gay servicemembers).

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[10] *See, e.g.*, *Watkins*, 875 F.2d at 725 (Norris, J., concurring) ("Sexual orientation plainly has no relevance to a person's ability to perform or contribute to society * * * "); *Equality Found. of Greater Cincinnati, Inc.* v. *City of Cincinnati*, 860 F. Supp. 417, 437 (S.D. Ohio 1994) ("[S]exual orientation * * * bears no relation whatsoever to an individual's ability to perform, or to participate in, or contribute to, society."), *rev'd on other grounds*, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996); *Jantz* v. *Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991) ("As a class-defining trait, sexual orientation 'bears no relation to ability to perform or contribute to society.'") (quoting *Frontiero*, 411 U.S. at 686), *rev'd* 976 F.2d 623 (10th Cir. 1992); *Kerrigan*, 957 A.2d at 434 ("The defendants also concede that sexual orientation bears no relation to a person's ability to participate in or contribute to society, a fact that many courts have acknowledged, as well.").

Particularly after *Lawrence*, moral disapproval of homosexual conduct can provide no basis for denying equal treatment or heightened scrutiny. As noted above, although some courts had held that the criminalization of such conduct justified lenient review of sexual orientation classifications, the decision in *Lawrence* eliminated that argument. *See supra* at 6-9; *Lawrence*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

Nor can heightened scrutiny be denied by arguing that rational bases exist to justify sexual orientation discrimination in certain circumstances. *Cf. Citizens for Equal Protection* v. *Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006) (holding that because a rational basis existed to prohibit same-sex marriage "Appellees are not entitled to strict scrutiny review on this ground"). As this Court has explained, when considering whether heightened scrutiny should apply, the Court "should look to the likelihood that governmental action premised on a particular classification is valid *as a general matter*, not merely to the specifics of the case before us." *City of Cleburne*, 473 U.S. at 446 (emphasis added). Thus, whether discrimination on the basis of sexual orientation warrants heightened scrutiny must be resolved based on the application of the relevant factors to sexual orientation discrimination *in general*. This inquiry is prior to and distinct from whether a particular statute that discriminates on that basis is supported by constitutionally sufficient justifications.

D. Sexual Orientation Is A Distinguishing Characteristic That Defines A Discrete Group.

As explained above, *see supra* at 12-14, the perceived immutability of a particular trait is not a necessary factor to identify a protected class. Rather, it is sufficient that there are "distinguishing characteristics that define * * * a discrete group." *Bowen*, 483 U.S. at 602. Indeed, the very existence of laws drawing distinctions based on that criterion demonstrates that gay people are a discrete group who share a distinguishing characteristic. The class is sufficiently discrete for it to be the subject of discriminatory legislation and it is therefore sufficiently discrete for it to be the subject of heightened scrutiny.

As the Court held in *Lawrence*, sexual orientation is an integral component of a person's identity, and gay people cannot be required to sacrifice it any more than heterosexual people may be required to do so. 539 U.S. at 574 ("Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."); *see also Christian Legal Soc'y*, 130 S. Ct. at 2990 ("Our decisions have declined to distinguish between status and conduct in this context."). Thus, to the extent immutability matters at all, the relevant question is not whether sexual orientation is theoretically alterable for some, but whether a person should be compelled to change it, even if theoretically possible, in order to avoid discriminatory treatment. The answer to that question is plainly no.[11] The law at issue here, for example, is directed specifically at individuals who have entered into long-term committed relationships with a person of the same sex. For purposes of equal protection analysis, their sexual orientation is just as immutable as that of a heterosexual couple and any other characteristic that has warranted heightened scrutiny in the past.

Just like other classifications that warrant heightened scrutiny, discrimination based on sexual orientation unfairly burdens a group based on "circumstances beyond their control." *Plyler*, 457 U.S. at 216 n.14. The overwhelming weight of scientific evidence establishes that sexual orientation is not subject to voluntary change. Indeed, this

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[11] *See, e.g.*, *Pedersen*, 891 F. Supp. 2d at 326 ("Where there is overwhelming evidence that a characteristic is central and fundamental to an individual's identity, the characteristic should be considered immutable and an individual should not be required to abandon it."); *Golinski*, 824 F. Supp. 2d at 987 ("[A] person's sexual orientation is so fundamental to one's identity that a person should not be required to abandon it."); *Kerrigan*, 957 A.2d at 438 (sexual orientation is "'so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it] * * *'") (quoting *Watkins*, 875 F.2d at 726 (Norris, J., concurring in the judgment)); *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) ("[A] person's sexual orientation is so integral an aspect of one's identity [that] it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.").

Court now has before it an unchallenged determination, based on a factual record developed in an adversarial proceeding, that "[n]o credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation." *Perry*, 704 F. Supp. 2d at 966; *see also Golinski*, 824 F. Supp. 2d at 986 ("[T]he consensus in the scientific community is that sexual orientation is an immutable characteristic."); American Psychological Association, *Sexual Orientation and Homosexuality* (www.apa.org/helpcenter/sexual-orientation.aspx) (sexual orientation is not a "conscious choice that can voluntarily be changed"); Douglas Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. Consulting & Clinical Psychol. 221, 226 (1994) (describing "lack of empirical support for conversion therapy"). Thus, heightened scrutiny is required because sexual orientation is not subject to voluntary change and, even if it were, it is a fundamental aspect of human identity that people should not be required to alter in order to avoid discrimination.

E. Gay People Remain Disadvantaged In The Political Arena.

As shown above, *supra* at 12-14, the relative political power of gay people is not essential to the heightened scrutiny inquiry. But to the extent this factor is relevant, it strengthens the presumptive invalidity of sexual orientation classifications. Gay people are a tiny fraction of the population who are politically underrepresented and continue to face ongoing, systemic discrimination.

Particularly when compared to women—a protected class that comprises more than half the population—gay people are a small minority. Although estimates vary, government surveys have found that less than 5% of the population self-identifies as gay or bisexual. *See* National Ctr. for Health Statistics, *Sexual Behavior, Sexual Attraction, and Sexual Identity in the United States: Data From the 2006–2008 National Survey of Family Growth* at 31 (www.cdc.gov/nchs/data/nhsr/nhsr036.pdf).

That small minority becomes even smaller when one looks at political representation, as "openly gay officials are underrepresented in political office in proportion to the gay and lesbian population." *Pedersen*, 881 F. Supp. 2d at 328; *cf. Frontiero*, 411 U.S. at 686 & n.17 ("when viewed in the abstract, women do not constitute a small and powerless minority" but "in part because of past discrimination, women are vastly underrepresented in the Nation's decisionmaking councils") (plurality). As of 2011, only 1.2% of state legislators nationwide were openly gay, and there had been only seven such members of Congress in history. *See* Aff. of Gary Segura ("Segura Aff.") at ¶¶ 45-46, *Windsor* v. *United States*, No. 10-cv-8435 (S.D.N.Y.) (filed May 17, 2011) (J.A. 415-16).

The percentage of openly gay people holding local public office is even lower. In 2010, only .05% of the more than 500,000 city, county, school, and local board officials in this country were openly gay. *Id.* ¶ 47 (J.A. 416). There are no congressional districts or municipalities with a majority gay population. *Id.* ¶ 49 (J.A. 417). There has never been an openly gay Cabinet member. Nor has there ever been an openly gay federal circuit court judge, with only two ever having been nominated, one of whom withdrew without having been confirmed. *See* Dan Levine, *Obama Nominates Openly Gay Lawyer For Patent Appeals Court* (Feb. 7, 2013) (www.reuters.com/article/2013/02/07/us-usa-court-gay-idUSBRE91614E20130207).

Much of this underrepresentation is due directly to the history of discrimination against gay people. Gay people expose themselves to the very discrimination they seek to eliminate when they acknowledge their identity in an effort to protest discriminatory practices. *See* Kenneth D. Wald, "The Context of Gay Politics," in *The Politics of Gay Rights* at 1, 14 (C. Rimmerman, K. Wald & C. Wilcox eds., 2000) ("The awareness of public hatred and the fear of violence that often accompanies it undermine efforts to develop an effective gay political identity," which "may explain why many gay officials hide their sexual orientation until they have built up considerable public trust"). Thus, four of the seven openly gay members of Congress in history were first elected with their sexual orientation not publicly known. Segura Aff. ¶ 46 (J.A. 415).

Regardless whether some legislatures or voters in some places have taken action to redress some historical wrongs, discrimination against gay people (as this case demonstrates) remains largely unchecked. Societal discrimination against gay people is pervasive, with nearly half reporting mistreatment or harassment in the workplace based on their sexual orientation.[12] Yet there is no federal legislation prohibiting discrimination on the basis of sexual orientation in employment, education, access to public accommodations, or housing. *Pedersen*, 881 F. Supp. 2d at 328; *Golinski*, 824 F. Supp. 2d at 988. Indeed, although federal employment non-discrimination legislation has been introduced regularly since 1994 (with earlier versions existing as far back as the 1970s), it has never passed Congress regardless of which party was in control. Segura Aff. ¶ 29 (J.A. 405).

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[12] *See* Katie Miller and Jeff Krehely, *New Data Demonstrates Unique Needs of Gay and Transgender Families*, Center for American Progress (Oct. 31, 2012) (www.americanprogress.org/issues/lgbt/news/2012/10/31/43383/new-data-demonstrate-the-unique-needs-of-gay-and-transgender-families/); Jerome Hunt, *Why the Gay and Transgender Population Experiences Higher*

Similarly, a majority of states have no statutory protection against sexual orientation discrimination in employment or public accommodations. *Id.* ¶ 33 (J.A. 408-09). Nor have other issues important to gay people fared well in legislatures or at the ballot box. A study of 143 votes from the 1970s through 2005 found that gay and lesbian rights were defeated or overturned more than 70% of the time, with the opponents of those rights prevailing at about the same rate for local and state elections. *Id.* ¶ 36 (J.A. 410). And while in 1990 there were no constitutional provisions banning marriage for same-sex couples, currently three fifths of the states have such amendments and another 11 states affirmatively prohibit it by statute. *Id.* at ¶ 34 (J.A. 409).

Any incremental gains in redressing sexual orientation discrimination through the political process pale in comparison to the political advances made by women when heightened scrutiny was first applied to them and thereafter. *See, e.g.*, *Kerrigan*, 957 A.2d at 452 (gay people have "a good deal less"

Rates of Substance Abuse, Center for American Progress (Mar. 9, 2012) (www.americanprogress.org/issues/lgbt/report/2012/03/09/11228/why-the-gay-and-transgender-population-experiences-higher-rates-of-substance-use/).

political influence than women, as a group, enjoyed at the time of *Frontiero*). By the time the Court applied intermediate scrutiny to sex-based classifications, *see Craig* v. *Boren*, 429 U.S. 190 (1976), Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963 had been in effect for more than a decade. *See Frontiero*, 411 U.S. at 687-88. These legislative protections did not eradicate invidious discrimination on the basis of sex, which continues to this day. And they did not stop this Court from holding that discrimination on the basis of sex must be subjected to heightened scrutiny. Nor has the ever-increasing political power of women decreased the need to ensure that discriminatory classifications are not perpetuating historical stereotypes and prejudice.

It is therefore clear that despite some recent advances there exists with respect to gay people "a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *City of Cleburne*, 473 U.S. at 443. Gay people remain intensely vulnerable in the majoritarian political arena and have been unable to rely on the traditional legislative processes to protect them from discrimination. Given that much antipathy towards gay people stems from "profound and deep convictions accepted as ethical and moral principles," *Lawrence*, 539 U.S. at 571, discrimination based on sexual orientation is particularly deep-seated. According heightened scrutiny to such classifications is necessary to ensure that distinctions based on these convictions do not manifest themselves as invidious governmental discrimination unrelated to a person's ability to contribute to society.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

AMICI CURIAE

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a coalition of more than 200 organizations committed to the protection of civil and human rights in the United States.[1] It is the nation's oldest, largest, and most diverse civil and human rights coalition. The Leadership Conference was founded in 1950 by three legendary leaders of the civil rights movement—A. Philip Randolph of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson of the National Jewish Community Relations Advisory Council. Its member organizations represent people of all races, ethnicities, and sexual orientations. The Leadership Conference works to build an America that is inclusive and as good as its ideals, and toward this end, urges the Court to hold that sexual orientation classifications should be subject to heightened scrutiny. The Leadership Conference believes that every person in the United States deserves to be free from discrimination based on race, ethnicity, gender, or sexual orientation.

9to5 is a national membership-based organization of women in low-wage jobs dedicated to achieving economic justice and ending discrimination. Our membership includes lesbian, bisexual and transgender women. Our members and constituents are directly affected by workplace discrimination and poverty, among other issues. 9to5 is committed to combating all forms of oppression, and has actively supported local, state and federal policy efforts to prohibit discrimination based on sexual orientation, gender identity and gender expression in the workplace, in the legal system, in educational institutions, in public programs, and in family rights. The outcome of this case will directly affect our members' and constituents' rights and economic well-being, and that of their families.

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[1] A list of the Leadership Conference's participating members is included at the end of this Appendix.

The **American Association of University Women ("AAUW")**, an organization of more than 150,000 members and supporters, has been a catalyst for the advancement of women and their transformations of American society for 132 years. In more than 1,000 branches across the country, AAUW members work to break through barriers for women and girls. AAUW's member-adopted Public Policy Principles opposes "all forms of discrimination" and supports the "constitutional protection for the civil rights of all individuals." It also supports "freedom in the definition of family and guarantee of civil rights in all family structures." AAUW has an established record of opposing the Defense of Marriage Act, which forbids same-sex couples from receiving federal marriage benefit, and is a strong advocate for marriage equality. AAUW members in several states have endorsed and promoted marriage equality ballot initiatives, and opposed Proposition 8 when it came to a vote in 2008.

API Equality–Northern California ("APIENC") is a grassroots community-based organization working at the intersections of the Asian Pacific Islander ("API") and Lesbian, Gay, Bisexual, Trans, and Queer/Questioning ("LGBTQ") communities of Northern California to reduce prejudice and oppression between and amongst community members and organizations. API Equality–Northern

California is dedicated to empowering community members, advancing civil rights protections, and promoting respect and understanding for cultural and community diversity.

Asian American Institute ("AAI") is a pan-Asian, non-partisan, not-for-profit organization located in Chicago, Illinois, whose mission is to empower the Asian American community through advocacy, coalition-building, education, and research. AAI is a member of the Asian American Center for Advancing Justice, whose other members include Asian American Justice Center, Asian Law Caucus, and Asian Pacific American Legal Center. AAI is deeply concerned about the discrimination and exclusion faced by Asian Americans and other marginalized groups, including lesbian, gay, and bisexual members of the Asian American community. Accordingly, AAI has a strong interest in this case.

Asian American Justice Center ("AAJC"), a member of the Asian American Center for Advancing Justice, is a national non-profit, non-partisan organization in Washington, D.C. whose mission is to advance the civil and human rights of Asian Americans and build and promote a fair and equitable society for all. Founded in 1991, AAJC engages in litigation, public policy advocacy, and community education and outreach on a range of issues, including anti-discrimination. AAJC is committed to challenging barriers to equality for all sectors of our society and has supported same-sex marriage rights in numerous amicus briefs.

The **Asian Pacific American Legal Center** ("APALC"), a member of Asian American Center for Advancing Justice, is the nation's largest civil rights organization representing and advancing the interests of Asian Americans, Native Hawaiians and Pacific Islanders. Founded in 1983, APALC provides direct legal services and engages in policy advocacy, impact litigation and leadership development to protect and expand the rights of Asian Americans, including LGBT Asian Americans. APALC has been a leading voice in the struggle for marriage equality through public speaking, in-language media, community education, and litigation

The **Asian & Pacific Islander American Health Forum** ("APIAHF") is a national health justice organization which influences policy, mobilizes communities, and strengthens programs and organizations to improve the health and well-being of more than 18 million Asian Americans, Native Hawaiians, and Pacific Islanders living in the United States and its jurisdictions. We believe that no individual or family should be subject to discriminatory treatment, and that the ability to marry is a crucial aspect to achieving health equity and justice for our communities.

The **Asian Law Caucus**, founded in 1972, is the country's oldest civil rights and public interest legal organization dedicated to serving Asian and Pacific Islanders communities. The Asian Law Caucus is a member of the Asian American Center for Advancing Justice. Recognizing that social, economic, political, and racial inequalities continue to exist in the United States, the Asian Law Caucus is committed to the pursuit of equality and justice for all sectors of our society and in advancing the integrity of the core constitutional principle of equal protection under the law to all Americans.

The **Bar Association of San Francisco** ("BASF") is a nonprofit voluntary membership organization of attorneys, law students, and legal professionals in the San Francisco Bay Area. Founded in 1872, BASF enjoys the support of more than 7,500 individuals, law firms, corporate legal departments, and law schools. Through its board of directors, its committees, and its volunteer legal services programs and other community efforts, BASF has worked to promote and achieve equal justice for all and oppose discrimination in all its forms, including, but not limited to, discrimination based on race, sex, disability, and sexual orientation.

Bay Area Lawyers for Individual Freedom ("BALIF") is a bar association of more than 700 lesbian, gay, bisexual, and transgender ("LGBT") members of the San Francisco Bay Area legal community. As the nation's oldest and largest LGBT bar association, BALIF promotes the professional interests of its members and the legal interests of the LGBT community at large. To accomplish this mission, BALIF actively participates in public policy debates concerning the rights of LGBT individuals and families. BALIF frequently appears as amicus curiae in cases, like this one, where it believes it can provide valuable perspective and argument that will inform court decisions on matters of broad public importance.

The **Boston Bar Association** ("BBA") traces its origins to meetings convened by John Adams in 1761, thirty-six years before he became United States President. The BBA works to advance the highest standards of excellence for the legal profession, to serve the community at large, and to advocate for access to justice, including the right of all persons to equality under law.

The **Center for American Progress** is an independent nonpartisan educational institute dedicated to improving the lives of Americans through progressive ideas and action. Building on the achievements of progressive pioneers such as Teddy Roosevelt and Martin Luther King, our work addresses 21st-century challenges such as energy, national security, economic growth and opportunity, immigration, education, and health care. We develop new policy ideas, critique the policy that stems from conservative values, challenge the media to cover the issues that truly matter, and shape the national debate.

The **Charles Houston Bar Association** is the oldest and largest African American bar association in the San Francisco Bay Area. The mission of the Association is to improve access to justice; to promote equal protection under the law; to be proactive in increasing diversity within the legal community and to the bench; and to bring services to the community.

Chinese for Affirmative Action ("CAA") is a community-based nonprofit organization founded to defend civil rights and advance multiracial democracy. Though our constituency includes the broader Asian American and Pacific Islander community, we prioritize the needs of the most marginalized. Our community building, research and analysis, and policy advocacy activities promote equality in a number of areas including immigrant rights, language diversity, racial justice, and marriage equality.

Connecticut Bar Association, Inc. ("CBA"), founded in 1875, is the preeminent organization for lawyers and the legal profession in Connecticut. The purposes of the CBA include promoting the public interest through the advancement of justice and the protection of liberty, supporting or opposing legislation and regulations consistent with the interests of the public good and the CBA's Members, promoting diversity within the Bar and the Bench, and safeguarding the dignity of the legal profession.

The **Connecticut Women's Education and Legal Fund** ("CWEALF") is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. Since its founding in 1973, CWEALF has provided legal education and advocacy and conducted research and public policy work to advance women's rights and end sex discrimination.

The **Courage Campaign** ("Courage") is a leading multi-issue advocacy organization working to bring progressive change to California and full equality to America's lesbian, gay, bisexual and transgender citizens and families. Courage empowers more than 750,000 grassroots and netroots activists. Courage Campaign Institute ("the Institute") is an affiliated organization of the Courage Campaign. Through a variety of groundbreaking public education campaigns, the Institute has played an integral role in keeping the public informed about *Hollingsworth* v. *Perry*, legal challenges to the so-called Defense of Marriage Act, and other LGBT equality cases.

Empire Justice Center is a statewide, not-for-profit public interest law firm in New York with offices in Rochester, Albany, White Plains, and Central Islip. Established in 1973, Empire Justice Center's mission is to protect and strengthen the legal rights of people in New York State who are poor, disabled or disenfranchised through systems change advocacy, direct representation, as well as training and support to other advocates and organizations in a range of substantive law areas. Since our founding, Empire Justice Center has worked to oppose discrimination and challenge barriers to equality, including barriers based upon sexual orientation or gender identity.

The **Equal Justice Society** ("EJS") is a national legal organization that promotes equality and an end to all manifestations of invidious discrimination and second-class citizenship. Using a three-pronged strategy of law and public policy advocacy, building effective progressive alliances, and strategic public communications, EJS's principal objective is to combat discrimination and inequality in America.

The **Feminist Majority Foundation** ("FMF"), founded in 1987, is the largest feminist research and action organization dedicated to women's equality, empowerment, and non-violence. FMF's programs focus on advancing the legal, social and political equality of women with men. To carry out these aims, FMF engages in research and public policy development, public education programs, grassroots organizing projects, and leadership training and development programs, and has filed numerous briefs amicus curiae in the United States Supreme Court and the federal circuit courts to advance opportunities for women and girls.

Hispanic National Bar Association ("HNBA") is an incorporated, not-for-profit, national membership organization that represents the interests of the more than 100,000 attorneys, judges, law professors, legal professionals, and law students of Hispanic descent in the United States, its territories, and Puerto Rico. HNBA supports equal application of the law to all.

Human Rights Campaign ("HRC"), the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where lesbian, gay, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. Among those basic rights is equal access for same-sex couples to marriage and the related protections, rights, benefits and responsibilities.

The **Japanese American Citizens League** ("JACL") was founded in 1929 and is the oldest and largest Asian American civil rights organization in the United States. It led the fight for redress for Japanese Americans incarcerated during World War II and has also fought for the civil liberties of all people including the right to vote, own real property, get a job, and marry a person of one's choice.

The **League of United Latin American Citizens** ("LULAC") is the nation's largest and oldest civil rights volunteer-based organization that empowers Hispanic Americans and builds strong Latino communities. Headquartered in Washington, DC, with 900 councils around the United States and Puerto Rico, LULAC's programs, services and advocacy address the most important issues for Latinos, meeting critical needs of today and the future. The mission of the League of United Latin American Citizens is to advance the economic condition, educational attainment, political influence, housing, health and civil rights of the Hispanic population of the United States. LULAC has a long-standing history of advancing equal justice under law for all Latinos—including our lesbian, gay, bisexual and transgender ("LGBT") sisters and brothers. Through direct action and national resolutions, LULAC and its membership have stood firm on the right for LGBT Americans to be protected from hate crimes, the right to work free from discrimination, the right to serve openly and honestly in the U.S. Armed Services, the right to allow bi-national couples to stay together by updating antiquated immigration laws, and officially oppose federal marriage laws that discriminate against couples who have entered legal unions in their state.

The **Legal Aid Society** is a private, not-for-profit legal services organization, the oldest and largest in the nation, dedicated since 1876 to providing quality legal representation to low-income New Yorkers. It is dedicated to one simple but powerful belief: that no New Yorker should be denied access to justice because of poverty. With a commitment to equal justice for all and eliminating discrimination on the basis of numerous classifications, including sexual orientation and gender identity, the Society handles 300,000 individual cases and matters annually and provides a comprehensive range of legal services in three areas: the Civil, Criminal and Juvenile Rights Practices. In recognition that its LGBT clients are living at disproportionately higher poverty rates and are more likely to be dependent on public benefit programs, the Society is an outspoken advocate committed to removing barriers to equality for these persons.

Legal Services NYC ("LS-NYC") is the nation's largest civil legal aid program, assisting over 40,000 New Yorkers every year, and operates numerous programs specifically focused on LGBT communities. The vindication of marriage equality will result in substantial benefits to the low income individuals and families served by LS-NYC, including equal access to essential federal, state, and local programs such as SSI/SSD, public assistance, and shelter subsidies.

The **LGBT Bar Association of Greater New York** ("LeGaL") was one of the nation's first bar associations of the lesbian, gay, bisexual, and transgender ("LGBT") legal community and remains one of the largest and most active organizations of its kind in the country. Serving the New York metropolitan area, LeGaL is dedicated to improving the administration of the law, ensuring full equality for members of the LGBT community and promoting the expertise and advancement of LGBT legal professionals.

The **Lesbian, Gay, Bisexual & Transgender Community Center in New York City** ("LGBT Community Center"), is the largest LGBT multi-service organization on the East Coast and the second largest LGBT community center in the country, offering many programs for the LGBT community, including Center Families. More than 2,500 families in the tri-state area participate in the Center Families program, which promotes the legitimacy and visibility of LGBT families. Consistent with its mission of supporting these families, the LGBT Community Center joins in this brief due to its strong belief that same-sex couples must have equal access to marriage and the same protections, rights, benefits and responsibilities afforded to heterosexual married couples in this country.

Marriage Equality USA is a national, not-for-profit, volunteer-based organization, comprised of over 40,000 same-sex couples, lesbian, gay, bisexual, and transgender people, their families, friends, supporters, and allies. The organization leads nonpartisan, community-based educational efforts to secure the freedom to marry for all loving, committed couples without regard to sexual orientation or gender identity and to have those marriages recognized by the federal government. Many of the organization's members are same-sex couples who wish to marry in their home states or who are legally married in their home states and seek the same rights, responsibilities, and recognition that all other married couples have under federal law.

The **Massachusetts Bar Association** ("MBA"), founded in 1910, is a nonprofit statewide bar association that serves the legal profession and the public by promoting the administration for justice, legal education, professional excellence and respect for the law.

The **Massachusetts LGBTQ Bar Association** is a statewide professional association of LGBT and queer lawyers and allies providing a visible LGBTQ presence within the Massachusetts legal community.

The **Mattachine Society of Washington, D.C.** is a non-profit, non-partisan research and educational society whose members support its original archival research. The mission of The Mattachine Society is to uncover the often-deleted pasts of LGBT Americans who faced persecution and discrimination by the federal government. Such persecution and discrimination often resulted in the loss of jobs and ruination of careers of gay and lesbian citizens simply because of their sexual orientation which rendered them "mentally ill" or a "security risk". The original Mattachine Society of Washington, D.C. founded in 1961, by Dr. Franklin Kameny, was the first gay civil rights organization in Washington, D.C. The current Mattachine Society is proud to continue this work with renewed passion and commitment.

The **Mexican American Legal Defense and Educational Fund** ("MALDEF") is a national civil rights organization established in 1968. Its principal objective is to secure the civil rights of Latinos living in the United States through litigation, advocacy, and education. MALDEF defends the rights of all Latino families, including those headed by lesbian or gay Latinos as well as Latino children who are disadvantaged because their same-sex parents are denied full recognition under the law.

National Action Network ("NAN") is one of the leading civil rights organizations in the nation, with chapters throughout the United States. Founded in 1991 by Reverend Al Sharpton, NAN works within the spirit and tradition of Dr. Martin Luther King, Jr. to promote a modern civil rights agenda that includes the fight for one standard of justice, decency and equal opportunities for all people. That effort is incomplete without working to ensure the equality of opportunities and treatment for the LGBT community. So long as one group is denied equal treatment under the law, the nation falls short of guaranteeing the right of all persons to life, liberty and the pursuit of happiness.

The **National Asian Pacific American Bar Association** ("NAPABA") is the national association of Asian Pacific American attorneys, judges, law professors, and law students. NAPABA represents the interests of over 40,000 attorneys and more than

60 local Asian Pacific American bar associations, who work variously in solo practices, large firms, corporations, legal services organizations, non-profit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has been at the forefront of national and local activities in the areas of civil rights. Equal access to the fundamental right to marry is one such right which Asian Pacific Americans were long denied through anti-miscegenation laws. NAPABA joins amici to continue the Asian Pacific American community's defense of equal access to the fundamental right to marry.

The **National Black Justice Coalition** ("NBJC") is a civil rights organization dedicated to empowering Black lesbian, gay, bisexual and transgender ("LGBT") people. NBJC's mission is to end racism and homophobia. As America's leading national Black LGBT civil rights organization focused on federal public policy, NBJC has accepted the charge to lead Black families in strengthening the bonds and bridging the gaps between the movements for racial justice and LGBT equality.

National Center for Lesbian Rights ("NCLR") is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of LGBT people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has an interest in ensuring that laws that treat people differently based on their sexual orientation are subject to heightened scrutiny, as equal protection requires.

The National Council of La Raza ("NCLR")—the largest national Hispanic civil rights and advocacy organization in the United States—works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations, NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. To achieve its mission, NCLR conducts applied research, policy analysis, and advocacy, providing a Latino perspective in five key areas—assets/investments, civil rights/immigration, education, employment and economic status, and health. In addition, it provides capacity-building assistance to its Affiliates who work at the state and local level to advance opportunities for individuals and families. Founded in 1968, NCLR is a private, nonprofit, nonpartisan, tax-exempt organization headquartered in Washington, DC, serving all Hispanic subgroups in all regions of the country. It has regional offices in Chicago, Los Angeles, New York, Phoenix, and San Antonio and state operations throughout the nation.

The **National Gay and Lesbian Task Force Foundation** (the "Task Force"), founded in 1973, is the oldest national LGBT civil rights and advocacy organization. As part of a broader social justice movement, the Task Force works to create a world in which all people may fully participate in society, including the full and equal participation of same-sex couples in the institution of civil marriage.

The **National LGBT Bar Association** ("LGBT Bar") is a non-partisan, membership-based professional association of lawyers, judges, legal academics, law students and affiliated lesbian, gay, bisexual and transgender legal organizations. The LGBT Bar promotes justice in and through the legal profession for the LGBT community in all its diversity. This case stands to impact our membership both professionally and personally. A ruling in favor of marriage equality would greatly increase our attorneys' ability to protect their clients' best interests and to safeguard the families and relationships they have formed in their own lives. Recently, we were privileged to see 30 of our openly-LGBT members inducted into the Supreme Court Bar, joining in the same time-honored, formal process with attorneys from all over the United States. Increasing inclusion in cherished civil institutions is one of the most storied arcs in the history of our nation, and we believe that marriage equality is a profound step in the right direction towards equitable treatment under the law for all citizens.

National Organization for Women Foundation ("NOW") is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. For decades, NOW has advocated for equal rights and full protection of the law for LGBT persons and has led the effort for recognition of same-sex couples' equal marriage rights.

The New York Legal Assistance Group ("NYLAG"), founded in 1990, is a not-for-profit organization dedicated to providing free civil legal services to New York's low-income individuals and families. The LGBT Law Project of NYLAG provides free legal consultations and legal representation to low-income LGBT community members in areas such as child custody, visitation, divorce and dissolution, second-parent adoption, legal name change, employment discrimination and immigration. The LGBT Project recognizes and addresses the unique legal needs in the LGBT communities and provides culturally competent services.

The **New York State Bar Association** ("NYSBA") was founded in 1876, and is the largest voluntary bar association in the United States, with over 76,000 members. NYSBA serves the profession and the public by, *inter alia*, promoting reform in the law and facilitating the administration of justice. NYSBA has long supported marriage equality for same-sex couples. In 2009, NYSBA passed a resolution supporting same-sex marriage; and in 2010 the NYSBA was a lead sponsor of the American Bar Association's resolution in support of same-sex marriage. The NYSBA supports allowing same-sex couples to marry and recognizing marriages if contracted elsewhere as the Association believes only marriage can grant full equality to same-sex couples and their families.

OCA – Asian Pacific American Advocates, a national membership driven organization dedicated to advancing the social, political and economic well-being of Asian Pacific Americans, consistent with its national resolution passed in 2007, denounces discriminatory policies and practices based on sexual orientation. We ardently support policies that uphold the importance of familial relationships without limitation based on race, religion, ethnicity, gender, or sexual orientation as a fundamental human right.

Permanent Commission on the Status of Women ("PCSW") was established by the Connecticut State Legislature in 1973. PCSW works to eliminate sex discrimination in Connecticut by informing leaders about the nature and scope of discrimination, serving as a liaison between government and private interest groups concerned with services for women, promoting consideration of women for governmental positions, and working with state agencies to access programs that affect women.

Public Advocates Inc. is a California-based civil rights law firm and advocacy organization that challenges the systemic causes of poverty and racial discrimination by strengthening community voices in public policy and achieving tangible legal victories. Since our founding in 1971, we have engaged in a wide range of cutting edge civil rights issues from school finance, urban development, transportation policy, and climate justice, to language access, employment discrimination, and health services disparities. The issues of this case are strongly aligned with Public Advocates' mission to fight discrimination and advance equal opportunity for marginalized populations.

The **Rainbow PUSH Coalition** supports marriage equality. All people deserve equal protection under the law. We believe in human rights for all human beings. We must measure human rights by one yardstick. That principle resides in the moral center and still applies—everything flows from this position. We seek to uphold the principles of due process, of equal protection under the law, of fighting against discrimination against any and all people based on race, religion, gender or sexual orientation. Discrimination against one group of people is discrimination against all of us. The State—and the courts—should not sanction discrimination. No group of people should be denied their fundamental constitutional liberties, like equal protection under the law, simply because of who they are. Keep Hope Alive.

Secular Woman is a non-profit organization whose mission is to amplify the voice, presence, and influence of non-religious women. The Family & Relationship Values of Secular Woman are: (1) we hold that each person has the right to seek happiness through consensual relationships that enhance their lives. We support full marriage equality nationwide and (2) we embrace diverse concepts of family and parenthood. Love and security come in many forms.

The **Society of American Law Teachers** ("SALT") is an association of law faculty, administrators, and legal education professionals from over 170 law schools. Incorporated in 1974, SALT was founded by a group of leading law professors dedicated to improving the quality of legal education by making it more responsive to societal concerns. SALT has worked within the legal academy to develop a jurisprudence to end discrimination of historically underrepresented groups, including discrimination based on sexual orientation and has appeared as amicus curiae in federal and state courts to further these claims to equal access to education, employment, and to full participation in civic life.

The **South Asian Bar Association of Connecticut** ("SABAC") was formed in 2003 to serve as a resource to South Asian lawyers and law students for mentoring, networking, advocacy and education, and community outreach. SABAC is a member organization of the North American South Asian Bar Association ("NASABA") and has played an active role in the formation of NASABA. SABAC members include attorneys who practice in a wide variety of organizations including law firms, corporate legal departments, non-profit organizations, government, and academic institutions. SABAC and its members have particular interest in cases where the rights of minorities to receive equal and fair treatment under the laws of the United States are at issue.

The Southern Poverty Law Center ("SPLC") is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. SPLC's lawsuits have toppled institutional racism in the South, bankrupted some of the nation's most violent white supremacist groups and won justice for exploited workers, abused prison inmates, disabled children and other victims of discrimination. The SPLC has appeared as counsel or amicus in numerous cases challenging discrimination on the basis of sex and sexual orientation, including as counsel of record in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), which paved the way for the Supreme Court's subsequent holding that intermediate scrutiny applies to gender-based classifications.

Transgender Law Center is a national legal organization working to advance the rights of transgender and gender nonconforming people. Transgender Law Center works to change law, policy, and attitudes so that all people can live safely, authentically, and free from discrimination regardless of their gender identity or expression.

Women's Bar Association of the State of New York ("WBASNY") is a statewide not-for-profit organization of attorneys, with eighteen chapters and more than 3,600 members. WBASNY is dedicated to fair and equal administration of justice and has been a vanguard for the rights of women, same-sex couples, and LGBT persons. It has participated as an amicus in numerous cases supporting equal rights under the law for all persons, regardless of sexual orientation.

* The Leadership Conference's participating members include:

A. Philip Randolph Institute

AARP

Advancement Project

African Methodist Episcopal Church

Alaska Federation of Natives

Alliance for Retired Americans

Alpha Kappa Alpha Sorority, Inc.

Alpha Phi Alpha Fraternity, Inc.

American-Arab Anti-Discrimination Committee

American Association for Affirmative Action

American Association of People with Disabilities

AAUW

American Baptist Churches, U.S.A.-National Ministries

American Civil Liberties Union

American Council of the Blind

American Ethical Union

American Federation of Government Employees

American Federation of Labor-Congress of Industrial Organizations

American Federation of State, County & Municipal Employees, AFL-CIO

American Federation of Teachers, AFL-CIO

American Friends Service Committee

American Islamic Congress (AIC)

American Jewish Committee

American Nurses Association

American Society for Public Administration

American Speech-Language-Hearing Association

Americans for Democratic Action

Amnesty International USA

Anti-Defamation League

Appleseed

Asian American Justice Center

Asian Pacific American Labor Alliance

Association for Education and Rehabilitation of the Blind and Visually Impaired

B'nai B'rith International

Brennan Center for Justice at New York University School of Law

Building & Construction Trades Department, AFL-CIO

Center for Community Change

Center for Responsible Lending

Center for Women Policy Studies

Children's Defense Fund

Church of the Brethren-World Ministries Commission

Church Women United

Coalition of Black Trade Unionists

Common Cause

Communications Workers of America

Community Action Partnership

Community Transportation Association of America

Compassion & Choices

DC Vote

Delta Sigma Theta Sorority

DEMOS: A Network for Ideas & Action

Disability Rights Education and Defense Fund

Division of Homeland Ministries-Christian Church (Disciples of Christ)

Epilepsy Foundation of America

Episcopal Church-Public Affairs Office

Equal Justice Society

Evangelical Lutheran Church in America

FairVote: The Center for Voting and Democracy

Families USA

Federally Employed Women

Feminist Majority

Friends Committee on National Legislation

Gay, Lesbian and Straight Education Network (GLSEN)

General Board of Church & Society of the United Methodist Church

Global Rights: Partners for Justice

GMP International Union

Hip Hop Caucus

Human Rights Campaign

Human Rights First

Immigration Equality

Improved Benevolent & Protective Order of Elks of the World

International Association of Machinists and Aerospace Workers

International Association of Official Human Rights Agencies

International Brotherhood of Teamsters

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)

Iota Phi Lambda Sorority, Inc.

Japanese American Citizens League

Jewish Council for Public Affairs

Jewish Labor Committee

Jewish Women International

Judge David L. Bazelon Center for Mental Health Law

Kappa Alpha Psi Fraternity

Labor Council for Latin American Advancement

Laborers' International Union of North America

Lambda Legal

LatinoJustice PRLDEF

Lawyers' Committee for Civil Rights Under Law

League of United Latin American Citizens

League of Women Voters of the United States

Legal Aid Society – Employment Law Center

Legal Momentum

Mashantucket Pequot Tribal Nation

Matthew Shepard Foundation

Mexican American Legal Defense and Educational Fund

Na'Amat USA

NAACP

NAACP Legal Defense and Educational Fund, Inc.

NALEO Educational Fund

National Alliance of Postal & Federal Employees

National Association for Equal Opportunity in Higher Education

National Association of Colored Women's Clubs, Inc.

National Association of Community Health Centers

National Association of Consumer Advocates (NACA)

National Association of Human Rights Workers

National Association of Negro Business & Professional Women's Clubs, Inc.

National Association of Neighborhoods

National Association of Social Workers

9 to 5 National Association of Working Women

National Bar Association

National Black Caucus of State Legislators

National Black Justice Coalition

National CAPACD – National Coalition For Asian Pacific American Community Development

National Center for Transgender Equality

National Center on Time & Learning

National Coalition for the Homeless

National Coalition on Black Civic Participation

National Coalition to Abolish the Death Penalty

National Committee on Pay Equity

National Community Reinvestment Coalition

National Conference of Black Mayors, Inc.

National Congress for Puerto Rican Rights

National Congress of American Indians

National Consumer Law Center

National Council of Churches of Christ in the U.S.

National Council of Jewish Women

National Council of La Raza

National Council of Negro Women

National Council on Independent Living

National Disability Rights Network

National Education Association

National Employment Lawyers Association

National Fair Housing Alliance

National Farmers Union

National Federation of Filipino American Associations

National Gay & Lesbian Task Force

National Health Law Program

National Hispanic Media Coalition

National Immigration Forum

National Immigration Law Center

National Korean American Service and Education Consortium, Inc. (NAKASEC)

National Latina Institute for Reproductive Healt

National Lawyers Guild

National Legal Aid & Defender Association

National Low Income Housing Coalition

National Organization for Women

National Partnership for Women & Families

National Senior Citizens Law Center

National Sorority of Phi Delta Kappa, Inc.

National Urban League

National Women's Law Center

National Women's Political Caucus

Native American Rights Fund

Newspaper Guild

OCA (formerly known as Organization of Chinese Americans)

Office of Communications of the United Church of Christ, Inc.

Omega Psi Phi Fraternity, Inc.

Open Society Policy Center

ORT America

OutServe-SLDN

Paralyzed Veterans of America

Parents, Families, Friends of Lesbians and Gays

People for the American Way

Phi Beta Sigma Fraternity, Inc.

Planned Parenthood Federation of America, Inc.

PolicyLink

Poverty & Race Research Action Council (PRRAC)

Presbyterian Church (USA)

Pride at Work

Progressive National Baptist Convention

Project Vote

Public Advocates

Religious Action Center of Reform Judaism

Retail Wholesale & Department Store Union, AFL-CIO

SAALT (South Asian Americans Leading Together)

Secular Coalition for America

Service Employees International Union

Sierra Club

Sigma Gamma Rho Sorority, Inc.

Sikh American Legal Defense and Education Fund

Sikh Coalition

Southeast Asia Resource Action Center (SEARAC)

Southern Christian Leadership Conference

Southern Poverty Law Center

Teach For America

The Association of Junior Leagues International, Inc

The Association of University Centers on Disabilities

The National Conference for Community and Justice

The National PTA

TransAfrica Forum

Union for Reform Judaism

Unitarian Universalist Association

UNITE HERE!

United Brotherhood of Carpenters and Joiners of America

United Church of Christ-Justice and Witness Ministries

United Farm Workers of America (UFW)

United Food and Commercial Workers International Union

United Mine Workers of America

United States International Council on Disabilities

United States Students Association

United Steelworkers of America

United Synagogue of Conservative Judaism

Women of Reform Judaism

Workers Defense League

Workmen's Circle

YMCA of the USA, National Board

YWCA USA

Zeta Phi Beta Sorority, Inc.

AMICUS
CURIAE
BRIEF

No. 12-307

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

WINDSOR, EDITH S., et. al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Brief of Amicus Curiae Liberty Counsel in Support of Respondent Bipartisan Legal Advisory Group of the United States House of Representatives (Merits Brief)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES....................iii

INTEREST OF AMICUS CURIAE.............. 1

SUMMARY OF ARGUMENT..................... 2

ARGUMENT.. 4

I. THIS COURT SHOULD FOLLOW ITS LONG-STANDING INTERPRETATION OF ARTICLE III STANDING AND HOLD THAT RESPONDENT CANNOT ESTABLISH CONCRETE INJURY OR REDRESS FROM THIS COURT................4

- A. The Second Circuit Improperly Determined That Respondent Had Article III Standing Based Upon An Incorrect Determination That Respondent Was Married Under New York Law In 2009.................................... 7
  - 1. Respondent cannot establish concrete and particularized injury because she was not married under New York law in 2009......................... 8
    - a. New York did not recognize same-sex marriage in 2009............ 10
    - b. The Second Circuit's incorrect understanding of the law and

public policy of New York in 2009 caused it to erroneously conclude that Respondent had Article III standing. 12

2. Respondent did not have concrete and particularized injury because New York did not Recognize Same-Sex Marriage, therefore any decision by this Court would not Provide any Redress to Her. 20

3. Respondent did not and cannot satisfy the Additional Prudential Requirements of Standing in Federal Court because the Issue of Same-Sex Marriage is more Appropriate for a Legislative Determination. 21

II. SECTION 3 OF THE DEFENSE OF MARRIAGE ACT SHOULD BE ANALYZED UTILIZING RATIONAL BASIS SCRUTINY, WHICH IT EASILY SATIFIES. 24

A. Section 3 Of DOMA Does Not Discriminate On The Basis Of A Suspect Or Quasi-Suspect Class, And Therefore Should Be Reviewed Under Rational Basis. 26

B. Section 3 Of DOMA Satisfies Rational Basis. 34

1. Defining marriage as the union of one man and one woman is rationally related to the government's interest in fostering the optimal environment for procreation and the rearing of children. 35

2. Affirming marriage as the union of one man and one woman for purposes of federal law is rationally related to the government's interest in memorializing social constructs and foundational concepts upon which statutory and common law are based. 41

CONCLUSION 46

TABLE OF AUTHORITIES

Cases

Adams v. Howerton,
486 F. Supp. 1119 (C.D. Cal. 1980) 35

Baker v. Nelson,
191 N.W.2d 185 (Minn. 1971) 35

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) 28, 29

City of New Orleans v. Dukes,
427 U.S. 297 (1976).................................. 25

Defiance Milk Products Co. v. Du Mond,
309 N.Y. 537 (1956).. 15

F.C.C. v. Beach Commc'ns, Inc.,
508 U.S. 307 (1993) 25, 34

Frontiero v. Richardson,
411 U.S. 677 (1986). 30

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920 N.E.2d 328 (N.Y. 2009). ....*passim*

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798 N.E.2d 941(Mass. 2003)......................... 44

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509 U.S. 312 (1993) 25

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855 N.E.2d 1(N.Y. 2006). ....*passim*

In re Estate of Ranftle,
81 A.D.3d 566 (N.Y. App. Div. 2011)..... 13, 15

Lawrence v. Texas,
539 U.S. 558 (2003) 25, 35, 36

Lewis v. N.Y. State Dep't of Civil Serv.,
60 A.D.3d 566 (N.Y. App. Div. 2009)..... 12, 14

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) ....*passim*

Martinez v. City of Monroe,
50 A.D.3d 189 (N.Y. App. Div. 2008)..... 12, 14

Matter of Natasha C.,
80 N.Y.2d 678(1993)...................................... 16

Morrison v. Sadler,
821 N.E.2d 15 (Ind. Ct. App. 2005) 44

Murphy v. Ramsey,
114 U.S. 15 (1885) 41, 42

Nguyen v. I.N.S.,
533 U.S. 53 (2001) 32, 36, 37

Reynolds v. United States,
98 U.S. 145 (1878) 43

Romer v. Evans,
517 U.S. 620 (1996) 25, 28

Sirkin v. Fourteenth St. Store,
124 A.D. 384 (1908).. 15

Skinner v. Oklahoma,
316 U.S. 535 (1942) 43

Smelt v. City of Orange,
447 F.3d 673 (9th Cir. 2006)...................... 8, 9

State Farm Mutual Auto. Ins. Co. v. Mallela,
372 F.3d 500 (2d Cir. 2004) 12

U.S. R.R. Ret. Bd. v. Fritz,
449 U.S. 166 (1980) 34

U.S. v. Rutherford,
442 U.S. 544 (1979). 18, 23

United States v. Carolene Products Co.,
304 U.S. 144 (1938) 27

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982). 5, 21

Washington v. Glucksberg,
521 U.S. 702 (1997) 27

Windsor v. United States,
699 F.3d 169 (2d Cir. 2012) ....*passim*

Woodward v. United States,
871 F.2d 1068 (Fed. Cir. 1989) 27, 29, 30

Statutes

1 U.S.C. § 7 8

26 U.S.C. § 2056..................................8, 9, 19

2011 N.Y. Dom. Rel. § 10-a (McKinney 2011) 22

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Constitutional Provisions

U.S. Const. art. III, § 2, cl. 1. 5

INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a civil liberties organization that provides education and legal defense on issues relating to traditional family values, including marriage, across the United States. Liberty Counsel has successfully defended the federal Defense of Marriage Act ("DOMA"), and has also defended various state DOMAs, and is presently involved in defending the definition of marriage against constitutional challenges in several jurisdictions. Liberty Counsel provided amicus curiae briefs in *Conaway v. Deane,* 932 A.3d 571 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006), and *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), and has been involved in approximately fifty DOMA cases. Liberty Counsel represented Campaign for California Families in *Smelt v.*

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[1] Counsel for a party did not author this Brief in whole or in part, an no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this Brief. The parties have filed consents to the filing of Amicus Briefs on behalf of either party or no party.

City of Orange, 447 F.3d 673 (9th Cir. 2006) and in its defense of California's law defining marriage as the union of one man and one woman. *In re Marriage Cases*, 143 Cal.App. 4th 873 (2006). Additionally, Liberty Counsel represented plaintiffs in several cases challenging recognition of same-sex marriages in New York, including *New Yorkers for Constitutional Freedoms v. N.Y. State Senate*, 98 A.D.3d 288 (N.Y. App. Div. 2012) and *Hebel v. West*, 25 A.D.3d 172 (N.Y. App. Div. 2005).

Liberty Counsel is committed to upholding the institution of marriage as defined for millennia – the union of one man and one woman – and to ensuring that the institution is not undermined. Liberty Counsel has developed a substantial body of information related to the importance of marriage as the fundamental social institution. Liberty Counsel respectfully submits this information to assist this Court in evaluating Respondent's claims.

SUMMARY OF ARGUMENT

The Second Circuit improperly determined that Respondent has Article III standing based upon an incorrect conclusion that Respondent was married under the laws of New York in 2009, and this Court should reject that conclusion. Respondent cannot establish concrete and particularized injury because she was not married under New York law in 2009. New York did not recognize same-sex marriages in 2009, so Respondent could not then have been married under New York law. The Second Circuit's incorrect understanding of the law and public policy of New York led to its erroneously conclusion that Respondent had Article III standing. Because Respondent did not have a concrete and particularized injury, any decision rendered by this Court could not provide her any redress. Additionally, recognition of same-sex marriage is more appropriately left to the legislature, so Respondent cannot satisfy the additional prudential requirements of standing. Therefore, Respondent cannot establish standing, and this Court should dismiss her case.

Only those classifications that discriminate against a suspect or quasi-suspect class warrant heightened constitutional scrutiny. Section 3 of DOMA does not discriminate on the basis of a suspect or quasi-suspect class, and therefore it should be analyzed using rational basis. Under this deferential standard, Section 3 of DOMA should be upheld because it is rationally related to numerous legitimate government interests. Defining marriage as the union of one man and one woman is rationally related to the government's interest in fostering the optimal environment for procreation and the rearing of children. Additionally, affirming marriage as the union of one man and one woman for purposes of federal law is rationally related to the government's interest in memorializing social constructs and foundational concepts upon which statutory and common law are based.

ARGUMENT

I. THIS COURT SHOULD FOLLOW ITS LONG-STANDING INTERPRETATION OF ARTICLE III STANDING AND HOLD THAT RESPONDENT CANNOT ESTABLISH CONCRETE INJURY OR REDRESS FROM THIS COURT.

Federal courts have limited jurisdiction, requiring that any party filing a lawsuit must have standing to do so. The Second Circuit improperly determined that Respondent has standing based upon an incorrect assumption that Respondent was married under the laws of New York in 2009. This Court should dismiss Respondent's claims. Respondent cannot establish concrete and particularized injury because she was not married under New York law in 2009. New York did not recognize same-sex marriages in 2009. The Second Circuit's incorrect understanding of the law of New York caused it to erroneously conclude that Respondent had standing. Because Respondent did not have a concrete and particularized injury, any decision rendered by this Court could not provide any redress. Additionally, recognition of same-sex marriage is a topic more appropriately left to the legislature, so Respondent cannot satisfy the additional prudential requirements of standing. As such, Respondent cannot establish standing, and this Court should dismiss her case.

Article III limits the jurisdiction of federal courts to "cases" and "controversies" that arise under the Constitution, laws, and treaties of the United States. U.S. Const. art. III, § 2, cl. 1. This limitation requires that all parties seeking to bring a legal challenge in federal court must have standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law . . . ." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). "Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-

or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560.

This Court has established the fundamental requirements of standing over a number of cases that were summarized and solidified in *Lujan*. "[O]ur cases have established that the irreducible constitutional minimum of standing consists of three elements." *Id.* "First the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Id.* The second element of standing requires that there be a causal connection between the injury and the defendant's action. *Id.* Finally, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561. Additionally, "the party invoking federal jurisdiction bears the burden of establishing these elements." *Id.*

A. The Second Circuit Improperly Determined That Respondent Had Article III Standing Based Upon An Incorrect Determination That Respondent Was Married Under New York Law In 2009.

Without addressing any of this Court's fundamental requirements of standing, the Second Circuit made the *ipse dixit* determination that Respondent had standing. The Second Circuit did not even mention the "irreducible constitutional minimum of standing." *See Windsor v. United States*, 669 F.3d 169, 176-78 (2d Cir. 2012). The court noted that the question of whether Respondent was married at the time of her partner's death in 2009 was decisive for this case, but determined that it could merely predict whether New York would have recognized a marriage that occurred outside of the jurisdiction of New York. *See id.* at 177.

The Second Circuit's "prediction" was in error. New York did not recognize same-sex marriage in 2009, and its highest court had declined to determine whether marriages solemnized outside of New York should be recognized within the state, explicitly stating that such a determination was for the legislature to make. Because Respondent's marriage would not have been recognized in New York, she did not and cannot satisfy her burden to establish a concrete and particularized injury. "Since they are not merely pleading requirements but rather an *indispensable part of the plaintiff's case*, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan*, 504 U.S. at 561 (emphasis added). Respondent did not establish concrete injury below, and she cannot do so here. The decision below should therefore be reversed.

1. Respondent cannot establish concrete and particularized injury because she was not married under New York law in 2009.

For Respondent to establish that Section 3 of DOMA imposes a concrete and particularized injury upon her, she must establish that she and her partner were married at the time of her partner's death in 2009. "If the individuals are not married, then they do not suffer an immediate injury under DOMA and do not have standing to challenge it." *Smelt v. City of Orange*, 447 F.3d 673, 683-84 (9th Cir. 2006). Because Respondent was not married in a manner recognized by New York law in 2009, she had no legally protectable interest in the federal marital deduction. *See* 26 U.S.C. § 2056. While Respondent was required to pay federal and state estate taxes upon her partner's death, she had no legal right to claim the marital deduction.

For purposes of federal law, Section 3 of DOMA limits the definition of "marriage" and "spouse" to marriages between one man and one woman. *See* 1 U.S.C. § 7. Because she had no legal right to claim the marital deduction, Respondent did not suffer any concrete and particularized injury by having to pay estate taxes. *Windsor*, 669 F.3d at 176. "That they might someday be married under the law of some state or ask for some federal benefit which they are denied is not enough." *Smelt*, 447 F.3d at 684.

Here, simply because New York later came to recognize same-sex marriage, Respondent cannot retroactively become a surviving spouse for purposes of the marital deduction when she was never legally considered a spouse under the law of New York. Upon her partner's death in 2009, her ability to be deemed a spouse or surviving spouse terminated. Public policy changes that occurred well *after* her partner's death are irrelevant to a determination of whether she qualifies as a surviving spouse for purposes of the marital deduction. As such, Respondent does not have standing.

a. New York did not recognize same-sex marriage in 2009.

In 2009, the year relevant for determining whether Respondent qualifies as a surviving spouse for purpose of 26 U.S.C. § 2056(a), New York's highest court declined to answer the question of whether New York law required recognition of marriages performed outside of New York. *See Godfrey v. Spano*, 920 N.E.2d 328, 337 (N.Y. 2009). The court expressed its "hope that the Legislature will address this controversy; that it will listen and decide as wisely as it can; and that those unhappy with the result . . . will respect it as people in a democratic state should respect choices democratically made." *Id.* Several years earlier, New York's highest court stated that "the New York Constitution does not compel recognition of marriages between members of the same sex." *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006). "Whether such marriages should be recognized is a question to be addressed by the legislature," but noted that "the Domestic Relations Law limits marriage to opposite-sex couples." *Id.*

In 2009, New York's legislature also did not recognize same-sex marriages performed outside of New York. Despite the persistent efforts by those advocating for legalization of same-sex marriage in New York, the legislature had consistently rejected all of those efforts.

In 2006, a number of bills were introduced to legalize same-sex marriage, *but none of them even made it out of committee. See id.* at 34 (Kaye, C.J., dissenting) (citing bills proposed in both the New York Senate and Assembly). By 2009, several more bills had been introduced, *but all were likewise rejected. See Godfrey*, 920 N.E.2d at 338 n.1 (Ciparick, J., concurring) (citing proposed legislation from 2007 and 2009 that passed the New York Assembly, but was defeated in the New York Senate). "There is no basis to conclude that, when the Legislature adopted the Domestic Relations Law more than a century ago, it *contemplated* the possibility of same-sex marriage, much less intended to *authorize* it." *Hernandez*, 855 N.E.2d at 13-14 (Graffeo, J., concurring) (emphasis added). Given this legislative refusal to recognize same-sex marriage in New York and historical policy of only recognizing marriages between one man and one woman, the State's public policy in 2009 was clearly opposed to same-sex marriage.

b. The Second Circuit's incorrect understanding of the law and public policy of New York in 2009 caused it to erroneously conclude that Respondent had Article III standing.

In the absence of legislation or a decision from the New York Court of Appeals concerning New York's recognition of same-sex marriages solemnized outside of New York in 2009, the Second Circuit was left with two options: (1) certify the question to the New York Court of Appeals, or (2) predict what the state law was in 2009. *See Windsor*, 699 F.3d at 177 (citing *State Farm Mutual Auto. Ins. Co. v. Mallela*, 372 F.3d 500, 505 (2d Cir. 2004)). The Second Circuit chose the latter option and based its erroneous conclusion on three intermediate court decisions from New York. *Id.*

Two of those decisions from the intermediate courts were decided prior to 2009 and were available to the New York Court of Appeals when it declined to reach the question. *See id.* The Second Circuit relied on *Lewis v. N.Y. State Dep't of Civil Serv.*, 60 A.D.3d 566 (N.Y. App. Div. 2009), which was decided in

January of 2009, and *Martinez v. City of Monroe*, 50 A.D.3d 189 (N.Y. App. Div. 2008). The New York Court of Appeals declined to answer this question in *Godfrey v. Spano*, which was decided in November of 2009, over a year after one case and over ten months after the other case the Second Circuit cited. These cases therefore provide little insight into the policy of New York when the Court of Appeals specifically stated that it was for the legislature to make this decision, and not for the courts. *Godfrey*, 920 N.E.2d at 337.

The only other case cited by the Second Circuit to support its conclusion that in 2009 New York recognized same-sex marriages solemnized outside of New York provides little discussion of why such "marriages" were recognized in 2009 and simply assumes it to be true. *See In re Estate of Ranftle*, 81 A.D.3d 566 (N.Y. App. Div. 2011). The *Ranftle* court's only justification for recognizing same-sex "marriages" solemnized outside New York was its assumption that the failure of the legislature to authorize same-sex marriage cannot serve as a statement of public policy. *Id.* at 2. This rationale, however, ignores the fact that it was much more than a mere failure to enact such legislation, but an express *rejection* of such a policy on several occasions. *See Hernandez*, 855 N.E.2d at 34 (Kay, C.J., dissenting); *Godfrey*, 920 N.E.2d at 338 n.1 (Ciparick, J., concurring). Certainly, express rejections of such a policy serve as more than a mere failure to adopt the public policy that the court alleges existed in New York at the time, and arguably constitute emphatic pronouncements *against* such a radical change in policy.

Additionally, even assuming the Second Circuit's cited cases support its conclusion that in 2009 New York recognized same-sex marriages solemnized elsewhere, the rationales of the cases it cites are erroneous and cannot establish standing in this case. In the absence of legislation or judicial policy to the contrary, New York follows the common law marriage recognition rule, which "recognizes as valid a marriage considered valid in the place where celebrated." *Id.* at 338 (Ciparick, J., concurring). However, this marriage recognition rule has two prominent exceptions: (1) where the legislature expressly provides that a marriage performed outside of New York is invalid, or (2) where the marriage performed outside of New York is abhorrent to New York public policy. *Id.* at 338-39. The first exception does not apply because there is no statute expressly prohibiting the recognition of same-sex marriages performed outside of New York. *See, e.g.*, *Lewis*, 60 A.D.3d at 221.

The second exception, however, does apply, and therefore the argument that in 2009 New York would have recognized same-sex marriages performed outside of New York fails because it was abhorrent to New York's public policy at that time. The cases relied upon by the Second Circuit to establish that out-of-state same-sex marriages would have been recognized in 2009 are all fundamentally flawed. The *Lewis* court stated that because there is no New York court precedent for striking down these marriages and no statute prohibiting the recognition of out-of-state same-sex marriages, then it was the public policy of New York to recognize them. *See Lewis*, 60 A.D.3d at 222.

In *Martinez*, the court noted that "[t]he Legislature may decide to prohibit the recognition of same-sex marriages solemnized abroad. Until it does so, however, such marriages are entitled to recognition in New York." *Martinez*, 50 A.D.3d at 193. The *Ranftle* court's decision rested on the same grounds. It noted that "the Legislature's failure to authorize same-sex couples to enter into marriage in New York or require recognition of validly performed out-of-state marriages cannot serve as an expression of public policy." *In re Estate of Ranftle*, 81 A.D.3d at 2.

The common and fatal flaw of each of these decisions is that they overlook a century of domestic relations laws in New York and conveniently ignore years of legislative rejection of the exact policy that the Second Circuit "predicted" was in existence in New York in 2009. It cannot be argued that there is a lack of legislative direction on this point of public policy. The legislature of New York *expressly rejected* numerous proposals seeking to authorize same-sex marriage in the state. *Hernandez*, 855 N.E.2d at 34 (Kaye, C.J., dissenting); *see also Godfrey*, 920 N.E.2d at 338 n.1 (Ciparick, J., concurring).

The legislature is the policy making body of New York, not the judiciary. *See, e.g., Sirkin v. Fourteenth St. Store*, 124 A.D. 384, 389, 108 N.Y.S. 830, 833-34 (1908) ("It being the province of the Legislature to declare the public policy of the state, it is the duty of the court to be guided thereby in administering the law."); *Defiance Milk Products Co. v. Du Mond*, 309 N.Y. 537, 550, 132 N.E.2d 829, 836 (1956) ("It is within the competency of the Legislature to declare public policy in order to protect the public and the courts may not intrude in order to disregard the legislative determination and substitute one of their own."); *Matter of Natasha C.*, 80 N.Y.2d 678, 682-83, 609 N.E.2d 526, 528 (1993) ("it is for the Legislature, and not the courts, to make the necessary policy choices as to how best to address . . . problems").

The New York legislature expressly rejected many legislative proposals to authorize same-sex marriage, as shown above. Moreover, New York Domestic Relations Law had numerous examples of the State's public policy in existence at that time.

> Articles 2 and 3 of the Domestic Relations Law, which govern marriage, nowhere say in so many words that only people of different sexes may marry each other, but that was the universal understanding when articles 2 and 3 were adopted in 1909, an understanding reflected in several statutes. Domestic Relations Law § 12 provides that the 'parties may solemnly declare . . . that they take each other *as husband and wife*." Domestic Relations Law § 15(1)(a) requires town and city clerks to obtain specified information from "*the groom*" and "*the bride*." Domestic Relations Law § 5 prohibits certain marriages as incestuous, specifying opposite-sex combinations (brother and sister, uncle and niece, aunt and nephew), but not same-sex combinations. Domestic Relations Law § 50 says that the property of "*a married woman* . . . shall not be subject to *her husband's* control.

Hernandez, 855 N.E.2d at 6 (emphasis added).

The New York Court of Appeals also noted that the idea of same-sex marriage as a public policy is a relatively new phenomenon and that a court should not take lightly the policies behind this tradition. *Id.* at 8. "The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Id.*

The cases cited by the Second Circuit ignore this important history and assert that because there is no statutory prohibition or express policy to the contrary, that same-sex marriages solemnized outside of New York would have been recognized in 2009. This ignores the explicit language of numerous statutory provisions declaring public policy to the contrary, nearly a decade of annual rejections of public policy proposals to authorize same-sex marriage, and centuries of tradition that recognized that marriage is between one man and one woman. It also impermissibly shifts the burden of proof from Respondent to the government.

"Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *U.S. v. Rutherford*, 442 U.S. 544, 555 (1979). The same is true of New York courts interpreting legislative policy determinations consistent with the New York Constitution, which the New York Court of Appeals has determined does not mandate recognition of same-sex marriage. *See Hernandez*, 855 N.E.2d at 5. Because the New York legislature had not adopted a policy recognizing same-sex marriages, the public policy of New York in 2009 was that marriage was between one man and one woman.

This determination of policy is bolstered by the fact that the New York legislature had explicitly rejected numerous attempts to redefine and revise the public policy of the state to include same-sex marriage. Because the domestic relations laws had since their inception limited marriage to one man and one woman, the recognition of same-sex marriages performed outside of New York would be abhorrent to this long-standing public policy. The Second Circuit therefore erred when it determined that judicial interpretations to the contrary constituted a sufficient basis upon which to "predict" that the public policy in New York in 2009 would have recognized same-sex marriages performed out of state.

Because the recognition would have been abhorrent to New York public policy in 2009, Respondent cannot establish that she was married in a manner recognized by New York in 2009. Respondent was not a spouse in 2009 and cannot subsequently become a surviving spouse for purposes of 26 U.S.C. § 2056 after New York changed its public policy in 2011. As such, she does not have standing to challenge Section 3 of DOMA, and this Court should dismiss Respondent's challenge for want of jurisdiction.

2. Respondent did not have a Concrete and Particularized Injury because New York did not Recognize Same-sex Marriage; therefore any Decision by this Court would not Provide any Redress to her.

In addition to the requirement that Respondent establish a concrete and particularized injury, she was required to satisfy the element of redressability. "[I]t must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. Because Respondent cannot show that she had a concrete injury, no matter what determination is made by this Court, she cannot obtain the relief she seeks.

Respondent's potential for likely redress of injuries is not merely speculative in this case, which itself would be sufficient to defeat her claim, but it is *impossible* for her purported injuries to be redressed, as there is no injury. Respondent was not considered a spouse under New York law in 2009, and so did not qualify as a surviving spouse for purposes of the marital deduction. Because she did not qualify as a surviving spouse, she was not entitled to the martial deduction on her partner's estate tax return. As such, Respondent has not and indeed cannot establish the third element of the irreducible constitutional minimum requirements of standing, and the decision below should be reversed.

3. Respondent did not and cannot Satisfy the Additional Prudential Requirements Necessary for Standing in Federal Court because the Issue of Same-sex Marriage is more Appropriate for a Legislative Determination.

"Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." *Valley Forge Christian*, 454 U.S. at 474. This Court has established a significant policy of "refrain[ing] from adjudicating abstract questions of wide public significance . . . most appropriately addressed in the representative branches." *Id.* at 475 (internal quotation marks omitted). Another prudential concern that this Court has required is "that the plaintiff's complaint fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* Here, as the New York Court of Appeals noted in *Godfrey* and *Hernandez*, the public policy question to be addressed is best left to a legislative determination and is not suitable for judicial overreach. *See Godfrey*, 920 N.E.2d at 337; *Hernandez*, 855 N.E.2d at 5.

When the determination of what New York's public policy was in 2009 is analyzed through the proper framework and focused on the legislature's determinations, the public policy becomes evident and *that policy did not recognize same-sex marriage*. On numerous occasions, dating back to 2003, the New York legislature explicitly rejected legislative proposals to recognize same-sex marriage in the state. *See Hernandez*, 855 N.E.2d at 34 (Kaye, C.J., dissenting) (noting legislative proposals dating back to 2003 that were introduced but never even made it out of a committee hearing); *see also Godfrey*, 920 N.E.2d at 338 n.1 (Ciparick, J., concurring) (noting that a same-sex marriage authorization statute was passed in the Assembly in 2007 and 2009, but failed in the Senate and was never enacted).

Indeed, had New York's public policy recognized same-sex marriage in 2009, it would not have been necessary to enact legislation in 2011 authorizing same-sex marriage. *See* 2011

N.Y. Dom. Rel. § 10-a (McKinney 2011). Not only had the legislature rejected expansion of New York public policy to include same-sex marriage, but its centuries-old statutes provided express language recognizing only traditional marriage between one man and one woman. *Hernandez*, 855 N.E.2d at 6. The Second Circuit and the New York courts cited by the Second Circuit exceeded their authority by overriding the policy determinations of the New York legislature. Whether the policy was correct and whether the judges liked the public policy of New York in 2009 is of no consequence. "[F]ederal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *U.S. v. Rutherford*, 442 U.S. at 555. Here, the Second Circuit has violated this bedrock principle of federalism and separation of powers by attempting to insert its own policy determination contrary to that of the elected public policy makers authorized to reject a policy recognizing same-sex marriage in 2009. This Court should not permit such an *ultra vires* determination.

Because New York public policy is best determined by the legislature and same-sex marriage is an issue of important public policy, Respondent has not and cannot satisfy the prudential requirements of standing. The Second Circuit erred in taking an expanded view of standing in this case, contrary to the precedents of this Court.

Respondent bears the burden of establishing her standing to bring this challenge. *Lujan*, 504 U.S. at 561. Respondent has failed to meet that burden. She did not and cannot satisfy the "irreducible constitutional minimum" requirements of standing, and she did not and cannot establish the prudential requirements of standing. As such, this Court should dismiss Respondent's challenge as non-justiciable.

II. SECTION 3 OF THE DEFENSE OF MARRIAGE ACT SHOULD BE ANALYZED UTILIZING RATIONAL BASIS SCRUTINY, WHICH IT EASILY SATIFIES.

Only those classifications that discriminate against a suspect or quasi-suspect class warrant heightened constitutional scrutiny. Section 3 of DOMA does not discriminate on the basis of a suspect or quasi-suspect class, and therefore it should be analyzed using rational basis. Under this deferential standard of review, Section 3 of DOMA unquestionably should be upheld because it is rationally related to numerous legitimate government interests. Defining marriage as the union of one man and one woman is rationally related to the government's interest in fostering the optimal environment for procreation and the rearing of children. Additionally, affirming marriage as the union of one man and one woman for purposes of federal law is rationally related to the government's interest in memorializing social constructs and foundational concepts upon which statutory and common law are based.

"[A] classification neither involving a fundamental right nor proceeding along suspect lines is accorded a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). This strong presumption reveals that legislative classifications "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate government purpose." *Id.* Regardless of what the Second Circuit thought about New York's public policy in 2009 or Congress's public policy articulated in Section 3 of DOMA, this law "must be upheld against an equal protection challenge if there is *any reasonably conceivable state of facts that could provide a rational basis* for the classification." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added).

"[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *City of*

New Orleans v. Dukes, 427 U.S. 297, 303 (1976). Rational basis review is also consistent with the level of scrutiny that this Court has applied to legislative classifications on the basis of sexual orientation. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

Here, by applying heightened scrutiny to Congress's legislative enactments in DOMA, the Second Circuit violated these fundamental principles and substituted its own policy determination for that of the democratically elected majority in the legislature that enacted the challenged provision. The Second Circuit was without authority to make this substitution. Section 3 of DOMA does not discriminate on the basis of a suspect or quasi-suspect class, so rational basis review is the appropriate standard. Section 3 of DOMA satisfies this review.

A. Section 3 Of DOMA Does Not Discriminate On The Basis Of A Suspect Or Quasi-Suspect Class, And Therefore Should Be Reviewed Under Rational Basis.

Section 3 of DOMA does not discriminate against a suspect class. This Court long ago articulated the test for determining whether a statute discriminates against a suspect class. It requires a showing that the statute (1) burdens a fundamental right; (2) burdens the democratic process; (3) discriminates on the basis of race, religion, or nationality; or (4) if prevailing prejudice against a discrete and insular minority curtails that minority's ability to take advantage of the political system. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Despite the long history of this test, this Court has only identified three suspect classifications: race, national ancestry and ethnic origin, and alienage. *See Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989). This Court has never treated sexual orientation as a suspect class, and it should not do so now. Section 3 of DOMA does not infringe upon any fundamental right, because there is no fundamental right to homosexual marriage. *See Washington v. Glucksberg*, 521 U.S. 702, 720, 721 (1997) (noting that fundamental rights are only those that are deeply rooted in the Nation's history and traditions and that are implicit in the concept of ordered liberty).

Certainly, Respondent cannot assert that there is a fundamental right to marry a member of the same-sex as it is not deeply rooted in the history of the Nation nor is it implicit in the concept of ordered liberty. Indeed, it is a relatively new concept that most people who have ever lived never considered. *See Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (noting that "[u]ntil a few decades ago, it was an accepted truth for almost everyone that ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex"). It is also wholly foreign to American jurisprudence at the federal level.

Additionally, nothing about Section 3 of DOMA burdens the democratic process. Indeed, Section 3 of DOMA arose as part of the democratic process by which the Nation's elected representatives followed the will of the electorate in protecting the traditional definition of marriage. Additionally, it simply cannot be said nor does Respondent assert that Section 3 of DOMA discriminates on the basis of race, religion, or nationality. Finally, nothing in Section 3 of DOMA infringes upon homosexuals' right to engage in the political process. They remain free to vote, petition their government, and engage in First Amendment activities to try to persuade the electorate of their opinion concerning same-sex marriage. Section 3 of DOMA simply provides the definition for how the terms "marriage" and "spouse" will be construed for purposes of federal law. As such, it does not impede access to the political process. *Compare Romer v. Evans*, 517 U.S. 620, 624 (1996) (striking Colorado law which "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect the named class" of "homosexual persons or gays and lesbians").

The Second Circuit relied upon *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) to determine that sexual orientation is a quasi-suspect class and to support its determination that intermediate scrutiny applied to Respondent's challenge. *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012).[2] This determination was in error.

In *City of Cleburne*, this Court articulated the test for determining whether a statute discriminates against a quasi-suspect class, which requires (1) that the statute bears no relation to the group's ability to contribute to society; (2) if there remains widespread prejudice against the group; (3) if the group is presently shut out of the political process; and (4) if the statute discriminates on the basis of an immutable characteristic. *City of Cleburne*,

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[2] The Second Circuit basically conceded that Section 3 of DOMA would satisfy rational basis review. *See Windsor*, 699 F.3d at 181 ("Fortunately, no permutation of rational basis review is needed if heightened scrutiny is available, as it is in this case. We therefore decline to join issue with the dissent, which explains why Section 3 of DOMA may withstand rational basis review.").

473 U.S. at 440-45. Similar to this Court's very limited recognition of suspect classifications, this Court has only found a quasi-suspect classification in two instances: gender and illegitimacy. *Woodward*, 871 F.2d at 1076. This Court should follow its precedent and resist the Second Circuit's attempt to expand the list of classifications deemed quasi-suspect.

Sexual orientation, unlike gender or race, is not "an immutable characteristic determined solely by accident at birth." *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1986). "Members of recognized suspect or quasi-suspect classes . . . exhibit immutable characteristics, whereas *homosexuality is primarily behavioral in nature*." *Woodward*, 871 F.2d at 1076 (emphasis added). Although scientists have studied homosexuality for many years, there is still no universally accepted definition of sexual orientation among professionals.

"Same-sex sexual attractions and behavior occur in the context of a variety of sexual orientations and sexual orientation identities, and for some, sexual orientation identity (i.e., individual or group membership and affiliation, self labeling) *is fluid or has an indefinite outcome*." *See* American Psychological Association, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, vii (2009), available at www.apa.org/pi/lgbt/resources/therapeutic-response.pdf (emphasis added). Additionally, "the recent research on sexual orientation identity diversity illustrates that sexual behavior, sexual attraction, and sexual orientation identity are labeled and expressed in many different ways, some of which are fluid." *Id.* at 14. If homosexuality is properly understood as a behavior or lifestyle choice and is well-recognized as fluid and evolving, then certainly it cannot be said to be immutable.

Section 3 of DOMA also does not discriminate in a manner unrelated to homosexuals' ability to contribute to society. By limiting, for purposes of federal law, the definition of marriage to those between one man and one woman, Congress was attempting to connect marriage to biological procreation. Certainly, homosexuals "cannot procreate simply by joinder of their different sexual being." *Windsor*, 699 F.3d at 199 (Straub, J., dissenting). While the particular details of marriage in a particular culture varies considerably, it always has something to do with creating a public sexual union between one man and one woman so that socially-valued children have both a mother and a father, and so society has the next generation it needs.

Essentially, the law presumes that a marriage will produce children and DOMA affords benefits on the basis of that presumption. That childbearing opportunities inherent in the male/female marital union are occasionally unrealized (i.e., exceptions to the general pattern) does nothing to undermine the basis for the rule of recognition of the special status of traditional marriage. By affirming a particular kind of relationship as the social ideal, the state attempts to both discourage unmarried childbearing and to encourage sufficient childbearing within marriage to reproduce the population. This Court has recognized that marriage plays an important role in "assuring that a biological parent-child relationship exists." *Nguyen v. I.N.S.*, 533 U.S. 53, 62 (2001). Congress's attempt to encourage that relationship bears on homosexuals' ability to contribute to the traditional biological parent-child relationship and is not merely intended to discriminate against them without cause.

The Second Circuit stated that this question hinges on "whether [homosexuals] have the strength to politically protect themselves from wrongful discrimination." *Windsor*, 699 F.3d at 184. It cannot be gainsaid that when a group has the support of the entire Executive Branch of the United States, that such a group has the ability to politically protect themselves. Respondent cannot show that homosexuals are unable to politically protect themselves, and the Second Circuit was wrong to conclude otherwise.

Finally, homosexuals do not qualify as a quasi-suspect class because they are not shut out of the political process. As previously mentioned, they have significant political influence over the President and the Department of Justice. In a number of states, homosexuals have successfully persuaded the electorate that same-sex marriage should be permitted. The fact that they have not yet achieved such political support among the national electorate is insufficient to show that they have been entirely excluded from the political process. There is unquestionably a difference between unsuccessful political participation and total exclusion from the political process. Homosexuals have thus far been unsuccessful in persuading the majority of Americans that same-sex marriage should be permitted and recognized at the federal level. They have not been disenfranchised. Nothing in Section 3 of DOMA prevents them from exercising the franchise like all other individuals who qualify for that right. Section 3 of DOMA simply provides a definition of the terms "marriage" and "spouse" for purposes of federal law, and it does not in any way shut homosexuals out of the political process.

Section 3 of DOMA does not discriminate on the basis of a suspect class because Respondent does not satisfy the requirements of *Carolene Products*. Section 3 of DOMA does not discriminate on the basis of a quasi-suspect class because Respondent cannot satisfy the requirements of *City of Cleburne*. The Second Circuit held that sexual orientation did qualify as a quasi-suspect class and applied intermediate scrutiny. *Windsor*, 669 F.3d at 181-85. That conclusion ignored this Court's substantial restraint in expanding the list of those categories that qualify as suspect or quasi-suspect. As such, it was in error and this Court should reject it.

B. Section 3 Of DOMA Satisfies Rational Basis.

Rational basis review is "a paradigm of judicial restraint." *Beach Commc'ns*, 508 U.S. at 314. Significantly, this Court has noted that when "there are *plausible* reasons for Congress' action, our inquiry is at its end." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (emphasis added). Under this extraordinarily deferential standard, Section 3 of DOMA must be upheld unless those opposing the legislation have satisfied their "burden to negative every *conceivable* basis which might support it." *Beach Commc'ns*, 508 U.S. at 315 (emphasis added).

The Second Circuit erred when it dawned its superlegislature regalia and substituted its judgment for that of the democratically elected representative body with the authority to enact a law defining marriage in a manner consistent with the history and traditions of this Nation. Respondent simply cannot satisfy her burden to defeat every *conceivable* or *plausible* justification of Section 3 of DOMA because many of the justifications for this Section rise above the required level of legitimate and satisfy the much higher compelling interest standard.

1. Defining marriage as the union of one man and one woman is rationally related to the government's interest in fostering the optimal environment for procreation and the rearing of children.

Numerous courts have recognized that the state purpose of furthering procreation where both parents are present to raise the child is at least rational, *if not compelling*. *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982) ("state has a compelling interest in encouraging and fostering procreation of the race"); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), appeal dismissed for want of a substantial federal question, 409 U.S. 810 (1972) ("'The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis").

Justice O'Connor specifically noted that "preserving the traditional definition of marriage" is itself "a legitimate state interest." *See Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring). She continued by stating that "other reasons exist to promote the institution of marriage beyond mere moral disapproval of the law." *Id.* Section 3 of DOMA is certainly related to legitimate government interests. Not only is Section 3 rationally related to a *legitimate* government interest, but this Court has recently described two *important* governmental objectives that reinforce the link between marriage and procreation.

The first interest this Court articulated in *Nguyen* is the role of marriage in "assuring that a biological parent-child relationship exists." *Nguyen v. I.N.S.*, 533 U.S. 53, 62 (2001). While admittedly less than perfect, marriage is the most reliable indicator (absent intrusive genetic testing) of a biological tie between parent and child. With the legal presumption of paternity under many state and federal laws, together with the marital expectations of monogamy and fidelity, marriage provides a basis for the legal and factual assumption that a married man is the father of his wife's child. Extending the definition of marriage to include same-sex couples would not only fail to advance this important governmental interest, but would actively undermine the signaling function of marriage with respect to any real connection between marriage and biological parenting.

The second important governmental interest articulated in *Nguyen* "is the determination to ensure that the child and citizen parent have some demonstrated opportunity to develop a relationship that consists of real, everyday ties providing a connection between child and citizen parent." *Id.* at 64-65; *see Marital Procreation*, 24 Harv. J.L. & Pub. Pol'y 771, 797 (2001). It is beyond question that Congress has an interest in fostering healthy familial relationships that provide a benefit to the public as a whole. Protecting the traditional definition of marriage advances this goal by ensuring that biological parents and children have the support of their government to foster those family ties.

Male gender identity and female gender identity are each uniquely important to a child's development. Accordingly, one significant justification for defining marriage as the union of one man and one woman is because children need a mother and a father. We live in a world demarcated by two genders, male and female. There is no third or intermediate category. Sex is binary. By striking down Section 3 of DOMA, this Court will be making a powerful statement that our government no longer believes children deserve mothers and fathers. In effect, it would be saying: "Two fathers or two mothers are not only just as good as a mother and a father, they are just the same."

The government promotion of this idea will likely have some effect even on people who are currently married, who have been raised in a particular culture of marriage. But this new idea of marriage, sanctioned by law and government, will certainly have a dramatic effect as the next generation's attitudes toward marriage, childbearing, and the importance of mothers and fathers are formed. By destroying the traditional definition of marriage, the family structure will be dramatically transformed. Many boys will grow up without any positive male influence in their lives to show them what it means to be a man, and many girls will grow up without any female influence to show them what it means to be a lady.

The repercussions of this deconstruction of society are incalculable and will reshape, in a drastically negative way, the culture in which we live. Many children learn appropriate gender roles by having interaction with both their mother and their father and by seeing their mother and father interact with one another. By redefining marriage to state that this is not the family structure the federal government wants to foster and encourage, this Court will be overturning centuries of historical understandings of the family and the home.

"[C]hildren appear most apt to succeed as adults—on multiple counts and across a variety of domains—when they spend their entire childhood with their married mother and father." Mark Regnerus, *How Different are the Adult Children of Parents Who Have Same-sex Relationships? Findings from the New Family Structures Study*, 41 Social Science Research 752, 766 (2012). Indeed, in this study, participants raised in same-sex households were more likely to fare worse on educational attainment, mental health needs, and economic stability. *Id.* at 763-64. "When compared with children who grew up in biologically intact, mother-father families, the children of women who reported a same-sex relationship look markedly different on numerous outcomes, *including many that are obviously suboptimal* (such as education, depression, employment status, or marijuana use)." *Id.* at 764 (emphasis added).

Regnerus concluded, based on the only large representative sample study to date that controlled for external variables, that the reason for the significant differences between children raised in traditional one man and one woman families as compared to homosexual parent families "is located not simply in parental sexual orientation but in successful cross-sex relationship role modeling, or its absence or scarcity." *Id.* at 763. This study provides additional support for Congress's legitimate interest in defining marriage as it did in Section 3 of DOMA.

In fact, even many homosexuals recognize the need for and the importance of children having both a mother and a father present in the home. *See* Wendy Wright, *French Homosexuals Join Demonstration Against Gay Marriage*, Catholic Family & Human Rights Institute (Jan. 17, 2013), *available at* www.c-fam.org/fridayfax/volume-15/French-homosexuals-join-demonstration-against-gay-marriage.html. A prominent homosexual French politician protested France's proposed same-sex marriage bill, stating that "[t]he rights *of* children trump the right *to* children." *Id.* What he meant was that children deserve to be raised in a home with both a mother and a father, and he did not believe that same-sex marriage fostered this important and historical tradition.

Another prominent spokesman against the French same-sex marriage bill who was raised by two women stated "he suffered from the lack of a father, a daily presence, a character and a properly masculine example." *Id.* Obviously, when individuals raised in homes lacking the traditional and necessary components of a mother and a father recognize that it caused them harm, Congress has a legitimate interest in fostering familial relationships that promote the beneficial role of the natural family. Indeed, this prominent French homosexual stated that permitting same-sex marriage would be "institutionalizing a situation that had scarred him considerably." *Id.* Given these reports, and the countless other examples that Regnerus wrote about in his study, Congress certainly had a legitimate interest in maintaining the traditional definition of marriage as between one man and one woman.

2. Affirming marriage as the union of one man and one woman for purposes of federal law is rationally related to the government's interest in memorializing social constructs and foundational concepts upon which statutory and common law are based.

This Court has long acknowledged that Congress has the authority to define the terms it uses in its statutes, including those excluding certain types of marriages from federal recognition. Indeed, the authority of Congress to define marriage as one man and one woman for purposes of federal law has a long pedigree in this nation. In 1885, this Court upheld an act of Congress that prohibited polygamists and bigamists from voting or holding office in any United States territory. *See Murphy v. Ramsey*, 114 U.S. 15 (1885).

In affirming Congress's definition of marriage to exclude polygamists and bigamists, this Court explained:

> For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, *as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony*; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who

> are practically hostile to its attainment.

Id. at 45 (emphasis added).

This Court specifically affirmed Congress's authority to prohibit polygamy and bigamy because those relationships were inconsistent with the longstanding common law meaning of marriage as the union of one man and one woman. In 1888, this Court described marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). In *Reynolds v. United States*, 98 U.S. 145, 166 (1878), the Court acknowledged that the legal redefinition of marriage (in the context of polygamy) would significantly impact the social structure of the Nation, emphasizing the authority of the legislature to choose one form of marriage over another: "there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion." *Id.* at 166.

The cultural significance of redefining marriage is not limited to the context of polygamy. Throughout the history of Western civilization, and certainly since the founding of the United States more than 200 years ago, the marriage-based familial structure has provided the basis of civil society, as parents infuse their own children with the education, values, and training necessary for continued self-government. Marriage is a normative social institution. Marriage is not primarily a way of expressing approval for an infinite variety of human affectional or sexual ties. Marriage is broader than just two people who have affection for one another. It impacts third-parties, namely children, and by extension, the rest of society. Marriage and natural family is the first form of government. It is therefore incumbent upon Congress to affirm natural marriage rather than deconstruct it. It is certainly beyond the constitutional purview of this Court to re-write the definition of marriage.

Changing this definition will have drastic and detrimental effects on society as a whole. Marriage is separated from other kinds of relationships by law and government as well as society because it is not merely a private, individual good, but a public, common good. Even people who do not marry depend on a healthy marriage culture in order to ensure a stable society and carry it into the next generation. Many courts continue to articulate this public understanding of the reasons for state involvement in marriage. *See, e.g.*, *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

When the natural definition of marriage as that between one man and one woman is revised to include other marriages, the state is left with precious little justification for laws limiting polygamy and polyamory (group marriage). Ultimately, there is no principled basis for recognizing same-sex marriage without simultaneously providing a basis for the legality of consensual polygamy and polyamory.

In sum, Congress could have rationally concluded that marriage is society's way of recognizing that the sexual union of one man and one woman is unique, and that government needs to support this union for the benefit of society and its children, or that marriage laws are not primarily about adult needs for approbation and support, but about the well-being of children and society. This conclusion is not only rational, but it based on centuries of historical traditions and customs, sociological studies, and common sense. If this Court does not dismiss this case, which it should, but instead reaches the merits, this Court should hold that no constitutional provision justifies striking down Section 3 of DOMA.

CONCLUSION

This Court should reverse the decision below and dismiss this case because Respondent lacks standing. If this Court should reach the merits, it should uphold Section 3 of DOMA.

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AMICUS
CURIAE
BRIEF

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In the Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,
Petitioners,
v.
KRISTIN M. PERRY, ET AL.,
Respondents.

UNITED STATES,
Petitioner,
v.
EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth and Second Circuits

BRIEF OF LIBERTY, LIFE AND LAW FOUNDATION AND NORTH CAROLINA VALUES COALITION AS *AMICI CURIAE* IN SUPPORT OF HOLLINGSWORTH AND BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS AND SUPPORTING REVERSAL

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TABLE OF CONTENTS

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. THIS COURT SHOULD EXERCISE JUDICIAL RESTRAINT AND DECLINE TO CREATE A RIGHT TO SAME-SEX MARRIAGE BY JUDICIAL DECREE. 2

II. THIS COURT MUST PRESERVE THE LIBERTY OF ALL AMERICANS. A RULING AGAINST PETITIONERS WOULD HAVE A DEVASTATING IMPACT ON A BROAD ARRAY OF CONSTITUTIONAL RIGHTS. 4

III. A RULING AGAINST PETITIONERS WOULD HAVE A CATASTROPHIC IMPACT ON RIGHTS OF CONSCIENCE GENERALLY AND RELIGIOUS LIBERTY SPECIFICALLY. 10

  A. A Ruling Against Petitioners Would Erode Integrity By Forcing Many Citizens To Violate Conscience. 11

  B. A Ruling Against Petitioners Would Have A Crushing Impact On Religious Liberty. . . 14

  C. A Ruling Against Petitioners Would Have A Disproportionately Harsh Impact On Christianity. 21

IV. A RULING AGAINST PETITIONERS WOULD HAVE A CORROSIVE EFFECT ON OTHER FUNDAMENTAL LIBERTIES. 26

A. A Ruling Against Petitioners Would Threaten Free Speech Rights. 26

B. A Ruling Against Petitioners Would Interfere With The Right To Earn A Living Or Enter A Profession. 28

C. A Ruling Against Petitioners Would Intrude On Rights To Privacy. 35

CONCLUSION 37

TABLE OF AUTHORITIES

Cases

Attorney Gen. v. Desilets,
418 Mass. 316, 636 N.E.2d 233 (1994) 33

Bailey v. State of Alabama,
219 U. S. 219 (1911) 31

Baird v. State Bar of Ariz.,
401 U.S. 1 (1971) 29

Barndt v. Cnty. of Los Angeles,
211 Cal.App.3d 397 (1989) 31

Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte,
481 U.S. 537 (1987) 17

Ben-Shalom v. Marsh,
881 F.2d 454 (7th Cir. 1989) 18

Bob Jones Univ. v. United States,
461 U.S. 574 (1983) 16, 19

Bowen v. Roy,
476 U.S. 693 (1986) 19, 20, 32

Bowers v. Hardwick,
478 U.S. 186 (1986) 4, 24

Boy Scouts of Am. v. Dale,
530 U.S. 640 (2000) . . . . *passim*

Braunfeld v. Brown,
366 U.S. 599 (1961) 19, 33

Cantwell v. Connecticut,
310 U.S. 296 (1940) 15

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 16, 25, 26

Church of the Holy Trinity v. United States,
143 U.S. 457 (1892) 21

Communist Party v. SACB,
367 U.S. 1 (1961) 9

Elane Photography v. Willock,
284 P.3d 428 (2012) 32

Emp't Div., Ore. Dep't of Human Res. v. Smith,
494 U.S. 872 (1990) 13, 14, 19

Equality Found. of Greater Cincinnati v. City of Cincinnati,
128 F.3d 289 (6th Cir. 1997) 3

Frazee v. Ill. Dept. of Emp't Sec.,
489 U.S. 829 (1989) 19

Gay Alliance of Students v. Matthews,
544 F.2d 162 (4th Cir. 1976) 8

Gay Lib. v. Univ. of Missouri,
558 F.2d 848 (8th Cir. 1977) 8, 9

Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.,
536 A.2d 1 (D.C. 1987) 19

Girouard v. United States,
328 U.S. 61 (1946) 11, 14

Gonzales v. O Centro Espirita Beneficente,
546 U.S. 418 (2006) 19

Grigsby v. Reib,
105 Tex. 597 (Tex. Sup. Ct. 1913) 21

Harper v. Poway Unified Sch. Dist.,
445 F.3d 1166 (9th Cir. 2006), vacated and remanded, 549 U.S. 1262 (2007) 28

Healy v. James,
408 U.S. 169 (1972) 9

High Tech Gays v. Defense Indus. Sec. Clearance Office,
895 F.2d 563 (9th Cir. 1990) 18

Hobbie v. Unemployment Appeals Comm'n of Fla.,
480 U.S. 136 (1987) 17, 19, 20

Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston,
515 U.S. 557 (1995) 6, 8, 27

In re Marriage Cases,
143 Cal.App.4th 873 (2006) 3

In re Marriage Cases,
183 P.3d 384 (Cal. 2008) 25

Jacobson v. Massachusetts,
197 U.S. 11 (1905) 14

Lawrence v. Texas,
539 U.S. 558 (2003) . . . . *passim*

Lyng v. Nw. Indian Cemetery Protective Ass'n,
485 U.S. 439 (1988) 13, 14

McCready v. Hoffius II,
593 N.W.2d 545 (Mich. 1999) 20

North Coast Women's Care Med. Group, Inc. v. Superior Court,
44 Cal. 4th 1145 (2008) 29, 30, 31

Paramount Pictures Corp. v. Holden,
166 F. Supp. 684 (D. Cal. 1958) 31

Perry v. Brown,
671 F.3d 1052 (9th Cir. 2012) 3, 14, 25

Philips v. Perry,
106 F.3d 1420 (9th Cir. 1997) 18

Pickup v. Brown,
2012 U.S. Dist. LEXIS 172034, Case No. 2:12-CV-02497-KJM-EFB (E.D. Cal. Dec. 4, 2012) . 36

Planned Parenthood of Se. Pa. v. Casey,
505 U.S. 833 (1992) 36, 37

Poultry Producers v. Barlow,
189 Cal. 278 (1922) 31

Prince v. Massachusetts,
321 U.S. 158 (1944) 14, 19

Rasmussen v. Glass,
498 N.W.2d 508 (Minn. Ct. of App. 1993) . . 20, 33

Reynolds v. United States,
98 U.S. 145 (1878) 19

Richenberg v. Perry,
97 F.3d 256 (8th Cir. 1996) 18

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 17, 33

Romer v. Evans,
517 U.S. 620 (1996) 3, 18

Sherbert v. Verner,
374 U.S. 398 (1963) . . . . *passim*

Smith v. Fair Emp't and Housing Comm'n,
12 Cal.4th 1143 (1996) 19

State by Cooper v. French,
460 N.W.2d 2 (Minn. 1990) 20

State ex rel. McClure v. Sports & Health Club, Inc.,
370 N.W.2d 844 (Minn. 1985) 33

Swanner v. Anchorage Equal Rights Comm'n,
874 P.2d 274 (Alaska 1994) 19, 20, 33

Thomas v. Review Bd. of Ind. Emp't,
450 U.S. 707 (1981) 16, 17, 19, 20

Thomasson v. Perry,
80 F.3d 915 (4th Cir. 1996) 18

Tony and Susan Alamo Found. v. Sec'y of Labor,
471 U.S. 290 (1985) 19, 33

United States v. Ballard,
322 U.S. 78 (1944) 5

United States v. Kozminski,
487 U.S. 931 (1988) 31

United States v. Lee,
455 U.S. 252 (1982) 19, 33, 34

United States v. Seeger,
380 U.S. 163 (1965) 13

Walden v. Ctrs. for Disease Control & Prevention,
669 F.3d 1277 (11th Cir. 2012) 28

Ward v. Polite,
667 F.3d 727 (6th Cir. 2012) 26, 27, 28, 29

Washington v. Glucksberg,
521 U.S. 702 (1997) 2

Watson v. Jones,
13 Wall. 679 (1872) 27

Welch v. Brown,
2012 U.S. Dist. LEXIS 172029, Case No. 2:12-cv-02484-WBS-KJN (E.D. Cal. Dec. 3, 2012) . . . 36

Wisconsin v. Yoder,
406 U.S. 205 (1972) 14, 16, 19, 32

Woodward v. United States,
871 F.2d 1068 (Fed. Cir. 1989) 18

Wooley v. Maynard,
430 U.S. 705 (1977) 27

W. Va. State Bd. of Educ. v. Barnette,
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636 F.3d 874 (7th Cir. 2011) 28

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http://www.aclu.org/lgbt-rights/baker-and-linsley-v-wildflower-inn 32

http://www.becketfund.org/hhsinformationcentral/ 12

Genesis 1:26-27 23

Genesis 2:7 23

Genesis 2:18-23 23

Genesis 2:24-25 23

Deuteronomy 4:9-10 23

Ephesians 5:31-32 23

INTEREST OF *AMICI CURIAE*[1]

Liberty, Life and Law Foundation ("LLLF") and North Carolina Values Coalition ("NCVC") , as *amici curiae*, respectfully urge this Court to reverse the decisions of the Ninth and Second Circuits.

LLLF is a North Carolina nonprofit corporation established to promote the legal defense of religious liberty, sanctity of human life, liberty of conscience, family values, and other moral principles. LLLF is gravely concerned about the growing hostility to religious expression in America and the related threats to liberty and conscience. LLLF's counsel, Deborah J. Dewart, is the author of a book, *Death of a Christian Nation*, and many *amicus curiae* briefs in this Court and the federal circuits.

The North Carolina Values Coalition ("NCVC") is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom in North Carolina by working in the arenas of public policy and politics to protect marriage and religious liberty. NCVC spearheaded the statewide ballot initiative in 2012 to amend North Carolina's Constitution to protect the time-honored definition of marriage (one man and one woman). The Marriage Amendment passed by a vote of 61% to 39% of the state's voters. A total of 1,317,178 citizens voted for the Amendment. NCVC's Executive Director, Tami L. Fitzgerald, served as Chairwoman of Vote FOR Marriage NC, the referendum committee that worked to pass the Amendment.

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[1] The parties have consented to the filing of this brief. *Amici curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

If this Court short-circuits the democratic process and redefines the right to marry by judicial fiat, it will wreak havoc on state statutes and constitutions across the nation. And not only that—it will cause irreparable damage to a broad array of cherished liberties, including religious freedom, conscience, speech, association, privacy, and the right to earn a living. This Court should consider the far-reaching consequences of a ruling against Petitioners and ensure equal protection for the liberties of all Americans.

ARGUMENT

I. THIS COURT SHOULD EXERCISE JUDICIAL RESTRAINT AND DECLINE TO CREATE A RIGHT TO SAME-SEX MARRIAGE BY JUDICIAL DECREE.

Courts rightly hesitate to announce new fundamental rights. Judicial restraint is imperative because the asserted rights are removed from the arena of public debate and legislative action. *Washington v. Glucksberg*, 521 U.S. 702, 720-1 (1997). Even the right to marry—as the concept has been widely understood for centuries—does not appear in the text of the Constitution. Redefining that right is a radical proposition and a matter of heated debate.

Alternative sexual lifestyles and family structures are too controversial to warrant disregarding the liberties of those who hold opposing viewpoints. Even the Ninth Circuit agreed that "people of good will may disagree" over same-sex marriage, "sometimes strongly." *Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012). The LGBT community seeks legal protection, tolerance, and social approval. But their newly emerging rights do not trump the constitutional freedoms of those who cannot conscientiously support their objectives.

Citizens all over the country have initiated legal action to halt the trend toward enhanced gay rights. Proposition 8 is merely one of these efforts. Over half of the states have amended their constitutions to preserve marriage. Colorado and Ohio voters passed initiatives to ban special protections for gays and lesbians. This Court struck down the overly broad Colorado initiative that essentially rendered gays and lesbians non-citizens, but the more narrowly drafted Ohio initiative survived judicial review. *Romer v. Evans*, 517 U.S. 620, 630 (1996) ("it deprives gays and lesbians even of the protection of general laws and policies"); *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997) (remanded). The very fact that such initiatives have been proposed and passed is evidence that many Americans are deeply troubled.

There is an "uncomfortable intersection of law, culture, and religion" in this case. *In re Marriage Cases,* 143 Cal.App.4th 873, 938 (2006) (Parrilli, J., concurring). Same-sex intimacy is contrary to centuries of religious teaching. It would "cast aside millennia of moral teaching" to convert it to a fundamental right. *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, J., concurring). "The decision whether to turn our backs on millennia of moral teaching should be the product of careful and thoughtful judgment and not of a subtle and manipulative campaign of propaganda." Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 Notre Dame L. Rev. 393, 415 (1994). Even in overruling *Bowers*, this Court acknowledged that:

> The condemnation [of homosexual conduct] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.

Lawrence v. Texas, 539 U.S. 558, 571 (2003).

II. THIS COURT MUST PRESERVE THE LIBERTY OF ALL AMERICANS. A RULING AGAINST PETITIONERS WOULD HAVE A DEVASTATING IMPACT ON A BROAD ARRAY OF CONSTITUTIONAL RIGHTS.

Gay rights have vastly expanded in recent years. Advocates have accomplished this dramatic social and political change by exercising their rights to free speech, association, and the political process. But overly aggressive advocacy threatens to erode the freedoms of all Americans—including speech, association, religion, and privacy. Ironically, by stifling the rights of dissenters, LGBT advocates weaken the First Amendment generally and ultimately threaten their own cause.

The best way to protect the rights of gays and lesbians is to preserve the constitutional liberties of *all* citizens. Americans who want to guard their own civil rights must respect their opponents rather than crushing them with debilitating legal penalties:

> The price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.

United States v. Ballard, 322 U.S. 78, 95 (1944).

Even sympathetic commentators acknowledge that gays and lesbians cannot demand for themselves what they would deny to others. Their rights do not supersede those of everyone else. Walter J. Walsh, *The Fearful Symmetry of Gay Rights, Religious Freedom, and Racial Equality*, 40 How. L.J. 513, 546, 570 (1997). Some even recognize the intrusion on religious liberty:

> In some instances, full gay equality would be a fundamental affront to liberty interests of religious or traditionalist groups, in ways that full gender or race equality no longer are.

William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, Collisions of Liberty and Equality in American Public Law*, 106 Yale L.J. 2411, 2473 (1997).

Anti-discrimination laws and policies have already spawned a multitude of lawsuits. Religion is one of the chief casualties but not the only one. In two cases, this Court held that anti-discrimination laws should not be applied so expansively as to infringe association rights. *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston,* 515 U.S. 557 (1995); *Boy Scouts of Am. v. Dale,* 530 U.S. 640 (2000). *Dale* appreciated the growing potential for conflict as anti-discrimination laws expand their reach beyond the places and persons encompassed by common law. *Id.* at 657. *Hurley* noted the expansion and held that the particular application of the Massachusetts statute infringed the parade organizers' rights, affirming our nation's commitment to protect expression regardless of content. *Hurley,* 515 U.S. at 571, 581. Although gay rights have gained wider public acceptance, those who oppose their practices have not forfeited the right to free expression. *Dale,* 530 U.S. at 660. "General antidiscrimination statutes [should] not be read expansively, beyond their clear application, when the broad reading would directly burden protected First Amendment rights." Eskridge, *Coming Out,* 106 Yale L.J.at 2462-2463. Another commentator sums it up well:

> If Americans are going to preserve their civil liberties...they will need to develop thicker skin. One price of living in a free society is toleration of those who intentionally or unintentionally offend others. The current trend, however, is to give offended parties a legal remedy, as long as the offense can be construed as "discrimination." ... *A society that undercuts civil liberties in pursuit of the "equality" offered by a statutory*

> *right to be free from all slights will ultimately end up with neither equality nor civil liberties.*

David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223, 245 (2003) (emphasis added). If this Court creates a new right to same-sex marriage—allegedly under the Equal Protection Clause—it is bound to generate new inequalities and erode time-honored liberties.

Anti-discrimination statutes have already posed threats to religious liberty. Commentators on both sides observe the legal quagmire:

> When a legislature acts to protect homosexual behavior under antidiscrimination laws, it elevates homosexual practices to the status of protected activities while at the same time branding many mainstream religious institutions and individuals as outlaws engaged in antisocial and immoral behavior.

Duncan, *Who Wants to Stop the Church,* 69 Notre Dame L. Rev. at 397-398.

> This conflict between the statutory rights of individuals against private acts of discrimination and the near universally-recognized right of free exercise of religion places a complex legal question involving competing societal values squarely before the courts.

Jack S. Vaitayanonta, *In State Legislatures We Trust? The "Compelling Interest" Presumption and Religious*

Free Exercise Challenges to State Civil Rights Laws, 101 Colum. L. Rev. 886, 887 (2001). See also Harlan Loeb and David Rosenberg, *Fundamental Rights in Conflict: The Price of a Maturing Democracy*, 77 N.D. L. Rev. 27, 29 (2001); Bernstein, *Defending the First Amendment,* 82 N.C. L. Rev. at 228 ("The laudable goal of the ever-broadening antidiscrimination edifice is to achieve a fairer, more just society. Yet even, or perhaps especially, well-meaning attempts to achieve a praiseworthy goal must be criticized when the means used to achieve that goal become a threat to civil liberties.").

What the Equal Protection Clause clearly forbids is irrational, arbitrary, or unreasonable discrimination. Discrimination is not "arbitrary" where its purpose is to avoid endorsing a cause. *Hurley,* 515 U.S. 557 (parade organizers did not exclude individual homosexuals, but were not required to grant access to a gay organization). The First Amendment protects a broad spectrum of expression, popular or not. In fact, the increasing popularity of an idea makes it all the more essential to protect the voices of those who hold different views. *Dale*, 530 U.S. at 660. Censorship spells death for a free society. "Once used to stifle the thought that we hate...it can stifle the ideas we love." *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167-168 (4th Cir. 1976); *Gay Lib. v. Univ. of Missouri*, 558 F.2d 848, 856 (8th Cir. 1977). Justice Black said it well in discussing the Communist Party, which advocated some of the most dangerous ideas of the twentieth century:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and

> assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Communist Party v. SACB,* 367 U.S. 1, 137 (dissenting opinion) (1961).

Healy v. James, 408 U.S. 169, 187-188 (1972).

This principle cuts across all viewpoints. A public university may not squelch student speech or association based on viewpoint. *Id.* at 187-188. An early student gay rights group sought to provide a forum to discuss homosexuality. *Gay Lib.*, 558 F.2d 848. The university did not want to recognize the student organization, but officials could not restrict the group's right to speak and associate merely because it disagreed with the ideas expressed. *Id.* at 852, citing *Healy v. James*, 408 U.S. at 187.

Citizens on both sides of the marriage debate are entitled to equal protection. *See* Josiah N. Drew, *Notes and Comments, Caught Between the Scylla and Charybdis: Ameliorating the Collision Course of Sexual Orientation Anti-Discrimination Rights and Religious Free Exercise Rights in the Public Workplace*, 16 BYU J. Pub. L. 287, 313 (2002) (drawing analogy between sexual orientation and religion). Courts must not dictate a particular view of sexual morality and squelch dissenting voices. *Dale,* 530 U.S. at 651, 661. This case holds the potential to not only chill those voices—but to penalize them and gut the First Amendment.

III. A RULING AGAINST PETITIONERS WOULD HAVE A CATASTROPHIC IMPACT ON RIGHTS OF CONSCIENCE GENERALLY AND RELIGIOUS LIBERTY SPECIFICALLY.

America's founders spoke passionately about the religious underpinnings of our judicial system. Benjamin Franklin forewarned:

> "If a sparrow cannot fall to the ground without His notice, is it probable that an empire can rise without His aid? We've been assured in the sacred writing that, 'Except the Lord build the house, they labor in vain that build it.'"

James Madison, *The Papers of James Madison*, Henry Gilpin, editor (Washington: Langtree and O'Sullivan, 1840), Vol. II, p. 185, June 28, 1787.

Thomas Jefferson, who first penned the phrase "separation of church and state"—in order to reassure the Danbury Baptists of their religious freedom—cautioned against discarding our religious roots: "And can the liberties of a nation be thought secure when we have removed their only firm basis—a conviction in the minds of the people that these liberties are the gift of God?" Thomas Jefferson, *Notes on the States of Virginia* (Philadelphia: Mathew Carey, 1794), p. 237, Query XVIII.

This case has the potential to accelerate the collision course between gay rights advocates and people who cannot conscientiously embrace their objectives because they hold a traditional view of marriage and family. This Court should proceed cautiously so as not to dismantle liberties of conscience and religion. Congress has ranked religious freedom "among the most treasured birthrights of every American." Sen. Rep. No. 103-111, 1st Sess., at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N., 1893-1894. America's founders risked their lives to escape religious tyranny and observe their faith free from government intrusion.

> The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

Girouard v. United States, 328 U.S. 61, 68 (1946). We dare not sacrifice the priceless American freedoms on which this country was founded.

A. A Ruling Against Petitioners Would Erode Integrity By Forcing Many Citizens To Violate Conscience.

The ability to follow conscience is a critical American freedom that cuts across a broad spectrum of issues and viewpoints. There is currently an epidemic of lawsuits challenging the requirement that employer-mandated health insurance programs include access to contraception and abortion-producing drugs.[2] If a government compels its citizens to violate conscience as a condition of participating in society, the impact on integrity is potentially disastrous. Integrity is a key component of a free society where citizens trust one another in their daily interactions. It is dangerous indeed to breed a citizenry that lacks conscience and integrity.

Liberty of conscience is even broader than the free exercise of religion although integrally related to it. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1491 (1990). This Court, recognizing man's "duty to a moral power higher than the State," quoted Harlan Fiske Stone (later Chief Justice):

> "...both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation

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[2] There are 43 cases in process, many in district courts and some on appeal. See http://www.becketfund.org/hhsinformationcentral/ (last visited 01/18/13).

> of the conscience of the individual will not in fact ultimately lose it by the process." Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919).

United States v. Seeger, 380 U.S. 163, 170 (1965).

People of faith should not have to choose between allegiance to the state and faithfulness to God, particularly where their beliefs can be accommodated without sacrificing public peace and safety. Generally, the claims likely to be triggered by coerced recognition of same-sex marriage would be conscientious objector claims rather than civil disobedience. Conscientious objection claims rarely endanger the community and are "very close to the core of religious liberty." Nora O'Callaghan, *Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 565, 611, 615-616 (2006). If morally shocking behavior (flag burning, computer-generated child pornography, cross burnings) is protected as free expression, Americans should be able to graciously decline to participate in activities that would compromise their faith or conscience. *Id.* at 616.

This approach is consistent with *Emp't Div., Ore. Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990) and the text of the First Amendment. The word "prohibit" is crucial, because "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-1 (1988); McConnell, *Origins*, 103 Harv. L. Rev. at 1486. Prior to *Smith*, many winning cases involved conscientious objectors—believers seeking freedom from state compulsion to commit an act against conscience. *Girouard v. United States*, 328 U.S. 61; *Sherbert v. Verner*, 374 U.S. 398 (Sabbath work); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (flag salute); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (education). Many losing cases implicated "civil disobedience" claimants seeking to engage in illegal or even criminal conduct. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor). O'Callaghan, *Lessons From Pharaoh*, 39 Creighton L. Rev. at 564. *Smith* repeatedly emphasized the *criminal* conduct at issue. *Smith*, 494 U.S. at 874, 878, 887, 891-892, 897-899, 901-906, 909, 911-912, 916, 921.

B. A Ruling Against Petitioners Would Have A Crushing Impact On Religious Liberty.

The Ninth Circuit quickly dismissed the religious liberty implications of this case because Proposition 8 changed no laws or government policies concerning sexual orientation, and thus allegedly did nothing to "decrease the likelihood that religious organizations would be penalized." *Perry v. Brown*, 671 F.3d at 1091. The Court missed the boat entirely. California's broad-sweeping Unruh Act (Cal. Civ. Code § 51) prohibits discrimination on the basis of marital status. Even without legislative changes, there would be penalties for refusing to recognize same-sex marriages. Moreover, the Court failed to grapple with the massive impact on individuals and small businesses—similar to what is already occurring across the nation as a result of anti-discrimination mandates.

Religious belief and conduct are both protected. Early state constitutions were typically framed to limit religious conduct only if it actually threatened peace, safety, or morality. McConnell, *Origins,* 103 Harv. L. Rev. at 1461-62. These provisos would be superfluous if protection was confined solely to beliefs. Free exercise is not limited to outright prohibitions of religious practice, nor should it be understood as an unrestrained right of personal autonomy that precludes reasonable regulations for public health and safety. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 170, 172 (1992).

Religions commonly include a moral code of behavior. O'Callaghan, *Lessons From Pharaoh,* 39 Creighton L. Rev. at 587. Religious belief and conduct both merit legal protection:

> Thus the Amendment embraces two concepts, – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.... *In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.*

Cantwell v. Connecticut, 310 U.S. 296, 303-304 (1940) (emphasis added). Even if enhancing gay rights is a permissible end, it should be undertaken with extraordinary caution so as not to infringe religious liberty.

Belief and conduct cannot be neatly split into airtight compartments, although the scope of protection differs. *Sherbert v. Verner*, 374 U.S. at 402-403; *Wisconsin v. Yoder*, 406 U.S. at 219-220; *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983). Religious beliefs need not be "acceptable, logical, consistent, or comprehensible to others" (*Thomas v. Review Bd. of Ind. Emp't*, 450 U.S. 707, 714 (1981)) and religious practices may be "abhorrent to some" but nevertheless protected. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

Religious moral codes commonly regulate sexual conduct—and that is what is at stake here. A state mandate to affirm same-sex marriage would have an explosive impact on religious persons who could easily treat all individuals with equal respect and dignity but cannot in good conscience endorse or facilitate same-sex marriage.

The government must avoid showing hostility to religion by refusing to acknowledge religious motivation. In some respects, the issue of same-sex marriage is similar to anti-discrimination laws, which rightly prohibit the refusal to conduct business with an entire group based on personal animosity or stereotypes. In both cases, the First Amendment demands that courts consider religious motivation. Motivation can make a radical difference in two seemingly identical situations. A person who deliberately refuses medical treatment, desiring to die, commits suicide. But a person who wants to live, yet refuses treatment because of religious convictions, does not. Gerard V. Bradley, *Beguiled: Free Exercise Exemptions And The Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 263-264 (1991). In the criminal law context, killing another person in self-defense is justifiable homicide. The same act, premeditated with malice aforethought, is first degree murder. The former carries no legal penalties, while the latter warrants severe consequences. In free exercise cases involving unemployment benefits, this Court agrees: "[T]o consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 142 (1987); *Thomas v. Review Bd.*, 450 U.S. at 708. The same principle is true here. A person's religiously motivated refusal to recognize same-sex unions is not tantamount to unlawful discrimination, nor is it irrational animosity. To hold otherwise would exhibit callous disregard for religion.

Sexual orientation is not analogous to race. Gays and lesbians have never been bought and sold as slaves, or denied the right to participate in the political process, because of their sexual orientation. African-Americans were enslaved for many years, treated as property rather than persons, and denied even the most elementary civil rights. Women were denied the right to vote for many years, and elimination of gender discrimination has gained increasing recognition as an important state interest. *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984) (admission of female members would not hinder the association's expressive purposes); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) (same). In *Romer*, this Court rejected an attempt to deny basic political protections to gays and lesbians. *Romer,* 517 U.S. at 630. But "discrimination" against persons engaged in morally controversial behavior—by refusing to endorse or facilitate it—does not warrant the same legal penalties as racial or gender discrimination. Duncan, *Who Wants to Stop the Church,* 69 Notre Dame L. Rev. at 399. Race and gender are morally neutral traits that tell nothing of a person's character or conduct. *Id.* at 402-403. Gays and lesbians already enjoy the same civil rights as other citizens. *Id.* at 400. They do not lack political power, as shown by the plethora of anti-discrimination laws—and the very fact that these cases are before the Court. Moreover, sexual orientation is inextricably intertwined with the tendency to engage in particular conduct.[3] *Id.* at 402-403. Many Americans hold strong moral and religious objections to that conduct.

Coerced recognition of same-sex marriage is likely to impose crippling burdens on people of faith. Courts have identified various levels of burden in free exercise cases:

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[3] Courts have long acknowledged conduct as an integral component of homosexuality. *Woodward v. United States,* 871 F.2d 1068, 1076 (Fed. Cir. 1989) (primarily behavioral); *Ben-Shalom v. Marsh,* 881 F.2d 454 (7th Cir. 1989) (inference of probable conduct); *Richenberg v. Perry,* 97 F.3d 256 (8th Cir. 1996) (rebuttable presumption of propensity or intent to engage in conduct); *Thomasson v. Perry,* 80 F.3d 915 (4th Cir. 1996) (same); *Philips v. Perry,* 106 F.3d 1420 (9th Cir. 1997) (admission of orientation is evidence of conduct); *High Tech Gays v. Defense Indus. Sec. Clearance Office,* 895 F.2d 563, 573 (9th Cir. 1990).

- Condition for government benefit: *Sherbert v. Verner*, 374 U.S. 398 (unemployment benefits); *Thomas v. Review Bd.*, 450 U.S. 707 (same); *Hobbie*, 480 U.S. 136 (same); *Frazee v. Ill. Dept. of Employment Sec.*, 489 U.S. 829 (1989) (same); *Bob Jones Univ.*, 461 U.S. 574 (tax exemption); *Bowen v. Roy*, 476 U.S. 693 (1986) (welfare benefits).

- Financial sacrifice or inconvenience—but without discontinuing the activity: *Braunfeld v. Brown*, 366 U.S. 599, 605-606 (1961) (Sunday closing); *Bob Jones Univ.*, 461 U.S. 574 (tax exemption); *Tony and Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290 (1985) (recordkeeping, minimum wage, overtime); *United States v. Lee*, 455 U.S. 252 (1982) (Social Security tax payment); *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (university required to grant student group tangible benefits but not endorsement).

- Criminal penalties for religiously mandated conduct: *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy); *Prince v. Massachusetts*, 321 U.S. 158 (child labor); *Wisconsin v. Yoder*, 406 U.S. 205 (compulsory education); *Smith*, 494 U.S. 872 (illegal drugs); *Gonzales v. O Centro Espirita Beneficente*, 546 U.S. 418 (2006) (same).

- Discontinue the activity altogether or violate religious conscience: *Smith v. Fair Emp't and Housing Comm'n*, 12 Cal.4th 1143, 1170 (1996) (apartment rental); *Swanner v. Anchorage Equal*

Rights Comm'n, 874 P.2d 274 (Alaska 1994) (same); *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) (same); *McCready v. Hoffius II*, 593 N.W.2d 545 (Mich. 1999) (same); *Rasmussen v. Glass*, 498 N.W.2d 508 (Minn. Ct. of App. 1993) (food delivery to abortion clinic).

The impact of these burdens varies widely. Claimants typically do not prevail where they can continue the activity at issue while observing religious commands. Imposing an incidental burden on religion as a condition for some public benefit is of a "wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications" (*Bowen v. Roy*, 476 at 704)—"far removed from the historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause" (*id.* at 703). But even in that context, there is legally cognizable harm when a person must choose between adherence to conscience and an important benefit. *Sherbert v. Verner*, 374 U.S. at 412; *Thomas v. Review Bd.*, 450 U.S. at 716; *Hobbie*, 480 U.S. at 141.

Where a government mandate imposes substantial penalties on a believer who follows his faith, the burden is far heavier than a law which incidentally makes religious practice more difficult or less convenient. Alvin C. Lin, *Note, Sexual Orientation Antidiscrimination Laws and the Religious Liberty Protection Act: The Pitfalls of the Compelling State Interest Inquiry*, 89 Geo. L.J. 719, 731-732 (2001). Coerced recognition of same-sex marriage would impose burdens of the highest order—similar to what is happening in the contraception mandate cases.

Small family-owned businesses face the untenable choice of following conscience or becoming liable for crippling penalties that will cause them to shut down. The same scenario will occur if people of faith must choose between acknowledging same-sex unions or incurring draconian penalties, either through litigation or government fines. No American should be compelled to make such a choice.

C. A Ruling Against Petitioners Would Have A Disproportionately Harsh Impact On Christianity.

America's founders wisely declined to establish a national religion, leaving the people free from government intrusion.[4] But Christianity had an undeniably prominent role in the nation's founding and early history. This Court once declared America to be "a Christian nation." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892). A century ago, the Texas Supreme Court relied on Scripture as the genesis for human marriage:

> Marriage was not originated by human law. When God created Eve, she was a wife to Adam; they then and there occupied the status of husband to wife and wife to husband.

Grigsby v. Reib, 105 Tex. 597, 607 (Tex. Sup. Ct. 1913). It would be ironic indeed if this Court's pronouncement on same-sex marriage caused unique and disproportionate burdens on American Christians.

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[4] There were originally many *state* establishments, but these were long ago abolished.

Laws prohibiting sexual orientation discrimination have already triggered religious concerns that cannot be ignored. Those concerns would escalate exponentially if same-sex marriage becomes legal—especially without carefully crafted religious exemptions. America's history and judicial system is inescapably linked to religion:

> "We have no government armed with power capable of contending with human passions unbridled by morality and religion.... Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."

John Adams, *The Works of John Adams, Second President of the United States*, Charles Francis Adams, editor (Boston: Little, Brown, 1854), Vol. IX, p. 229, October 11, 1798.

Today the nation is characterized by religious pluralism. Many faith traditions enjoy freedom under the First Amendment umbrella. These faiths do not all agree about the propriety of same-sex marriage and those who do not embrace the concept are not equally burdened. But within the broad tradition of Christianity, many would be harshly penalized by a legal mandate to affirm same-sex marriage. This is a critical example of the severe burden that same-sex marriage would place on many people of faith, unless the democratic process is allowed to move with caution and enact adequate religious exemptions.

Compelled recognition of same-sex marriage would gut the core of Christianity for many believers. And like abortion, same-sex marriage would enhance sexual freedom at the expense of religious liberty. Where core religious beliefs are implicated, the government bears a heavier burden to justify the intrusion and strict scrutiny should be applied. Even one commentator who advocates a "compelling interest" presumption in religious challenges to civil rights laws would leave room for courts to grant an exemption where a "core" religious belief is burdened. Vaitayanonta, *In State Legislatures We Trust?*, 101 Colum. L. Rev. at 889, 923.

Christianity teaches that God affirmed sexuality as a fundamental element of the created order when He created male and female in His image (Genesis 1:26-27, 2:7, 2:18-23). He ordained their union in the covenant of marriage, to bear children and instruct them in His law (Genesis 2:24-25; Deuteronomy 4:9-10). New Testament Scripture draws an analogy between husband-wife and Jesus Christ's relationship to His church (Ephesians 5:31-32). For many Christians, erasure of the male-female distinction is tantamount to a pantheistic worldview that blurs the distinction between God the Creator and His creation, and homosexuality is not a minor aberration. As one theologian expressed it:

> Though presented in the righteous robes of civic justice, homosexuality represents a complete distortion of creation's sexual structures. We cannot understand the radical implications of

> homosexuality's acceptance until we realize that homosexuality turns the blueprint for life inside out and upside down.

PETER JONES, THE GOD OF SEX (2006), 27.

Many Christians are troubled when conduct they consider sin morphs into a constitutional right. The expansion of civil rights has accelerated in recent decades. It is time to put on the brakes to avoid annihilating the First Amendment. Conduct once criminalized is now constitutionally protected. One author observes that "sex outside of marriage has gone from misdemeanor to compelling interest in one generation, and religious believers who resist the change must be crushed." Laycock & Thomas, *Interpreting the Religious Freedom Restoration Act,* 73 Tex.L.Rev. 209, 223-224 (1994) (discussing marital status discrimination in the housing industry). Sodomy was transformed from a crime (*Bowers*) to a protected liberty interest (*Lawrence*) in less than twenty years. There is no compelling interest in imposing such radical change on religious objectors so as to coerce their endorsement or active assistance. Many view same-sex intimacy as sin. Not all sin is criminalized, but neither is it a civil right. A common view is that "[w]e are all sinners. But we all do not demand that our sins be recognized as civil rights." Duncan, *Who Wants to Stop the Church,* 69 Notre Dame L. Rev. at 415.

Moreover, Christians view marriage in the context of family, contrary to the modern liberal focus on autonomy. "Liberalism"—the protection for individual rights—was originally linked to religion and supportive of religious freedom, but those connections have been severed. Liberalism now stands for "individualism, independence, and rationality." Freedom *from* religion increasingly replaces the freedom *of* religion in liberal thought. Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 172-174 (1993). The Ninth Circuit reflects this exaltation of the individual, quoting the California Supreme Court's declaration that "the right to marry is an integral component of an individual's interest in personal autonomy protected by the privacy provision of article I, section 1 [of the California Constitution], and of the liberty interest protected by the due process clause of article I, section 7." *Perry v. Brown*, 671 F.3d at 1066, quoting *In re Marriage Cases*, 183 P.3d 384, 426 (Cal. 2008).

A legal requirement to affirm or facilitate same-sex marriage, and the corollary redefinition of the family, would be a grave burden on fundamental Christian teachings for many believers. One commentator wisely suggests that avoidance of sin be considered "per se integral to religious practice," entitling believers to strict scrutiny. O'Callaghan, *Lessons From Pharaoh,* 39 Creighton L. Rev. at 612-613. Moreover, the religious neutrality of laws enhancing gay rights is questionable. A law that reflects only one side of such a contentious issue is hardly neutral. McConnell, *Origins,* 103 Harv. L. Rev. at 1420 (discussing definitions of "neutrality"). A law may satisfy "formal neutrality" yet lack "substantive neutrality" where it encourages or discourages religious practice. Duncan, *Who Wants to Stop the Church,* 69 Notre Dame L. Rev. at 422, n113; *Church of Lukumi Babalu Aye,* 508 U.S.

at 562 (Souter, J., concurring); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001 (1990).

IV. A RULING AGAINST PETITIONERS WOULD HAVE A CORROSIVE EFFECT ON OTHER FUNDAMENTAL LIBERTIES.

Religious liberty is a critical freedom that would be injured by the legalization of same-sex marriage. But it does not stand alone. Religious freedom is often integrally intertwined with other cherished constitutional rights which would be equally at risk if this Court pronounces a right to same-sex marriage.

A. A Ruling Against Petitioners Would Threaten Free Speech Rights.

The "fixed star in our constitutional constellation" barring any public official from prescribing orthodoxy in religion (*Barnette*, 319 U.S. at 642)—shines across decades of precedent and prohibits the government from conditioning participation in society on the demise of a citizen's free speech and religious liberties.

A recent Sixth Circuit case shows how gay rights can impede free speech. *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012). Julea Ward was a student in the final stages of a graduate counseling program at the University of Michigan. In a mandatory student practicum, she was assigned a gay student to counsel. She asked to refer this client because she could not in good conscience affirm same-sex relationships. The university subjected her to a disciplinary hearing and ultimately expelled her—in spite of her excellent academic performance (3.91 GPA). *Id.* at 729-730. Reversing the district court's summary judgment in favor of the university, the Sixth Circuit concluded that "a reasonable jury could conclude that Ward's professors ejected her from the counseling program because of hostility toward her speech and faith." *Id.* at 730. Compelled speech approving same-sex unions grates against the First Amendment.

Ward v. Polite is a classic example of compelled speech and impermissible viewpoint discrimination. The First Amendment protects against government coercion to endorse or subsidize a cause. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Barnette,* 319 U.S. 624. The government has no power to force a speaker to either support or oppose a particular viewpoint. *Hurley,* 515 U.S. at 575. The state may not coerce approval of same-sex intimacy. *Dale,* 530 U.S. at 654. Compelled religious speech is particularly odious to the Constitution. "Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship...." *Barnette*, 319 U.S. at 646 (Murphy, J., concurring). This is not new: "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 13 Wall. 679, 728 (1872). The government has no business imposing a particular view of sexual morality on religious institutions and individuals who want to be left alone to operate their ministries and businesses according to religious convictions. Duncan, *Who Wants to Stop the Church,* 69 Notre Dame L. Rev. at 396.

Ward is not the only recent example of the potential for conflict between gay rights and free speech:

- *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1281 (11th Cir. 2012) (Christian counselor fired for refusing to *lie* to homosexual clients she referred to other counselors)

- *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), vacated and remanded, 549 U.S. 1262 (2007) (Christian student forbidden to wear t-shirt proclaiming the biblical view of homosexuality)

- *Zamecnik v. Indian Prairie Sch. Dist. #204*, 636 F.3d 874 (7th Cir. 2011) (school could not prohibit students from wearing t-shirts that said "Be Happy, Not Gay" merely because of the potential for hurt feelings)

The Sixth Circuit rightly concluded that "[t]olerance is a two-way street." *Ward v Polite*, 667 F.3d at 735. Religious liberty is decimated when secular ideologies employ the strong arm of the state to advance their causes, promoting tolerance and respect for some while suppressing others. McConnell, *"God is Dead!"*, 1993 BYU L. Rev. at 186-188. Coerced recognition of same-sex marriage chills protected speech and threatens to compel speech in line with a government-mandated sexual orthodoxy.

B. A Ruling Against Petitioners Would Interfere With The Right To Earn A Living Or Enter A Profession.

In some situations, coerced recognition of same-sex marriage would exclude people of faith from a profession (or specialty) or compel personal services in violation of common law and perhaps also the Thirteenth Amendment.

"The First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971). *Ward v. Polite* exemplifies the potential exclusion of a citizen from a profession—in that case, counseling—because of religious convictions. If all professional counselors must affirm same-sex relationships, regardless of conscience or religion, many people of faith will be unable to enter the profession. Cal. Const. art. 1, § 8 provides that no person shall be "disqualified from entering or pursuing a...profession...because of...creed...." But two physicians lost their Free Exercise claim against a lesbian woman who sued them for refusing to perform an intrauterine semination procedure to enable her to become pregnant with a child she intended to raise with her live-in female partner. *North Coast Women's Care Med. Group, Inc. v. Superior Court*, 44 Cal. 4th 1145 (2008). That troubling precedent—based on the state's statutory anti-discrimination scheme, well before the legalization of same-sex marriage in California—would exclude some doctors from specializing in fertility treatments if they cannot in good conscience facilitate redefinition of the family. Same-sex couples have a legal right to adopt children in some jurisdictions, just as pregnant women have the legal right to abortion, but in neither case is there an accompanying right to draft unwilling accomplices. In this "clash of autonomies," the other party's "right to choose" is entitled to equal protection. Courtney Miller, *Note, Reflections on Protecting Conscience for Health Care Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations*, 15 S. Cal. Rev. L. & Social Justice 327, 340-341, 344 (2006). State coercion of personal services compromises both personal and professional integrity, particularly in a relationship where fiduciary obligations are not easily divorced from moral convictions. The interests of both the client/customer *and* the professional can be better served in other ways, such as referral. Jennifer Tetenbaum Miller, *Note, Free Exercise v. Legal Ethics: Can a Religious Lawyer Discriminate in Choosing Clients?*, 13 Geo. J. Legal Ethics 161, 166-167, 182 (1999).

North Coast Women's also exposes grave concerns about coerced personal services. A requirement to actively perform personal services imposes a direct and crushing burden—a critical component in some cases. Courts decline to specifically enforce personal service contracts because enforcement might constitute involuntary servitude.[5]

> [T]he general rule is that a contract for service will not be specifically enforced, either directly by means of a decree directing the defendant to perform it, or indirectly by an injunction restraining him from violating it. Especially is this the rule where the relation between the

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[5] In litigation, a plaintiff might seek monetary damages rather than specific enforcement—but financial penalties may be so crippling as to threaten the defendant's livelihood.

> parties to the contract is one of mutual confidence and the contract stipulates for acts that require special knowledge, skill, or ability, or the exercise of judgment, discretion, integrity, and like personal qualities.

Paramount Pictures Corp. v. Holden, 166 F. Supp. 684, 688 (D. Cal. 1958), quoting *Poultry Producers v. Barlow*, 189 Cal. 278, 288 (1922). Common law disfavored specific performance, and courts want to avoid the friction and social costs of a failed personal relationship. *Barndt v. Cnty. of Los Angeles*, 211 Cal.App.3d 397, 404 (1989) (staff physician could not specifically enforce settlement agreement that required his appointment to the hospital's cardiology department).

Thirteenth Amendment concerns lurk just beneath the surface. "The words involuntary servitude 'have a larger meaning than slavery.' ... The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, *by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude*." *Bailey v. State of Alabama*, 219 U. S. 219, 241 (1911) (emphasis added). There may be a Thirteenth Amendment violation where an individual has "no available choice but to work or be subject to legal sanction." *United States v. Kozminski*, 487 U.S. 931, 942-943 (1988).

In the context of expanding gay rights, there are many situations—as in *North Coast Women's*—where a religious objector has "no available choice but to work or be subject to legal sanction." Just to facilitate same-sex weddings, people of faith may be compelled to provide a wide array of services: Photographers,[6] florists, tailors, caterers, printers, bakeries, bed-and-breakfast establishments,[7] reception venues.[8] These examples barely scratch the surface, as there are a multitude of other situations where religious faith and gay rights may clash to such an extent that a person must either perform services contrary to conscience—or be forced out of business by crippling litigation or fines.

Discontinuing an activity altogether is more oppressive than continuing to conduct it at greater expense or inconvenience. *Wisconsin v. Yoder,* 406 U.S. at 218; *Bowen v. Roy,* 476 U.S. at 704. The burden is equally harsh for coerced personal services. If the government compels the performance of services that affirm same-sex marriage, persons who believe homosexuality is sinful are faced with the gruesome choice to either violate their religious convictions and sin under the state's compulsion, or get out of business. Duncan, *Who Wants to Stop the Church,* 69 Notre Dame L. Rev. at 414; O'Callaghan, *Lessons From Pharaoh,* 39 Creighton L. Rev. at 562.

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[6] See *Elane Photography v. Willock*, 284 P.3d 428, 433 (2012) (New Mexico Human Rights Commission fined a Christian photographer $6,637.94 in fees and costs for her religiously motivated refusal to photograph a same-sex commitment ceremony.)

[7] Lambda Legal filed suit in the First Circuit Court of Hawaii on behalf of a lesbian couple refused accommodations by Aloha Bed & Breakfast. The Hawaii Civil Rights Commission intervened as a plaintiff. See http://www.lambdalegal.org/in-court/cases/cervelli-v-aloha-bed-and-breakfast (last visited 01/17/13).

[8] The Wildflower Inn, a small country resort in Lyndonville, Vermont, settled a lawsuit filed by a lesbian couple (Baker and Linsley) after its owners refused to host a same-sex wedding reception. See http://www.aclu.org/lgbt-rights/baker-and-linsley-v-wildflower-inn (last visited 01/17/13).

Believers do not forfeit their constitutional rights when they enter the commercial sphere. Free exercise cases often arise in connection with commerce. *Braunfeld v. Brown,* 366 U.S. 599 (Sunday closing); *Sherbert v. Verner,* 374 U.S. 398 (and other unemployment cases); *Lee,* 455 U.S. 252 (Amish business); *Roberts,* 468 U.S. 609 (commercial association); *Alamo Fdn.,* 471 U.S. 290; *State ex rel. McClure v. Sports & Health Club, Inc.,* 370 N.W.2d 844, 853 (Minn. 1985) (hiring); *Rasmussen v. Glass,* 498 N.W.2d 508 (food delivery); *Swanner,* 874 P.2d 274 (housing); *Attorney Gen. v. Desilets,* 418 Mass. 316, 636 N.E.2d 233 (1994) (same). The state actively regulates commerce but exercises minimal control over the internal affairs of religious entities, so it is no surprise that conflicts between religion and regulation often occur in a commercial setting. Some of these claimants succeeded (*Sherbert, Rasmussen, Desilets*), while others did not (*Braunfeld, Lee, Roberts, Alamo Fdn., McClure, Swanner*). The "commercial" factor is only one of many and does not determine the outcome.

Lee is frequently cited to oppose religious exemptions in the commercial sphere. But *Lee* does not hold that believers shed their constitutional rights in the business world. Note the often quoted language in context:

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but *every* person cannot be shielded from *all* the burdens incident to exercising *every* aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

Lee, 455 U.S. at 261 (emphasis added). Religious freedom is more limited in the commercial realm but not abrogated altogether.

If believers must abandon their moral principles in the commercial sphere, they will be squeezed out of full participation in civic life. O'Callaghan, *Lessons From Pharaoh,* 39 Creighton L. Rev. at 561-3. Religion does not end where daily business begins. Its moral precepts cannot be removed from the public realm. If religion is confined to the private fringes of life, the constitutional guarantees of the First Amendment ring hollow. McConnell, *"God is Dead,"* 1993 BYU L. Rev. at 176.

A state mandate to engage in sinful conduct is essentially a statement that "no religious believers who refuse to do [X-sinful act] may be included in this part of our social life." O'Callaghan, *Lessons From Pharaoh*, 39 Creighton L. Rev. at 573. Banning religious believers from participation in society is contrary to the First Amendment and our American traditions.

C. A Ruling Against Petitioners Would Intrude On Rights To Privacy.

Even if there is a sphere of privacy which government may not transgress, and even if private sexual conduct is a fundamental right, there is no corollary right to draft unwilling private citizens to assist in the exercise of that right. Nor is there a right to deny those unwilling accomplices their own right to privacy.

Lawrence v. Texas repeatedly turns on the assumption that homosexual persons have a right to enjoy personal privacy and define their own morality:

- Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. *Lawrence v. Texas*, 539 U.S. at 562.

- [A]dults may choose to enter upon [a homosexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. *Id.* at 567.

- Persons in a homosexual relationship may seek autonomy for these purposes [personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education], just as heterosexual persons do. *Id.* at 574.

- The State cannot demean [a homosexual person's] existence or control their destiny by making their private sexual conduct a crime.

> Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Planned Parenthood of Se. Pa. v. Casey,* 505 U.S. 833, 847 (1992). *Id.* at 578.

Now that this Court has sanctioned their own rights to privacy and autonomy in *Lawrence*, LGBT advocates recently passed legislation that substantially intrudes on the rights of others to the same liberties. Cal. Sen. Bill No. 1172 (to be codified as Cal. Bus. and Prof. Code §§ 865, 865.1, 865.2) prohibits a mental health provider from engaging in sexual orientation change efforts with a patient under 18 years of age under all circumstances. Two lawsuits are pending with mixed results at the preliminary stages: *Pickup v. Brown*, 2012 U.S. Dist. LEXIS 172034, Case No. 2:12-CV-02497-KJM-EFB (E.D. Cal. Dec. 4, 2012) (injunction denied); *Welch v. Brown*, 2012 U.S. Dist. LEXIS 172029, Case No. 2:12-cv-02484-WBS-KJN (E.D. Cal. Dec. 3, 2012) (injunction granted). *Welch* was filed by a marriage and family therapist who is also an ordained minister, a psychiatrist, and an adult who experienced same-sex attractions as a child. The district court granted an injunction, finding the new law subject to strict scrutiny because it interferes with free speech and is not viewpoint neutral. *Welch*, at *3. The Court did not need to reach the cause of action for privacy. *Id.* But this case involves an explosive intersection of rights to privacy, speech, religion, and association. The law establishes a state orthodoxy in highly sensitive matters of morality and trespasses in the privacy of the counseling room—where it does not belong. It denies to people of faith the very rights that LGBT advocates demand for themselves.

CONCLUSION

"Our obligation is to define the liberty of all, not to mandate our own moral code." *Lawrence v. Texas*, 539 U.S. at 571, quoting *Casey*, 505 U.S. at 850. If this Court bypasses the states and the people and proclaims a constitutional right to same-sex marriage, it will be destroying the liberty of many Americans by mandating a moral code contrary to their deepest convictions. *Amici curiae* urges this Court to rule in favor of Petitioners so as to protect the religious and other constitutional rights of persons who cannot in good conscience affirm same-sex marriage.

Respectfully Submitted,

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RECORD
AND
BRIEFS

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IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF LOS ANGELES COUNTY BAR ASSOCIATION AND ARMED FORCES COMMITTEE OF THE LOS ANGELES COUNTY BAR ASSOCIATION *AS AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act (DOMA) violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF THE AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. MISSION EFFECTIVENESS DEPENDS ON EQUAL BENEFITS FOR MILITARY DEPENDENTS 3

II. SAME-SEX SPOUSES DO NOT RECEIVE EQUAL BENEFITS 4

CONCLUSION 7

TABLE OF AUTHORITIES

Page(s)

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IDENTITY AND INTEREST OF THE *AMICI*[1]

With more than 21,000 members, the Los Angeles County Bar Association ("LACBA") is the largest voluntary local bar association in the United States. For more than 130 years, LACBA has represented the interests of its members, encouraged legal reform, promoted the administration of justice and supported the independence of the judiciary in California. LACBA opposes discrimination and supports the protection of fundamental rights. It previously joined in *amicus curiae* briefs filed with the California Supreme Court in *In re Marriage Cases* (Case No. S147999) and *Strauss v. Horton* (Case No. S168047) supporting marriage equality for same-sex couples, and opposed the passage of California's Proposition 8, the constitutionality of which is presently before this Court in *Hollingsworth v. Perry* (Case No. 12-144).

The Armed Forces Committee of the Los Angeles County Bar Association ("AFC") was created in 2012 as a means to provide pro bono legal assistance to veterans, to create a network for lawyers with military experience, and to coordinate with existing legal service and nonprofit organizations that address the needs of veterans and active-duty service members.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, made a monetary contribution intended to fund the preparation of submission of this brief. Both petitioner and respondent have consented to the filing of this brief. Counsel for the petitioner has filed a letter with the Clerk granting blanket consent to the filing of *amicus* briefs; counsel for respondent has consented to the filing of this brief, as reflected in a letter filed contemporaneously with this brief.

Fulfilling these promises and purposes, LACBA and AFC present this *amicus curiae* brief to protect Constitutional principles of equal protection and inalienable rights and to protect the interests of our veterans and service members.

SUMMARY OF ARGUMENT

The inconsistent application of the Defense of Marriage Act ("DOMA") to active-duty service members and veterans favors clear resolution by this Court. Empirical evidence supports equal inclusion and benefits for military dependents in order to achieve family adaptation and mission effectiveness. Unequal treatment is also contrary to the U.S. Military's core values, which support marriage and family units.

Mission effectiveness depends on equal treatment of all dependents, including same-sex spouses. The application of DOMA is inconsistent with the repeal of "Don't ask, don't tell." Young gay and lesbian veterans of the long wars in Iraq and Afghanistan have readily sacrificed for our nation, but their dependents are denied the normal access to a military base, as well as normal spousal benefits.

ARGUMENT

I. MISSION EFFECTIVENESS DEPENDS ON EQUAL BENEFITS FOR MILITARY DEPENDENTS

When "Don't ask, don't tell" was repealed in 2011, military recruiters began to accept applications from openly gay and lesbian applicants who sought to enlist in the military and active-duty gay and lesbian service members began to open up about their orientation, partners and families.

Same-sex couples, even those legally married, cannot obtain dependent identification cards for their spouses. Without the identification card, the spouse cannot obtain spousal benefits, nor purchase items at the base exchange, and cannot even enter the base alone. In some cases, the spouse cannot join support groups on the base and is deprived of equal resources. Such disparate treatment impacts all service members, including heterosexuals, because an active family support system is essential to effective deployment of active-duty service members in this time of war.

Participation in informal networks allows families to adapt more readily to the demands of deployment. The efficacy of benefits for dependents of military personnel is supported by empirical evidence. Pasek, Daniel J., *Love and War: An Argument for Extending Dependent Benefits to Same-Sex Partners of Military Service Members*, 6 Harvard Law & Policy Rev. 460 (2012); *citing* Orthner, Dennis K. & Bowen, Gary L., U.S. Army Research Inst. for the Behavioral & Soc. Scis., Research Report 1559:

Family Adaptation in the Military 6-7 (2006). Social isolation is "one of the most relevant factors that predicted poor family adaptation." Pasek, *supra* 3, at 467.

Currently, families of veterans returning from deployment in Iraq or Afghanistan need resources to address post-traumatic stress, traumatic brain injury and other emotional and behavioral problems. The Department of Defense collaborates with non-medical support systems, including family support centers. See Adamson, David M., et al., *Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery,* RAND Corporation 8 (2008), http://www.rand.org/pubs/monographs/MG720; Armstrong, Keith, et al., *Courage After Fire: Coping Strategies for Troops Returning From Iraq and Afghanistan and Their Families* 31-33 (Ulysses Press 2005); Galovski, T. et al., *Psychological sequelae of combat violence: A review of the impact of PTSD* on *the veteran's family and possible interventions,* 9 Aggression and Violent Behavior 477-501 (2004); Batten, Sonja V., et al., *Veteran interest in family involvement in PTSD treatment,* 6 Psychological Services 184-89 (2009). Such collaboration is impossible where the dependent spouse is not recognized as such.

II. SAME-SEX SPOUSES DO NOT RECEIVE EQUAL BENEFITS

On September 20, 2011, after the repeal of "Don't ask, don't tell," Navy Lieutenant Gary Ross, a graduate of the U.S. Naval Academy Class of 2002, married his partner, Dan. The marriage was a valid marriage under the laws of the state of Vermont. His shipmates and their spouses "welcomed" the couple.

"From the moment we [Gary and Dan] arrived, we felt accepted like everyone else at the command. From the commander to my coworkers, everyone seemed genuinely happy to meet my husband and exchange pleasantries." Welle, Joshua, et al., *In the Shadow of Greatness*, U.S. Naval Inst. Press 221 (2012).

> Not long after we were married, Dan and I went to the ID office to report our marriage and get a dependent's card, just like other newly married military couples. We were treated like all other applicants; for a moment, we thought that we finally really would be equal. Once we were called to the desk, however, the representative informed us that Dan could not be issued a dependent's ID card, since he is the same gender...Without the ID card, Dan was unable to receive equal spousal benefits...each time we went to the base, the government ran a background check on Dan. It was humiliating for him and frustrating for me to be told that my husband could not accompany me onto the base unless we submitted to another lengthy background check.

Id. at 221.

Army Lt. Col. Heather Mack encountered similar problems. Her spouse, Ashley Broadway, volunteers and works with military families. The couple has been together for 15 years. They married, legally, after the repeal of "Don't ask, don't tell." Despite the marriage, Broadway was not allowed to join the base spouses club "because she does not have a military dependent ID card." Hlad, J., *Same-sex spouse not allowed to join group at Fort Bragg*, Stars & Stripes, Dec. 12, 2012, http://www.stripes.com/news/same-sex-spouse-not-allowed-to-join-group-at-fort-bragg-1.200491. After considerable press coverage, Broadway was offered a guest membership.

Chief Warrant Officer Charlie Morgan returned from a yearlong deployment to Kuwait with the New Hampshire National Guard in 2010. She then learned that she had terminal cancer. "That's when Morgan began a new battle: to make sure her wife and their daughter receive the same survivor benefits that would go to any other married couple with children." Murine, A., *Gay marriage at Supreme Court: Will military couples get more benefits?*, Christian Science Monitor, Dec. 28, 2012, *available at* http://www.csmonitor.com/USA/Military/2012/1228/Gay-marriage-at-Supreme-Court-Will-military-couples-get-more-benefits.

The pattern is identical. A gay or lesbian service member serves honorably, often in multiple deployments. Each hides his or her orientation.

Their long-term committed relationships are also hidden. Suddenly, "Don't ask, don't tell" is repealed. The couples open up about their families. The couples get legally married. DOMA, however, prevents the issuance of dependent identification to the dependent spouse. There are no spousal benefits. No health care. No support. No insurance.

CONCLUSION

For these reasons, LACBA and the LACBA Armed Forces Committee request that, as the Second Circuit ruled, DOMA be declared unconstitutional.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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AMICUS CURIAE BRIEF OF MANHATTAN DECLARATION IN SUPPORT OF RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS AND SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. Marriage Is the Foundational Unit of Society, and There Are Numerous Rational and Compelling Reasons to Preserve Its Universally Constitutive Male-Female Character. 4

II. The Effort to Preserve Marriage as It Has Been Universally Understood Throughout History Is Grounded in Sincere Belief and Sound Public Policy Considerations, and Not in Animus as Respondent Argues. 10

III. Redefining Marriage Imperils Religious Freedom, Inhibits People of Faith from Living Out Their Lives in the Public Square, and Creates a Culture Where Christian Believers Are Ostracized and Themselves Targeted for Discrimination. 15

CONCLUSION 21

TABLE OF AUTHORITIES

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455 F.3d 859 (8th Cir. 2006) 8

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539 U.S. 558 (2003) 10

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514 F.3d 87 (1st Cir. 2008) 17, 18

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INTEREST OF AMICUS[1]

Manhattan Declaration Inc. is a not-for-profit corporation based in Virginia and qualified as tax-exempt under the Internal Revenue Code, 26 U.S.C.A. § 501(c)(3).

Manhattan Declaration Inc. was founded in 2009 by Charles Colson, Timothy George, and Robert George with the input and support of over 100 Catholic, Orthodox, and Evangelical leaders. Its purposes are to reflect and uphold Christian values respecting life, marriage and family, and religious liberty. The signers and supporters of Manhattan Declaration Inc. regard these values as foundational to the survival of American society.

On November 20, 2009, the Manhattan Declaration Inc. released a document called: "Manhattan Declaration: A Call of Christian Conscience." This document was drafted primarily by: Robert George, McCormick Professor of Jurisprudence, Princeton University; Timothy George, Professor, Beeson Divinity School, Samford University; and Chuck Colson, Founder, the Chuck Colson Center for Christian Worldview and Prison Fellowship Ministries.

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[1] The parties have consented to the filing of this brief and that consent is on file with the Clerk of the Court. As required by Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *Amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

As of the filing of this amicus curiae brief, 535,037 people of faith have signed the Manhattan Declaration. These persons include Orthodox, Catholic, and Evangelical Christians.

Manhattan Declaration Inc. files this brief because this case presents the question of whether marriage will continue to be defined as a male-female relationship or instead be redefined at a constitutional level in a genderless manner to include relationships between or among persons of the same sex.

The signers and supporters of the Manhattan Declaration consider the male-female nature of marriage to be an essential Christian teaching and to be critical to the health and survival of American marriages and families.

The Manhattan Declaration Inc. believes it has the right and duty to provide input from the Christian perspective into the important public policy debate over the meaning and future of marriage and the family.

SUMMARY OF THE ARGUMENT

The United States Congress, with strong majorities in both Houses, enacted the Defense of Marriage Act ("DOMA") in 1996, defining marriage for federal purposes as "only a legal union between one man and one woman as husband and wife."[2] The primary governmental interest advanced for the law was "defending and nurturing the institution of traditional, heterosexual marriage."[3]

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[2] 1 U.S.C. § 7.

Marriage is a foundational institution universally known and accepted, without regard to the accidents of time and place, as a male-female coupling. It has been given formal or legal recognition in nearly every culture throughout history because it encourages and supports responsible procreation and childrearing. Because marriage as it has always been understood redounds to the health and well-being of societies in general, it should be preserved without alteration, and from a federal perspective DOMA does just that.

The teaching of history and the facts relative to the ongoing national marriage debate confirm that efforts to preserve marriage, like the one represented by Amicus in its document entitled *Manhattan Declaration: A Call of Christian Conscience*, find their origin in sincere belief and sound public policy considerations, rather than animus, as many proponents of same-sex marriage have argued.

Notwithstanding the pure intentions of those who seek to preserve marriage, it has become increasingly difficult for people of faith to live lives of integrity and service in the public square where same-sex marriage has been adopted. Put simply, redefining marriage imperils religious liberty and oftentimes requires that freedom of conscience be sacrificed to the newly regnant orthodoxy. This verifiable trend will only become more pronounced if same-sex marriage is effectively constitutionalized.

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[3] H.R. Rep. No. 104-664, at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2916.

Fortunately, despite the real dangers posed by the effort to redefine marriage, there is no warrant under the Constitution, the natural law, or the reality of lived experience to find that DOMA is constitutionally infirm. Because Congress had not only rational but compelling bases to enact DOMA, the decision of the lower courts should be reversed, and marriage preserved as the union of one man and one woman.

ARGUMENT

I. Marriage Is the Foundational Unit of Society, and There Are Numerous Rational and Compelling Reasons to Preserve Its Universally Constitutive Male-Female Character.

Vast human experience confirms that marriage is the original and most important institution for sustaining the health, education, and welfare of all persons in a society. Where marriage is honored, and where there is a flourishing marriage culture, everyone benefits—the spouses themselves, their children, the communities and societies in which they live. Where the marriage culture begins to erode, *social pathologies of every sort quickly manifest themselves.*[4]

Christians believe that marriage is an institution ordained by God from the creation of the world, an institution which predates the state and provides the foundation upon which all other human institutions rest. Marriage, through the conjugal union of one man and one woman, is uniquely and primarily directed towards the procreation and nurturing of children, through which spouses are granted the privilege of taking part in the creative act of God Himself.

> Marriage is what one man and one woman establish when, forsaking all others and pledging lifelong commitment, they found a sharing of life at every level of being—the biological, the emotional, the dispositional, the rational, the spiritual—on a commitment that is sealed, completed and actualized by loving sexual intercourse in which the spouses become one flesh, not in some merely metaphorical sense, but by fulfilling together the behavioral conditions of procreation.[5]

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[4] Robert George et al., *Manhattan Declaration: A Call of Christian Conscience*, at 4 (Nov. 20, 2009), http://manhattandeclaration.org/#2.

[5] *Id.* at 6.

While it is true that Holy Scripture and Christian tradition provide Christians more than sufficient warrant to steadfastly resist any attempt to redefine marriage to include same-sex couples, it is equally true that the natural law, the nature of the human person, public-policy considerations, and common sense also provide ample reason to preserve marriage as it has always been understood.

This explains why the Christian definition of marriage is, in many relevant respects, essentially the same definition that has been known and accepted throughout history, irrespective of culture, geography, or religion. Although certain procedures or incidents of marriage have varied across time and space, its constitutive male-female nature has been its defining, and until very recently, unquestioned characteristic.[6] Put simply, marriage as the union of one man and one woman is a universal phenomenon of human society without equal, for good and numerous reasons.

Marriage has universally been given formal or legal recognition because in so doing, societies encourage and support responsible procreation and childrearing, which inevitably strengthens families and redounds to the benefit of those societies in general.[7] This concept, although expressed in secular terms, is remarkably similar to the Christian belief that through marriage man and woman cooperate conjugally in the creative act of God Himself. But regardless of whether the concept is expressed in a secular or religious vocabulary, it is undeniable that this is a normative arrangement that has been embraced throughout history[8] and continues to be overwhelmingly affirmed today.[9] Numerous courts, including this one, have also concluded that marriage is an institution of exceeding social importance, and that responsible procreation and childrearing are central to its very reason for being.[10]

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[6] *See* Peter Lubin & Dwight Duncan, *Follow the Footnote or The Advocate as Historian of Same-Sex Marriage*, 47 Cath. U. L. Rev. 1271, 1324 (1998) (critiquing attempts by scholars to establish historical precedents for same-sex marriage, and concluding that the affirmation of marriage as an opposite-sex union is pervasive across diverse cultures even outside the Western tradition).

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[7] *See* Robert P. George, Sherif Girgis & Ryan T. Anderson, *What is Marriage?*, 34 Harv. J.L. & Pub. Pol'y 245, 286-87 (2011) ("Almost every culture in every time and place has had some institution that resembles what we know as marriage. But imagine that human beings reproduced asexually and that human offspring were self-sufficient. In that case, would *any* culture have developed an institution anything like what we know as marriage? It seems clear that the answer is no.").

[8] *See, e.g.*, *Why Marriage Matters* 15 (W. Bradford Wilcox et al., eds., 2d ed. 2005) ("As a virtually universal human idea, marriage is about regulating the reproduction of children, families, and society."); James Q. Wilson, *The Marriage Problem* 41 (2002) ("Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."); Gladys Robina Quale, *A History of Marriage Systems* 2 (1988) ("Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature."); Bronislaw Malinowski, *Sex, Culture, and Myth* 11 (1962) ("the institution of marriage is primarily determined by the needs of the offspring, by the dependence of the children upon their parents"); Joel Prentiss Bishop, *Commentaries on the Law of Marriage & Divorce* § 16 (6th ed. 1881) ("If the husband is under obligation to support his wife, so likewise is he to support his children. . The relation of parent and child, equally with that of husband and wife, from which the former relation proceeds, is a civil status").

Respondent Windsor seeks to require the federal government to accept each state's redefinition of a foundational institution, but she pays little heed to the potential consequences of her endeavor. In a very real sense, she is, in the words of one particularly trenchant observer of American politics and culture, "striking at restraints without considering what they preserve."[11] This cavalier project threatens to transform marriage from an organic institution marked primarily by unitive creation and the promotion of life and generational continuity to a manufactured institution marked primarily by the satisfaction to be provided by adult romance.[12] In this way the new marriage regime, should it come to fruition, would inevitably opt for the private over the common good, with predictably deleterious consequences for children and society at large.[13] But that redefinition and its consequences need not come to pass, because this Court has more than ample justification, given the very nature of marriage itself, to uphold DOMA as constitutional.

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[9] "[S]ince 1998, voters in thirty states have approved state constitutional amendments defining marriage, taking the strongest legal step available to them in protecting marriage against governmental redefinition." Joshua Baker & William C. Duncan, *As Goes DOMA . . Defending DOMA and the State Marriage Measures*, 24 Regent U.L. Rev. 1, 2-3 (2011-12).

[10] *See Maynard v. Hill*, 125 U.S. 190, 211 (1888) ("[Marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress"); *Skinner v. State of Okl.*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *Conaway v. Deane*, 401 Md. 219, 317 (2007); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

[11] Richard M. Weaver, *Visions of Order: The Cultural Crisis of Our Time*, 50 (ISI Books 1995).

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[12] *See* Roger Scruton, *The Moral Birds and Bees*, National Review (Sep. 15, 2003) ("Marriage is ceasing to be a sacrificial union of lovers, in which future generations have a stake, and becoming a transitory agreement between people living now."); *see also* Margaret Somerville, *What About the Children?*, *in* Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment (Daniel Cere & Douglas Farrow, eds., 2004) ("[A]ccepting same-sex marriage necessarily means accepting that the societal institution of marriage is intended primarily for the benefit of the partners to the marriage, and only secondarily for the children born into it. And it means abolishing the norm that children—whatever their sexual orientation later proves to be—have a prima facie right to know and be reared within their own biological family by their mother and father. Carefully restricted, governed, and justified exceptions to this norm, such as adoption, are essential. But abolishing the norm would have a far-reaching impact.").

[13] *See* Witherspoon Institute, *Marriage and the Public Good: Ten Principles* 18-19 (2008), *available at* http://www.winst.org/family_marriage_and_democracy/WI_Marriage.pdf. (predicting that "[same-sex] marriage would undermine the idea that children need both a mother and a father, further weakening the societal norm that men should take responsibility for the children they beget"); Mark Regnerus, *How Different are the Adult Children of Parents who have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 Soc. Sci. Research 752 (2012) (finding that children raised by parents in same-sex relationships fared worse than children raised by married biological parents in a wide range of significant outcomes).

II. The Effort to Preserve Marriage as It Has Been Universally Understood Throughout History Is Grounded in Sincere Belief and Sound Public Policy Considerations, and Not in Animus as Respondent Argues.

No one has a civil right to have a non-marital relationship treated as a marriage. Marriage is an objective reality—a covenantal union of husband and wife—that it is the duty of the law to recognize and support for the sake of justice and the common good. If it fails to do so, genuine social harms follow.[14]

Perhaps sensitive to the reality of lived experience, numerous courts, including a justice of this Court, have recognized that preferencing marriage as the normative societal arrangement does not originate in animus.[15] Indeed, the ubiquity of the institution, present in "virtually every corner of the globe," would seem to belie the notion that defenders of marriage are animated merely by animus, because if that were the case "the practice would not be universal."[16] Rather, it is axiomatic that "[i]f a custom is important to a society's survival, it 'will be routinely rediscovered by every culture, without need of either genetic descent or cultural transmission of the particulars.'"[17] Marriage is one of those organic institutions that, whether viewed as divine in origin or not, obviously serves a deep human need or purpose.

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[14] *Manhattan Declaration, supra* note 4, at 6.

[15] *See Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J concurring) (noting that "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group"); *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 682 F.3d 1, 16 (1st Cir 2012) ("[W]e do not rely upon the charge that DOMA's hidden but dominant purpose was hostility to homosexuality"); *Sevcik v. Sandoval*, No. 2:12-cv-00578-FCJ-PAL, 2012 WL 5989662, at *21 (D. Nev. Nov. 26, 2012) (holding that "the maintenance of the traditional institution of civil marriage as between one man and one woman" did not originate in animus against homosexuals); *In re Kandu*, 315 B.R. 123, 147-48 (Bankr. W.D. Wash. 2004) (finding DOMA explicable by legitimate interests not tainted by animus); *Hernandez*, 855 N.E.2d at 8 (noting that "[t]he idea

Notwithstanding this seeming truism, Respondent Windsor and other advocates of same-sex marriage have consistently pursued a public relations and litigation strategy that seeks to portray Christians and other defenders of marriage as motivated by little more than rank bigotry or irrational animus.[18] These accusations, however, are simply not sustainable as a matter of human experience or fact.

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that same-sex marriage is even possible is a relatively new one," and refusing to ascribe to a preference for the traditional arrangement animus or bigotry).

[16] George W. Dent, *"How Does Same Sex Marriage Threaten You?,"* 59 Rutgers L. Rev. 233, 246 (2007).

[17] *Id.* (quoting Daniel C. Dennett, *Darwin's Dangerous Idea: Evolution and the Meanings of Life* 487 (1995)).

[18] *See* Brief of Plaintiff-Appellee, *Windsor v. U.S.*, No. 12-2335-cv(L) (2d Cir. Aug. 31, 2012), ECF No. 239 (alleging that DOMA promotes "disapproval of gay men and lesbians" and arguing that the law represents an unconstitutional attempt to "harm a politically unpopular group." (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))).

As to experience, it is simply inconceivable that for millennia people of apparent good will and otherwise perceptive moral faculties have eagerly embraced in marriage an institution whose core was, if Respondent Windsor is to be taken at her word, infected by animus. Although patently untrue on its face, the charge is nevertheless particularly scurrilous with respect to the Christian faithful, over a half-million of whom signed the Manhattan Declaration, who view marriage as a divine institution, and whose fellow believers have throughout the course of history, many at the cost of their very lives, made profound contributions to the human family.

History confirms that Christians have, precisely because of their faith: defended innocent life; tended to the sick and dying during plagues; preserved the Bible and the art and literature of Western culture; extirpated slavery; tended to the poor and imprisoned; challenged the divine right of kings, fought to establish the rule of law and the balance of governmental powers, thereby making democracy possible; toiled in the women's suffrage movement; led the civil rights movement; fought to end human trafficking and sexual slavery; and brought compassionate care to AIDS sufferers in Africa.[19] While not denying that each of us is a sinner who has fallen short of God's plan for our lives, this litany of verifiable contributions should dispel the notion that the Christian faithful have been unknowingly participating in marriage as a way of subjugating their fellow man.

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[19] *Manhattan Declaration*, *supra* note 4, at 1.

The facts on the ground also dispel the notion that defenders of marriage are seeking merely to deprive proponents of same-sex marriage of their rights and privileges under the law. While it is true that the majority of states have preserved marriage as it has been universally understood, despite the ongoing national debate as to the propriety of same-sex marriage, many have also provided broad accommodations to same-sex couples through legal statuses such as civil unions and domestic partnerships.[20] Judging from the breadth of these accommodations, it should be evident that defenders of marriage are not interested in discrimination but rather in preserving marriage as the objective reality it has always been—for the good of the societal interests it has always served. Indeed, religious convictions, prevailing mores, social practices, political aims, attachments, and allegiances continue to sustain a broad and deep commitment to traditional marriage, as evinced by the laws of 39 States defining marriage as the union of a man and a woman.[21]

If marriage is permitted to be redefined by judicial fiat, however, it will not have merely evolved to become more inclusive, as Respondent Windsor benignly would have it—it will have been replaced by another institution entirely, one that cannot deliver the unique goods traditional marriage now does, goods which include a "child's right to know and be brought up by his or her biological parents," a child-rearing mode which correlates with "optimal outcomes deemed crucial for a child's—and hence society's—well being.[22]

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[20] *See Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, National Conference of State Legislatures (Nov. 2012), http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx.

[21] *Id.*

Proponents of same-sex marriage cannot help but admit that redefinition will radically disrupt society—in fact, some seem to revel in the prospect, going so far as to predict that once "same-sex marriage becomes legal, that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers."[23] But the replacement of marriage as an organic institution with an ad hoc substitute will have profoundly disruptive consequences for not only children, spouses, and families, but also for American society more broadly, especially with respect to religious freedom.

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[22] *See* Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 Duke Journal of Constitutional Law & Public Policy, 1, 16, 18 (2006) (outlining the goods provided by man-woman marriage and illustrating why same-sex, or "genderless," marriage, cannot function as a substitute).

[23] E.J. Graff, *Retying the Knot*, *in* Same-Sex Marriage: Pro and Con: A Reader, 135-136 (Andrew Sullivan ed., 1st ed., Vintage Books 1997); *see also* Judith Stacy, *Gay and Lesbian Families: Queer Like Us*, *in* All Our Families: New Policies for a New Century, 117, 128-129 (Mary Ann Mason et al., eds., Oxford U. Press 1998) (predicting that "[l]egitimizing gay marriage would promote a democratic, pluralist expansion of the meaning, practice, and politics of family life in the United States," where people "might dare to question the dyadic limitations of Western marriage and seek some of the benefits of extended family life through small group marriages arranged to share resources, nurturance, and labor"); Michelangelo Signorile, *Bridal Wave*, Out Magazine 161 (Dec.–Jan. 1994) (stating that gays and lesbians should "demand the right to marry not as a way of

III. Redefining Marriage Imperils Religious Freedom, Inhibits People of Faith from Living Out Their Lives in the Public Square, and Creates a Culture Where Christian Believers Are Ostracized and Themselves Targeted for Discrimination.

> *It is ironic that those who today assert . . . a right to [same-sex marriage] . . . are very often in the vanguard of those who would trample upon the freedom of others to express their religious and moral commitments . . . to the dignity of marriage as the conjugal union of husband and wife.*[24]

Religious freedom is our first, most cherished liberty, and its guarantee is threatened today by the redefinition of marriage. Such redefinition in practice would bring a new orthodoxy that circumscribes the ability of the Christian faithful to put their beliefs into practice. Examples of Christians unable to live integrated lives of work, faith, and service as a result of overzealous attempts to redefine marriage are many, but a few should suffice to reveal the pernicious threat that the

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adhering to society's moral codes but rather to debunk a myth and radically alter an archaic institution").

[24] *Manhattan Declaration, supra* note 4, at 7.

adoption of same-sex marriage poses to religious liberty.

Religious organizations with sincere convictions about marriage have become disqualified from placing needy and neglected children in foster and adoptive homes if those organizations, due to their religious convictions, decline to place children with married same-sex couples, notwithstanding the fact that other foster and adoption agencies are willing and able to place children with those couples. The District of Columbia, for example, first enacted a law permitting same-sex marriage in December 2009. Catholic Charities reported that shortly thereafter D.C. government officials informed them that they

> no longer would be allowed to continue to provide foster care and publicly-funded adoption programs in the District of Columbia. This is because under the new law, the agency would be required to place children with same-sex married couples and to license the couples as adoptive and foster care families.[25]

Thus, as a result of the D.C. law redefining marriage, which took effect in March 2010, Catholic Charities was forced to close its foster-care and adoption programs.[26]

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[25] Archdiocese of Washington, *Same-Sex Marriage Legislation and the Implications for Catholic Charities* 1 (Mar. 1, 2010), *available at* http://site.adw.org/pdfs/10Marr_CathChar%20 Impact_0301.pdf. (letter from the Archdiocese of Washington discussing this situation).

Religious parents who object to public schools teaching their young elementary school students about same-sex marriage and its asserted equivalence to marriage between one man and one woman have been denied the right to require that they be given an opportunity to exempt their children from exposure to materials teaching these lessons. For instance, less than a year after Massachusetts began issuing marriage licenses to same-sex couples, two sets of parents sued the Lexington, Massachusetts school district, challenging under the free exercise clause the district's refusal to provide prior notice and an opportunity to exempt their children from exposure to materials that celebrated and legitimized same-sex marriage, a violation of the families' sincerely-held religious beliefs.[27] The First

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[26] *See Same-Sex 'Marriage' Law Forces D.C. Catholic Charities to Close Adoption Program*, Catholic News Agency, Feb. 17, 2010, *available at* http://www.catholicnewsagency.com/news/same-sex_marriage_law_forces_d.c._catholic_charities_to_close_adoption_program/ ("Although Catholic Charities has an 80-year legacy of high quality service to the vulnerable in our nation's capital, the D.C. Government informed Catholic Charities that the agency would be ineligible to serve as a foster care provider due to the impending D.C. same-sex marriage law"); Julia Duin, *Catholics End D.C. Foster-Care Program*, Washington Times, Feb. 18, 2010, *available at* http://www.washingtontimes.com/news/2010/feb/18/dc-gay-marriage-law-archdiocese-end-foster-care/ ("The Archdiocese of Washington's decision to drop its foster care program is the first casualty of the District of Columbia's pending same-sex marriage law").

[27] *Parker v. Hurley*, 514 F.3d 87, 90 (1st Cir. 2008).

Circuit rejected the parents' claim, holding that even though "the school's choice of books for young students has . . . deeply offended [their] sincerely held religious beliefs," they were "not entitled to a federal judicial remedy under the U.S. Constitution."[28] Indeed, because "Massachusetts [had] recognized gay marriage under its state constitution," the court concluded that "it [was] entirely rational for its schools to educate their students regarding that recognition."[29]

Citizens with sincere religious convictions regarding marriage have been forced to resign from public offices that administer marriage licenses or otherwise address the issue of marriage. The New York Legislature first enacted a law permitting same-sex marriage in June 2011, but before that law went into effect, at least two municipal clerks were forced to resign their positions because of their religious convictions against facilitating same-sex marriages.[30] Additionally, following the redefinition of marriage in Canada, "some marriage commissioners in Saskatchewan . . . refuse[d] to solemnize same-sex marriages on the basis that they could not provide services in this regard without acting in violation of their personal religious beliefs. Their position gave rise to various legal proceedings . . . ."[31] When ruling on those proceedings, the Court of Appeal for Saskatchewan rejected a proposal to "allow every commissioner . . . to decline to solemnize a marriage if doing so would be contrary to his or her religious beliefs."[32] That court held that the suggested religious accommodation, "if enacted, would violate the equality rights of gay and lesbian individuals."[33] Thus, marriage commissioners whose sincere religious beliefs prevented them from solemnizing same-sex marriages were forced to give up their positions.

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[28] *Id.* at 107.

[29] *Id.* at 95.

[30] Laura L. Fotusky, Barker Town Clerk, submitted her resignation on July 11, 2011. *See New York Town Clerk Quits Over Opposition to Gay Marriage*, Fox News, July 12, 2011, *available at* http://www.foxnews.com/politics/2011/07/12/new-york-town-clerk-quits-over-gay-marriage-opposition/ ("Laura Fotusky submitted a letter of resignation to the town board . . . , saying her religious beliefs prevent her from signing a marriage certificate for a gay couple, as she'd be required to do as a municipal clerk."); Dan Wiessner, *New York Town Clerk Quits Over Gay Marriage Licenses*, Reuters, July 12, 2011, *available at* http://www.reuters.com/article/2011/07/12/us-gaymarriage-newyork-resignation-idUSTRE76B7BJ20110712. Around that

Religious organizations with sincere religious convictions about marriage have been forced in some jurisdictions to stop providing health-care benefits to the spouses of their employees because of their religious convictions against recognizing or providing marital benefits based on same-sex marriage.

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time, Ruth Sheldon, Granby Town Clerk, also resigned rather than compromise her religious beliefs. *See* Jen Doll, *Ruth Sheldon, Town Clerk, Will Also Resign Instead of Performing Gay Marriages*, The Village Voice, July 18, 2011, *available at* http://blogs.villagevoice.com/runninscared/2011/07/ruth_sheldon_gay_marriage.php.

[31] *In re Matter of Marriage Commissioners Appointed under the Marriage Act, 1995, SS 1995, c. M-4.1*, 2011 SKCA 3, at 1 (Can.).

[32] *Id.*

[33] *Id.* at 2.

Between the enactment and effective date of the District of Columbia's law permitting same-sex marriage, the Archdiocese of Washington, D.C. made the following announcement:

> Catholic Charities will continue to honor the health coverage current employees have as of March 1, 2010. After that, all new employees, and any existing employees who want to change their health coverage, will be covered under a new benefits package. The new plan will provide the same level of coverage for employees and their dependents, with one exception: spouses cannot be covered. This change is the direct result of not receiving an adequate exemption for religious organizations in the same-sex marriage legislation.[34]

Similarly, less than a year after New York redefined marriage, a Catholic-hospital employee who married a person of the same sex filed suit against her employer, claiming that the Catholic organization must recognize her marriage and provide benefits to her same-sex spouse.[35] The federal district court has yet to rule in the case.

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[34] Archdiocese of Washington, *supra* note 25, at 2.

[35] *See* Sharon Otterman, *Employee Sues for Benefits to Cover Same-Sex Spouse*, N.Y. Times, June 19, 2012, *available at* http://www.nytimes.com/2012/06/20/nyregion/st-josephs-medical-center-sued-over-benefits-by-same-sex-couple.html?_r=0.

This crisis of religious liberty, documented in the most cursory of fashions above, would multiply should this Court strike down DOMA and thus effectively declare as irrational the views on marriage of the more than half million signatories of the Manhattan Declaration—not to mention the countless other Christians who share their religious convictions.

CONCLUSION

Amicus submits that there is simply no principled justification for this Court to find that DOMA is constitutionally infirm. Whether as a matter of constitutional jurisprudence, natural law, or the reality of lived experience, it is beyond cavil that Congress had, and continues to have, rational and even compelling reasons to preserve male-female marriage, among all the other various and sundry possible alternatives, as the institution most likely to redound to the benefit of American society.

For the foregoing reasons, Amicus respectfully requests that the Court reverse the decision of the court below.

Respectfully submitted,

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CURIAE
BRIEF

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Nos. 12-144, 12-307

In The
Supreme Court of the United States

◆

DENNIS HOLLINGSWORTH, et al.,

Petitioners,

v.

KRISTIN M. PERRY, et al.,

Respondents.

◆

UNITED STATES,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, in Her Capacity as Executor of the Estate of Thea Clara Spyer, and BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,

Respondents.

◆

On Writs of Certiorari to the United States Court of Appeals for the Ninth and Second Circuits

◆

AMICUS CURIAE BRIEF OF DR. PAUL McHUGH IN SUPPORT OF HOLLINGSWORTH AND BIPARTISAN LEGAL ADVOCACY GROUP ADDRESSING THE MERITS AND SUPPORTING REVERSAL

◆

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QUESTIONS PRESENTED

HOLLINGSWORTH v. PERRY

1. Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.
2. Whether Petitioners have standing under Article III, §2 of the Constitution in this case.

UNITED STATES v. WINDSOR

1. Whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

I. Sexual Orientation Does Not Define a Discrete and Insular Minority 4

A. Threshold Questions Prevent the Court from Defining a Class Based on Sexual Orientation with Sufficient Clarity 4

B. Social Science Experts Raise Serious Doubts About the Definability of Sexual Orientation 8

II. Sexual Orientation is Not an Immutable Characteristic 14

A. Immutability Means Solely an Accident of Birth 14

B. Sexual Orientation Is Not *Solely* an Accident of Birth 15

C. Sexual Orientation Can and Often Does Change Over Time 20

CONCLUSION 28

TABLE OF AUTHORITIES

Page

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TABLE OF AUTHORITIES – Continued

Page

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Page

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Page

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Page

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TABLE OF AUTHORITIES – Continued

Page

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Dr. Paul McHugh, M.D. is the University Distinguished Service Professor of Psychiatry at the Johns Hopkins University School of Medicine. From 1975 until 2001, Dr. McHugh was the Henry Phipps Professor of Psychiatry and the director of the Department of Psychiatry and Behavioral Science at Johns Hopkins. At the same time, he was psychiatrist-in-chief at the Johns Hopkins Hospital. His scholarship and expertise include issues of gender identity and sexual orientation. Dr. McHugh appears as an *amicus* to address whether sexual orientation, like race and gender, is a clearly definable (discrete) category or a fixed and immutable characteristic – factors that are highly relevant to whether this Court should declare sexual orientation a new suspect class. He concludes based on the current state of scientific knowledge that sexual orientation is neither.

◆

SUMMARY OF THE ARGUMENT

Powerful voices, including the United States Department of Justice, seek to persuade this Court to recognize sexual orientation as a suspect class. But compelling reasons counsel against taking that momentous step. Even ignoring the substantial and growing political power of the LGBT-rights movement, which alone should be sufficient to reject the demand for heightened scrutiny, sexual orientation is neither a "discrete" nor "immutable" characteristic in the legal sense of those terms. Under this Court's longstanding jurisprudence, therefore, sexual orientation should not be granted the "extraordinary protection from the majoritarian political process" entailed by suspect-class status. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

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[1] No counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of the brief have been submitted to the Clerk. Monetary support for printing this Brief was provided by the Institute for Marriage and Public Policy.

Numerous decisions express this Court's understanding that heightened scrutiny is improper for classifications that are insufficiently discrete. Discreteness requires, at least, that a group or trait be clearly defined. Sexual orientation fails that test. A review of scientific studies demonstrates that there is no scholarly consensus on how to define sexual orientation, and that the various definitions proposed by experts produce substantially different classes. In contrast with race and sex, which are well-defined and understood, and despite popular beliefs to the contrary, sexual orientation remains a contested and indeterminate classification.

This Court's decisions also teach that immutability is a necessary characteristic for heightened-scrutiny protection, and that the class-defining trait must be determined solely by accident of birth. Unlike the traits of race and sex, and again despite popular beliefs to the contrary, no replicated scientific study supports the view that sexual orientation is determined at birth. Studies conclude, instead, that sexual orientation is influenced by complex and unpredictable factors. Even if, contrary to its past decisions, the Court were to expand the concept of immutability from a trait determined by accident of birth to a personal trait that cannot change – and there are surely many of those – scientific research offers substantial evidence that sexual orientation is far more fluid than commonly assumed.

This brief takes no position on the proper definition or cause of sexual orientation. Those are matters for ongoing scholarly inquiry and debate. *Amicus*'s more modest point is that scholars do not know enough about what sexual orientation is, what causes it, and why and how it sometimes changes for the Court to recognize it as the defining feature of a new suspect class.

◆

ARGUMENT

I. Sexual Orientation Does Not Define a Discrete and Insular Minority.

A. Threshold Questions Prevent the Court from Defining a Class Based on Sexual Orientation with Sufficient Clarity.

This Court has never suggested that sexual orientation is a suspect class entitled to heightened scrutiny under the Equal Protection Clause,[2] and no fewer than 10 federal circuits have considered and rejected that claim.[3] Only the Second Circuit, in a decision striking down the federal Defense of Marriage Act, has held that "homosexuals compose a class that is subject to heightened scrutiny." *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012).

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[2] The Court's leading cases on sexual orientation are *Romer v. Evans*, 517 U.S. 620, 635 (1996), decided on "conventional" rational-basis review, and *Lawrence v. Texas*, 539 U.S. 558, 575 (2003), decided under the Due Process Clause and not as a matter of equal protection.

[3] *See Massachusetts v. Dep't of Health & Human Servs.*, 682 F.3d 1, 9-10 (1st Cir. 2012); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Milligan-Hitt v. Bd. of Trustees of Sheridan County Sch. Dist. No. 2*, 523 F.3d 1219, 1233 (10th Cir. 2008); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (*en banc*); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989).

Adding sexual orientation to the catalog of suspect classes is a long and consequential step that the Court's established approach to the Equal Protection Clause does not support. The Court applies heightened scrutiny to certain classifications, such as race, alienage, national origin, and gender, to protect "'discrete and insular' group[s], in need of 'extraordinary protection from the majoritarian political process.'" *Murgia*, 427 U.S. at 313 (quoting *Rodriguez*, 411 U.S. at 28).[4] But the Court has repeatedly declined to apply heightened scrutiny where discreteness or insularity is lacking. *Id.* at 313-314 ("old age does not define a 'discrete and insular' group" (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4)); *Rodriguez*, 411 U.S. at 25-28 (1973) (explaining the law in question did not discriminate against any "definable category of 'poor' people," but rather against a "large, diverse, and amorphous class"); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (noting close relatives are not a suspect class because they "do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"); *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 445 (1985) (denying protected status to the mentally disabled in part because they are a "large and amorphous" class). These decisions teach that "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *City of Cleburne*, 473 U.S. at 441-42.

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[4] Although religion is often listed as a suspect class for equal protection purposes, *see, e.g.*, *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992), heightened scrutiny for religious discrimination arises directly from the First Amendment rather than from factors like immutability and political powerlessness that justify suspect-class status under the Equal Protection Clause of the Fourteenth Amendment. Hence, once protections under the Free Exercise and Establishment Clauses have been satisfied, any further religious discrimination claims under the Equal Protection Clause is subject only to rational basis review. *See Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004).

The Court's reluctance to create new suspect classes is particularly appropriate here because sexual orientation is a less discrete characteristic than age or poverty, which the Court has already refused to accord suspect-class status. In *Rodriguez*, for instance, the Court rejected the claim that the Texas statutory regime for allocating funding for public schools violated the Equal Protection Clause by discriminating against the poor. *Rodriguez*, 411 U.S. at 54-55. The Court sharply criticized lower courts for "virtually assum[ing] their findings of a suspect classification through a simplistic process of analysis: since, under the traditional systems of financing public schools, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth." *Id.* at 19. The Court warned that "[t]his approach largely ignores the hard threshold questions, including whether it makes a difference, for purposes of consideration under the Constitution, that the class of disadvantaged 'poor' cannot be identified or defined in customary equal protection terms." *Id.* Such "hard threshold questions" determine whether a class ought to be accorded special treatment under the Fourteenth Amendment – questions that begin with whether the equal protection claim is clothed with a "definitive description of the classifying facts or delineation of the disfavored class." *Id.*; *accord City of Cleburne*, 473 U.S. at 442 & n.9 (rejecting mental retardation as a suspect class).

In *Windsor* the Second Circuit "ignore[d] the hard threshold questions," by reasoning that a class is sufficiently discrete to qualify for heightened scrutiny if its identifying "characteristic invites discrimination when it is manifest." *Windsor*, 699 F.3d at 184. A test so indeterminate conflicts with *Murgia*, *Rodriguez*, and *City of Cleburne*, because age, poverty, and mental disability can "invite[ ] discrimination when [they are] manifest." *Id.* Certain types of sexual orientation may invite discrimination in particular circumstances, but it does not follow that sexual orientation is the characteristic of a discrete class. To be sure, sexual orientation characterizes the difference between heterosexuals, gay men, lesbians, and bisexuals. But for reasons *amicus* explains below, sexual orientation also may characterize points along a continuum of sexual attraction, sexual behavior, and sexual identity where individual categories are anything but distinct. For that reason alone, sexual orientation should be rejected as the basis for heightened scrutiny because it "cannot be identified or defined in customary equal protection terms." *Rodriguez*, 411 U.S. at 19.

B. Social Science Experts Raise Serious Doubts About the Definability of Sexual Orientation.

Deep conceptual and empirical difficulties prevent sexual orientation from being used to define a discrete class of persons. Sexual orientation is a complex and amorphous phenomenon that often defies consistent and uniform definition. "There is currently no scientific or popular consensus . . . that definitively 'qualify' an individual as lesbian, gay, or bisexual." Lisa M. Diamond, *New Paradigms for Research on Heterosexual and Sexual Minority Dev.*, 32 (4) J. Clinical Child & Adolescent Psychol., 492 (2003). "Much of the confusion about sexual orientation occurs because there is no single agreed upon definition of the term. . . . There is no one universally accepted definition of sexual orientation, nor of who is bisexual, lesbian, or gay." Gail S. Bernstein, *Defining Sexual Orientation,* Selfhelp Magazine (Sept. 18, 2012), http://www.selfhelpmagazine.com/articles/sexual_orientation. *See also* Todd A. Salzman & Michael G. Lawler, *The Sexual Person: Toward a Renewed Catholic Anthropology* 65 (2008) ("The meaning of the phrase 'sexual orientation' is complex and not universally agreed upon.").

Scientific literature often mentions three different ways to define homosexuality. "Does it mean someone who engages in same-sex sexual behavior? Someone who fantasizes about such acts? Someone who will identify himself or herself as gay or lesbian?" M.V. Lee Badgett, *Money, Myths, & Change: The Economic Lives of Lesbians & Gay Men* 4 (2001). Most definitions of sexual orientation "include[ ] components of at least one of three" of the dimensions of behavior, attraction, and identity. Laura Dean et al., *Lesbian, Gay, Bisexual, and Transgender Health: Findings and Concerns*, J. Gay & Lesbian Med. Ass'n, Sept. 2000, Vol. 4, at 135. Some definitions include all three and, additionally, membership in a community defined by sexual orientation. The APA's definition holds that "[s]exual orientation refers to an enduring pattern of emotional, romantic, and/or sexual *attractions* to men, women, or both sexes. Sexual orientation also refers to a person's sense of *identity* based on those attractions, related *behaviors*, and *membership in a community* of others who share those attractions." Am. Psychol. Ass'n, *Sexual Orientation and Homosexuality: Answers to Your Questions for a Better Understanding, What Is Sexual Orientation?*, http://www.apa.org/topics/sexuality/orientation.aspx?item=2 (last visited Jan. 11, 2012) (emphasis added).

The problem with sexual orientation, so defined, is that many people are not consistent across all three dimensions. "There is a physical orientation, an affectional orientation, and a fantasy orientation, with each of those three further divided into a past (historical) component and a present component. A person's behavior may be totally at variance with all aspects of orientation, and the various parts of orientation may not all agree." A.E. Moses & R.O. Hawkins, Jr., *Counseling Lesbian Women and Gay Men: A Life Issues Approach* 43 (1982). "The more carefully researchers map these constellations, differentiating, for example, between gender identity and sexual identity, desire and behavior, sexual versus affectionate feelings, early-appearing versus late-appearing attractions and fantasies, or social identifications and sexual profiles, the more complicated the picture becomes because few individuals report uniform intercorrelations among these domains." Lisa M. Diamond & Ritch C. Savin-Williams, *Gender & Sexual Identity*, *in Handbook Applied Dev. Sci.* 101, 102 (Richard M. Lerner et al. eds., 2003). Many other researchers also acknowledge discordance between components of sexual orientation. *See* John C. Gonsiorek & James D. Weinrich, *The Definition and Scope of Sexual Orientation*, *in Homosexuality: Research Implications for Public Policy* 8 (John C. Gonsiorek & James D. Weinrich eds., 1991) ("It can be safely assumed that there is no necessary relationship between a person's sexual behavior and self-identity unless both are individually assessed."); Letitia Anne Peplau et al., *The Development of Sexual Orientation in Women*, 10 Ann. Rev. Sex Research, at 70 (1999) ("[T]here is ample documentation that same-sex attractions and behaviors are not inevitably or inherently linked to one's identity.").

Practical consequences follow from these definitional uncertainties. Different definitions produce substantially different estimates of the size of the homosexual population. "Sizable numbers of people reporting only same-sex attraction and/or behavior self-identify as heterosexual or bisexual. Similarly, sizable numbers of those who identify as gay or lesbian report some sexual partners of a different sex and/or some level of attraction to different sex partners." Williams Institute: Sexual Minority Assessment Research Team, *Best Practices for Asking Questions about Sexual Orientation on Surveys*, 6-7 (Nov. 2009), http://williamsinstitute. law.ucla.edu/ wp-content/uploads/SMART-FINAL-Nov-2009.pdf.[5] The "Chicago Sex Survey," considered one of the most reliable scholarly efforts to determine sexual practices in the United States, reported that of the portion of the population exhibiting at least one of the three components of sexual orientation, only 15% of the women and 24% of the men exhibited all three. *See* Edward O. Laumann et al., *The Social Organization of Sexuality: Sexual Practices in the United States* 299 (1994). This and other national studies led one group of researchers to conclude that "[d]epending upon how [the class] is defined and measured, 1-21% of the population could be classified as lesbian or gay to some degree, with the remainder classified as bisexual or heterosexual to some degree." Dean et al., *supra*, at 135.

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[5] The Williams Institute is an LGBT-rights think tank at UCLA Law. *See* Williams Institute, http://williamsinstitute.law. ucla.edu/ (last visited Jan. 11, 2012).

Even more problematic, the definitional complexity is not limited to the familiar categories of straight, homosexual, bisexual, and their variations. Some researchers believe that "sexual orientation cannot be reduced to a bipolar or even a tripolar process, but must be recognized within a dynamic and multi-variate framework." Fritz Klein et al., *Sexual Orientation: A Multi-Variable Dynamic Process*, J. Homosexuality, 11 (1), at 35-49 (1985). Others recommend the use of a 17-question, multiple-subpart test to measure sexual orientation. John C. Gonsiorek et al., *Definition and Measurement of Sexual Orientation*, *in Suicide and Life-Threatening Behavior* 40 (1995). Still other researchers say that sexual orientation must be analyzed on a continuum. *See* Zhana Vrangalova & Ritch C. Savin-Williams, *Mostly Heterosexual and Mostly Gay/Lesbian: Evidence of New Sexual Orientation Identities*, Arch. Sexual Behav. 85, 96 (2012) ("Taken together, these data suggest that sexual orientation is a continuously distributed characteristic and decisions to categorize it into discrete units, regardless of how many, may be useful for particular research questions but are ultimately external impositions that are not consistent with reports of individuals."); Committee on Lesbian Health Research Priorities, Inst. of Med., *Lesbian Health* 25-26 (Andrea L. Solarz ed., 1999) ("In general, sexual orientation is most often described as including behavioral, affective (i.e., desire or attraction), and cognitive (i.e., identity) dimensions that occur along continua."). And others, with the caveat that "the concept of sexual orientation is a product of contemporary Western thought," apply a distinct definition for a specific research purpose. Timothy F. Murphy, *Gay Science: The Ethics of Sexual Orientation Research* 15-24 (1997); Alfred C. Kinsey et al., *Sexual Behavior in the Human Male* 639 (1948) ("Males do not represent two discrete populations, heterosexual and homosexual.").

Given the complexities of defining sexual orientation, it should not be surprising that some experts openly admit that "the categories of homosexual, gay, and lesbian do not signify a common, universal experience." Salzman & Lawler, *supra*, at 2. Because there is no common experience, one can anticipate arguments for an ever-broadening definition of exactly who belongs in a judicially-protected class founded on sexual orientation. "It will be useful to expand our notions of sexual orientation to include more than just bisexuality, heterosexuality and homosexuality. . . . With respect to various components of sexual orientation, an individual may be heterosexual, homosexual, bisexual, as well as fetishistic, transvestitic, zoophiliac, and so on. It is important to note that these are not mutually exclusive categories." John P. DeCecco, *Gay Personality and Sexual Labeling* 16 (1985). Even polyamory, "a preference for having multiple romantic relationships simultaneously," has been defended as "a type of sexual orientation for purposes of anti-discrimination law." Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79

U. Cin. L. Rev. 1461, 1462 (2011). And "asexuality" – the absence of any sexual attraction – is being discussed as a possible sexual orientation. *Id.* at 1463 n.4. Its very capaciousness might lead one reasonably to "conclude there is serious doubt whether sexual orientation is a valid concept at all. Social constructionism suggests that there is nothing 'real' about sexual orientation except a society's construction of it." Gonsiorek et al., *supra*, at 4.

Because scientific experts cannot agree on how to define it with substantial certainty, this Court should reject the category of sexual orientation as incapable of being "identified or defined in customary equal protection terms." *Rodriguez*, 411 U.S. at 19.

II. Sexual Orientation is Not an Immutable Characteristic.

A. Immutability Means Solely an Accident of Birth.

Sexual orientation also fails the ordinary standards for heightened scrutiny because it is not immutable. Every class to which the Supreme Court has applied heightened scrutiny is defined by an immutable characteristic. *Parham v. Hughes*, 441 U.S. 347, 351 (1979) (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964) (race); *Oyama v. California*, 332 U.S. 633 (1948) (national origin); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Gomez v. Perez*, 409 U.S. 535 (1973) (illegitimacy); *Reed v. Reed*, 404 U.S. 71 (1971) (gender)). Moreover, the Supreme Court has refused to apply heightened scrutiny to classes that are not marked by an immutable characteristic. *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (undocumented aliens); *Lyng v. Castillo*, 477 U.S. 635, 639 (1986) (close relatives). The Court's jurisprudence makes clear that immutability is a necessary condition for recognizing a new protected class.

The Court's precedents teach that immutability denotes a characteristic "determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). As then-Judge Ginsburg explained, "the 'immutable characteristic' notion . . . does not mean, broadly, something done that cannot be undone. Instead, it is a trait 'determined *solely* by accident of birth.'" *Quiban v. Veterans Administration*, 928 F.2d 1154, 1160 n.13 (D.C. Cir. 1991) (quoting *Schweiker v. Wilson*, 450 U.S. 221, 229 n.11 (1981)).

B. Sexual Orientation Is Not *Solely* an Accident of Birth.

Sexual orientation, unlike race or gender, is not determined solely or even primarily at birth – there is no convincing evidence that biology is decisive. On the contrary, some researchers have concluded that biological and genetic factors play little to no role in sexual orientation. *E.g.*, Letitia Anne Peplau & Linda D. Garnets, *A New Paradigm for Understanding Women's Sexuality and Sexual Orientation*, 56 J. Soc. Issues 329, 332 (2000) ("Although additional research will fill in gaps in our knowledge, there is no reason to expect that biological factors play anything other than a minor and probably indirect role in women's sexual orientation."). Rather, there is "substantial indirect evidence in support of a socialization model at the individual level." Peter S. Bearman & Hannah Bruckner, *Opposite-Sex Twins and Adolescent Same-Sex Attraction*, 107 Am. J. Soc. 1179, 1180 (2002) (finding "no support for genetic influences on same-sex preference net of social structural constraints.").

Studies of identical twins have confirmed that same-sex attraction is not solely determined by heredity or other biological factors. *See id.* at 1196-97 (finding concordance rates of 6.7% for identical twins); Niklas Langstrom et al., *Genetic and Environmental Effects on Same-sex Sexual Behavior: A Population Study of Twins in Sweden*, Arch. Sexual Behav. 77-78 (2010) (finding concordance rates of 18% for male identical twins and 22% for female identical twins); Kenneth S. Kendler et al., *Sexual Orientation in a U.S. National Sample of Twin and Nontwin Sibling Pairs*, 157 Am. J. Psychiatry 1843, 1845 (2000) (finding concordance rates of 31.6% for identical twins). Because there is not 100% concordance among identical twins, genetic factors are not the sole cause of sexual orientation. *See* Michael King & Elizabeth McDonald, *Homosexuals Who Are Twins*, 160 Brit. J. Psychiatry 407, 409 (1992) (concluding that "genetic factors are insufficient explanation of the development of sexual orientation," because "[t]he co-twins of men and women who identify themselves as homosexual appear to have a potential for a range of sexual expression.").

Other studies have found strong correlations between sexual orientation and external factors, such as family setting, environment, and social conditions, which are difficult if not impossible to explain under exclusively biological theories. Professors at Columbia University reported, for instance, that "[a]mong male [opposite-sex] twins, the proportion reporting a same-sex romantic attraction is twice as high among those without older brothers (18.7%) than among those with older brothers (8.8%)." Bearman & Bruckner, *supra*, at 1196-97. Researchers in Australia discovered "a major cohort effect in same-gender sexual behavior" and noted that this had "implications for purely biological theories of sexual orientation, because there must be historical changes in environmental factors that account for such an effect." A.F. Jorm et al., *Cohort Difference in Sexual Orientation: Results from a Large Age-Stratified Population Sample*, 49 Gerontology 392, 393 (2003). The Chicago Sex Survey found that men were twice as likely and women nine times as likely to identify as gay or bisexual if they had completed college. Laumann et al., *supra*, at 305. Researchers in New Zealand noted a correlation between sexual orientation and certain social conditions: "The overall higher rate of same-sex attraction and contact for women in New Zealand in relation to other comparable countries, almost certainly represents a recent increase in prevalence. As such it argues strongly against a purely genetic explanation and suggests the environment can have a significant influence. It might be related to social changes which have happened with particular intensity and rapidity in this country." Nigel Dickson et al., *Same Sex Attraction in a Birth Cohort: Prevalence and Persistence in Early Adulthood*, 56 Soc. Sci. & Med. 1607, 1613 (2003).

Studies like these have led scientists to conclude that sexual orientation is influenced by a variety of factors beyond genetics or biology alone. *See, e.g.*, G.M. Herek, *Homosexuality, in 4 Encyclopedia Psychol.* 149, 150 (A.E. Kazdin ed., 2000) (political or aesthetic values); J.H. Gagnon, *The Explicit and Implicit Use of the Scripting Perspective in Sex Research*, 1 Ann. Rev. Sex Research, at 1-43 (1990) (visible gay and lesbian communities); M.V. Lee Badgett, *Sexual Orientation Discrimination: An International Perspective* 23 (2007) (socioeconomic outcomes); Linda D. Garnets & Letitia Anne Peplau, *A New Look at Women's Sexuality & Sexual Orientation*, CSW Update, Dec. 2006, at 5 (2006) (sexual orientation is shaped by "cultural beliefs about gender and sexuality, by kinship systems, by economic opportunities, by social status and power, by attitudes about women's roles, by whether or not sexual identities are recognized in a given culture, and by attitudes of acceptance versus rejection toward sexual minorities.").[6]

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[6] It is sometimes suggested that sexual orientation is genetically based, and that its development and expression owe, to

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In brief, available evidence casts serious doubt on the simplistic, popular notion that sexual orientation is biologically determined. There is simply no firm evidence to support that conclusion, only unproven theories. As the American Psychiatric Association's latest statement on the issue summarizes: "Currently there is a renewed interest in searching for biological etiologies for homosexuality. *However, to date there are no replicated scientific studies supporting any specific biological etiology for homosexuality.*" *See* Am. Psychiatric Ass'n, *LGBT-Sexual Orientation*, http://www.psychiatry.org/mental-health/people/lgbt-sexual-orientation (last visited Jan. 11, 2012) (emphasis

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some limited extent, to very early life experiences. In this view, sexual orientation is like left-handedness, which surely appears to be both inherited and a product of early childhood developmental. There is, however, little social scientific evidence to support this hypothesis. Indeed, if this hypothesis were sound, one would expect that sexual orientation – like left-handedness – would be randomly and uniformly distributed throughout the population. But it is not so distributed. Laumann and collaborators have shown, for example, that there is a remarkable difference in the rates of male homosexual behavior in America, depending upon whether the subject lived through adolescence in a rural or an urban area. Whereas only 1.2% of males with rural adolescence had a male sexual partner in the year of survey, those with metropolitan adolescence had nearly four times (4.4%) that rate of male sexual partners. Laumann, et al, *supra*, at 303-04.

One reflection of the social and cultural influences upon sexual orientation was supplied by Justice Kennedy when he wrote, for the Court in *Lawrence v. Texas*, that "the concept of the homosexual as a distinct category of person did not emerge until the late 19th century." 539 U.S. at 568.

added). *See also* Peplau et al., *Development of Sexual Orientation*, *supra*, at 81 ("To recap, more than 50 years of research has failed to demonstrate that biological factors are a major influence in the development of women's sexual orientation. . . . Contrary to popular belief, scientists have not convincingly demonstrated that biology determines women's sexual orientation."). And some research suggests that biology does not even play an important role in determining sexual orientation. *See* Bearman & Bruckner, *supra*, at 1180. As such, "the assertion that homosexuality is genetic is so reductionistic that it must be dismissed out of hand as a general principle of psychology." Richard C. Friedman & Jennifer I. Downey, *Sexual Orientation and Psychoanalysis: Sexual Science and Clinical Practice* 39 (2002).

Sexual orientation is not immutable. Unlike every other class-defining trait accepted by the Court, such as race or gender, the best available evidence concludes that sexual orientation is not "a trait 'determined *solely* by accident of birth.'" *Quiban*, 928 F.2d at 1160 n.13 (Ginsburg, J.).

C. Sexual Orientation Can and Often Does Change Over Time.

Even if the concept of immutability were expanded from a trait determined by accident of birth to a trait that is firmly resistant to change, there is significant evidence that sexual orientation is more plastic than commonly supposed.[7] Changes in sexual orientation are difficult to measure because of the definitional ambiguities described above, but researchers have found that all three of the most frequently mentioned dimensions of sexual orientation – attraction, behavior, and identity – are subject to change over time. Moreover, the presence of a large bisexual population is evidence that sexual orientation is, for some people and to some extent, fluid.

Research suggests that a person's sexual orientation is not entirely fixed and may be influenced by individual preference or choice. *See* Lisa M. Diamond & Ritch C. Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women*, 56 J. Soc. Issues 297, 301 (2000) ("Contrary to the notion that most sexual minorities undergo a one-time discovery of their true identities, 50% of [a study's] respondents had changed their identity label more than once since first relinquishing their heterosexual identity."). Sexual orientation appears to be especially plastic for women. *See* Peplau et al., *Development of Sexual Orientation*, *supra*, at 93 (noting the "astonishing sexual plasticity of the human female").

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[7] Of course, the Court has never suggested such an expansive approach, which could potentially lead to dozens of new suspect classes based on personal traits or conditions that are nearly impossible to change, such as certain mental illnesses or physical disabilities. The point is that even under a more liberal approach sexual orientation would not qualify.

"Female sexual development is a potentially continuous, lifelong process in which multiple changes in sexual orientation are possible. . . . Women who have had exclusively heterosexual experiences may develop an attraction to other women, and vice versa." Garnets & Peplau, *A New Look*, *supra*, at 5. Researchers have found that "both women's identification as lesbian, bisexual, or heterosexual and women's actual behavior can vary over time." Peplau & Garnets, *A New Paradigm*, *supra*, at 333; *see also* Lisa M. Diamond, *Sexual Identity, Attractions, and Behavior Among Young Sexual-Minority Women Over a 2-Year Period*, 36 Dev. Psychol. 241, 247 (2000) ("Half of the young women . . . relinquished the first sexual-minority identity they adopted."). Indeed, a 10-year study of 79 non-heterosexual women reported that 67% changed their identity at least once and 36% changed their identity more than once. Lisa M. Diamond, *Female Bisexuality from Adolescence to Adulthood: Results from a 10-Year Longitudinal Study*, 44 Dev. Psychol. 5, 9 (2008).[8]

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[8] Professor Diamond's seminal research on the fluidity of female sexuality was summarized in a widely-praised book published by Harvard University Press. *See* Lisa M. Diamond, *Sexual Fluidity: Understanding Women's Love and Desire* 3 (2008) ("[O]ne of the fundamental, defining features of female sexuality is its *fluidity*. We are now on the brink of a revolutionary new understanding of female sexuality that has profound scientific and social implications."). Her work on the fluidity of female sexuality has been repeatedly profiled in the mainstream media. *See, e.g.*, Ian Kerner, "Understanding females' sexual fluidity," CNNHealth (Feb. 9, 2012), http://thechart.blogs.cnn.com/2012/02/

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Research also shows changes over time in the intensity of same-sex attraction. When asked to rate their attraction to members of the same sex on a scale, many individuals vary in their own estimation over time, with some becoming more "gay" and others becoming less "gay." A study of the same-sex attraction of bisexual men reported that "homosexuality is not some monolithic construct one moves toward or from in a linear way; movement toward homosexuality fails to capture the fluid and contextual nature of sexuality. We also acknowledge that changes in sexual feelings and orientation over time occur in all possible directions." Joseph P. Stokes et al, *Predictors of Movement Toward Homosexuality: A Longitudinal Study of Bisexual Men*, 43 J. Sex Res. 304, 305 (1997) (finding that 34% of respondents moved toward homosexuality, 17% moved away, and 49% did not change). A study of same-sex attraction in a New Zealand birth cohort revealed "a surprising degree of change over time. Ten percent of men, and nearly a quarter of women, reported same-sex attraction at any time, but this nearly halved for current attraction at age 26. The changes were not just in one direction." Dickson et al., *supra*, at 1613.

Extensive studies of the real-world experiences of men and women sharply rebut the notion that sexual orientation is unchanging. The Chicago Sex Survey

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09/understanding-females-sexual-fluidity/; NPR, *'Late-Life Lesbians' Reveal Fluidity Of Sexuality* (Aug. 7, 2010), http://www.npr.org/ templates/story/story.php?storyId=129050832.

found that of those who had at least one same-sex partner in the last five years, over half of the men and two-thirds of the women also had an opposite-sex partner in the same time period. Laumann et al., *supra*, at 310-11. Scholarly surveys also show that a significant portion of individuals in same-sex relationships had previously been married to someone of the opposite sex. *See, e.g.*, Gary J. Gates et al., *Marriage, Registration and Dissolution by Same-Sex Couples in the U.S.*, Williams Institute 2 (2008) (reviewing data from three states and finding that "more than one in five individuals in same-sex couples who marry or register have previously been married to a different-sex partner."); Sean Cahill et al., *Family Policy: Issues Affecting Gay, Lesbian, Bisexual and Transgender Families*, The National Gay and Lesbian Task Force Policy Institute, at 59 (2002) ("According to the 1990 U.S. Census, 31 percent of lesbians and bisexual women in same-sex relationships and 19 percent of gay or bisexual men in same-sex relationships were once married to a person of the other sex."). One researcher captured the overall direction of the scientific research when she noted that "[a]lthough some may think of sexual orientation as determined early in life and relatively unchanging from then on, growing evidence indicates that the nature of a woman's intimate relationships can change throughout her life and differ across social settings." Letitia Anne Peplau, *Rethinking Women's Sexual Orientation: An Interdisciplinary, Relationship-Focused Approach*, 8 Personal Relationships 1, 5 (2001). *See also* Herek et al., *Internalized Stigma*

Among Sexual Minority Adults, 56 J. Counseling Psychol. 32, at 37, 39 (2009) (study finding that 13% of gay men, 30% of lesbians, 41% of bisexual men, and 55% of bisexual women report "[s]ome," "fair amount," or "a lot" of choice with respect to their sexual orientation). Professor Herek, one of plaintiffs' experts in the *Hollingsworth* trial, conceded that while current sexual identity is for "betting" purposes a good predictor of future sexual behavior, "you should also realize that for some individuals that would not be the case." Trial Tr. 2211. Indeed, " 'if you are trying to predict for any specific individual whether their identity will predict their sexual behavior in the future, especially, that can be problematic.' " *Id.* at 2212 (quoting Prof. Herek's deposition testimony). One of the challenges of research in this evolving area is that, as Professor Herek further admitted, in describing changes in their own sexuality "people don't always have a knowledge of their mental processes." *Id.* at 2213.

One might defend the immutability of sexual orientation by insisting that anyone whose sexual orientation changes over time is bisexual and that bisexuality is a discrete category of sexual orientation. But lumping everyone whose behavior does change into a broad residual category conveniently manipulates theory to blot out the primary evidence that sexuality is often mutable and not an essential and fixed characteristic of human behavior. *See* Diamond, *Female Bisexuality*, *supra*, at 5, 6 ("According to an essentialist perspective, individuals are thought to be endowed with fixed, early developing sexual predispositions that manifest themselves in consistent patterns of same-sex or other-sex desire over the life course. . . . Bisexual attractions pose a quandary for this model because such attractions necessarily create the potential for change over time.").

If human sexual preference were generally fluid rather than fixed, one would expect that some individuals would fall at the tails of the bell curve where behavior, attraction, and identity remain exclusively homosexual or heterosexual, but that most would exhibit at least some variation along the sexual orientation continuum with respect to attraction, behavior, and identity. Research confirms this expectation. A recent report by the Williams Institute averaged the results of five recent population-based surveys, and found that of the 3.5% of the population identifying as LGB, over half (1.8%) identifies as bisexual. Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?*, Williams Institute 1 (2011). Above and beyond those self-reporting an LGB identity, 4.7% of the population admits to *some* same-sex sexual experience and 7.5% acknowledges *some* degree of same-sex attraction – numbers that are much higher than the population of self-identified homosexuals. *Id.*

Another recent survey confirmed the plasticity of sexual orientation by including two additional categories – "mostly heterosexual" and "mostly homosexual" – when asking participants to identify their sexual orientation. Vrangalova & Savin-Williams, *supra*, at 85. Of the 1631 participants, 14% of men and 27% of women chose one of the three non-exclusive identities (mostly heterosexual, bisexual, mostly homosexual), while only 5% of men and 2% of women chose an exclusively homosexual identity. *Id.* at 89. Less than half of those adopting an exclusive identity also reported exclusive behavior and attraction (48% of men and 39% of women). *Id.* at 94. These results suggest that sexual orientation is a fluid concept, not one that in practice denotes entirely distinct or fixed categories.

The notion that choice powerfully influences some persons' sexual orientation is highly controversial, but some studies conclude that for some women self-identity as a lesbian is experienced as a personal choice rather than an immutable constraint. Diamond & Savin-Williams, *Explaining Diversity*, *supra*, at 298 (noting that "variability in the emergence and expression of female same-sex desire during the life course is normative rather than exceptional."). Researchers Charbonneau and Lander interviewed 30 women who had spent half their lives as heterosexuals, married, had children, and then in midlife became lesbian. Some of these women explained their lesbianism as a process of self-discovery. But a "second group of women . . . regarded their change more as a choice among several options of being lesbian, bisexual, celibate or heterosexual." Karen L. Bridges & James M. Croteau, *Once-Married Lesbians: Facilitating Changing Life Patterns*, 73 J. Counseling &

Dev. 134, 135 (1994) (describing C. Charbonneau & P.S. Lander, *Redefining Sexuality: Women Becoming Lesbian in Mid-Life, in Lesbians at Mid-Life*, at 35 (B. Sang et al. eds., 1991)).

In short, scientific research on sexual identity, attraction, and behavior strongly suggests "that sexual orientation is not static and may vary throughout the course of a lifetime," especially in women. Michael R. Kauth & Seth C. Kalichman, *Sexual Orientation and Development: An Interactive Approach, in The Psychology of Sexual Orientation, Behavior, and Identity: A Handbook* 82 (Louis Diamant & Richard D. McAnulty eds., 1995). These studies show that even if the concept of immutability were extended to mean a substantial resistance to change, available evidence tends to show that sexual orientation is more plastic than commonly supposed.

CONCLUSION

Sexual orientation should not be recognized as a new suspect class. In contrast with other suspect classes, it is neither discrete (clearly definable) nor immutable. There is no scientific consensus on how to define sexual orientation, and the various definitions proposed by experts produce substantially different classes. Nor is there any convincing evidence that sexual orientation is biologically determined; rather, research tends to show that at least for some persons sexual orientation is mutable (or at least malleable) over time. These are not the characteristics of a proper suspect class.

For the foregoing reasons, the Court should conclude that classifications based on sexual orientation are not subject to heightened scrutiny.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 12-307

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR, in her capacity as Executor
of the estate of THEA CLARA SPYER, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENT WINDSOR
(Equal Protection Guarantee)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. An essential function of equal protection law is to guard against government action that subordinates historically marginalized groups 4

  A. The antisubordination principle developed as a tool to expose and invalidate the legacy of America's racial caste system 5

  B. The antisubordination principle helped to cabin the expansion of heightened scrutiny 10

II. The role of the courts is to safeguard the rights of historically subordinated groups by applying heightened scrutiny to laws, like DOMA, that disadvantage them as a class 13

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Page(s)

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 10

Anderson v. King County, 138 P.3d 963 (Wash. 2006) 13

Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) 14

Bolling v. Sharpe, 347 U.S. 497 (1954) 9

Brown v. Board of Education, 347 U.S. 483 (1954) 1, 5, 6, 9

Califano v. Webster, 430 U.S. 313 (1977) 9

Conaway v. Deane, 932 A.2d 571 (Md. 2007) 1, 13

Craig v. Boren, 429 U.S. 190 (1976) 3

Frontiero v. Richardson, 411 U.S. 677 (1973) 13, 15

Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006) 1

Hernandez v. Texas, 347 U.S. 475 (1954) 7, 10

In re Marriage Cases, 183 P.3d 384 (Cal. 2008) 1

Lawrence v. Texas, 539 U.S. 558 (2003) 12

Loving v. Virginia, 388 U.S. 1 (1967) 2, 8, 15

McLaughlin v. Florida, 379 U.S. 184 (1964) 1, 7-8

McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950) 1, 5

Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) 1, 5

Nixon v. Condon, 286 U.S. 73 (1932) 14

Oyama v. California, 332 U.S. 633 (1948) 2

Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007) 3

Pedersen v. Office of Personnel Management, 881 F. Supp. 2d 294 (D. Conn. 2012) 11

Perry v. Schwarzenegger, 591 F.3d 1147 (9th Cir. 2010) 1

Plessy v. Ferguson, 163 U.S. 537 (1896) 5, 14, 15

Romer v. Evans, 517 U.S. 620 (1996) 1, 11-12

Sipuel v. Board of Regents of the University of Oklahoma, 332 U.S. 631 (1948) 1, 5

Skinner v. Oklahoma ex rel. Williamson, 318 U.S. 535 (1942) 8

Strauder v. West Virginia, 100 U.S. 303 (1880) 7

Strauss v. Horton, 207 P.3d 48 (Cal. 2009) 1

Sweatt v. Painter, 339 U.S. 629 (1950) 1, 5-6

United States v. Carolene Products Co., 304 U.S. 144 (1938) 10, 14

United States v. Paradise, 480 U.S. 149 (1987) 10

United States v. Virginia, 518 U.S. 515 (1996) 2, 3, 5, 9

Statutes

Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7) 4, 11

Legislative Materials

H.R. Rep. No. 104-664 (1996) 14

Other Authorities

Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 Mich. L. Rev. 1363 (2011) 13

Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 Harv. L. Rev. 1470 (2004) 3

INTEREST OF AMICUS[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit legal organization that for more than seven decades has fought to enforce the guarantees of the United States Constitution against discrimination. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). LDF has sought to eradicate barriers to the full and equal enjoyment of social and political rights, including in the context of partner or spousal relationships, *see, e.g.*, *McLaughlin v. Florida*, 379 U.S. 184 (1964), and has participated as amicus curiae in cases across the nation that affect the rights of gay people, including *Romer v. Evans*, 517 U.S. 620 (1996); *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010); *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); and *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

Consistent with its opposition to all forms of discrimination, LDF has a strong interest in the fair application of the Fifth and Fourteenth Amendments to the United States Constitution, which provide important protections for all Americans, and submits that its experience and knowledge will assist the Court in this case.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of all parties.

SUMMARY OF THE ARGUMENT

To safeguard our Constitution's guarantee of equal protection, it is well-settled that courts should apply a more rigorous standard of review to government classifications that categorically exclude individuals from equal participation in our country's social and political community based solely on their status as members of a certain group. In determining the type of group-based classifications that trigger such "heightened scrutiny," this Court has focused on the need to guard against government action that intentionally relegates individual members of historically subordinated groups to an inferior social status. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 9 (1967). It is for that reason that the government bears a "heavy burden" in justifying such laws. *See id.*

Over time, this Court has expanded the application of heightened scrutiny to various groups for different reasons. In addition to classifications based on race, *see id.* at 11, the Court has applied heightened scrutiny to laws that discriminate on the basis of, among other things, national origin, *see Oyama v. California*, 332 U.S. 633, 646 (1948), and sex, *see United States v. Virginia* (*VMI*), 518 U.S. 515 (1996). This expansion of heightened scrutiny has been essential to our forward progress as a nation in eliminating entrenched discrimination. In an analogous context, Justice Kennedy has written:

> Our Nation from the inception has sought to preserve and expand the

> promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain.

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment). This case provides an important opportunity to continue our nation's tradition of rooting out injustices that inhibit equal opportunity for all Americans.

Expansion of heightened scrutiny has always involved a careful and deliberative analysis that focuses at least in part on whether the particular classification is predicated upon "social stereotypes," *Craig v. Boren*, 429 U.S. 190, 202 n.14 (1976), and/or "create[s] or perpetuate[s] the legal, social, and economic inferiority" of a group that has been subjected to sustained discrimination, *VMI*, 518 U.S. at 534. This rationale for heightened scrutiny has become known as the "antisubordination" principle.[2]

LDF writes separately in this case for two reasons. First, LDF wishes to emphasize that this antisubordination principle—which has always provided a critical justification for the role that heightened scrutiny plays in enforcing the Constitution's guarantee of equal protection—should apply with the same force against laws that unquestionably subordinate gays and lesbians, including the Defense of Marriage Act (DOMA). *See* Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7). This federal statute was explicitly fashioned to ensure that legally married gay and lesbian couples would not be afforded the same status and benefits of federal law as heterosexual married couples.

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[2] *See generally* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 Harv. L. Rev. 1470 (2004).

Second, LDF writes separately to underscore that the judiciary has a distinctive role to play in rooting out the pernicious stereotypes that motivate laws like DOMA. Of course, all government actors contribute to the vindication of the Constitution's equal protection guarantee. Yet, contrary to the claim of DOMA's proponents that application of heightened scrutiny in the circumstances at issue here would overstep the role of the courts, equal protection law endows the judicial branch with a special responsibility to safeguard historically subordinated groups, including gays and lesbians, whom the majoritarian political processes are often unwilling or unable to protect against constitutional violations.

ARGUMENT

I. An essential function of equal protection law is to guard against government action that subordinates historically marginalized groups.

A seminal role of equal protection law is to guard against government action that promotes or reinforces social hierarchy to the specific disadvantage of groups that have long been the subject of discrimination. The Court's focus on government action that perpetuates subordination is most apparent in early equal protection cases leading up to and following *Brown v. Board of Education*, 347 U.S. 483 (1954). These cases rejected state laws that subordinated African Americans as a class based on their presumed "inferiority."[3]

A. The antisubordination principle developed as a tool to expose and invalidate the legacy of America's racial caste system.

In the years before *Brown*, LDF successfully brought a series of higher education cases to dismantle the "separate but equal" doctrine, established under *Plessy v. Ferguson*, 163 U.S. 537 (1896), which consigned African Americans, by law, to an inferior social position. *See, e.g.*, *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948) (per curiam); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). In *Sweatt v. Painter*, for example, this Court in 1950 mandated that the University of Texas Law School (UT) admit Heman Sweatt, who had been rejected based solely on his "Negro" status and instead offered admission to a separate law school that Texas had created for African Americans. 339 U.S. 629, 631-32 (1950). The

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[3] The Court's more recent cases that apply heightened scrutiny do not negate this core animating principle of equal protection law. Indeed, the Court has concluded that certain government classifications should be subject to heightened scrutiny because of a concern that those classifications both reflect and reinforce social stereotypes. *See VMI*, 518 U.S. at 541 (reviewing courts should take a "hard look" at overbroad generalizations that are likely to perpetuate discrimination).

Court rejected UT's argument that the education offered Sweatt at the newly-created segregated black school was "substantially equal." *Id.* at 634. It reasoned that Sweatt's exclusion from UT denied him the "standing in the community, traditions and prestige" that were customarily accorded white students who graduated from UT. *Id.* at 634. As *Sweatt* illustrates, the Court's unmooring of the "separate but equal" doctrine reflected its evolving view that separate could never truly be equal because this doctrine was simply a state-sponsored subterfuge that had both the purpose and effect of creating and entrenching a racial caste system.

The Court's reasoning in *Sweatt*—taken together with the unmistakable impact of racial segregation on the lives of school children and indeed on the nation—crystallized fully in *Brown*. Perhaps more than any other case, *Brown* points to the role that equal protection law has played in rooting out government action that relegates historically marginalized groups to an inferior social status. Rejecting the systemic subordination of African-American children in public education under the doctrine of "separate but equal," the Court concluded that forced racial separation by law "denot[es] the inferiority of the negro group" and "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown*, 347 U.S. at 494 (internal quotation marks omitted). The Court's condemnation of both *de jure* segregation and the notion that "separate" could ever be "equal" cemented its rejection of laws that purposefully perpetuated racial subordination.

The Court also articulated this view of equal protection outside of the education context. In *Strauder v. West Virginia*, the Court struck down a state law that limited jury service to certain "white male" citizens. 100 U.S. 303, 305, 310 (1880); *see also Hernandez v. Texas*, 347 U.S. 475 (1954) (holding that jury commissioners unconstitutionally excluded persons of Mexican descent from jury service). The *Strauder* Court objected to the law on the grounds that its purpose was to "single[] out and expressly den[y] [African Americans] by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified." 100 U.S. at 308. In its categorical exclusion of African Americans from jury service, the state law "affixed . . . an assertion of their inferiority, and [served as] a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Id.* The Court focused on the demeaning and stigmatizing aspects of the law, which functioned "practically [as] a brand upon [African Americans]" and, in so doing, codified their subordinate status. *Id.*

The Court similarly applied this antisubordination principle to laws that discriminated against interracial couples. In *McLaughlin v. Florida*, the Court applied heightened scrutiny to strike down a state law that penalized the cohabitation of interracial couples, concluding that racial classifications that were designed to "single[] out the promiscuous interracial couple for special statutory treatment" were constitutionally impermissible. 379 U.S. 184, 196 (1964). The Court further observed that such laws "bear a far heavier burden of justification," *id.* at 194, and indicated its presumptive suspicion of "invidious" distinctions that "'select[] a particular race or nationality for oppressive treatment.'" *Id.* (quoting *Skinner v. Oklahoma ex rel. Williamson*, 318 U.S. 535, 541 (1942)). While not stating so explicitly, the Court's analysis reflected its underlying concern that the criminal penalty against interracial cohabitation furthered a system in which African Americans—and anyone who associated with them—were deemed to be socially inferior.

Loving v. Virginia, which followed *McLaughlin*, also illustrates this point. In *Loving*, the Court struck down Virginia's "comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages." 388 U.S. at 4. Virginia argued that the Court should "defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages" based on rational basis review. *Id.* at 8.

Importantly, this Court rejected that argument in *Loving*, finding that the apparent purpose of the statute was to "maintain White Supremacy." *Id.* at 11. As in its earlier decisions, the Court's analysis reflected its underlying concern with state measures that create and/or entrench the social subordination of groups that have been the subject of persistent discrimination. Rejecting Virginia's argument that the judgment of its legislature was owed deference, the Court concluded that Virginia failed to satisfy its "very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Id.* at 9.

Loving, like *Strauder*, *Sweatt*, *Brown*, and *McLaughlin*, illustrates this Court's repudiation under equal protection law of measures that are intended to foster a social hierarchy to the disadvantage of historically marginalized groups. Although equal protection law has evolved over time, the antisubordination principle remains at its core. *Cf. VMI*, 518 U.S. at 534 (observing that classifications may be appropriate to compensate women for past economic suffering but "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women" (citation omitted)); *Califano v. Webster*, 430 U.S. 313, 320 (1977) (approving of differing treatment of men and women "to compensate for particular economic disabilities suffered by women," but not when such treatment results from "'a traditional way of thinking about females'" (citation omitted)).[4]

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[4] Two amicus briefs filed in defense of DOMA's constitutionality contend that the states alone, and not the federal government, are subject to the Constitution's equal protection guarantee. *See* Amicus Br. of Foundation for Moral Law 7-13, Amicus Br. of Citizens United's National Committee for Family, Faith and Prayer et al. 13-15. Yet this Court has long held otherwise. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); U.S. Merits Br. 16. On the same day that the Court issued its landmark opinion in *Brown*, striking down state-sponsored racial segregation in public schools, 347 U.S. 483, it also invalidated similar policies endorsed by the federal government for the District of Columbia public schools, on the ground that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on the states. *Bolling*, 347 U.S. at 500. The Court thereafter has reaffirmed repeatedly the principle that the federal government is subject to the same antidiscrimination and antisubordination obligations that the Constitution imposes upon states. *See, e.g.*,

B. The antisubordination principle helped to cabin the expansion of heightened scrutiny.

As this Court has aptly noted, "community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection." *Hernandez*, 347 U.S. at 478; *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that the role of the courts is to safeguard "discrete and insular minorities" against discrimination by state actors). That is why heightened scrutiny has expanded over time to include other classifications that burden socially stigmatized groups.

Of course, the nature of discrimination against gays and lesbians differs fundamentally from *de jure* racial segregation, just as racial discrimination differs from discrimination based on sex and other suspect classifications to which heightened scrutiny applies. But DOMA and other laws that purposefully infringe on the rights of gay people are analogous to the racial caste system effectuated under "separate but equal" in an important respect: they create and perpetuate a social hierarchy that is premised on the superiority of one group over another.

By virtually any measure, gays and lesbians have been subjected to systemic discrimination throughout our nation's history, resulting in their ongoing

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United States v. Paradise, 480 U.S. 149, 166 n.16 (1987) (plurality opinion) ("[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth."); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995).

subordination as a class. And DOMA's express purpose is to create and perpetuate a hierarchy that disadvantages gay people based on their sexual orientation. *See Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 298-99 (D. Conn. 2012); Letter from Eric H. Holder, Jr., Attorney General, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) (J.A. 190) [hereinafter Holder Letter] ("[T]he legislative record underlying DOMA's passage . . contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate family relationships—precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.").

Section 3 of DOMA defines "marriage" as a "legal union between one man and one woman," and it defines "spouse" as "a person of the opposite sex who is a husband or a wife" for the purpose of all federal laws and regulations. 1 U.S.C. § 7. DOMA, therefore, expressly denies marital benefits under federal law to gays and lesbians who are legally married under state law, while extending these same benefits to married heterosexual couples. *See id.* By categorically excluding gay people from "more than a thousand" federal protections and obligations that come with marriage, *see* U.S. Supp. Br. App. 13a, U.S. Merits Br. 17, DOMA treats gays and lesbians as legally and socially inferior. *Cf. Romer v. Evans*, 517 U.S. 620, 631 (1996) ("Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. . . . These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.").

This exclusion is premised on stereotypes regarding the fitness of gay and lesbian partnerships, *see, e.g.*, Amicus Br. of Liberty Counsel 35-41, and moral condemnation of gay people more generally. For these reasons, DOMA is both stigmatizing and demeaning and perpetuates the historical discrimination that gay people have long suffered as a group. *Cf. Lawrence v. Texas*, 539 U.S. 558, 575-76 (2003) (observing dignity harms of state law that targets same-sex sodomy but not sodomy between people of different sexes). This scheme, like any other that demeans and denigrates an entire class of people, should be subject to heightened scrutiny, not rational basis, as the Court of Appeals correctly concluded.[5] U.S. Merits Br. 21 & n.4.

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[5] The Court of Appeals faithfully applied this Court's standard test for determining whether heightened scrutiny should apply to gays and lesbians. *See* U.S. Supp. Br. App. 15a-23a; U.S. Merits Br. 21; Windsor Merits Br. 18-31. "[T]here is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today." Holder Letter (J.A. 185); *see* U.S. Merits Br. 22-27. DOMA is but one of numerous laws that disadvantage gays and lesbians. Gays and lesbians also lack federal protection from discrimination in employment, housing, and public accommodations. In more than half of the states, gay and lesbian people lack any legal protection from discrimination in private sector employment (29 states), housing (30 states), and public accommodations (29 states). (Chauncey Aff., J.A. 376; Segura Aff., J.A. 405.) Despite these political realities, other courts have concluded that the success of gay rights advocates in securing the passage of antidiscrimination legislation in some jurisdictions bars a finding of political powerless-

DOMA's denial of marital benefits under federal law to gays and lesbians subordinates them within the institution of marriage. And like early laws that were designed to oppress African Americans, DOMA relegates gays and lesbians to an unequal and inferior status as a group. This is contrary to the core purpose of equal protection.

II. The role of the courts is to safeguard the rights of historically subordinated groups by applying heightened scrutiny to laws, like DOMA, that disadvantage them as a class.

Respondent Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) and several of its amici argue that application of heightened scrutiny to laws that discriminate against gays and lesbians subverts the democratic process by "tak[ing] issues away from" voters. BLAG Br. 22; *see also* Amicus Br. of Liberty, Life and Law Foundation et al. 2, 22; Amicus Br. of National Association of Evangelicals et al. 3, 7, 14. But the Consti-

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ness and, thus, application of strict scrutiny, *see Conaway v. Deane*, 932 A.2d 571, 611-12 (Md. 2007); *Anderson v. King Cnty.*, 138 P.3d 963, 974-75 (Wash. 2006) (en banc). This is illogical. "It hardly follows that a group is politically 'powerful' because it has achieved some success in securing legal remedies against some formal and informal discrimination that has long burdened the group." Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 Mich. L. Rev. 1363, 1393 (2011). Any meaningful analysis of political power must consider the history of discrimination that led to the need for antidiscrimination legislation in the first place, as the Court of Appeals correctly concluded. *See* U.S. Supp. Br. App. 22a (citing *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973) (plurality opinion)).

tution's guarantee of equal protection locates *in the judiciary* a special responsibility of prodding society to reexamine assumptions that are rooted in animus, bigotry, and social stereotypes that in turn entrench social caste. *See Carolene Prods.*, 304 U.S. at 152 n.4. While all branches of government have a role to play in ensuring the equal protection of the laws, the judiciary is best situated to protect subordinated groups whose rights are not always protected by majoritarian political processes. *See Nixon v. Condon*, 286 U.S. 73, 89 (1932) ("[Equal protection] lays a duty upon the court to level by its judgment these barriers . . . .").

The passage of DOMA illustrates well the need for more searching judicial review. DOMA was enacted in large measure in response to the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), which suggested that the state's ban on same-sex marriage likely violated the equal rights amendment to the Hawaii Constitution, *id.* at 67. H.R. Rep. No. 104-664, at 2 (1996). Congress's sweeping response, made explicit in the legislative record, puts gays and lesbians who choose to marry on a separate, unequal, and lesser footing than married heterosexuals and, therefore, subordinates gay people as a class. *Cf. Plessy*, 163 U.S. at 559-60 (Harlan, J., dissenting).

First, by denying federal benefits to legally married gay and lesbian couples, which are granted to otherwise similarly situated heterosexual couples, DOMA codifies a social hierarchy based on sexual orientation that has destructive social and economic consequences. Second, DOMA promotes harmful and inaccurate stereotypes of gays and lesbians as immoral and as unfit parents in ways that reinforce their status as a lesser class. *Cf. Frontiero*, 411 U.S. at 686-87 (statutory distinctions between the sexes can "have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members"); *Loving*, 388 U.S. at 11 (concluding that purpose of antimiscegenation law is to maintain "White Supremacy"); *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting) (noting that the "real meaning" of the law requiring racial segregation in public transportation was "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens").

In every sense, DOMA demeans and stigmatizes gays and lesbians generally and consigns married gay men and lesbians in particular, by operation of law, to an inferior status. Consistent with the core function of equal protection law, the application of heightened scrutiny to DOMA is crucial.[6]

The application of heightened scrutiny to degrading and oppressive laws has been instrumental in pushing past discriminatory barriers of all kinds by signaling that such laws should have no place in our society. More searching judicial review is critical to advancement of civil rights for all, and to our progress as a nation.

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[6] To be clear, DOMA could not pass constitutional muster even under a more relaxed standard of review. *See* Windsor Merits Br. 32-59.

CONCLUSION

For the foregoing reasons, as well as those outlined by the United States and Respondent Edith Schlain Windsor, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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AND
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In The
Supreme Court of the United States

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UNITED STATES,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

◆

BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF EVANGELICALS; THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE LUTHERAN CHURCH-MISSOURI SYNOD; THE ROMANIAN-AMERICAN EVANGELICAL ALLIANCE OF NORTH AMERICA; AND TRUTH IN ACTION MINISTRIES IN SUPPORT OF BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES ADDRESSING THE MERITS

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QUESTION PRESENTED

This brief addresses the following question presented:

Does Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violate the equal protection component of the Due Process Clause of the Fifth Amendment?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

- I. Rational-Basis Review Is the Proper Standard for Evaluating Legislation, Like DOMA, That Implicates Fundamental Questions of Social Values and Policy 4
- II. Moral and Religious Views Voiced in Support of DOMA Do Not Detract From Its Validity 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Alberts v. California, 354 U.S. 475 (1957) 13

Board of Educ. of Westside Cnty. Schs. (Dist. 66) v. Mergens, 496 U.S. 226 (1990) 20

Bolling v. Sharpe, 347 U.S. 497 (1954) 4

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 20

Citizens for Equal Prot. v. Bruning, 455 F.3d 859 (8th Cir. 2006) 5

City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) 6, 18

Dallas v. Stanglin, 490 U.S. 19 (1989) 18

FCC v. Beach Commc'ns, Inc., 508 U.S. 307 (1993) 18

Gonzales v. Carhart, 550 U.S. 124 (2007) 10

Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) 8, 10

Harris v. McRae, 448 U.S. 297 (1980) 19

Heller v. Doe, 509 U.S. 312 (1993) 17

High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) 5

In re Winship, 397 U.S. 358 (1970) 21

Jimenez v. Weinberger, 417 U.S. 628 (1974) 18

TABLE OF AUTHORITIES – Continued

Page

Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004) 5

Lehr v. Robertson, 463 U.S. 248 (1983) 15

Lochner v. New York, 198 U.S. 45 (1906) 6

Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004) 5, 9

Loving v. Virginia, 388 U.S. 1 (1967) 15

Massachusetts v. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012) 5

Maynard v. Hill, 125 U.S. 190 (1888) 14

McDaniel v. Paty, 435 U.S. 618 (1978) 20

McGowan v. Maryland, 366 U.S. 420 (1961) 19

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) 21

Michael H. v. Gerald D., 491 U.S. 110 (1989) 15

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 15

Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005) 8, 10

Murphy v. Ramsey, 114 U.S. 15 (1885) 8, 14

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 13

Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) 11

Rowland v. California Men's Colony, 506 U.S. 194 (1993) 8

TABLE OF AUTHORITIES – Continued

Page

Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816 (1977) 15

Standhardt v. Super. Ct., 77 P.3d 451 (Ariz. Ct. App. 2003) 9

Stenberg v. Carhart, 530 U.S. 914 (2000) 17

Turner v. Safley, 482 U.S. 78 (1987) 16

Vance v. Bradley, 440 U.S. 93 (1979) 6

Washington v. Glucksberg, 521 U.S. 702 (1997) 3

Williams v. North Carolina, 317 U.S. 287 (1942) 14

Windsor v. United States, 699 F.3d 169 (2d Cir. 2012) 4, 5

Zablocki v. Redhail, 434 U.S. 374 (1978) 15

CONSTITUTIONAL AND LEGISLATIVE MATERIALS

H.R. Rep. No. 104-664 (1996) 7, 19

Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3516 18

United Nations Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1456 10

Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) 10

Page

STATUTES

1 U.S.C. § 1 (2012) 8

1 U.S.C. § 7 (2012) 1, 2, 4, 6, 7

18 U.S.C. § 2252A (2012) 19

42 U.S.C. § 7413(a) (2012) 19

OTHER

David Hume, *A Treatise of Human Nature* (L.A. Selby-Bigge ed., 1975) 16

Edward Westermarck, *The History of Human Marriage* (1891) 9

Giambattista Vico, *The New Science* (Thomas Goddard Bergin & Max Harold Fisch trans., 1948) (3d ed. 1744) 17

John Locke, *Two Treatises of Government* (Peter Laslett ed., 1988) 16

Kenji Yoshino, *The New Equal Protection*, 122 Harv. L. Rev. 747 (2011) 5

Loren Marks, *Same-Sex Parenting and Children's Outcomes*, 41 Soc. Sci. Res. 735 (2012) 13

Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships?*, 41 Soc. Sci. Res. 752 (2012) 12

Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 Brit. J. Am. Leg. Studies 411 (2012) 9

TABLE OF AUTHORITIES – Continued

Page

Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment*, 16 Applied Developmental Sci. 98 (2012) 13

Oliver Wendell Holmes, *Collected Legal Papers* (1920) 17

Ralph Wedgwood, *The Fundamental Argument for Same-Sex Marriage*, 7 J. Pol. Phil. 225 (1999) 11

Robert F. Nagel, *Playing Defense*, 6 Wm. & Mary Bill Rts. J. 167 (1997) 17

Sherif Girgis et al., *What Is Marriage? Man and Woman: A Defense* (2012) 10

INTEREST OF *AMICI CURIAE*

The voices of tens of millions of Americans are represented in the broad cross-section of faith communities that join in this brief. Our theological perspectives, though often differing, converge to support the proposition that the traditional, opposite-sex definition of marriage in the civil law is not only constitutional but essential to the welfare of families, children, and society. Faith communities have the deepest interest in the legal definition of marriage and in the stability and vitality of that time-honored institution. We seek to be heard in the democratic and judicial forums where the fate of that foundational institution will be decided. This brief is submitted out of a shared conviction that the Fifth Amendment does not prohibit Congress from exercising its core lawmaking power to preserve the traditional definition of marriage for purposes of federal law.[1]

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SUMMARY OF ARGUMENT

This brief addresses whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 (2012)

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[1] No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution to the preparation or submission of the brief. Letters from the United States and the Bipartisan Legal Advisory Group consenting to the filing of this brief are on file with the Clerk. Written consent by Respondent Edith Windsor has been submitted with this brief.

("DOMA"),[2] violates the equal protection component of the Due Process Clause of the Fifth Amendment. We argue that it does not.

Rational basis, not heightened scrutiny, should govern this case. Fairly considered, what is at issue in DOMA is not discrimination against a discrete and insular minority needing extraordinary judicial protection from majoritarian forces, but rather a profound cultural debate over the nature and meaning of marriage.

Marriage can be conceived in very different ways. The age-old, traditional understanding conceives of marriage as a union between a man and a woman that is inherently oriented toward procreation and childrearing and in which society has a profound stake. A more recent conception views marriage as primarily a vehicle for affirming and supporting intimate adult relationship choices, a vision that is not inherently oriented toward uniting the sexes for the bearing and rearing of children. Both visions are held honestly and sincerely by well-informed, rational people of good will.

Which vision should prevail in the federal government and in the various States is a matter of spirited and legitimate debate among scholars, lawyers, judges, legislators, and of course the People. We and other religious communions are a necessary part of that democratic discussion. Faith communities are essential pieces of the social fabric that sustains our Nation's marriage culture. Our faith traditions define, explain, and nourish the institution of marriage and the couples and families whose lives in turn depend on and are defined by it. And our long experience in these matters gives us unique perspectives that are as worthy of consideration in this debate as any others. We have just as much right as anyone else to have our views considered by democratic decision makers.

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[2] Unless otherwise specified, all references herein to "DOMA" refer to Section 3 of the Defense of Marriage Act."

But that cannot properly occur if the great marriage debate is removed from our democratic institutions and decided by the judiciary under a heightened standard of review. While we certainly believe empirical evidence and sound science support our position, fundamental social questions such as the nature of marriage cannot be decided on technical grounds. They are matters of the People's values, morals, judgments, and culture – of their "history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

This is yet another reason, beyond the many provided in the brief of the Bipartisan Legal Advisory Group ("BLAG"), why rational basis is the right standard for evaluating the conflicting visions and moral claims inherent in challenges to the millennia-old definition of marriage. Only that deferential standard affords the democratic process its proper respect and place. Only that deferential standard allows all voices in this historic debate to be fairly heard.

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ARGUMENT

I. Rational-Basis Review Is the Proper Standard for Evaluating Legislation, Like DOMA, That Implicates Fundamental Questions of Social Values and Policy.

Section 3 of DOMA declares that for the limited purpose of construing federal law "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7. Respondents[3] challenged these commonplace and time-tested definitions as a violation of the Fifth Amendment's implicit guarantee of equal protection, *see Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), alleging that limiting the term "marriage" to opposite-sex couples denies same-sex couples the equal protection of the laws. The Second Circuit agreed, holding that "Section 3 of DOMA violates equal protection and is therefore unconstitutional." *Windsor v. United States*, 699 F.3d 169, 188 (2d Cir. 2012).

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[3] The unconventional alignment of parties in this case makes it necessary to clarify that the word "petitioner" refers to the Bipartisan Legal Advisory Group of the United States House of Representatives and that the word "respondents" refers to the United States and Ms. Windsor.

The decision below stands on a rickety foundation. Conceding important interests on both sides of the marriage issue, the panel majority "decline[d] to join issue with the dissent" on whether "Section 3 of DOMA may withstand rational basis review" and instead concluded that Section 3 must satisfy "heightened scrutiny," *id.* at 181, because "homosexuals compose a class that is subject to heightened scrutiny," *id.* at 185. Thus, the court created the first new protected class in 35 years. *See* Kenji Yoshino, *The New Equal Protection*, 122 Harv. L. Rev. 747, 748 (2011) (noting that "the last classification accorded heightened scrutiny by [this] Court was that based on nonmarital parentage in 1977" and that since then, "[a]t least with respect to federal equal protection jurisprudence, this canon has closed.") (footnotes omitted). At the circuit court level, this holding runs headlong into a phalanx of contrary decisions. Until the decision below, *every* federal court of appeals to address the question had concluded that sexual orientation classifications were subject only to rational-basis review.[4]

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[4] *Compare Windsor*, 699 F.3d at 185 ("homosexuals compose a class that is subject to heightened scrutiny") *with Massachusetts v. Dep't of Health & Human Servs.*, 682 F.3d 1, 9-10 (1st Cir. 2012) (applying rational basis); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) (same); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006) (same); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990) (same); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (citing

(Continued on following page)

BLAG's opening brief provides an array of convincing reasons why heightened scrutiny is plainly improper in this case. Several additional points bolster that conclusion.

1. First, this Court's heightened-scrutiny jurisprudence teaches that there is a strong presumption against new suspect classes, for courts should be "very reluctant . . . to closely scrutinize legislative choices." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985). Reserving heightened scrutiny for the adjudication of fundamental rights and already-recognized suspect classes affirms that our democratic "constitution . . . is made for people of fundamentally differing views," *Lochner v. New York*, 198 U.S. 45, 75-76 (1906) (Holmes, J., dissenting). Most often, therefore, "the appropriate method of reaching such instances [of discrimination] is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation." *City of Cleburne*, 473 U.S. at 446. Our Constitution presumes, rather, that unjust discrimination will be remedied through the ordinary democratic process. *See Vance v. Bradley*, 440 U.S. 93, 97 (1979). This Court's 35-year history of refusing to recognize new suspect classes confirms the necessity of a very cautious approach in this

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decisions from the Fourth, Sixth, Seventh, Tenth, D.C., and Federal Circuits) (same).

sensitive area. The court below erred in failing to exercise such caution.

2. That mistake led to a second, more profound error: the failure to adequately account for the role of rational-basis review in preserving the primacy of the democratic process in cases turning on fundamental issues of public policy, culture, and morality. This is a preeminent example of such a case. Rational-basis review is essential here because respondents' challenge to DOMA implicates a far-reaching debate over conflicting conceptions of marriage – our most fundamental social institution – about which reasonable people can and do disagree.

Technically, Section 3 of DOMA is unremarkable. It is merely a rule of interpretation adopted by Congress prescribing the meaning it intends to attach whenever the words "marriage" and "spouse" appear in its own statutes and in rules and regulations promulgated by federal agencies. It does not regulate marriage itself or disturb state definitions of marriage. On the contrary, a key purpose of DOMA – both Section 2 and its other provisions – is to ensure that States remain free to set their own marriage policies while also ensuring that no State may unilaterally define marriage for a sister State or for the federal government. Each jurisdiction can define marriage within its own sphere. *See, e.g.*, H.R. Rep. No. 104-664, at 6-10 (1996) ("House Report"). And the definitions DOMA prescribes would have been deemed obvious a mere 20 years ago. Moreover, in setting definitions intended to control the interpretation of federal law *en masse*, DOMA resembles the definitions of the Dictionary Act, *see* 1 U.S.C. § 1 (2012), that the Court has followed carefully to ensure adherence to congressional intent. *See, e.g.*, *Rowland v. California Men's Colony*, 506 U.S. 194, 199-201 (1993) (determining whether "person" includes associations).

But DOMA has become a major flashpoint in a monumental cultural conflict between rival conceptions of marriage. The traditional, opposite-sex conception arises from a particular vision of family and ordered liberty. It is a social institution deeply rooted in this Nation's history, culture, laws, and diverse religions that gives distinctive recognition and legal protection to male-female couples and their children. It uniquely unites a man and a woman in a legally protected bond that sustains "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony." *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885). Sex between men and women presents both a social problem and an opportunity, in that "'an orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth.'" *Morrison v. Sadler*, 821 N.E.2d 15, 25-26 (Ind. Ct. App. 2005) (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting) (citations omitted)). Traditional marriage provides that mechanism. Long experience, including our own over many decades, has taught that children thrive best when cared for at home by their biological parents, *see*

Standhardt v. Super. Ct., 77 P.3d 451, 463 (Ariz. Ct. App. 2003) (accepting as reasonable that "the children born from such [opposite-sex married] relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children"), and that "children benefit from the presence of both a father and mother in the home." *See Lofton*, 358 F.3d at 819. Traditional marriage is therefore the knot tying together a man, a woman, and their children in an institution the law uniquely supports and protects. *See also* Edward Westermarck, *The History of Human Marriage* 22 (1891) ("Marriage and family are thus intimately connected with each other: it is for the benefit of the young that male and female continue to live together.").

Thus, while acknowledging the wide variations in individual circumstances, traditional marriage supporters maintain that "[a] family headed by two married parents who are the biological mother and father of their children is the optimal arrangement for maintaining a socially stable fertility rate, rearing children, and inculcating in them the [values] requisite for politically liberal citizenship." Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 Brit. J. Am. Leg. Studies 411, 414 (2012). In our best judgment, "'a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic'" and less civil for all Americans. *Morrison*, 821 N.E.2d at 25 (quoting *Goodridge*, 798 N.E.2d at 996 (Cordy, J., dissenting)). Accordingly, the welfare of adults and especially children "makes [traditional] marriage a public good that the state should recognize and support." Sherif Girgis et al., *What Is Marriage? Man and Woman: A Defense* 3 (2012). This child-centered conception of marriage has deep roots in America's legal traditions and is fully recognized in international human rights law, which the American tradition has directly influenced. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at art. 16(1) & (3) (1948) (declaring that "[m]en and women of full age . . . have the right to marry and found a family" and "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State"); United Nations Convention on the Rights of the Child, art. 7, Nov. 20, 1989, 28 I.L.M. 1456, 1460 ("as far as possible, [a child has the right] to know and be cared for by his or her parents"); *cf. Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child."). It is eminently reasonable for defenders of traditional marriage to hold such views, and tens of millions of Americans do.

The competing vision of marriage in this debate is comparatively recent. It conceives of marriage primarily as a means of socially and legally affirming intimate adult relationships. The Ninth Circuit in the Proposition 8 case summarized the notion: "'marriage' is the name that society gives to the relationship that matters most between two adults" and "signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships." *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012). This conception emphasizes that "[t]he basic rationale for marriage lies in its serving certain legitimate and important interests of married couples." *See* Ralph Wedgwood, *The Fundamental Argument for Same-Sex Marriage*, 7 J. Pol. Phil. 225, 225 (1999). Marriage, so understood, focuses on the spouses – two adults in an intimate relationship who seek the State's authorization of that official status and the approval that comes with it.

In contrast with the traditional conception, procreation and childrearing in this vision are not central to marriage's meaning. Indeed, in a radical break from all human history, gender itself is irrelevant. What matters most is public endorsement of the adults' chosen relationship, obtaining official status for that relationship, and the official approval that comes with such endorsement and status. Even if other means exist to provide benefits and rights to same-sex couples, withholding "marriage" harms same-sex couples, it is said, because of the loss of status and dignity. *See Perry*, 671 F.3d at 1063 (Proposition 8 "lessen[s] the status and human dignity of gays and lesbians in California").

These competing visions overlap in important respects but are nevertheless in deep tension. One is inherently intergenerational; the other, primarily interpersonal. One is inherently oriented toward children's and society's needs; the other, toward the desires of the couple. Which vision of marriage will ultimately prevail legally and culturally matters profoundly because the meaning of marriage shapes and guides behavior and determines the social goods marriage produces. Marriage conceived as a 10-year union with an option for additional 10-year periods, for example, would shape behavior differently than marriage conceived as a union for life. By the same token, the differences between the traditional, dual-gendered, child-centered understanding of marriage and the genderless, adult-centered conception are profound.

3. Whether the Nation retains the traditional definition of marriage or redefines marriage to include same-sex couples is a social issue with potentially wide-ranging consequences. By their nature, such policy questions cannot be definitively answered by science, professional opinion, or legal reasoning alone. Although we are certainly persuaded by scholarly opinion supporting traditional marriage, the truth is that social science scholars, for instance, disagree about the effects of gay parenting on children.[5] Whatever the ultimate conclusions may be,

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[5] *Compare* Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships?*, 41 Soc.

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"[n]othing in the Constitution requires [government] to accept as truth the most advanced and sophisticated [scientific] opinion." *Alberts v. California*, 354 U.S. 475, 501 (1957) (Harlan, J., concurring in result). Why? In part, because such opinions are inherently tentative, especially in the social sciences where conclusions are often laden with values-based assumptions and there is no values-neutral position from which to weigh and judge what is best. But also because in a democratic society the People govern – not philosophers, scientists, or academics.

Hence, whether the Nation should redefine marriage is principally about the People's values, morals, and policy judgments. Lawmakers are entitled, in making such judgments, to "act[ ] on various unprovable assumptions," including those that in "[t]he sum of [their] experience," *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61, 63 (1973), lead them to conclude that traditional marriage and the family structure it supports deserve distinctive legal protection. "Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data." *Id.* at 63.

Sci. Res. 752, 766 (2012), *and* Loren Marks, *Same-Sex Parenting and Children's Outcomes*, 41 Soc. Sci. Res. 735, 748 (2012), *with* Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment*, 16 Applied Developmental Sci. 98, 104 (2012).

Only rational-basis review has the flexibility to account for the fact that major social policy questions – and particularly how best to define marriage – are *always and inevitably* a matter of the People's values, moral sense, history, traditions, and practices. In equal protection jurisprudence, rational-basis review is the only standard that ensures the judicial deference and restraint necessary to allow the People's reasonable judgments to govern. In adopting heightened scrutiny, the court below failed to respect this important and necessary limitation on judicial incursions into the democratic process in core public-policy matters. We urge this Court to restore that important limitation.

4. A further reason not to adopt heightened scrutiny in the context of deciding the constitutionality of the traditional definition of marriage is that the Court itself has long endorsed the strong legislative preference for man-woman marriage as the foundation of our society, describing it as "the most important relation in life, as having more to do with the morals and civilization of a people than any other institution." *Maynard v. Hill*, 125 U.S. 190, 205 (1888); *Murphy*, 114 U.S. at 44 (extolling "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony"). The Court's decisions describe traditional marriage as "an institution more basic in our civilization than any other," *Williams v. North Carolina*, 317 U.S. 287, 303 (1942), and as "a relationship having its origins entirely apart from the

power of the State." *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977). The Court has stated that "[t]he institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society." *Lehr v. Robertson*, 463 U.S. 248, 256-57 (1983) (footnotes omitted). Decision after decision by this Court affirms "the historic respect – indeed, sanctity would not be too strong a term – traditionally accorded to the relationships that develop within the unitary family." *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (plurality opinion) (footnote omitted). This Court has recognized that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) (footnotes omitted).

By contrast, the genderless, adult-centered definition of marriage favored by respondents has never received this Court's endorsement. Decisions recognizing marriage as a fundamental right under the Fourteenth Amendment Due Process Clause were premised on relationships between men and women. *See Loving v. Virginia*, 388 U.S. 1, 2 (1967) (describing the complainants as "Mildred Jeter, a Negro woman, and Richard Loving, a white man"); *Zablocki v. Redhail*, 434 U.S. 374, 379 (1978) ("[A]ppellee [Redhail] and the woman he desired to marry were expecting a child in March 1975 and wished to be lawfully married before that time."); *Turner v. Safley*, 482 U.S. 78, 82 (1987) ("generally only a pregnancy or the birth of an illegitimate child would be considered a compelling reason" to permit the marriage of inmates affected by the challenged prison regulation). Subjecting the man-woman definition of marriage to heightened scrutiny would be a sharp break from this Court's frequent expressions of support for traditional marriage and the families that arise from them.

While no level of judicial scrutiny should require justification of laws by philosophers or experts, rational-basis review affords courts wide leeway to find rationality in the opinions of learned voices that the People could have relied on in establishing the man-woman definition of marriage. They are numerous and include leading thinkers, some who influenced the Founding generation, that long ago discerned the central significance of traditional marriage to society. Hume identified marriage as "the first and original principle of human society," grounded in "that natural appetite betwixt the sexes, which unites them together, and preserves their union, till a new tye [sic] take place in their concern for their common offspring." David Hume, *A Treatise of Human Nature* 486 (L.A. Selby-Bigge ed., 1975). Locke depicted marriage as a "*Conjugal Society* . . . which unites Man and Wife in that Society, as far as may consist with Procreation and the bringing up of Children till they could shift for themselves. . . ." John Locke, *Two Treatises of Government* 322 (Peter

Laslett ed., 1988). *See also* Giambattista Vico, *The New Science* 7 (Thomas Goddard Bergin & Max Harold Fisch trans., 1948) (3d ed. 1744) (marriage is "the seed-plot of the family, as the family is the seed-plot of the commonwealth"). Nearer our own time, Justice Holmes discerned that marriage – "some form of permanent association between the sexes" – qualifies as one of the "necessary elements in any society that may spring from our own and that would seem to us to be civilized." Oliver Wendell Holmes, *Natural Law, in Collected Legal Papers* 312 (1920).

5. In sum, far from being subject to heightened scrutiny for trenching on a suspect classification, the venerable opposite-sex definition of marriage is entitled to a "strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993) (citations omitted); *see also Stenberg v. Carhart*, 530 U.S. 914, 977 (2000) (Kennedy, J., dissenting) (charging the majority with neglecting its "obligation to interpret the law in a manner to validate it, not render it void"). Given that presumption, the Court should construe DOMA as a rational preference for the tried and familiar over the untried and novel. *See* Robert F. Nagel, *Playing Defense*, 6 Wm. & Mary Bill Rts. J. 167, 188 (1997) ("[T]here is nothing necessarily unenlightened about attempting to protect what has been of value in the past."). The common sense judgments of the People – deeply rooted in their history, traditions, morals, laws, practices, common experiences, and sense of identity – that mark traditional marriage for distinctive protection furnish a "reasonably conceivable

state of facts that could provide a rational basis" for distinguishing between opposite-sex and same-sex couples. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

The Equal Protection Clause requires no more. Congress's decision in DOMA to adopt the traditional definition of marriage as the rule of interpretation for federal law is, at a bare minimum, eminently debatable. It reflects a legitimate conflict that divides reasonable people of good will. From their kitchen tables to the halls of Congress, Americans are discussing, debating, compromising, and deciding how to address the needs and claims of same-sex couples; DOMA itself may be revised or repealed as part of that discussion, much as occurred recently with the military's "Don't Ask, Don't Tell" policy. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3516. But as long as Congress's choice remains debatable, as it surely is here, the Court should be "very reluctant" to displace it by applying heightened scrutiny. *City of Cleburne*, 473 U.S. at 441. Rational basis scrutiny should apply.

It would be startling indeed for DOMA – a law enacted just a few years ago with the overwhelming support of Congress and the President – to falter under that "most relaxed and tolerant form of judicial scrutiny" for equal protection claims. *Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). It appears that not since *Jimenez v. Weinberger*, 417 U.S. 628 (1974), has the Court invalidated an Act of Congress for failing rational basis, and nothing about DOMA makes it a candidate to join that small and discredited catalog of laws.

II. Moral and Religious Views Voiced in Support of DOMA Do Not Detract From Its Validity.

Congress identified four "governmental interests" served by DOMA, among them was "defending traditional notions of morality" – a recognition that "[f]or many Americans, there is to this issue of marriage an overtly moral or religious aspect that cannot be divorced from the practicalities." House Report at 12, 15. Although some suggest otherwise, that expressed purpose of Congress is not constitutionally disqualifying in the least.

No principle of constitutional law prevents Congress from exercising its lawmaking power to protect a valued moral norm within its own sphere of authority. To the contrary, many congressional enactments reflect unmistakable moral and value choices. *See, e.g.*, 18 U.S.C. § 2252A (2012) (punishing involvement in child pornography); 42 U.S.C. § 7413(a) (2012) (explaining federal enforcement practices for the Clean Air Act). Certainly, it is axiomatic that no law is invalid when it "merely happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). Sunday closing laws and abortion funding restrictions have been upheld on this principle, *see id.*; *Harris v.*

McRae, 448 U.S. 297, 319-20 (1980), and there is no reason why it does not sustain DOMA too.

More fundamentally, declaring DOMA void because it adheres to traditional moral and religious beliefs would fly in the face of this Court's teaching that the Constitution "does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Board of Educ. of Westside Cnty. Schs. (Dist. 66) v. Mergens,* 496 U.S. 226, 248 (1990) (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)). Religious Americans and their faith communities do not participate in the national debate over same-sex marriage out of official sufferance: "no less than members of any other group, [they] enjoy the full measure of protection afforded speech, association, and political activity generally." *McDaniel*, 435 U.S. at 641. Subjecting DOMA to unusual constitutional scrutiny because of its affiliation with traditional morality would raise First Amendment concerns.

Increased scrutiny could be regarded as a "religious gerrymander," indirectly "regulat[ing] . . . conduct [here, political participation] because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (Kennedy, J.) (citations omitted). By scrutinizing a law reflecting, in part, religious values more severely than others, courts would effectively target such beliefs or religious support for unusual burdens or penalties.

Increased scrutiny could also result in the disenfranchisement, or at least vote dilution, of religious voters. Every American holds the "hard-won right to vote one's conscience without fear of retaliation," ***McIntyre v. Ohio Elections Comm'n***, 514 U.S. 334, 343 (1995), behind which lies "perhaps the most fundamental individual liberty of our people – the right of each [person] to participate in the self-government of his society." ***In re Winship***, 397 U.S. 358, 385 (1970) (Black, J., dissenting). That taproot of American citizenship would be damaged if votes cast by the religious – or by their representatives when influenced by religious values – were evaluated more critically by courts than other votes. In such situations, invalidating votes *post hoc* poses no less a burden on the franchise than barriers at a polling station.

DOMA is entitled to be judged on its merits according to settled rules of law – not on a more demanding standard born of suspicion toward religion, religious believers, or their values.

◆

CONCLUSION

The judgment of the U.S. Court of Appeals for the Second Circuit should be reversed.

January 29, 2013

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AMICUS
CURIAE
BRIEF

No. 12-307

IN THE
SUPREME COURT OF THE UNITED STATES

REPRINTED COPY

UNITED STATES,

Petitioners,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF NATIONAL ORGANIZATION FOR MARRIAGE ON THE MERITS IN SUPPORT OF RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP

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QUESTIONS PRESENTED

1. Whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT............................ 1

ARGUMENT 4

I. The Defense of Marriage Act is entirely consistent with longstanding precedent in which Congress defines terms, including terms related to domestic relations and marriage, used in federal law. 4

  A. Congress has a duty to establish a definition of marriage for federal statutes, and DOMA neither commandeers state governments nor dictates the internal operations of state governments. 6

  B. Historical precedent and current practice show that Congress has always been free to define terms as used in federal statutes, even in areas related to marriage and domestic relations. 7

C. The federal government's significant involvement in defining marriage for federal law purposes extends back to the Nineteenth Century and was approved by this Court.......... 20

II. Efforts to distinguish prior congressional actions defining domestic relations terms for federal purposes are unavailing.......... 23

III. The analysis of the court below, if applied in other contexts, would dramatically alter state and federal relations.......... 25

CONCLUSION.......... 27

TABLE OF AUTHORITIES

Cases

Adams v. Howerton, 673 F.2d 1036, 1040–41 (9th Cir. 1994) 12
Astrue v. Capato, 566 U.S. __ (2012).......... 9, 10, 11
Boggs v. Boggs, 520 U.S. 833, 854 (1997) 15
De Sylva v. Ballentine, 351 U.S. 570, 582 (1956) ... 17
Egelhoff v. Egelhoff, 532 U.S. 141, 143 (2001)........ 15
Garcia-Jaramillo v. INS, 604 F.2d 1236, 1238 (9th Cir. 1979) 12
Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979). 15, 27
In re Appeal of O'Rourke, 310 Minn. 373, 246 N.W.2d 461, 462 (Minn. 1976) 12
Kleinfield v. Veruki, 173 Va. App. 183, 372 S.E.2d 407, 410 (Va. Ct. App. 1988) 12
Lutwak v. United States, 344 U.S. 604, 611 (1953) 12
Mansell v. Mansell, 490 U.S. 581, 594–95 (1989)... 14
Massachusetts v. Department of Health and Human Services, 682 F.2d 1, 12 (1st Cir. 2012) 6, 12, 25
Massachusetts v. Department of Health and Human Services, 682 F.3d 1, 12 (1st Cir. 2012). 7
McCarty v. McCarty, 453 U.S. 210, 232–33, 236 (1981) 14, 27
McCune v. Essig, 199 U.S. 382 (1905).......... 13
Nihiser v. Comm'r, 95 T.C.M. (CCH) 1531 (2008).. 18
Perkins v. Comm'r, 95 T.C.M (CCH) 1165 (2008)... 18
Proctor v. Comm'r, 129 T.C. 92 (2007) 18
Reynolds v. United States, 98 U.S. 145 (1878) 22
Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984).......... 17
Stout v. Prussel, 691 F.2d 859, 861 (9th Cir. 1982) 17
United States v. Jordan, 30 C.M.R. 424, 429–30 (1960) 14

United States v. Richardson, 4 C.M.R. 150, 158–59 (1952) 14

United States v. Rohrbaugh, 2 C.M.R. 756, 758 (1952) 14

United States v. Sacco, 428 F.2d 264, 267–68 (9th Cir. 1970) 12

Windsor v. United States, 699 F.3d 169, 186 (2nd Cir. 2012) 4, 5, 9

Windsor v. United States, 833 F.Supp.2d 394, 405 (S.D. N.Y. 2012) 4, 9, 24

Wissner v. Wissner, 338 U.S. 655, 658 (1950) 15

Yiatchos v. Yiatchos, 376 U.S. 306, 309 (1964) 15

Statutes

10 U.S.C. §1408 14

24 Stat. 635 (1887) 20

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Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (1831) 17

Act of July 4, 1836, ch. 362, 5 Stat. 127, 127–28 (1836) 13

Act of June 27, 1890, ch. 634, 26 Stat. 182, 182–83 (1890) 14

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Naturalization Act of 1802, 2 Stat. 153 (1802) 11

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Census Bureau Urges Same-Sex Couples to be Counted, USA Today, April 6, 2010 16

Census to Recognize Same-Sex Marriages in '10 Count, N.Y. Times, June 21, 2009......................... 16

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Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue*, 42 Fam. L.Q. 713, 713, 751 (2009).. 9

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Rev. Rul. 76-255, 1976-2 C.B. 40............................... 18

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massachusetts-supreme-court-opinions-columnists-richard-a-epstein.html 25

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INTEREST OF *AMICUS CURIAE*[1]

The National Organization for Marriage (NOM) is a nationwide, non-profit organization with a mission to protect marriage and the faith communities that sustain it. NOM was formed in response to the need for an organized opposition to redefining marriage in state legislatures and it serves as a national resource for marriage-related initiatives at the local, state and national level. The *Washington Post* described NOM as "the preeminent organization dedicated" to preserving the definition of marriage as the union of a husband and wife.[2] The outcome of this litigation will impact NOM's ability to pursue its mission nationally.

SUMMARY OF THE ARGUMENT

In this case Plaintiffs have proposed, and the court below seems to have partially accepted a legal theory that would turn the principle of federalism on its head by creating a reverse Supremacy Clause whereby the states can dictate to the national government the meaning of terms used in federal law. This theory conflicts with past precedent and current practice.

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[1] Letters of consent have been filed with the Clerk. *Amicus curiae* also represents that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Monica Hesse, *Opposing Gay Unions With Sanity and a Smile* WASHINGTON POST, Aug. 28, 2009, at C01.

The Defense of Marriage Act provides that when the term "marriage" and its variants are used in federal law they will be interpreted to refer only to the union of a husband and wife. The specific definition does not include unions of two men or two women or of an individual with more than one other person. It preserves the traditional authority of Congress to determine the appropriate interpretation of federal statutes, so that federal law is enacted and federal monies disbursed by the representatives of the people elected for that purpose rather than by the judges or legislators of one state. It prevents a patchwork application of the law where federal statutes apply differently to residents of different states, based not on Congress' intent but on the idiosyncratic definitions favored by state officials.

Perhaps more important is reiterating what DOMA does not do. It does not regulate who may marry in the various states, it creates no mandate that the states define marriage in any particular way for state law purposes. It does not affect the licensing, solemnization, incidents or dissolution of marriage. It does not change the way Congress has treated state marriage definitions that conflict with clear federal policies. It does not "commandeer" state authority for federal purposes.

This Court has recognized Congress' authority to define terms used in federal law consistently and recently. In fact, there is a longstanding practice of Congress creating employing definitions of terms in federal law, rather than invariably relying on state definitions of those terms over the history of the Republic. It has covered a broad subject matter including immigration, land grants, military benefits, pension regulations, the census, copyrights, bankruptcy and taxation. These discrepancies are also part of current practice.

Interestingly, in 2011 and 2012, one of the public policy organizations bringing this case publicly supported federal legislation that would in one case define marriage for federal purposes and, in another, create a new marriage-like legal status in federal law. This suggests that what they and other opponents of DOMA find offensive is not the consistent practice of Congress defining the terms it uses in the law but rather the definition chosen in this instance. That is an objection appropriately lodged with Congress itself rather than the federal courts.

The lower courts in this case (and similar challenges to DOMA) appear to be confused about the distinction between the common, though not invariable, practice of Congress employing state marriage definitions in federal law on the one hand, and a constitutional mandate to do so in every instance, on the other.

This Court should correct that confusion and uphold the longstanding Congressional practice of defining the terms it uses when it enacts law.

ARGUMENT

I. The Defense of Marriage Act is entirely consistent with longstanding precedent in which Congress defines terms, including terms related to domestic relations and marriage, used in federal law.

The panel below found that the Defense of Marriage Act (DOMA) is an "unprecedented intrusion" into an area of law traditionally governed by state law and called DOMA "an unprecedented breach of longstanding deference to federalism."[3] This finding echoed the District Court conclusion that "DOMA operates to reexamine the states' decisions concerning same-sex marriage. It sanctions some of the decisions and rejects others. But such a sweeping federal review in this arena does not square with our federalist system of government, which places matters at the 'core' of the domestic relations law exclusively within the province of the states."[4]

At the outset, it should be noted that these descriptions of the effect of DOMA bear no relation to the actual statute. When DOMA was enacted in 1996, no state had redefined marriage to include same-sex unions, so Congress could hardly have meant to "reexamine" non-existent same-sex marriage laws. Similarly, although a number of states have redefined marriage since its passage, DOMA does not require any examination or "intrusion" into those state definitions. Rather, it avoids doing so by enacting a simple statement of the how the term "marriage" will be used in federal statutes, regardless of the variety of state definitions that might be enacted.

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[3] *Windsor v. United States*, 699 F.3d 169, 186 (2nd Cir. 2012).

[4] *Windsor v. United States*, 833 F.Supp.2d 394, 405 (S.D. N.Y. 2012).

While it is true that Congress *may* adopt state classifications for purposes of federal law, it is under no compulsion to do so.[5] Whatever the origin for the lower courts' misunderstanding of DOMA and the notion of federalism, their holdings turn the principle of federalism on its head. Rather than protecting against federal usurpation of powers reserved to the states, the rulings below would allow each state to impose its own definition of marriage on the federal government in a sort of reverse Supremacy Clause.

Plaintiff offers no other example where such a reverse Tenth Amendment analysis has been applied, forcing Congress to adopt state classifications for purposes of federal statutes. The District Court wrongly characterized DOMA as "a radical departure from the tradition of federalism in the area of domestic relations," but it is the court's suggestion that states can impose their idiosyncratic definitions of legal terms in the interpretation of federal statutes, even when contrary to the explicit intention of Congress, that departs from our federalist tradition.

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[5] *See Windsor*, 699 F.3d at 205 (J. Straub, dissenting) ("Congress may . . borrow definitions from state law, but Windsor is incorrect to suggest that it is required to do so or is irrational when it does not."")

A. Congress has a duty to establish a definition of marriage for federal statutes, and DOMA neither commandeers state governments nor dictates the internal operations of state governments.

Like every branch of government, Congress may not act outside the bounds of its constitutionally granted powers. Thus, Congress is unable "to commandeer state governments or otherwise directly dictate the *internal operations* of state government" and must ensure "conditions on federal funds" are "related to a federal purpose."[6]

But DOMA easily satisfies these two conditions. As a panel of the First Circuit has recently held:

> Congress surely has an interest in who counts as married. The statutes and programs that section 3 governs are federal regimes such as social security, the Internal Revenue Code and medical insurance for federal workers; and their benefit structure requires deciding who is married to whom. That Congress has traditionally looked to state law to

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[6] *Massachusetts v. Department of Health and Human Services*, 682 F.2d 1, 12 (1st Cir. 2012) (*citing Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992); *South Dakota v. Dole*, 483 U.S. 203 (1987)) (emphasis in original).

> determine the answer does not mean that the Tenth Amendment or Spending Clause requires it to do so.[7]

The First Circuit further explained that the impugned section of DOMA "governs only federal programs and funding, and does not share these two vices of commandeering or direct command."[8]

In enacting DOMA, Congress has not infringed upon the powers of any state to regulate matters of family law. Indeed, since DOMA was adopted, a handful of states have adopted definitions of marriage that differ from the definition in DOMA.[9]

B. Historical precedent and current practice show that Congress has always been free to define terms as used in federal statutes, even in areas related to marriage and domestic relations.

Tellingly, Plaintiff has not suggested that Congress lacks authority to legislate in the subject matter areas impacted by DOMA (e.g., taxation, immigration, etc.). Instead, they have argued that when regulating in these areas, Congress must defer to each state when touching on matters that also involve marriage or domestic relations.

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[7] *Massachusetts v. Department of Health and Human Services*, 682 F.3d 1, 12 (1st Cir. 2012).

[8] *Id.* As discussed below, the First Circuit panel ultimately created an unprecedented and mistaken legal rule in holding that DOMA was unconstitutional. Yet in doing so, it properly and squarely rejected the reasoning of the courts below regarding Congress' ability to define terms used in federal law.

[9] Maine (2012 Question 1); Maryland (2012 House Bill 438); New York (N.Y. Dom. Rel. §10-A); New Hampshire (N.H. Rev. St. Ann. §457:1-a); Vermont (15 Vt. Stat. Ann. §8); Washington (2012 Senate Bill 6239).

Thus, under the analysis adopted by the courts below, Congress may unquestionably legislate in the area of taxation, but must defer to each state in determining who is permitted to file a joint return. Or Congress may regulate immigration status, but must defer to individual state marriage laws in determining whether to grant certain visa or citizenship applications.

Even apart from the patchwork effect this rule would create (in which federal statutes are applied differently to residents of different states), and the potential conflict created in matters involving more than one state, such a rule is patently indefensible in light of history and legal precedent.[10]

In this regard, the courts below were simply incorrect in asserting that DOMA is an unprecedented inroad into an area of domestic relations law.[11] While DOMA may have been the first time in which Congress adopted a single definition of marriage applicable to all federal statutes, Congress has long defined marriage for purposes of federal statutes, even when such definitions conflicted with applicable state law.

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[10] *See* Jill E. Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 884, 891-892 (2004) (arguing that "federal constitutional requirements make federal family law inevitable," finding attempts to counter federal involvement in family law matters simply by invoking the talisman of ostensibly local exclusivity "logically unconvincing," and noting that "the legitimacy of . . . DOMA . . . or other federal statutes cannot be logically undermined simply by identifying the statutes as forms of family law [because] [e]ven if these statutes are instances of federal family law, federal laws and constitutional decisions have long regulated family relationships, rights, and responsibilities").

Specifically relevant here, there has never been a special carve-out that requires Congress to defer to state laws on domestic relations and marriage when federal statutes intersect with them. To announce such a carve-out now would be to radically transform the jurisprudence of federalism that has properly prevailed for over two centuries, at a time when the intersection between federal and state laws on domestic relations has dramatically increased.[12]

This Court's recent unanimous decision in *Astrue v. Capato*[13], which addressed Congress' intended definition of a surviving child for purposes of survivor benefits under the Social Security Act, provides no support for Plaintiff's novel approach, which is without warrant in law or past practice

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[11] *Windsor v. United States*, 699 F.3d 169, 185-186 (2nd Cir. 2012); *Windsor v. United States*, 833 F.Supp.2d 394, 405-406 (S.D. N.Y. 2012).

[12] Professors Linda Elrod and Robert Spector have noted that as family mobility has increased, "the federal government has been asked to enact laws in numerous areas that traditionally were left to the states, such as child support, domestic violence, and division of pension plans," which has led to an "explosion of federal laws, uniform laws, and cases interpreting them." Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue*, 42 FAM. L.Q. 713, 713 (2009).

[13] 566 U.S. __ (2012), slip op.

Indeed, the notion that Congress must reflexively, and categorically, defer to the states whenever a domestic relations matter is involved is belied by *Astrue*. If the rule proposed by the court below were actually the law, *Astrue* would have been a very simple decision—the Court would have had to apply state law because the question of parentage is a domestic relations matter. While the Court did ultimately apply a state law definition in *Astrue*, that result was not compelled by the Constitution, but rather it *was what Congress intended.*[14]

In affirming Congressional intent, however, the Court also noted that other sections of the Social Security Act have different federal standards for determining the meaning of "child" under the Act.[15] In fact, the Social Security Administration's regulations would allow a child to receive benefits if the child is the biological offspring of the insured person and the parents "'went through a ceremony which would have resulted in a valid marriage between them except for a legal impediment,'" thus implying a broader federal definition of marriage than state law.[16] The Court also noted provisions in the Act that are independent of state law, such as "duration-of-relationship limitations," remarking that "[t]ime limits also qualify the statutes of several

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[14] Slip op. at 11 (noting that the relevant statutory language "directs that, '*for purposes of this subchapter*,' the law of the insured's domicile determines whether '[the] applicant and [the] insured individual were validly married,' and if they were not, whether the applicant would nevertheless have 'the same status' as a wife under the State's intestacy law.").

[15] *Id.* at 5-6.

[16] *Id.* at 6 (quoting 20 CFR §404.355(a)).

States that accord inheritance rights to posthumously conceived children."[17]

Congressional enactments of laws relating to domestic relations, and marriage in particular, have a long history and are clearly part of current practice. Put simply, "[t]he attempt to conclude that, constitutionally and historically, only the states have had and exercised the power to define marriage--and that their definitions have always been, and constitutionally must be, adopted by and incorporated into federal law for purposes of federal programs--is completely wrong as a matter of legal history and constitutional principle."[18]

What follows is not an exhaustive list but one that is ample for purposes of illustrating that the assertions of the courts below are inconsistent with past precedent and practice.[19] In particular, these examples show that (a) Congress has adopted definitions relating to domestic relations since the earliest days of the United States, and (b) such definitions have routinely been upheld even when conflicting with applicable state law.

Immigration. Dating back to the Naturalization Act of 1802, federal law provided that children of parents who have been naturalized will automatically become citizens unless their fathers were not naturalized.[20] An 1855 immigration law allowed citizenship to women who married citizens and to children of citizens.[21] Current immigration law continues to impose a definition of marriage which may conflict with state law.[22] For example, the Immigration and Naturalization Act provides that marriages contracted for the purpose of gaining preferential immigration status are not valid for federal law purposes,[23] even though some states may recognize those marriages as valid or voidable.[24] To defer to state law on marriage for immigration purposes would allow one state to circumvent the entire federal policy.[25]

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[17] *Id.* at 12.

[18] Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution* 58 DRAKE L. REV. 951, 968 (2010).

[19] For a fuller account of the relevant precedent, *see* id.

[20] 2 Stat. 155 (April 14, 1802).

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[21] 10 Stat. 604 (February 10, 1855).

[22] *See* 8 U.S.C. §1186a(b)(A)(i) cited in *Massachusetts v. Department of Health and Human Services*, 682 F.3d 1, 12 (1st Cir. 2012).

[23] *See* 8 U.S.C. § 1154(a)(2)(A) (2006); 8 U.S.C. § 1255(e).

[24] *See In re Appeal of O'Rourke*, 310 Minn. 373, 246 N.W.2d 461, 462 (Minn. 1976); *Kleinfield v. Veruki*, 173 Va. App. 183, 372 S.E.2d 407, 410 (Va. Ct. App. 1988); *Lutwak v. United States*, 344 U.S. 604, 611-613 (1953); *id.* at 620–21 (Jackson, J., dissenting); *see also Adams v. Howerton*, 673 F.2d 1036, 1040–41 (9th Cir. 1982) (even if same-sex marriage was valid under state law, it did not count as a marriage for federal immigration law purposes); *Garcia-Jaramillo v. INS*, 604 F.2d 1236, 1238 (9th Cir. 1979) (argument that validity of marriage under federal law is "frivolous" because INS can make independent inquiry into validity of marriage law for immigration purposes); *United States v. Sacco*, 428 F.2d 264, 267–68 (9th Cir. 1970) (ruling, inter alia, that a bigamous marriage did not count as a marriage for federal law purposes).

[25] Indeed, even proponents of same-sex marriage agree that immigration laws readily demonstrate that invalidating DOMA based upon the states' ostensibly exclusive role in defining marriage is unsound. *See* Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 Drake L. Rev. 923, 926 (2010) (discussing the district court's decision in *Mass. v. U.S. Dep't of Health & Human Servs.*, 698 F.Supp.2d 234 (D. Mass. 2010), and concluding that the argument that DOMA unconstitutionally

Land Grants. In 1803, Congress provided that homestead land south of Tennessee would be given only to heads of families or individuals over 21.[26] An 1804 law protected the land interest of "an actual settler on the lands so granted, for himself, and for his wife and family."[27] The Homestead Act of 1862 specified that grants would be limited to "any person who is the head of a family, or who has arrived at the age of twenty-one years."[28] Applying this statute, in 1905 this Court resolved a land grant dispute brought by a daughter against her mother and stepfather.[29] The daughter argued that state inheritance law should be applied to provide her an interest in the property, but the Court ruled that "the words of the [federal Homestead Act] statute are clear," rejecting the daughter's claim that state law, rather than federal, should govern the definition of "head of a family" as used in the Homestead Act.[30]

Military Benefits. In 1836, Congress enacted legislation bolstering pensions awarded to widows of Revolutionary War soldiers.[31] The 1890 Dependent

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intrudes on traditional government functions is "silly and potentially mischievous," because it implies that "whenever a federal law uses the word 'marriage' to define the scope of some federal program, it is obligated to follow state law," an implication that is flatly refuted by the "obvious counterexample [of] immigration").

[26] 2 Stat. 229 (March 3, 1803).

[27] 2 Stat. 283 (March 26, 1804).

[28] 12 Stat. 392 (May 20, 1862).

[29] *McCune v. Essig*, 199 U.S. 382 (1905).

[30] *Id.* at 389.

[31] 5 Stat. 127 (July 4, 1836).

and Disability Pension Act also provided money for widows and other family members of veterans.[32] Federal courts interpreting military benefits and other military laws have used federal interpretations of the term "family," even at times where the definitions did not accord with state law.[33] This Court has noted, for instance, that the Uniformed Services Former Spouses' Protection Act[34] is an example "where Congress has directly and specifically legislated in the area of domestic relations."[35] The Court held that a claim for military retirement pay was governed by the Act and not by state community property law.[36]

Federal Pension Regulations. The federal Employment Retirement and Income Security Act (ERISA) and other federal pension laws have consistently been held to control the marital incidents of pensions.[37] For example, in 1997 this Court held that ERISA controlled the distribution of a retirement pension in preemption of Louisiana community property law.[38] Similarly, in 2001 this Court found that ERISA preempted a Washington statute (to the extent it applied to ERISA plans) which provided that "the designation of a spouse as the beneficiary of a nonprobate estate [was] revoked automatically upon divorce."[39] In so doing this Court noted that it has "not hesitated to find state family law pre-empted when it conflicts with ERISA or relates to ERISA plans."[40]

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[32] 26 Stat. 182 (June 27, 1890).

[33] *See United States v. Jordan*, 30 C.M.R. 424, 429–30 (1960) (finding that the military could limit the defendant's right to marry abroad because of special military concerns); *United States v. Richardson*, 4 C.M.R. 150, 158–59 (1952) (holding a marriage valid for purposes of military discipline, although it would have been invalid in the state where the marriage began); *United States v. Rohrbaugh*, 2 C.M.R. 756, 758 (1952) (noting, *inter alia*, that common law marriages are specifically recognized in "a variety of matters"); *McCarty v. McCarty*, 453 U.S. 210, 232–33, 236 (1981), *superseded by* Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 718 (1982) (codified as amended at 10 U.S.C. § 1408 (2006)) (military retirement pay governed by federal law, not community property law)).

[34] 10 U.S.C. §1408.

[35] *Mansell v. Mansell*, 490 U.S. 581, 587 (1989).

[36] *Id.*

Census. In the instructions to marshals for the 1850 Census, Congress included a definition of family:

> By the term family is meant, either one person living separately in a house, or a part of a house, and providing for him or herself, or several persons living together in a house, or in part of a house, upon one common means of support, and separately from others in similar circumstances. A widow living

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[37] *See e.g., Hisquierdo v. Hisquierdo*, 439 U.S. 572 at 582 & 590 (1979) (railroad retirement assets governed by federal law, not community property law); *Yiatchos v. Yiatchos*, 376 U.S. 306, 309 (1964) (United States Savings Bonds governed by federal law, not community property law, unless fraud involved); *Wissner v. Wissner*, 338 U.S. 655, 658 (1950) (National Service Life Insurance Act governs beneficiary of policy, not community property laws).

[38] *Boggs v. Boggs*, 520 U.S. 833, 853-854 (1997).

[39] *Egelhoff v. Egelhoff*, 532 U.S. 141, 143 (2001).

[40] *Id.* at 151.

> alone and separately providing for herself, or 200 individuals living together and provided for by a common head, should each be numbered as one family. The resident inmates of a hotel, jail, garrison, hospital, an asylum, or other similar institution, should be reckoned as one family.[41]

The 2010 Census included same-sex marriages for the first time in its count of marriages.[42] In doing so, rather than deferring to the law of the state of residence, the Census counted same-sex couples as married if they had been validly married in any state, even though that marriage may not be valid under the law of their home state.[43] This "reflect[s] a new federal policy decision regarding the definition of marriage for purposes of a particular program or activity."[44]

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[41] U.S. CENSUS BUREAU, MEASURING AMERICA: THE DECENNIAL CENSUS FROM 1790 TO 2000, at 9 (2002), *available at* http://www.census.gov/prod/2002pubs/pol02marv-pt2.pdf.

[42] *Census to Recognize Same-Sex Marriages in '10 Count*, N.Y. TIMES, June 21, 2009, *available at* http://www.nytimes.com/2009/06/21/us/21census.html?_r=1; *Census Bureau Urges Same-Sex Couples to be Counted*, USA TODAY, April 6, 2010, *available at* http://www.usatoday.com/news/nation/census/2010-04-05-census-gays_N.htm.

[43] *See* General Counsel of the U.S. Department of Commerce, *Collecting and Reporting Census Data Relating to Same-Sex Marriages* July 30, 2009; U.S. Census Bureau, *A Census That Reflects America's Population* at http://www.washingtonpost.com/wp-srv/nation/documents/same_sex_talking_points.pdf.

Copyright. In 1831, Congress enacted a law allowing a child or widow to inherit a copyright.[45] In 1956, this Court issued a decision, *DeSylva v. Ballentine*, holding that, in the absence of a federal definition, state law controlled the question of who counted as a child for copyright law.[46] In 1978, however, Congress effectively reversed this decision by enacting a definition of "child" to include a "person's immediate offspring, whether legitimate or not, and any children legally adopted by that person" so as to ensure that – regardless of state law – copyright law would not exclude illegitimate children.[47]

Bankruptcy. Bankruptcy law determines the meaning of alimony, support and spousal maintenance using federal law rather than state law.[48] This has been recognized in multiple federal court decisions.[49]

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[44] Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution* 58 DRAKE L. REV. 951, 979 (2010).

[45] 4 Stat. 436 (February 3, 1831).

[46] *De Sylva v. Ballentine*, 351 U.S. 570, 582 (1956).

[47] 17 U.S.C. § 101.

[48] H.R. REP. NO. 95-595, at 364 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320.

[49] *Shaver v. Shaver*, 736 F.2d 1314, 1316 (9th Cir. 1984) (bankruptcy courts look to federal—not state—law to determine whether obligation is in the nature of alimony, maintenance or support); *Stout v. Prussel*, 691 F.2d 859, 861 (9th Cir. 1982).

Taxation. Federal tax law considers a couple that is married under state law but legally separated as unmarried for tax purposes.[50] A couple who consistently divorces at the end of the year to obtain single status for tax filing could be considered unmarried for state purposes but married for purposes of federal tax law.[51]

In sum, as these compelling and multifarious examples show, it is beyond cavil that Congress has the exclusive prerogative to define terms used in federal law and that this prerogative undoubtedly extends to laws implicating domestic relations and marriage. This near truism, although vociferously and conveniently opposed by Plaintiff here, has actually been embraced in previous bills proposed by proponents of same-sex marriage. At least two of these bills, which would legislatively accomplish Plaintiff's objectives here, are predicated upon the central belief that Congress emphatically *does* have a role to play in marriage and domestic relations. The proposed Domestic Partnership Benefits and Obligations Act, S.1910, would provide government benefits to registered domestic partners (including married same-sex partners) of government employees that are equivalent to those given to spouses of employees. The proposed repeal of DOMA, S.598, would consider same-sex marriages as valid for federal law purposes even if they are not so recognized in the state of the couple. Both of these bills would adopt a uniform federal definition of domestic relations that would conflict with the law of many states. Applying the purported tradition invoked by the court below would invalidate both pieces of legislation.[52] This is particular ironic since the American Civil Liberties Union, one of the organizations bringing this case, has publicly supported both bills.[53]

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[50] 26 U.S.C. § 7703(a)(2), (b) (definitions of marital status).

[51] Rev. Rul. 76-255, 1976-2 C.B. 40. For federal law treatment of marriage for tax purposes, *see generally* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue*, 42 FAM. L.Q. 713, 714–15 (2009) (discussing *Nihiser v. Comm'r*, 19315-04 T.C.M. 2008-135 (2008); *Perkins v. Comm'r, T.C.M.*, 2008-41, 6521-06 (2008); *Proctor v. Comm'r*, 129 T.C. 12 (2007); 73 Fed. Reg. 37997 (July 2, 2008)).

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[52] *See* Jill E. Hasday, *Canon of Family Law*, 57 STAN L. REV. at 884-890 (noting that federal involvement in family law is not unprecedented but historically pervasive, and maintaining that the argument that family law is "inherently and exclusively a matter of local jurisdiction . . . may be particularly bizarre in the context of DOMA's third section [in that] that section has such practical importance only because . . so many federal rights and responsibilities already turn on whether a couple is recognized as married for purposes federal law").

[53] ACLU, *Coalition Letter to the Senate in Support of the Domestic Partnership Benefits and Obligations Act*, S.1910 (March 27, 2012) at http://www.aclu.org/lgbt-rights/coalition-letter-senate-support-domestic-partnership-benefits-and-obligations-act-s-1910; ACLU, *ACLU Letter of Support for the Respect for Marriage Act* (S 598) (July 27, 2011) at http://www.aclu.org/lgbt-rights/aclu-letter-support-respect-marriage-act-s-598.

C. The federal government's significant involvement in defining marriage for federal law purposes extends back to the Nineteenth Century and was approved by this Court.

In the mid-Nineteenth Century, Congress legislated heavily concerning marriage in federal territories.[54]

Between 1862 and 1894, Congress passed five separate statutes intended to repress the development of polygamy as a recognized marriage system in the United States: the Morrill Anti-Bigamy Act of 1862,[55] the Poland Act of 1874,[56] the Edmunds Anti-Polygamy Act of 1882,[57] the Edmunds-Tucker Act of 1887[58] and the Utah Enabling Act of 1894.[59]

The Morrill Anti-Bigamy Act, approved by Congress in 1862 and signed by President Abraham

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[54] From a jurisdictional perspective, it is important to note that this precedent is relevant not because the government of federal territories is analogous to the regulation of states. Indeed, Congress could not impose a definition of marriage upon the various states. Rather, the regulation of federal territories is analogous to other areas of plenary federal regulation, including federal tax law, military benefits, etc. In this respect, the regulation of marriage in the territories is simply one more example of extensive federal regulation of marriage with respect to its definition under federal law.

[55] 12 Stat. 501 (July 1, 1862).

[56] 18 Stat. 253 (1874).

[57] 22 Stat. 30 (March 23, 1882).

[58] 24 Stat. 635 (1887).

[59] 28 Stat. 107 (July 16, 1894).

Lincoln, criminalizes attempts to engage in polygamy in federal territories. The Act was described in the chapter laws as "An Act to punish and prevent the Practice of Polygamy in the Territories of the United States and other Places."[60] The relevant portion of the law read:

> That every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall, except in the cases specified in the proviso to this section, be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years: *Provided, nevertheless*, That this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years without being known to such person within that time to be living; nor to any person by reason of any former marriage which shall have been dissolved by the decree of a competent court; nor to any person by reason of any former marriage which shall have been annulled or pronounced void by the sentence or decree of a

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[60] 12 Stat. 501 (July 1, 1862).

> competent court on the ground of the nullity of the marriage contract.

This measure regulates marriage in federal law in two ways: it criminalizes polygamy, and it also establishes in federal law, the common law standard that a spouse who has been missing for a prescribed number of years is "judicially dead" for the purpose of remarriage.

Like DOMA, the Congressional ban on polygamy was challenged in federal court. The issue was eventually resolved in this Court's landmark decision, *Reynolds v. United States*.[61] As to marriage, the Court said:

> Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. . . . In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control.[62]

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[61] 98 U.S. 145 (1878).

[62] *Id.* at 165-166.

Perhaps the Plaintiffs would object to this analogy based on the fact that Congress has plenary authority over territorial matters while with DOMA, Congress applies a federal definition to federal terms rather than deferring to state definitions as it could choose to do. "This objection, however, draws the wrong parallel. Both federal actions—control over territories and defining terms in the United States Code—are areas of federal jurisdiction. In both polygamy regulation and DOMA contexts, Congress has adopted and promulgated a substantive definition of marriage. In the case of DOMA, Congress has enacted a substantive definition of marriage in an area of federal jurisdiction—the definition of terms used in federal law. In the case of its historic precedent regarding polygamy, Congress also enacted a substantive definition of marriage in an area of federal jurisdiction—plenary authority over federal territories."[63]

II. Efforts to distinguish prior congressional actions defining domestic relations terms for federal purposes are unavailing.

The courts below suggest that DOMA is unprecedented by saying that "before DOMA, any uniformity at the federal level with respect to citizens' eligibility for marital benefits was merely a byproduct of the states' shared definition of marriage."[64] That is simply not true. As has been amply demonstrated, prior to DOMA, Congress enacted definitions of marriage and other domestic relations terms which vary from State definitions. A few States have now chosen, as is their prerogative, to redefine marriage. But this fact has no relevance to Congress' power to specify what terms used in federal statutes will mean.

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[63] Joshua Baker & William C. Duncan, *As Goes DOMA:. Defending DOMA and the State Marriage Measures* 24 REGENT U. L. REV. 1, 42 (2012).

If Congress says, in the context of immigration, that marriage is a relationship not entered into in order to avoid deportation, it has defined marriage. That its definition is stricter than an otherwise comparable state definition does not make it any less a definition. This, of course, is precisely what DOMA does: it provides that for all purposes of federal law, marriage means the union of a man and a woman.

As noted above, a First Circuit panel agreed with the analysis of amicus here that federalism principles do not bar the enactment of DOMA. Yet that panel suggested an alternative federalism-infused theory to strike down DOMA under constitutional equal protection principles: "Supreme Court precedent relating to federalism-based challenges to federal laws reinforce the need for closer than usual scrutiny of DOMA's justifications and diminish somewhat the deference ordinarily accorded."[65] But that court did not, because it could not, point to any provision in the Constitution or decisions of this Court to justify the idea that more searching judicial scrutiny is required when Congress enacts laws touching on areas typically within the province of state law.

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[64] *Windsor v. United States*, 833 F. Supp. 2d 394, 405 (S.D. N.Y. 2012).

In fact, the First Circuit decision implicitly acknowledged that it created a novel legal rule when it stated: "If we are right in thinking that disparate impact on minority interests and federalism concerns both require somewhat more in this case than almost automatic deference to Congress' will, this statute [DOMA] fails that test."[66] But opinions of federal judges about what the law *might* be cannot substitute for binding declarations of what the law *is*, and none of the latter indicate or even hint that a special type of scrutiny applies to laws like DOMA in which Congress acts to define terms related to marriage and domestic relations.

III. The analysis of the court below, if applied in other contexts, would dramatically alter state and federal relations.

The import of accepting the "novel"[67] theory of federalism used by the courts below would be to potentially unsettle every area of federal law. If the central holding of the court below that federal law cannot define "marriage" or "family" independent of state definitions were applied consistently, it would require the invalidation of current immigration, tax, bankruptcy, census, copyright, and taxation laws, among others,[68] and would be contrary to this Court's precedent upholding federal definitions even when they contrast with state definitions.

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[65] *Massachusetts v. U.S. Department of Health and Human Services*, 682 F.3d 1, 12 (1st Cir. 2012).

[66] *Id*. at 28.

[67] Richard A. Epstein, *Judicial Offensive Against Defense of Marriage Act*, FORBES, July 12, 2010 at http://www.forbes.com/2010/07/12/gay-marriage-massachusetts-supreme-court-opinions-columnists-richard-a-epstein.html.

The doctrine of preemption would be meaningless if states were free to enact legislation contradicting statutes enacted by Congress *on matters of federal law* and require the federal government to defer to the states' contradictory enactments. Similarly, ERISA, which trumps state law in areas traditionally subject to state regulation prior to its enactment, would be invalidated by the theory of federalism proposed by the court below.

Simply put, Plaintiff's argument that Congress lacks the authority to specify what it means when it enacts law could not be more clearly contradicted by the precedent and practice of Congress and this Court. This Court has appropriately limited the circumstances in which the Supremacy Clause requires state law to be overridden, but that is not the issue in this case. The Defense of Marriage Act does not require any state to adjust its definition of marriage. Unlike some previous cases, there is also no question of whether Congress' intention was to have federal law, rather than state law, provide definitions for purposes of federal enactments.[69] "Congress's constitutional authority to direct the application of federal law to supersede and displace state domestic relation law in interpreting federal law is clear; the question usually is whether congressional intent to preempt is clear."[70] Even in the cases where that intent is not completely clear, this Court has held that "federal law governing interests of family members in federal benefits superseded the otherwise applicable state domestic law."[71] If that rule applies in those cases, it clearly should apply here where Congress' intent is absolutely explicit and the effect on state's ability to determine its own definitions for state law purposes is not hampered whatsoever.

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[68] Although not strictly definitional, the Indian Child Welfare Act, for instance, directly interferes with state law regarding consent to adoption while DOMA easily coexists with state laws that have redefined marriage. *See* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the Court reverse the decision of the court below in this case.

Respectfully submitted,

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[69] *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979); McCarty v. McCarty, 453 U.S. 210 (1981).

[70] Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution* 58 DRAKE L. REV. 951, 981 (2010).

[71] *Id.* at 981-982 (discussing *Hiquierdo* and *McCarty*).

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No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, WILLIAMS INSTITUTE SCHOLARS OF SEXUAL ORIENTATION AND GENDER LAW, AND WOMEN'S LEGAL GROUPS IN SUPPORT OF RESPONDENT EDITH SCHLAIN WINDSOR ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

A. The Constitution's Equal Protection Principle Requires that Courts Subject to Heightened Scrutiny Laws by Which the Government Seeks to Require Adherence to Gender Stereotypes 7

B. Marriage Laws Once Enforced Gender Stereotypes in Ways That Came To Be Understood to Violate Equal Protection Guarantees 14

  1. Laws related to marriage once reflected and enforced gender stereotypes defining married men's and women's distinctly separate roles in the family 14

  2. Laws prescribing separate roles for women and men in marriage have failed heightened scrutiny because of their reliance on gender stereotypes............................... 17

C. Like Laws that Discriminate Based on Sex, Laws that Discriminate Based on Sexual Orientation Frequently Are Based on Gender Stereotypes........................ 19

TABLE OF CONTENTS (continued)

Page

1. Discrimination against gay and lesbian persons typically reflects assumptions that heterosexual relationships are preferred 19
2. Marriage laws that discriminate based on sexual orientation are based on stereotypes about the relationship roles and preferences of men and women.................................. 27
3. Attempts to justify discriminatory marriage laws by reference to the supposed desirability of children being raised by both a mother and a father are based on stereotypes about the capacities of women and men. 30

D. Laws that Discriminate Based on Sexual Orientation Are Rooted in Impermissible Gender Stereotypes and Should Be Subject to Heightened Scrutiny...................... 33

CONCLUSION 36

APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Back v. Hastings on Hudson Union Free Sch. Dist.,
365 F.3d 107 (2d Cir. 2004) 31

Batson v. Kentucky,
476 U.S. 79 (1986) 8

Bradwell v. Illinois,
16 Wall. 130 (1873) 9, 10, 29

Caban v. Mohammed,
441 U.S. 380 (1979) 31

Califano v. Goldfarb,
430 U.S. 199 (1977) 12, 16, 17

Califano v. Westcott,
443 U.S. 76 (1979) 13, 29

Carrasco v. Sec'y of Health, Educ. & Welfare,
628 F.2d 624 (1st Cir. 1980) 17, 18

Centola v. Potter,
183 F. Supp. 2d 403 (D. Mass. 2002) 24, 25

Christian Legal Soc. Chapter v. Martinez,
__ U.S. __, 130 S. Ct. 2971 (2010) 20

Craig v. Boren,
429 U.S. 190 (1976) 11

TABLE OF AUTHORITIES
(continued)

Duncan v. Gen. Motors Corp.,
499 F.2d 835 (10th Cir. 1974) 18

EEOC v. Prospect Airport Servs., Inc.,
621 F.3d 991 (9th Cir. 2010) 26

Frontiero v. Richardson,
411 U.S. 677 (1973) .... *passim*

Goesaert v. Cleary,
335 U.S. 464 (1948) 10

Heller v. Columbia Edgewater Country Club,
195 F. Supp. 2d 1212 (D. Or. 2002) 27

Higgins v. New Balance Athletic Shoe, Inc.,
194 F.3d 252 (1st Cir. 1999) 23

Hoyt v. Florida,
368 U.S. 57 (1961) 10

In re Marriage Cases,
183 P.3d 384 (Cal. 2008) 6

J.E.B. v. Alabama ex rel. T.B.,
511 U.S. 127 (1994) 7, 8, 12, 33

Johnson v. California,
543 U.S. 499 (2005) 7

TABLE OF AUTHORITIES
(continued)

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431 U.S. 909 (1977) 16, 18

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957 A.2d 407 (Conn. 2008) 6

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450 U.S. 455 (1981) 17

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272 F.3d 625 (4th Cir. 2001) 31

Lawrence v. Texas,
539 U.S. 558 (2003) ....*passim*

Lewis v. Heartland Inns of Am.,
591 F.3d 1033 (8th Cir. 2010) 23

Mackenzie v. Hare,
239 U.S. 299 (1915) 15

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632 F.2d 1226 (5th Cir. 1980) 17

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458 U.S. 718 (1982) 11, 13, 14, 27

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109 F. Supp. 2d 1081 (D. Minn. 2000).............26,

TABLE OF AUTHORITIES
(continued)

Muller v. Oregon,
208 U.S. 412 (1908) 11

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538 U.S. 721 (2003) 31

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256 F.3d 864 (9th Cir. 2001) 24

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523 U.S. 75 (1998) 24

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442 U.S. 256 (1979) 33

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505 U.S. 833 (1992) 34

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499 U.S. 400 (1991) 8

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490 U.S. 228 (1989) 23

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579 F.3d 285 (3d Cir. 2009) 24

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404 U.S. 71 (1971) 9, 16

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467 F. Supp. 2d 219 (D. Conn. 2006) 26

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517 U.S. 620 (1996) 5, 20

San Antonio v. Rodriguez,
411 U.S. 1 (1973) 4

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405 U.S. 645 (1972) 31

Stanton v. Stanton,
421 U.S. 7 (1975) 13

United States v. Carolene Prods. Co.,
304 U.S. 144 (1938) 4

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518 U.S. 515 (1996) .... *passim*

United States v. Windsor,
No. 12-307 .... *passim*

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763 N.W.2d 862 (Iowa 2009) 6

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2012) 6

CONSTITUTION AND STATUTES

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No. 111–321, 124 Stat. 3515 (2010) 20

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STATEMENT OF INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are the National Women's Law Center and other women's legal organizations, and professors of law associated with the Williams Institute, an academic research center at UCLA School of Law dedicated to the study of sexual orientation and gender identity law and public policy. These organizations and individuals have substantial expertise in constitutional issues related to equal protection of the laws, including with respect to discrimination based on sex, sexual orientation, and gender stereotypes. Their expertise thus bears directly on the issues before the Court in both *United States v. Windsor*, No. 12-307, and *Hollingsworth v. Perry*, No. 12-144. Descriptions of the individual *Amici* are set out in the Appendix.[2]

SUMMARY OF ARGUMENT

Over the past forty years, this Court repeatedly has emphasized that laws that classify based on gender stereotypes violate the federal Constitution's equal protection principle. In particular, the government may not assume and enforce gender-specific rules based on stereotypes about roles that women and men perform within the family, whether as caregivers, breadwinners, heads of households, or parents. Under this Court's precedents, the Constitution demands that such laws be examined with heightened scrutiny, because legal imposition of archaic and overbroad gender stereotypes arbitrarily harms women and men by limiting or burdening individuals' abilities to make decisions fundamental to their lives and their identities.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *Amici Curiae* and their counsel made a monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

[2] *Amici* are simultaneously filing identically worded briefs on the merits in both *Windsor* and *Hollingsworth*.

Laws that discriminate based on sexual orientation share with laws that discriminate based on sex a similar basis in overbroad gender stereotypes about the preferences and capacities of men and women. Lesbians, gay men, and bisexual persons long have been harmed by legal enforcement of the expectation that an individual's most intimate relationship will be with a person of a different sex, not with a person of the same sex. Such presumptions underlie many laws that discriminate based on sexual orientation, including laws such as the measures at issue in the cases before this Court, Section 3 of the federal Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, and California's Proposition 8, Cal. Const., art. I, § 8.5. Just as the Constitution has required close scrutiny of laws that restrict the roles that men and women perform within marriage on the basis of gender stereotypes, so, too, the Constitution requires close scrutiny of laws based on gender stereotypes that restrict individuals' liberty to decide with whom they will enter such intimate relationships.

Heightened scrutiny of laws that discriminate on the basis of sexual orientation is especially warranted because legal enforcement of overbroad gender stereotypes improperly burdens individuals' most personal choices about how and with whom they will build and live their lives.

This Court should hold that laws that discriminate based on sexual orientation warrant heightened judicial scrutiny and that the provisions challenged in these lawsuits—the federal DOMA and California's Proposition 8—cannot withstand such scrutiny.

ARGUMENT

This Court recognized in *Lawrence v. Texas*, 539 U.S. 558 (2003), that, "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Id.* at 579. Over the last four decades, application of heightened scrutiny to laws that discriminate based on sex has served as an important bulwark in protecting opportunities to seek fulfillment in family life, education, and work, free from the imposition by government of gender-based roles.

Gay men, lesbians, and bisexual persons, however, are still subject to laws that burden their liberty to enter into relationships, including marriage, with the person to whom they may feel closest—a person of the same sex. Those laws deny gay, lesbian, and bisexual persons full citizenship in profound ways. Rather than serving an important government interest, such discriminatory laws typically reflect the gender-role stereotypes that women should form intimate relationships with men, not with other women, and that men should form such relationships with women, not with other men. The decisions whether and with whom to enter into intimate relationships, including marriage, are central to individual liberty under the Constitution, and the government has no authority to restrict those choices based on gender stereotypes, just as it has no authority to codify the roles that men and women fill within marriage on such bases. This Court repeatedly has held that the government may not justify sex discrimination by an asserted interest in perpetuating traditional gender roles in people's family and work lives. Neither may state actors restrict rights and opportunities in ways that rely upon rigid and exclusionary definitions of the roles that men and women fill within relationships.

Under the federal Constitution's equal protection guarantees, laws that deny rights or opportunities based on sexual orientation should be subject to heightened scrutiny. Heightened scrutiny for such laws follows straightforwardly from this Court's precedents identifying factors to which this Court historically has looked when considering whether certain classifications warrant careful judicial scrutiny, rather than simple deference to majoritarian lawmaking. *See generally United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (noting several considerations that "may call for . . . more searching judicial inquiry"); *San Antonio v. Rodriguez*, 411 U.S. 1, 28 (1973) (reciting "traditional indicia of suspectness"). Central among the reasons why close scrutiny is appropriate for laws that discriminate on the basis of sexual orientation is such laws' frequent reliance on inaccurate and sometimes invidious stereotypes. In particular, laws that discriminate based on sexual orientation share a key feature with laws that discriminate on the basis of sex: Both forms of discrimination are frequently rooted in stereotypes about supposedly "natural," "moral," or "traditional" roles or conduct for women and men. Were this Court to apply to laws that discriminate based on sexual orientation the same standard of review that the Court has applied to sex discrimination, a law denying rights based on sexual orientation would be invalid unless the government could show an "exceedingly persuasive justification" for the law, including a showing "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives," without "rely[ing] on overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States v. Virginia (VMI)*, 518 U.S. 515, 533 (1996) (internal quotation marks and citations omitted; first alteration in original).

Twice in recent history, this Court has invalidated laws that discriminated against gay, lesbian, or bisexual persons because this Court determined that those laws lacked any rational basis or failed to further any legitimate government purpose. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating under Fourteenth Amendment's Due Process Clause a Texas law that criminalized consensual sexual conduct between persons of the same sex); *Romer v. Evans*, 517 U.S. 620, 624 (1996) (invalidating under Fourteenth Amendment's Equal Protection Clause a Colorado constitutional amendment entitled "No Protected Status Based on

Homosexual, Lesbian, or Bisexual Orientation"). In both instances, because this Court found the challenged measures to be completely lacking in rational basis or legitimate governmental purpose, there was no need for the Court to consider whether laws that classify based on sexual orientation should be subject to a heightened level of scrutiny under the Fourteenth Amendment's Equal Protection Clause.

In the years since this Court's decision in *Lawrence*, the high courts of California, Connecticut, and Iowa have held that, under their state constitutions, laws that classify based on sexual orientation are subject to heightened judicial scrutiny. *See Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009) ("[L]egislative classifications based on sexual orientation must be examined under a heightened level of scrutiny under the Iowa Constitution."); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 432 (Conn. 2008) ("[A]s a minority group that continues to suffer the enduring effects of centuries of legally sanctioned discrimination, laws singling [gay persons] out for disparate treatment are subject to heightened judicial scrutiny to ensure that those laws are not the product of such historical prejudice and stereotyping."); *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008) (holding that, like laws that discriminate based on race or sex, laws that discriminate based on sexual orientation are subject to strict scrutiny under the California Constitution). In the *Windsor* case under review, the Second Circuit held that the federal Constitution too requires heightened scrutiny of laws that discriminate based on sexual orientation. *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (No. 12-307) (U.S. Dec. 7, 2012).

As further explained below, this Court similarly should hold that laws that deny rights and opportunities based on sexual orientation warrant heightened judicial scrutiny. The particular measures challenged in these lawsuits—the federal DOMA and California's Proposition 8—cannot withstand such scrutiny.[3]

A. *The Constitution's Equal Protection Principle Requires that Courts Subject to Heightened Scrutiny Laws by Which the Government Seeks to Require Adherence to Gender Stereotypes.*

This Court applies "close judicial scrutiny" to classifications based on gender, race, and ethnicity, because these classifications historically have been used to deny opportunities to individuals and typically bear no relation to an individual's ability to contribute to society; reliance on these classifications thus violates the concepts of individual liberty and responsibility. *Frontiero v. Richardson*, 411 U.S. 677, 685, 686 (1973); *see also J.E.B. v. Alabama ex rel.*

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[3] While discrimination on the basis of sexual orientation should be subjected to heightened scrutiny, *Amici* also note that, as set out by the parties challenging DOMA and Proposition 8 in these cases, those laws also lack any rational basis and cannot survive even the most deferential form of review. Moreover, were this Court to adopt for laws that discriminate based on sexual orientation the strict level of scrutiny that this Court already applies to laws that discriminate on the basis of race and national origin, *e.g., Johnson v. California*, 543 U.S. 499, 505 (2005), the measures now challenged in the cases before the Court would fail, for they are not narrowly tailored to further a compelling state interest.

T.B., 511 U.S. 127, 152-53 (1994). Central to this Court's embrace of heightened scrutiny is the recognition that overbroad stereotypes are a constitutionally insufficient basis for state action that discriminates in this manner. *Frontiero,* 411 U.S. at 685; *see also e.g., Batson v. Kentucky,* 476 U.S. 79, 104 (1986) (Marshall, J., concurring) (equal protection prohibits state action based on "crude, inaccurate racial stereotypes"); *Powers v. Ohio,* 499 U.S. 400, 410 (1991) (same). Even when laws employ suspect classifications based not on animus or hostility toward the targeted class, but rather on unthinking habits of mind, they must be subject to this close analysis.

In particular, a repeated refrain runs through this Court's modern case law addressing measures that deny rights or opportunities based on sex: Such laws warrant "skeptical scrutiny," *VMI,* 518 U.S. at 531, because of "the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender, or based on 'outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas." *J.E.B.*, 511 U.S. at 135 (internal quotations omitted). In carefully scrutinizing laws that draw distinctions based on sex, this Court has emphasized that central to equal protection is the principle that both women and men are entitled to "full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *VMI,* 518 U.S. at 532.

In the first case in which Justices of this Court expressly subjected a sex-based classification to heightened scrutiny, *Frontiero v. Richardson*, 411 U.S. 677 (1973),[4] a plurality of the Court noted not only "that our Nation has had a long and unfortunate history of sex discrimination," but also that the Court itself had played a role in that history. *Id.* at 684 (plurality). Justice Brennan's plurality opinion in *Frontiero* quoted now-infamous language by Justice Bradley, who had explained in a concurring opinion in 1873 that "'[m]an is, or should be, women's protector and defender'"; that women's "natural and proper timidity and delicacy" rendered women "unfit[]for many of the occupations of civil life"; and that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother." *Id.* at 684-85 (quoting *Bradwell v. Illinois*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring)). The plurality in *Frontiero* recognized that "[a]s a result of notions such as these, *our statute books gradually became laden with gross, stereotyped distinctions between the sexes*." 411 U.S. at 685 (emphasis added).

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[4] In *Frontiero*, four Justices applied strict scrutiny to the challenged sex classification, one Justice concurred and concluded that the provision constituted "invidious discrimination," and three Justices concurred but found it unnecessary to determine whether strict scrutiny applied. Two years before *Frontiero*, in *Reed v. Reed*, 404 U.S. 71 (1971), this Court, "for the first time in our Nation's history . . . ruled in favor of a woman who complained that her State had denied her the equal protection of its laws," *VMI*, 518 U.S. at 532 (citing *Reed*, 404 U.S. at 73), but did not expressly apply heightened scrutiny. *See Reed*, 404 U.S. at 74.

At issue in *Frontiero* was a law requiring a female Air Force officer to prove that her husband was dependent on her for over half of his support in order to obtain increased allowances for housing and medical and dental benefits, without imposing any such proof requirement on male married servicemembers. *Id.* at 678-79. The Government defended the statute by arguing that Congress could reasonably presume that wives of male servicemembers were financially dependent on their husbands. *Id.* at 689. Subjecting the statute to heightened scrutiny, however, the Court noted that "there [was] substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits," and held the Government's rationale of administrative convenience to be insufficient. *Id.* at 689-90. In its application of heightened scrutiny to smoke out gender stereotypes, the *Frontiero* plurality opinion was a direct rejection of assumptions underlying Court decisions stretching from the 1870s (*Bradwell*) through the 1950s and 1960s—assumptions that fundamental differences between women and men, rooted in women's family roles, justified laws limiting opportunities for women. *See Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding state law that made jury duty registration optional for women because "woman [was] still regarded as the center of home and family life"); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding statute prohibiting women from bartending unless they were a wife or a daughter of the bar owner because states were not precluded "from drawing a sharp line between the sexes" and "oversight . . . by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight"); *cf. Muller v. Oregon*, 208 U.S. 412, 421-22 (1908) (upholding legislation limiting women's work hours because "healthy mothers are essential to vigorous offspring, [and so] the physical well-being of woman becomes an object of public interest").

In adopting heightened scrutiny for sex classifications, this Court recognized that statutes relying on these stereotypes "employ[ed] gender as an inaccurate proxy for other, more germane bases of classification." *Craig v. Boren*, 429 U.S. 190, 198 (1976). These "loose-fitting characterizations" were determined to be "incapable of supporting . . . statutory schemes . . . premised upon their accuracy." *Id.* at 199. By requiring a far closer relationship between a sex classification and a statutory scheme's objective, and by demanding that the objective at least be important, heightened scrutiny rejected the "artificial constraints on an individual's opportunity" imposed by laws resting on imprecise gender stereotypes. *VMI*, 518 U.S. at 533. Because of the harm that these laws impose on individuals who depart from the stereotype, heightened scrutiny requires courts to "take a 'hard look'" at sex-based classifications, *id.* at 541 (quoting Sandra D. O'Connor, *Portia's Progress*, 66 N.Y.U. L. Rev. 1546, 1551 (1991)), so that "[s]tate actors controlling gates to opportunity . . . [do] not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'" *Id* (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)). In this way, heightened scrutiny recognizes that "'[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual ... class.'"

J.E.B., 511 U.S. at 152-53 (Kennedy, J., concurring) (citation omitted; alterations in original).

In *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), this Court illuminated how laws based on gender stereotypes arbitrarily harmed those who did not conform to those stereotypes. There, this Court found a provision of the Social Security Act that provided for payment of benefits to a deceased worker's *widow* and minor children, but not to a deceased worker's *widower*, to violate the Constitution. *Id.* at 637-38. First, the Court explained that the challenged measure's reliance on the "gender-based generalization" that "men are more likely than women to be the primary supporters of their spouses and children" devalued the employment of women, "depriv[ing] women of protection for their families which men receive as a result of their employment," while nevertheless requiring that women workers contribute through the Social Security system to the support of others' families. *Id.* at 645. Second, this Court explained, the challenged provision "was intended to permit women to elect not to work and to devote themselves to the care of children." *Id.* at 648. The measure thereby failed to contemplate fathers such as Stephen Wiesenfeld, who wished to care for his child at home. Rejecting the statute's imposition of gender roles, this Court declared, "It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised . . . .'" *Id.* at 652 (citation omitted); *see also Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977) (finding unconstitutional a

Social Security provision differentially treating nondependent widows and widowers "based simply on 'archaic and overbroad' generalizations").

As these and other decisions of this Court illustrate, laws premised on gender stereotypes—and including particularly stereotypes of the family as necessarily constituted by a woman assuming the role of homemaker and caretaker and a man assuming the role of breadwinner and protector—deeply offend the Constitution.[5] Such laws cause offense because, in their failure to recognize that many men and women either do not wish to or are unable to conform to these roles, such laws arbitrarily limit individuals' ability to make fundamental decisions about how to live their lives. When the law enforces "assumptions about the proper roles of men and women," *Hogan*, 458 U.S. at 726, it closes opportunity, depriving individuals of their essential liberty to depart from gendered expectations. Accordingly, "the test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females." *Id.* at 724-25.

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[5] *See Califano v. Westcott*, 443 U.S. 76, 89 (1979) (finding unconstitutional federal statute providing for support in event of father's unemployment, but not mother's unemployment; describing measure as based on stereotypes that father is principal provider "while the mother is the 'center of home and family life'"); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (invalidating measure imposing alimony obligations on husbands, but not on wives, because it "carries with it the baggage of sexual stereotypes"); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (finding unconstitutional state support statute assigning different age of majority to girls than to boys and stating, "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.")

B. *Marriage Laws Once Enforced Gender Stereotypes in Ways That Came To Be Understood to Violate Equal Protection Guarantees.*

Laws related to marriage were once a leading example of these sex-based rules. Both state and federal laws setting out the legal consequences of marriage expressly reflected and enforced separate gender roles for men and women. But these sex-specific rules that once characterized and defined the law of marriage have been almost completely dismantled, as courts and lawmakers have recognized the harms that arise from laws that require adherence to gender stereotypes.

1. Laws related to marriage once reflected and enforced gender stereotypes defining married men's and women's distinctly separate roles in the family.

For centuries, under the doctrine of coverture, established in England and carried to the early United States, "the husband and wife [were] one person in law: . . . the very being or legal existence of the woman [was] suspended . . . or at least . . . incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she perform[ed] everything." 1 William Blackstone, *Commentaries on the Laws of England* 442-445 (1765); *see* Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 11 (2000). For example, coverture prohibited wives from independently contracting or disposing of their own assets without their husbands' cooperation. Blackstone, *supra*, at 442-445; Cott, *supra*, at 11. Coverture also allowed a husband to abuse his wife sexually because the wife had "given up herself in this kind." Sir Matthew Hale, *The History of the Pleas of the Crown* 629 (1736).

Even after the Married Women's Property Acts and nineteenth century laws "dismantled the legal fiction that women lost individual identity upon marriage," Deborah A. Widiss, *Changing the Marriage Equation*, 89 Wash. U. L. Rev. 721, 735-45 (2012), many laws continued to discriminate on the basis of sex, relying on the notion that the very nature of marriage imposed separate (and unequal) roles on men and women. For example, in 1915, this Court upheld a federal law stripping a woman who married a foreign man of her U.S. citizenship, while imposing no such consequences on men marrying foreign women. The Court reasoned: "The identity of husband and wife is an ancient principle of our jurisprudence. . . . determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband." *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915). Courts also routinely invalidated as contrary to public policy efforts by married spouses to "alter the 'essential' elements of marriage" through voluntary contracts modifying various aspects of marriage "gender-determined" by law. Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 Law & Sexuality 9, 15 (1991) (citing cases declaring void contractual arrangements between spouses to allow the wife to choose the marital domicile, to provide wages to a wife for caring for her husband, to pay a wife for work performed as a business partner, and to terminate a husband's support obligations to his wife).

An extensive legal framework continued to set out sex-specific rules relating to marriage well into the second half of the twentieth century. In 1971, an appendix to the appellant's brief in *Reed* listed numerous areas of state law that disadvantaged married women, including, *inter alia*: mandatory disqualification of married women to administer estates of the intestate; special qualifications on married women's right to engage in independent business; limitations on the capacity of married women to become sureties or guarantors; differential marriageable ages (to allow time to men for education and preparation for labor or business); and domiciles of married women following their husbands' domiciles. App. to Appellant's Br., *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) (collecting state laws in each area).

Federal law also persisted in attaching different legal consequences to marriage for men and women well into the latter half of the twentieth century. For example, across a variety of programs, the law provided benefits to wives on the assumption that they were financially dependent on their husbands, but denied benefits to husbands altogether or unless they could prove financial dependence on their wives. *See, e.g.*, *Goldfarb*, 430 U.S. at 199; *Wiesenfeld*, 420 U.S. at 643; *Frontiero*, 411 U.S. at 677; *Kalina v. R.R. Ret. Bd.*, 541 F.2d 1204, 1209 (6th Cir. 1976), *aff'd*, 431 U.S. 909 (1977) (Railroad Retirement Act spousal benefits). The Social Security Act presumed income from a trade or business in a community property state to be the husband's income. *See Carrasco v. Sec'y of Health, Educ. & Welfare*, 628 F.2d 624, 627, 629 (1st Cir. 1980). Federal bankruptcy law provided that alimony and support debts owed to a wife were nondischargeable, while the same debts owed to a husband lacked such protection. *See Matter of Crist*, 632 F.2d 1226 (5th Cir. 1980) (citing 11 U.S.C. § 523 (a)(5) (1978)). These laws assumed husbands bore primary financial responsibility in a marriage, while wives bore primary domestic responsibilities. The laws burdened those who departed from these roles.

2. Laws prescribing separate roles for women and men in marriage have failed heightened scrutiny because of their reliance on gender stereotypes.

In the intervening years, courts applying heightened scrutiny have played a key role in dismantling the legal machinery enforcing separate gender roles within marriage, based on the principle that such legally enforced roles do not properly reflect individuals' "ability to perform or contribute to society" and thus violate "'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" *Frontiero*, 411 U.S. at 686 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)); *see also, e.g.*, *Goldfarb*, 430 U.S. at 206-07 (rejecting "role-typing society has long imposed") (internal quotation marks omitted); *Kirchberg v. Feenstra*, 450 U.S. 455, 459-60 (1981) (overturning Louisiana provision giving the husband as "head and master" the right to sell marital property without his wife's consent); *Orr*, 440 U.S. at

281-82 (rejecting stereotypes regarding wives' financial dependency in the context of alimony); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 147-48 (1980) (same for differential workers' compensation benefits to widows versus widowers); *Duncan v. Gen. Motors Corp.*, 499 F.2d 835, 838 (10th Cir. 1974) (loss of consortium for men but not women unconstitutional because the "intangible segments of the elements comprising the cause of action . . . are equally precious to both husband and wife"); *Kalina*, 541 F.2d at 1209 (differential rules for spousal Railroad Retirement benefits "denigrat[ed] the efforts" of women) (internal quotation marks omitted); *Carrasco*, 628 F.2d at 627, 629 (striking down provision that treated income in a community property jurisdiction from a trade or business as the husband's).

As a result of these decisions and attendant legislative reforms, laws relating to marriage have become almost wholly gender-neutral, apart from their frequent exclusion of same-sex couples. *See generally* Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 Stan. L. & Pol'y Rev. 97, 113-14 (2005). Men and women entering into marriage today have the liberty to determine for themselves the responsibilities each will shoulder as parents or wage earners or family decision-makers, regardless of whether these responsibilities conform to or depart from traditional arrangements.

C. *Like Laws that Discriminate Based on Sex, Laws that Discriminate Based on Sexual Orientation Frequently Are Based on Gender Stereotypes.*

Although the laws of the states and the Nation no longer expressly impose separate roles on married men and women, gender stereotypes remain embedded in the Nation's laws and the laws of many states through measures that discriminate based on sexual orientation. In particular, laws regarding marriage that discriminate based on sexual orientation rest on—and now are expressly defended based on—presumptions about the preferences, relationship roles, and capacities of men and women that do not reflect the realities of the lives of most gay men and lesbians. This Court has rejected these stereotypes as a proper basis for lawmaking with regard to sex; it should accord these stereotypes no deference here.

1. Discrimination against gay and lesbian persons typically reflects assumptions that heterosexual relationships are preferred.

The term "sexual orientation" refers to "the sex of those to whom one is sexually and romantically attracted."[6] "Categories of sexual orientation typically have included attraction to members of one's own sex (gay men or lesbians), attraction to members of the other sex (heterosexuals), and attraction to members of both sexes (bisexuals)."[7]

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[6] The Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients, adopted by the American Psychological Association Council of Representatives, (Feb. 18-20, 2011) (available at http://www.apa.org/pi/lgbt/resources/guidelines.aspx).

Laws can classify based on sexual orientation in several ways. Because sexual orientation is defined in terms of relationships, many laws that classify based on sexual orientation do so by regulating the relationships formed by two persons—such as relationships between two men, between two women, or between a man and a woman. [8] Such is the case with numerous laws restricting marriage or marriage recognition to unions of a man and woman, including California's Proposition 8 and Section 3 of the Federal DOMA.[9]

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[7] *Id.*

[8] Other laws that classify based on sexual orientation do so by directly regulating with respect to particular sexual orientations, *see, e.g., Romer*, 517 U.S. at 624-26 (invalidating Colorado state constitutional measure labeled "No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation"), or by singling out persons having or identifying as having a particular sexual orientation, *see e.g.*, 10 U.S.C. § 654(b) (1993) ("Don't Ask, Don't Tell" statute formerly providing for discharge of a member of the United States armed forces for "stat[ing] that he or she is a homosexual or bisexual"), *repealed by* Pub. L. No. 111–321, 124 Stat. 3515 (2010). Finally, some laws classify based on sexual orientation by targeting particular intimate conduct between two persons, such as the sodomy statute that this Court invalidated in *Lawrence*. *See* 539 U.S. at 563; *id.* at 583 (O'Connor, J., concurring in the judgment) ("While it is true that the law applies only to conduct, ... [i]t is . . . directed toward gay persons as a class."); *Christian Legal Soc. Chapter v. Martinez*, __ U.S. __, 130 S. Ct. 2971, 2990 (2010) ("Our decisions have declined to distinguish between status and conduct in this context.").

[9] Respondent Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") in *Windsor* argues in a

Historically, most laws classifying based on sexual orientation in this Nation have been based on an assumption that men and women form intimate, romantic, or sexual relationships with each other, rather than with persons of the same sex. Such laws have embodied assumptions such as the following:

- that a woman will be attracted romantically and sexually to a man, and that a man will be attracted romantically and sexually to a woman;
- that a woman's usual (or preferred) role is to form a household and a family with a man, and that a man's usual (or preferred)

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footnote in its brief on the merits that "DOMA does not classify based on a married couple's sexual orientation" because a gay person could enter into a different-sex union that would fall within DOMA's definition of marriage. *See* Br. on the Merits of Resp't BLAG at 25 n.7, *Windsor*, No. 12-307. That argument ignores that, *by definition*, a person with a gay sexual orientation seeks to enter into a relationship with a person of the same sex. By expressly limiting its definition to the relationships of different-sex couples, DOMA on its face classifies based on sexual orientation.

Within the same footnote of its brief, BLAG states that "DOMA classifies based on whether a marriage is . . . between two persons . . . *of the opposite sex*." *Id.* (emphasis added). That statement essentially acknowledges that DOMA's definition is a sex-based classification. *Amici* agree that DOMA classifies sex by basing recognition of a person's marriage on the sex of the person's spouse, and *Amici* contend that Proposition 8 similarly expressly classifies on the basis of sex. Regardless of whether these laws also classify based on sex, however, laws that discriminate based on sexual orientation (including DOMA and Proposition 8) are entitled to heightened judicial scrutiny for the reasons set out herein.

role is to form a household and a family with a woman; and

- that women will not enter intimate relationships with each other, and that men will not enter intimate relationships with each other.

Such assumptions have been at the root of laws regulating personal conduct, intimate relationships, family structure and roles, and have motivated denials of opportunities in employment, housing, and other realms of social life, too. The result of such assumptions has been a profound degree of discrimination limiting or burdening the personal autonomy of gay and lesbian persons.

The notion that laws that discriminate against gay and lesbian persons are premised on gender-role assumptions is a matter of common experience in our society. "There is nothing esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles. Everyone knows that it is so." Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 235 (1994); *id.* ("Most Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate for one's sex is the imputation of homosexuality. The two stigmas, sex-inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other.").

Court decisions applying federal statutes reaching private sex discrimination have recognized this important link between assumptions about gender-

"appropriateness" and discrimination based on sexual orientation. Although such statutes do not expressly prohibit discrimination based on sexual orientation, courts have recognized that gay and lesbian persons frequently experience discrimination that is actionable as sex discrimination under those statutes because such plaintiffs allege conduct that constitutes impermissible imposition of gender stereotypes.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), this Court recognized that an employer violates the sex discrimination prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, *et seq.*, when the employer takes an adverse action against an individual based on her failure to conform to gender stereotypes.[10] *Id.* at 251 (plurality); *id.* at 272 (O'Connor, J., concurring in the judgment). Court of Appeals cases following *Price Waterhouse* consistently have held that employers discriminate "because of sex" under Title VII when they require employees to conform to conventional gender-based expectations.[11] This protection against employer imposition of gender stereotypes extends to gay and lesbian employees just as it does to all other employees, and, indeed, federal courts in numerous cases alleging such discrimination have noted the difficulty of line drawing "between sexual orientation discrimination and discrimination 'because of sex.'" *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (reversing summary judgment grant for employer where gay male employee presented evidence that fellow employees harassed him because his appearance, behavior, and demeanor did not accord with what was regarded as typical male behavior); *see also Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (holding that harassment for failing to act "as a man should act," including being derided for not having sex with female colleague, constituted actionable sex discrimination because plaintiff was discriminated against for violating gender stereotypes).

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[10] In *Price Waterhouse*, the defendant accounting firm denied partnership to Ann Hopkins, the only woman in her class, after partners suggested that she take a "course at charm school" and "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 490 U.S. at 235.

[11] *See, e.g.*, *Lewis v. Heartland Inns of Am.*, 591 F.3d 1033, 1038-39 (8th Cir. 2010) (finding proof of sex-stereotyping where female hotel employee who dressed in a masculine fashion was terminated and her employer commented she was not pretty enough and lacked a "Midwestern girl look"); *cf.* *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (explaining "a man can ground a [sex discrimination] claim on evidence that other men discriminated

Moreover, following this Court's holding in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), that a male employee stated a Title VII claim for sex discrimination when he alleged harassment by his male coworkers including derogatory name-calling suggesting homosexuality, federal sex discrimination decisions have observed that cases involving same-sex harassment often involve anti-gay hostility rooted in gender stereotypes. For example, in *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002), the plaintiff brought a Title VII claim alleging that his co-workers tormented him for over seven

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against him because he did not meet stereotyped expectations of masculinity.").

years by mocking him as effeminate and implying that he was gay, even though the plaintiff did not disclose his sexual orientation at work. *Id.* at 406, 410. The district court observed "[s]ex stereotyping"—"making assumptions about an individual because of that person's gender . . . that may or may not be true"—"is central" both to discrimination based on sex and to discrimination based on sexual orientation. *Id.* at 408-09. The court stated:

> Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, "real men don't date men." The gender stereotype at work here is that "real" men should date women, and not other men.

Id. at 410.

The links between discrimination based on sexual orientation and the types of gender stereotyping that underlie sex discrimination are also illustrated by cases allowing sex discrimination claims under Title IX, 20 U.S.C. § 1681, *et seq.*, where hostility to an individual based on his or her perceived failure to conform to gender stereotypes has taken the form of anti-gay attitudes and slurs, regardless of whether the targeted individual is gay or heterosexual. In *Montgomery v. Independent School District*, 109 F. Supp. 2d 1081, 1084 (D. Minn. 2000), a male high school student brought a Title IX claim alleging that fellow students harassed him almost daily from elementary school until the end of tenth grade by calling him "gay" and derogatory names suggesting that he was gay (including "homo," "fairy," "queen," "pansy," and other names), and also by calling him names suggesting that he was feminine. The district court concluded that the plaintiff had stated a sex discrimination claim under Title IX by alleging that the students targeted him "not only because they believed him to be gay, but also because he did not meet their stereotyped expectations of masculinity," and noted that the harassment had started as early as kindergarten, when the court found it unlikely the plaintiff had "developed any solidified sexual preference, or for that matter, that he even understood what it meant to be 'homosexual' or 'heterosexual.'" *Id.* at 1090. Similarly, in *Riccio v. New Haven Board of Education*, 467 F. Supp. 2d 219 (D. Conn. 2006), in which a student's classmates called her "dyke," "freak," and "lesbian," the district court denied defendants' motion for summary judgment on the plaintiff's Title IX harassment claim, *id.* at 222, rejecting the school board's argument that such harassment was based simply on the student's sexual orientation, not the student's gender or failure to conform to gender stereotypes. *See id.* at 225; *cf. EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991 (9th Cir. 2010) (reversing summary judgment for employer in Title VII case; widower was taunted as homosexual when he repeatedly refused female co-worker's advances); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002) (denying employer's motion for summary judgment on Title VII sexual discrimination claims in case where supervisor repeatedly used anti-gay slurs).

Such analyses of what constitutes sex discrimination under federal statutes help to illustrate the common basis that much sexual orientation discrimination shares with sex discrimination in stereotyping about gender preferences, roles, and abilities. Laws that discriminate against gay and lesbian persons based on sexual orientation are, at their core, based on just such "'fixed notions'" about the roles, preferences, and capacities of women and men that this Court has rejected in sex discrimination cases under the Equal Protection Clause. *VMI*, 518 U.S. at 541 (quoting *Hogan*, 458 U.S. at 725).

2. Marriage laws that discriminate based on sexual orientation are based on stereotypes about the relationship roles and preferences of men and women.

As discussed above, this Court repeatedly has recognized that stereotypical notions about how men and women should conduct their lives have included presumptions about supposedly appropriate roles for women and men within the family and within intimate relationships. The gender stereotypes that this Court has rejected as a permissible basis for sex classifications in law are closely tied to presumptions that men and women should form heterosexual relationships; both seek to prescribe the roles that women and men will play in their most personal interactions. Just as state actors' reliance on stereotypes regarding women's financial dependency or domestic role or nurturing nature constitutes discrimination subject to heightened scrutiny under the Constitution, so, too, should state actors' reliance on the gender stereotype that men do not enter into intimate relationships with men and women do not enter into intimate relationships with women.

Proposition 8 and DOMA's specifications that women can be wives only to men and that men can be husbands only to women—and that marriage requires one of each—are vestiges of an obsolete legal regime that imposed separate and unequal roles on men and women within marriage. *See, e.g.*, Pet. App. 219a, No. 12-144 (*Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 960 (N.D. Cal. 2010) ("California has eliminated marital obligations based on the gender of the spouse. Regardless of their sex or gender, marital partners share the same obligations to one another and to their depend[e]nts. As a result of Proposition 8, California nevertheless requires that a marriage consist of one man and one woman."), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 133 S. Ct. 786 (No. 12-144) (U.S. Dec. 7, 2012)).

This Court has rejected the legal presumption that "'[t]he constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things'" demands that "'[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother'" and that "'man is, or should be, women's protector and defender.'" *Frontiero*, 411 U.S. at 684-85 (quoting

Bradwell, 16 Wall. at 141 (Bradley, J., concurring)). Yet many of the justifications that have been advanced in support of limiting marriage to different-sex couples are no more than modern iterations of the same stereotypes, assuming that men and women must fill separate and complementary roles within marriage. This assumption underlies the argument pressed by those defending the exclusion of same-sex couples from marriage that, for example, "redefining marriage as a genderless institution will have deeply harmful consequences for society" and that children need both mothers and fathers to be properly raised. *See* Br. of Pet'rs at 51, 55, *Hollingsworth*, No. 12-144; *see also* Br. on the Merits of Resp't BLAG at 48, *Windsor*, No. 12-307. Indeed, arguments asserting a universal, qualitative difference between marriages of same-sex couples and different-sex couples will almost inevitably reflect the kind of gender stereotyping to which the Constitution turns a close eye. Attempts to enforce separate gender roles through law are precisely what this Court has previously subjected to heightened constitutional scrutiny. Marriage laws that discriminate against gay men and lesbians are based on the "baggage of sexual stereotypes" that bears "no relation to ability to perform or contribute to society" and should be subject to heightened scrutiny, as well. *See Westcott*, 443 U.S. at 89; *Frontiero*, 411 U.S. at 686.

3. Attempts to justify discriminatory marriage laws by reference to the supposed desirability of children being raised by both a mother and a father are based on stereotypes about the capacities of women and men.

In *Windsor* and *Perry*, the parties defending Proposition 8 and DOMA, as well as various of their *amici*, have asserted that the marriage restrictions in these cases serve a governmental interest in preferring the rearing of children by one mother and one father. The government defendants in these cases disavow such a purported governmental interest, but even were such interest genuine, it would not be legitimate because it would be based on stereotypes about mothers' and fathers' separate roles that have been rejected repeatedly. The assertion that denying legal recognition of same-sex relationships is appropriate in order to "offer special encouragement and support for relationships that can result in mothers and fathers jointly raising their biological children," Br. on the Merits of Resp't BLAG at 48, *Windsor*, No. 12-307, relies on notions that mothers inherently play the role of nurturer, while fathers inherently play the role of provider and disciplinarian—in other words, on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *VMI*, 518 U.S. at 533.

This Court has struck down laws that discriminate between men and women based on the assumption that mothers and fathers reliably and predictably play different roles as parents, rejecting "any universal difference between maternal and paternal relations at every phase of a child's development." *Caban v. Mohammed*, 441 U.S. 380, 388, 389 (1979); *see also Wiesenfeld*, 420 U.S. at 652 ("It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female."); *Stanley v. Illinois*, 405 U.S. 645 (1972) (finding state law presumption that unmarried fathers were unfit violated Due Process and Equal Protection Clauses). The Court also has recognized that stereotypes about distinct parenting roles for men and women foster discrimination in the workplace and elsewhere. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) ("Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. . . . These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.").

Following this precedent, the federal Courts of Appeals have recognized that "generalizations about typical gender roles in the raising and nurturing of children" are constitutionally insufficient bases for sex discrimination. *Knussman v. Maryland*, 272 F.3d 625, 636 (4th Cir. 2001) (refusal of state police department to grant father paid leave as primary caregiver for newborn violated Equal Protection Clause); *see also Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 130 (2d Cir. 2004) (finding it "eminently clear that it is unconstitutional to treat men and women differently simply because of presumptions about the respective roles they play in family life.").

Generalizations about how mothers typically parent and how fathers typically parent are an insufficient basis for discriminatory laws even when these generalizations are "not entirely without empirical support." *Wiesenfeld*, 420 U.S. at 645. But the laws at issue here lack any empirical support for their purported underlying assumptions regarding the superiority of different-sex parents in raising children. The purportedly "common sense" notion that children fare better when raised by a mother and a father than when raised by same-sex parents in committed, stable relationships is, in fact, not supported by evidence. *See* Pet. App. 263a, No. 12-144 (*Perry*, 704 F. Supp. 2d 921, 980-81 (2010) (finding that "[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted," setting out the extensive record evidence supporting this finding, and noting that "[t]he research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology")); Michael E. Lamb, ***Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment***, 16 Applied Developmental Sci. 98, 104 (2012); ("[N]umerous studies of children and adolescents raised by same-sex parents conducted over the past 25 years by respected researchers and published in peer-reviewed academic journals conclude that they are as successful psychologically, emotionally, and socially as children and adolescents raised by heterosexual parents."). Nancy D. Polikoff, ***For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage***

Both Miss the Mark, 8 N.Y. City L. Rev. 573, 581-83 (2005) (collecting studies finding same); Judith Stacey, *Legal Impact of Same-Sex Couples: The Impact on Children and Families*, 23 Quinnipiac L. Rev. 529, 533 (2004) ("[T]here is no empirical support in the social science research literature for the claim that there is an optimal gender mix of parents or that children with two female or two male parents suffer any developmental disadvantages compared with children with two different-gender parents."). Laws based on stereotypes about differences in how mothers and fathers parent thus do no more than "ratify and reinforce prejudicial views of the relative abilities of men and women," and demand close constitutional scrutiny. *J.E.B.*, 511 U.S. at 140.

D. *Laws that Discriminate Based on Sexual Orientation Are Rooted in Impermissible Gender Stereotypes and Should Be Subject to Heightened Scrutiny.*

Gay men and lesbians long have had important life opportunities foreclosed by measures that constitute improper efforts by the government to enforce invalid gender-based stereotypes in connection with the most intimate of human relationships. Just as classifications based on sex "have traditionally been the touchstone for pervasive and often subtle discrimination," *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979), so, too, have classifications based on sexual orientation. As with measures seeking to enforce outdated gender stereotypes on the basis of sex, this Court should require at least "an exceedingly persuasive justification," *id.*, in order for classifications based on sexual orientation to withstand equal protection review. That is so because such measures frequently bear little or no relation to the actual abilities, capacities, or preferences of the persons that such measures constrain or burden.

Heightened scrutiny is particularly appropriate in this context because laws that impose gender-role expectations in contravention of the actual preferences of individuals offend the central liberty interest on which this Court focused in *Lawrence*. There, this Court recognized that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution *allows homosexual persons the right to make this choice*." 539 U.S. at 567 (emphasis added). This Court reaffirmed that "'matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment,'" and that "'[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.'" *Id.* at 573 (quoting *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 851 (1992)). This Court was emphatic that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574.

That liberty principle so fundamental to this Court's analysis in *Lawrence* and the related equal opportunity principle that equal protection embodies are incompatible with a system of laws that would presume as constitutional, rather than viewing with close scrutiny, the legally enforced expectation that men and women should enter into intimate relationships only with each other. Such laws arbitrarily deny opportunities and legal protections to individuals who are capable of fulfilling the responsibilities of marriage and who would benefit from legal protections accompanying marriage.

The courts should look with skepticism upon laws that rely on overbroad stereotypes instead of making room for the actual abilities of persons, without regard to sexual orientation, to engage in mutual care and protection, to share economic risks, and, if they choose, to raise children together. An essential component of the Constitution's equal protection guarantee is that the government cannot exclude individuals from important social statuses, institutions, relationships, or legal protections because of a characteristic that is irrelevant to participation in such statuses, institutions, relationships, or protections. Because legal enforcement of overbroad gender stereotypes arbitrarily constrains and determines individuals' most fundamental and personal choices about their own lives, equal protection requires vigorous interrogation of any such enforcement.

The Constitution's guarantee of equal protection promises gay and lesbian persons, as it promises all persons, "full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society." *VMI*, 518 U.S. at 532. Subjecting laws that discriminate based on sexual orientation to heightened scrutiny is appropriate so that each person may have equal opportunity to aspire to and to experience a relationship with the person with whom he or she most wishes to build a life.

CONCLUSION

For the foregoing reasons, *Amici Curiae* urge this Court to hold that laws that classify based on sexual orientation are subject to heightened scrutiny under the Constitution's equal protection guarantee and to affirm the judgment of the Court of Appeals that the challenged provision does not survive constitutional scrutiny.

Respectfully submitted,

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APPENDIX

APPENDIX

Williams Institute Scholars of Sexual Orientation and Gender Law

The *Amici* professors of law are associated with the Williams Institute, an academic research center at UCLA School of Law dedicated to the study of sexual orientation and gender identity law and public policy. These *Amici* have substantial expertise in constitutional law and equal protection jurisprudence, including with respect to discrimination based on sex, sexual orientation, and gender stereotypes. Their expertise thus bears directly on the constitutional issues before the Court in these cases. These *Amici* are listed below. Institutional affiliations are listed for identification purposes only.

- Nancy Polikoff;

  Professor of Law, American University Washington College of Law;

  2012 Visiting McDonald/Wright Chair of Law, UCLA School of Law;

  Faculty Chair, The Williams Institute;

- Vicki Schultz;

  Ford Foundation Professor of Law and Social Sciences, Yale Law School;

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- Nan D. Hunter;

  Associate Dean for Graduate Programs and Professor of Law, Georgetown Law;

  Former Faculty Chair & Faculty Advisory Committee Member, The Williams Institute;

  Legal Scholarship Director, The Williams Institute;

- Christine A. Littleton;

  Vice Provost for Diversity and Faculty Development, UCLA;

  Professor of Law and Gender Studies, UCLA School of Law;

  Former Faculty Chair and Faculty Advisory Committee Member, The Williams Institute;

- Devon Carbado;

  Professor of Law, UCLA School of Law;

  Faculty Advisory Committee Member, The Williams Institute;

- Cheryl Harris;

  Rosalinde and Arthur Gilbert Professor of Civil Liberties and Civil Rights, UCLA School of Law;

  Faculty Advisory Committee Member, The Williams Institute;

- Seana Shiffrin;

  Pete Kameron Professor of Law and Social Justice, UCLA School of Law;

  Professor of Philosophy, UCLA;

  Faculty Advisory Committee Member, The Williams Institute;

- Brad Sears;

  Assistant Dean of Academic Programs and Centers, UCLA School of Law;

Roberta A Conroy Scholar of Law and Policy, The Williams Institute;

Executive Director, The Williams Institute.

California Women's Law Center

California Women's Law Center ("CWLC"), founded in 1989, is dedicated to addressing the comprehensive and unique legal needs of women and girls. CWLC represents California women who are committed to ensuring that life opportunities for women and girls are free from unjust social, economic, legal and political constraints. CWLC's issue priorities on behalf of its members are gender discrimination, women's health, reproductive justice, and violence against women. CWLC and its members are firmly committed to eradicating invidious discrimination in all forms. CWLC recognizes that women have historically been the target of invidious discrimination and unequal treatment under the law.

Equal Rights Advocates

Equal Rights Advocates ("ERA") is a national non-profit civil rights advocacy organization based in San Francisco that is dedicated to protecting and expanding economic justice and equal opportunities for women and girls. Since its founding in 1974, ERA has sought to end gender discrimination in employment and education and advance equal opportunity for all by litigating historically significant gender discrimination cases in both state and federal courts, and by engaging in other advocacy. ERA recognizes that women historically have been the targets of legally sanctioned discrimination and unequal treatment, which often have been justified by or based on stereotypes and biased assumptions about the roles that women (and men) can or should play in the public and private sphere, including within the institution of marriage. ERA is concerned that if laws such as California's Proposition 8 and others like it are allowed to stand, millions of gay, lesbian, and bisexual persons in the United States will be deprived of the fundamental liberty to choose whether and whom they will marry—a deprivation that offends the core principle of equal treatment under the law.

Legal Momentum

Legal Momentum, formerly NOW Legal Defense and Education Fund, is the nation's oldest women's legal rights organization. Legal Momentum has appeared before the Court in many cases concerning the right to be free from sex discrimination and gender stereotypes, including appearing as counsel in *Nguyen v. INS*, 533 U.S. 53 (2001), and *Miller v. Albright*, 523 U.S. 420 (1998), and as *Amicus Curiae* in *United States v. Virginia (VMI)*, 518 U.S. 515 (1996), and *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). Legal Momentum views discrimination on the basis of sexual orientation as a form of sex discrimination, and strongly supports the rights of lesbians and gay men to be free from discrimination based on, among other things, gender stereotyping.

Legal Voice

Legal Voice, founded in 1978 as the Northwest Women's Law Center, is a regional nonprofit public interest organization based in Seattle that works to advance the legal rights of women in the five Northwest states (Washington, Oregon, Idaho, Montana, and Alaska) through litigation, legislation, education, and the provision of legal information and referral services. Since its founding, Legal Voice has worked to eliminate all forms of sex discrimination, including gender stereotyping. To that end, Legal Voice has a long history of advocacy on behalf of lesbians, gay men, bisexuals, and transgender individuals. Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country. Legal Voice also served on the governing board of Washington United for Marriage, the coalition that successfully advocated in 2012 to extend civil marriage to same-sex couples in Washington State.

National Association of Women Lawyers

The National Association of Women Lawyers ("NAWL") is the oldest women's bar association in the United States. Founded in 1899, the association promotes not only the interests of women in the profession but also women and families everywhere.

That has included taking a stand opposing gender stereotypes in a wide range of areas, including Title IX and Title VII. NAWL is proud to have been a signatory to the civil rights *amicus* brief in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), in which the Massachusetts Supreme Judicial Court found that denial of marriage licenses to same-sex couples violated state constitutional guarantees of liberty and equality. Now, a decade later, NAWL is proud to join in this *amicus* brief and stand, once again, for marriage equality.

National Partnership for Women & Families

The National Partnership for Women & Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care for all, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has been instrumental in many of the major legal changes that have improved the lives of women and their families. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious discrimination and has filed numerous briefs *amicus curiae* in the United States Supreme Court and in the federal Courts of Appeals to protect constitutional and legal rights.

National Women's Law Center

The National Women's Law Center is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women, and has participated as counsel or *amicus curiae* in a range of cases before this Court to secure the equal treatment of women under the law, including numerous cases addressing the scope of the Constitution's guarantee of equal protection of the laws. The Center has long sought to ensure that rights and opportunities are not restricted for women or men on the basis of gender stereotypes and that all individuals enjoy the protection against such discrimination promised by the Constitution.

Southwest Women's Law Center

The Southwest Women's Law Center is a nonprofit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential, including by eliminating gender bias, discrimination and harassment. *United States v. Windsor* and *Hollingsworth v. Perry* could help prevent discrimination in matters involving the most intimate and personal choices that people make during their lifetime. Personal intimate choices that individuals make for themselves are central to the liberty protected by the Fourteenth Amendment.

Women's Law Project

Founded in 1974, the Women's Law Project ("WLP") is a non-profit women's legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Its mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. For nearly forty years, WLP has engaged in high-impact litigation, advocacy, and education challenging discrimination rooted in gender stereotypes. WLP represented the plaintiffs in *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992), striking down the Pennsylvania Abortion Control Act's husband notification provision as "repugnant to this Court's present understanding of marriage and the nature of the rights secured by the Constitution." WLP served as counsel to *Amici Curiae* in *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001), which conferred third-party standing on parents in same-sex relationships to sue for partial custody or visitation of the children they have raised; and *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002), which recognized that the Pennsylvania Adoption Act permits second-parent adoption in families headed by same-sex couples. Together with Legal Momentum, WLP represented women in non-traditional employment as *Amici Curiae* in *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009), in which the Court of Appeals reinstated a Title VII sex discrimination claim involving concurrent evidence of sexual orientation discrimination. Because harmful gender stereotypes often underlie bigotry against lesbian and gay persons, it is appropriate to subject classifications based on sexual orientation to heightened judicial scrutiny.

AMICUS
CURIAE
BRIEF

SUPREME COURT, U.S.
FILED
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No. 12-307

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON THE MERITS FOR THE STATES OF NEW YORK, MASSACHUSETTS, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MAINE, MARYLAND, NEW HAMPSHIRE, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT EDITH SCHLAIN WINDSOR

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

TABLE OF CONTENTS

Page

Interest of the *Amici* States 1

Summary of Argument..............................3

Argument...5

- I. Section 3 Is an Unprecedented Infringement on the States' Regulation of Domestic Relations and Therefore Warrants Closer Judicial Scrutiny 5
  - A. Section 3's Novel Disregard of the Traditional Role of the States Warrants Searching Scrutiny.....................5
  - B. Section 3's Complete Rejection of an Entire Class of Valid State Marriages Has No Historical Parallel...............9
  - C. The Staggering Breadth of Section 3 Also Warrants Skeptical Review.........15
- II. Section 3 of DOMA Fails Any Level Of Scrutiny, Even Rational-Basis Review........18
  - A. Section 3 Amends an Enormous Body of Federal Law Bearing No Relation to Specific Domestic Relations Policies 18
  - B. In Light of Its Enormous Breadth, Section 3 Does Not Advance a Coherent Federal Purpose 19

Conclusion.......................................29

TABLE OF CITED AUTHORITIES

Page

Cases:

Boggs v. Boggs, 520 U.S. 833 (1997) 6, 9, 10, 20

Capitano v. Secretary of Health and Human Services, 732 F.2d 1066 (2d Cir. 1984) 12, 21

Cruz v. McAneney, 31 A.D.3d 54 (1st Dep't 2006) 27

De Sylva v. Ballentine, 351 U.S. 570 (1956) 6

Dickerson v. Thompson, 73 A.D.3d 52 (3d Dep't 2010) 26, 27

Godfrey v. Spano, 13 N.Y.3d 358 (2009) 26, 27

Haddock v. Haddock, 201 U.S. 562 (1906) 6, 10, 20

In re Estate of Ranftle, 81 A.D.3d 566 (1st Dep't 2011) 26

Lewis v. N.Y. State Department of Civil Service, 60 A.D.3d 216 (3d Dep't 2009) 26-27

Lopez v. Monterey County, 525 U.S. 266 (1999) 8

Loving v. Virginia, 388 U.S. 1 (1967) 13

Mansell v. Mansell, 490 U.S. 581 (1989) 10

Martinez v. County of Monroe, 50 A.D.3d 189 (4th Dep't 2008) 27

Massachusetts v. U.S. Department of Health and Human Services, 682 F.3d 1 (1st Cir. 2012) 17, 20-21, 22, 23

Massachusetts v. U.S. Department of Health and Human Services, 698 F. Supp. 2d 234 (D. Mass. 2010) 23

Miller v. Johnson, 515 U.S. 900 (1995) 8

Page

National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012) 7, 22

Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) 8

Romer v. Evans, 517 U.S. 620 (1996) . . . . *passim*

Rose v. Rose, 481 U.S. 619 (1987) 8

Slessinger v. Secretary of Health and Human Services, 835 F.2d 937 (1st Cir. 1987) 13

Williams v. North Carolina, 317 U.S. 287 (1942) 6, 7

Zablocki v. Redhail, 434 U.S. 374 (1978) 10

Laws:

Federal Statutes

Ch. 71, 16 Stat. 431 (1871) 12

1 U.S.C. § 1 5

1 U.S.C. § 7 1

7 U.S.C. § 2012 21

8 U.S.C. § 1255 11

11 U.S.C.
  § 101 25
  § 523 . . . . 10, 25

17 U.S.C. § 101 13

18 U.S.C. § 115 24

26 U.S.C. § 7703 11

29 U.S.C. § 2612 26

42 U.S.C.

Page

§ 416 . . . . .11, 13
§ 659 25
§ 1437f. 21

State Statutes

Conn. Gen. Stat. § 46b-30. 14

Iowa Code § 595.19 14

N.H. Rev. Stat. Ann.
§ 457:2. 14
§ 457:4. 14

N.Y. Executive Law § 296. 27

N.Y. Public Health Law § 2805-q 27

Vt. Stat. tit. 18, § 5142. 14

Wash. Rev. Code
§ 26.04.010 14
§ 26.04.020 14

Regulations

24 C.F.R. § 5.403 21

29 C.F.R.
§ 825.101 . . . . .25, 26
§ 825.122. 13

32 C.F.R. § 733.3 25

Administrative Sources:

Absence and Leave, 75 Fed. Reg. 33,491
(June 14, 2010) 17

Same-Sex Domestic Partners, 77 Fed. Reg. 42,901
(July 20, 2012) 17

Page

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H.R. Rep. No. 104-664 (1996). 9, 20

S. Rep. No. 94-568 (1975) 12

Secretary of Defense, Extending Benefits to Same-Sex Domestic Partners of Military Members (Feb. 11, 2013) 17

INTEREST OF THE *AMICI* STATES

Amici States New York, Massachusetts, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington, together with the District of Columbia, file this brief in support of respondent Edith Schlain Windsor. While *amici* States have made different choices about protecting the rights of same-sex couples and their families, *amici* share a strong interest in ensuring that, when a State has chosen to recognize or authorize same-sex marriage, its considered judgment is not disregarded by Congress in the exercise of a different judgment about sound domestic relations policy.

There are millions of gay and lesbian individuals living in the United States, and many of those individuals form households and families based on committed, long-term relationships. Section 3 of the Defense of Marriage Act rejects state attempts to protect and recognize such same-sex couples by sanctioning their marriages,[1] although Congress made no finding that state laws authorizing marriages between individuals of the same sex are unconstitutional or discriminatory.

Some of the *amici* States sanction full civil marriage for same-sex couples, while others offer legal recognition through civil-union or domestic-partnership laws, or have chosen to protect same-sex couples and their families through other, more targeted laws. Regardless of their particular laws, the *amici* States object to Congress's unprecedented act of rejecting the decisions of sovereign States to authorize same-sex marriage. Variation among the States on this point does not interfere with federal interests. But allowing Congress to impose uniformity by rejecting state domestic relations decisions on the scant rationales offered in support of DOMA sets a dangerous precedent incompatible with our federal system and the role of the States in that system. Section 3 of DOMA is but a small step away from Congress refusing to recognize other marriages of which it disapproves, as well as domestic partnerships and civil unions, divorces, adoptions, custody decisions, and other domestic relations law determinations, historically committed to state regulation and control.

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[1] Section 3 provides that, for the purposes of all federal law, "the word 'marriage' means only a legal union between one man and one woman . . . and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7.

DOMA subjects state marriage laws to a contrary policy determination of Congress, upending over two hundred years of congressional deference to state domestic relations determinations. *Amici* States have an interest in explaining that there is no federal interest adequate to justify DOMA's categorical disregard of the choice of some States to recognize or authorize same-sex marriage.

This case does not require the Court to reach the broader question of whether the Constitution mandates same-sex marriage, as the amicus brief of Indiana and other States suggests (*see* Br. of Indiana, et al. at 13-15, 21-22), and this brief takes no position on that question. *Amici* States here file this brief to explain that section 3 of DOMA is invalid no matter how that question is answered.

SUMMARY OF ARGUMENT

DOMA's sweeping refusal to recognize for federal purposes a class of marriages valid under state law violates the equal protection component of the Fifth Amendment.

Section 3 of DOMA should be subjected to closer scrutiny because it combines three features that warrant special skepticism: it discriminates against validly married couples on the basis of sexual orientation, it discriminates among the States based on their decision to sanction same-sex marriage, and it does so in a way that intrudes on the States' traditional authority to regulate marriage and family relations. The combination of these three factors requires a searching review of the justifications offered in support of the law.

Since the founding of our Nation, the subject of domestic relations, including determination of marital status, has been committed to state law and state policy judgments, and the federal government has deferred to state determinations about marriage even when States adopted different marital policies. Section 3 of DOMA departs radically from that historic pattern. By treating validly married same-sex couples differently from other married couples, DOMA not only discriminates against individuals, but also discriminates against the States—endorsing the policy judgments made by some States, and rejecting the decisions of other States on the question whether to offer marital rights to same-sex couples. Moreover, DOMA compels those States that recognize same-sex marriage to discriminate among their own lawfully married couples in the many programs that are jointly administered by federal and state governmental authorities. And it imposes these forms of discrimination in an area that is traditionally committed to state control.

For all these reasons, this Court should examine carefully both the interests invoked to justify DOMA and the extent to which DOMA serves those interests. Section 3 of DOMA cannot survive that examination. Indeed, the justifications offered to support DOMA cannot survive even rational basis review.

DOMA amends all of federal law—an immense body of statutes, regulations, and administrative rulings—to deny same-sex marriages legal effect and same-sex spouses recognition as spouses, now and in the future. None of the asserted justifications for section 3 of DOMA supports its sweeping operation across the entire body of federal law, without respect or consideration for the particular objectives of the thousands of underlying federal statutes and regulations it amends. Nor do the asserted rationales justify the substantive irrationalities that section 3 inflicts on federal policy goals. Instead, the only coherent aim served by DOMA is to stigmatize married same-sex couples by codifying disapproval for all past or future state decisions to sanction same-sex marriage. That aim alone cannot justify Congress in denying equal respect to the States' domestic relations laws and to the couples validly married under those laws.

ARGUMENT

I. Section 3 Is an Unprecedented Infringement on the States' Regulation of Domestic Relations and Therefore Warrants Closer Judicial Scrutiny

Respondent BLAG and its *amici* argue that section 3 of DOMA is a routine exercise of congressional power and accordingly should be subject to highly deferential rational-basis review. (BLAG Merits Br. at 19-20.) Section 3, however, is anything but routine. Section 3 imposes a sweeping disability—non-recognition of lawful state marriages between same-sex couples—based on a novel exercise of federal power that comes at the expense of historic state authority.

Never before has Congress refused to recognize an entire category of state-sanctioned marriages throughout all of federal law with the express goal of rejecting state policy decisions about marriage. To the contrary, federal law traditionally has deferred to state marriage determinations—even when States differed sharply as to domestic relations policy. DOMA's dramatic departure from more than two hundred years of state-federal relations should give this Court pause.

A. Section 3's Novel Disregard of the Traditional Role of the States Warrants Searching Scrutiny.

DOMA's discriminatory treatment of state marriage laws and same-sex couples married under state law requires more than minimal justification. This Court has recognized that laws that impose novel disabilities and "'[d]iscriminations of an unusual character'" warrant more searching scrutiny even under a rational basis standard. *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). Section 3 of DOMA imposes just such a novel and unusual rule of non-recognition on marriages that are valid under state law, and thereby constitutes a broad, unprecedented intrusion into state regulation of domestic relations.

The ability to define and authorize marriages is a fundamental sovereign power. (BLAG Merits Br. at 31, 43.) And under our federal system, that power has long been understood as reserved primarily to the States, not the federal government. *See, e.g.*, *Boggs v. Boggs*, 520 U.S. 833, 848 (1997) ("As a general matter, '[t]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States.'" (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)); *Haddock v. Haddock*, 201 U.S. 562, 575 (1906) ("No one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] that the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce."), *overruled on other grounds*, *Williams v. North Carolina*, 317 U.S. 287 (1942) (holding that divorce decrees are entitled to full faith and credit).

Prior to DOMA, there had never been a "federal law of domestic relations" to define or recognize marriage for federal purposes independently from, and contrary to, the regulatory judgments of the States. *See, e.g., De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (The Court will look to state law "especially . . . where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern."). Congress's attempt to assert a new and expansive "conception[ ] of federal power" warrants more skeptical examination, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (opinion of Roberts, C.J.), particularly when its assertion of power comes at the expense of state domestic relations authority.

When Congress interferes in an area of historic and primary state concern and deviates from any previously known legislative pattern, it is by definition operating in a field where it has little experience and no expertise—negating one reason for judicial deference to congressional judgments. Moreover, in the context of marriage, judicial deference is warranted not to the congressional judgment but rather to the state policy judgments that Congress has sought to displace, given the States' special experience and interest in marriage under our federal system of government.

Marriage is a central aspect of state regulation of domestic relations. State regulation of marriage is connected to much broader interests, such as the protection of children and regulation of family law in general. *See, e.g.*, *Williams*, 317 U.S. at 298 ("The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal."). Congressional interference in this area risks substantial damage to coherent state regulation of domestic relations in all its manifold applications. *Cf.*

Lopez v. Monterey County, 525 U.S. 266, 282 (1999) (noting "substantial federalism costs" of "federal intrusion into sensitive areas of state and local policymaking" (quotation marks omitted)).

Moreover, by stepping outside the bounds of its normal role and favoring some States at the expense of others, Section 3 "differentiates between the States" in violation of the Nation's historic tradition of equal state sovereignty, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). Such a vast departure from equal deference to fundamental state policy choices requires meaningful justification from Congress. *See id.*; *see also* Tr. of Oral Argument at 34-35, *Nw. Austin Mun. Util. Dist.*, 557 U.S. 193 (No. 08-322) (the federal government has "a very substantial burden" in contending "that our States must be treated differently") (statement of Kennedy, J.).

The nature of DOMA warrants a reasonable skepticism. This Court should more closely examine whether section 3 of DOMA meaningfully advances a legitimate federal end and whether Congress has identified "extraordinary circumstances" justifying its unprecedented intrusion into state domestic relations policy and differential treatment of state marriage laws. *See Miller v. Johnson*, 515 U.S. 900, 926-27 (1995). *Cf. Rose v. Rose*, 481 U.S. 619, 625 (1987) ("Before a state law governing domestic relations will be overridden, it must do major damage to clear and substantial federal interests." (quotation marks omitted)).

B. Section 3's Complete Rejection of an Entire Class of Valid State Marriages Has No Historical Parallel.

Pointing to discrete federal statutes that touch on marriage, BLAG and its *amici* attempt to depict section 3 as a familiar exercise of federal power to define the scope of federal programs. But section 3 is not comparable to other federal statutes. It is, instead, an unprecedented intervention by Congress on one side of a state debate over marital and domestic relations regulation.

1. Section 3 cannot be defended on the ground that DOMA simply "preserved" the federal government's "sovereign[ ] ability to define marriage for itself," or that Congress may choose not to recognize same-sex marriages for "the same reasons" a State might decline to do so. (BLAG Merits Br. at 31, 43.) These arguments fundamentally misconstrue the relationship between the federal government and the States in regulating marriage. The States, as sovereigns endowed with general police powers, have always enjoyed primacy with respect to regulation of marriage and domestic relations—authority not shared, let alone shared on an equal basis, with Congress. *See, e.g.*, *Boggs*, 520 U.S. at 848.

Moreover, prior to DOMA, Congress always recognized the primacy of the States in domestic relations. As Congress recognized in enacting DOMA, "[t]he determination of who may marry in the United States is uniquely a function of state law." H.R. Rep. No. 104-664, at 3 (1996). The vast majority of citizens can be married only under state law. Outside of federal territories and other discrete pockets of federal control, there is no such thing as federal marital status or a federal marriage. It is simply not accurate to say that federal law respects and recognizes state marriages only when Congress "has found it convenient to" do so. (BLAG Merits Br. at 4; *see also id.* at 4-6, 33-37.)

Far from being a matter of convenience, federal recognition and incorporation of state marriage laws is a practical necessity, not merely historic happenstance. As this Court has long recognized, the right to marry "under our federal system" is "defined and limited by state law." *Zablocki v. Redhail*, 434 U.S. 374, 392 (1978) (Stewart, J., concurring in the judgment). It is the States, not Congress, that "possess[ ] full power over the subject of marriage and divorce." *Haddock*, 201 U.S. at 575.

2. The federal statutes that BLAG and its *amici* identify do not deviate from this historical tradition, and do not establish a "long history" of Congress defining marriage. (BLAG Merits Br. at 4-5 & n.2.) In particular, they do not provide a single instance, apart from DOMA, in which Congress has ignored or overridden entire classes of lawful state marriages. For example, Congress has preempted state property laws under comprehensive federal remedial schemes like the Bankruptcy Code and ERISA.[2] These provisions, however, follow the tradition of

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[2] *See Boggs*, 520 U.S. at 841 (ERISA preempts state community-property law); 11 U.S.C. § 523(a)(15) (federal, rather than state, law determines whether a debt owed under state law for alimony or for support of a spouse or child is eligible under federal law for bankruptcy discharge); *see also Mansell v. Mansell*, 490 U.S. 581, 589 (1989) (federal Uniformed Services Former Spouses' Protection Act preempts some applications of state community-property law to disposition of military retirement benefits).

deferring to state-sanctioned marriages. They continue to treat state marital *status* as controlling, substituting only a different federal rule with respect to the disposition of certain forms of marital *property*.

Likewise, Congress has imposed specialized federal requirements in addition to the fact of a valid state marriage to establish eligibility for federal rights or benefits made available to married couples. Once again, these provisions continue to treat state marital status as controlling. They simply require proof of additional facts so as to further particularized policy interests, such as deterring unmarried couples from marrying solely to qualify for a federal right or benefit,[3] or avoiding treating married couples as economically interdependent when they are not.[4] Each of these provisions is precisely what section 3 is not: a targeted federal statute that treats all state marriages as equal rather than imposing a congressional policy choice about marriage on States that have made different choices.

3. BLAG's assertion that it "runs entirely counter to our basic constitutional structure" for varying state definitions of marriage to determine "what the words

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[3] *See, e.g.*, 8 U.S.C. § 1255(e) (requiring an alien seeking adjustment in immigration status based on marriage to a United States citizen to establish that the marriage was not entered into so as to secure admission to the United States); 42 U.S.C. § 416 (b)(2), (f)(2) (requiring a marriage to have lasted at least one year before an individual can receive Social Security benefits following the death of a spouse).

[4] *See, e.g.*, 26 U.S.C. § 7703(b) (treating married individuals who maintain separate households for more than half the year as unmarried in certain circumstances).

'marriage' and 'spouse' mean for purposes of *federal* law" likewise fails. (BLAG Merits Br. at 36.) Congress has never before imposed federal uniformity at the expense of state regulation of marriage. To the contrary, federal programs have consistently allowed marital status to be determined by state law, and thus have refrained from promoting the nationwide uniformity that DOMA seeks to advance. The Court of Appeals for the Second Circuit has noted, for example, that widowhood, for purposes of the Social Security Act, is determined under the law of the deceased worker's domicile at death, and that the Act accordingly does not promote uniformity in the administration of benefits nationwide. *Capitano v. Sec'y of Health & Human Servs.*, 732 F.2d 1066, 1068-69 (2d Cir. 1984).[5]

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[5] Nor do scattered federal laws defining terms such as "spouse," "husband," or "wife" with reference to a traditional male-female couple (*see* BLAG Merits Br. at 5-6, 37-39) provide any precedent for DOMA. Federal statutes often contain gendered language that expresses no exclusionary policy. Congress has provided since 1871 that statutes written in masculine terms can be applied to women. Ch. 71, § 2, 16 Stat. 431, 431 (1871); *see also* 1 U.S.C. § 1 (current codification). Statutes referring to spouses in gendered terms are therefore more likely to reflect the fact that when they were written, marriage was largely defined by the States in gendered terms; the federal laws do not indicate any intent to discriminate against spouses on the basis of gender. *Cf.* S. Rep. No. 94-568, at 19-20 (1975) (adding a definition to 38 U.S.C. § 101 of "spouse" as "a person of the opposite sex who is a wife or husband" for purposes of veterans' benefits was intended to *remove* unconstitutional gender-based assumptions about military service members). Nor do such statutes provide evidence that Congress meant to interfere with state policy judgments about marriage, or in particular to reject valid same-sex marriages across the board.

Federal reliance on state-defined marital status has stemmed from express provisions of various federal statutes and regulations, *see, e.g.*, 17 U.S.C. § 101 (Copyright Act); 42 U.S.C. § 416(h)(1)(A) (Social Security Act); 29 C.F.R. § 825.122(a) (Family and Medical Leave Act), as well as the federal courts' interpretation of federal law where statutes are silent, *see, e.g.*, *Slessinger v. Sec'y of Health & Human Servs.*, 835 F.2d 937, 939 (1st Cir. 1987) (deferring to state rule rather than applying federal common law to make an eligibility determination under the Social Security Act).

The historical record underscores that, prior to DOMA, Congress did not ever override or limit state domestic relations regulation despite wide state-by-state variation in many respects, including with respect to who may marry. (Joint Appendix ("JA") 289-90 (Affidavit of Professor Nancy F. Cott).)

Laws prohibiting interracial marriage, for example, were once matters of fierce division among States. Some States, such as New York and Vermont, never imposed restrictions of this nature, while others, like Massachusetts, enacted them early but repealed them as the abolition movement gained traction. (JA298.) By 1930, thirty States prohibited some form of interracial marriage. (JA300.) The number of States with such prohibitions then began to decline. When this Court held in *Loving v. Virginia*, 388 U.S. 1 (1967), that state laws banning interracial marriage violated equal protection, sixteen States maintained such restrictions. (JA301.) Throughout the course of the anti-miscegenation controversy, which spanned more than a century, Congress never sought to impose uniformity on the States. Ultimately, the matter was resolved by constitutional adjudication, but while variation persisted, Congress accepted the differences among the States on whether to permit interracial marriage.

The States have also differed considerably in other judgments about who may marry, and how they may do so, and Congress has never sought to impose uniformity. For example, only a minority of States recognize common-law marriages today, and some only for limited purposes. (JA294.) The federal government has never declined to recognize common-law marriages valid under applicable state law, notwithstanding the administrative burden of determining whether a common-law marriage exists and the possibility that couples may lose or gain marital status by moving between jurisdictions. (JA294; *but cf.* BLAG Merits Br. at 33-34.)

Similarly, the federal government continues to defer to considerable variation, including among *amici* States, regarding marriageable age and consanguinity. (JA295, 296.) Some States have a statutory minimum age—sixteen in Vermont, for example, but thirteen for women in New Hampshire—while others, such as Washington and Connecticut, permit marriage of individuals under the age of consent, but only with a court order.[6] Many *amici* allow first cousins to marry, but Iowa, New Hampshire, and Washington do not.[7] Yet Congress has not established a uniform rule.

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[6] *See, e.g.*, Conn. Gen. Stat. § 46b-30; N.H. Rev. Stat. Ann. § 457:4; Vt. Stat. tit. 18, § 5142; Wash. Rev. Code § 26.04.010.

[7] *See* Iowa Code § 595.19; N.H. Rev. Stat. Ann. § 457:2; Wash. Rev. Code § 26.04.020.

Nor has Congress ever sought to impose uniformity despite wide variation in how the States permit marriages to end. Early in the Nation's history, the States were relatively uniform in limiting the grounds for divorce to adultery, desertion, and conviction for certain crimes. (JA302.) Over time, some States relaxed their divorce laws far more quickly and more extensively than others. For instance, Indiana allowed divorces based on any grounds deemed proper as early as the 1850s. (JA302-03.) Other States, such as New York, remained restrictive into the twenty-first century—indeed, New York adopted no-fault divorce only in 2010. Critics of liberal divorce rules pressed for a uniform divorce code to solve the problem of "migratory divorce" that resulted from substantial interstate variation (JA303), but Congress never enacted such a uniform regulation of divorce (JA304).

Thus, before 1996 and the enactment of section 3 of DOMA, Congress had never intervened on one side to tip the balance even as States confronted controversies over marriage and addressed them in differing fashion over time. Rather than pursue a "uniform federal legal rule[ ] of nationwide applicability" with respect to marriage (BLAG Merits Br. at 37), Congress uniformly accepted state marital status determinations—as it continues to do to this day in all respects other than the sex of the married spouses.

C. The Staggering Breadth of Section 3 Also Warrants Skeptical Review.

Section 3 of DOMA is also unprecedented in the breadth of its application, and that fact further supports the need for closer scrutiny. Because it applies to all federal programs and statutes, it is not and cannot be based on, or tailored to, the purposes of any particular federal program. Indeed, as explained below, in practice section 3 frustrates rather than promotes the purposes of numerous individual federal programs.

BLAG claims that DOMA simply codified preexisting law (*see* BLAG Merits Br. at 37-38), but that cannot be correct. If that were so, then section 3 would be superfluous; even without DOMA, courts and executive officials should be able to discern congressional intent to limit statutory references to "marriage" and "spouse" in federal law to different-sex couples.

Congress did not enact a superfluous statute. Before DOMA there was no broad congressional disapproval of same-sex marriage; indeed, there is no evidence that Congress even contemplated the question, much less had any specific intent regarding it. Thus, the status quo was federal recognition of all valid state marriages, absent specific indicia of a contrary congressional purpose. DOMA made a dramatic change in the status quo by mandating a defined outcome, without regard to any program-specific congressional intent on the matter and without attention to the goals and functions of the federal laws and regulations section 3 amends.

As a result, DOMA supplants the normal process of statutory and regulatory interpretation. In the absence of DOMA, congressional intent would not be ignored; it would be analyzed as to specific federal laws by the executive officials charged with administering those laws. The Secretary of Defense, for example, has recently indicated that the words "spouse" and "marriage" in federal regulations governing military benefits should be interpreted to include same-sex spouses—and that only DOMA, rather than any other indication of congressional intent, forecloses that result. Secretary of Defense, Extending Benefits to Same-Sex Domestic Partners of Military Members at 2, Feb. 11, 2013; *see also* Absence and Leave, 75 Fed. Reg. 33,491 (June 14, 2010) (expanding definition of "family member" in 5 C.F.R. § 630.201 to include same-sex domestic partner); Same-Sex Domestic Partners, 77 Fed. Reg. 42,901 (July 20, 2012) (same, with respect to 5 C.F.R. § 315.608(e)(1)). Section 3 of DOMA, rather than codifying preexisting congressional intent, forecloses the normal interpretive processes that would allow officials and courts to reasonably discern it.

By interfering with state judgments about marriage and how best to protect same-sex couples and families, Congress deviated from an unbroken pattern of deference to state marriage laws even when States differed substantially in their underlying policies. Preserving state authority over domestic relations from congressional interference protects not only the States, but more broadly the interests of individual liberty.

"One virtue of federalism is that it permits . . . diversity of governance based on local choice," *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 16 (1st Cir. 2012), including the choice of States to allow same-sex couples to marry. By doing so, and by offering other protections to same-sex couples, States are enhancing rights for individuals in committed relationships. Section 3 is an unprecedented congressional intervention to impede state-law protections for married couples and their families—a core area of state, not federal, responsibility.

That unique and discriminatory legislative impingement on state authority warrants closer, more skeptical scrutiny.

II. Section 3 of DOMA Fails Any Level Of Scrutiny, Even Rational-Basis Review

Section 3 of DOMA is so sweeping that it cannot survive the skeptical examination warranted by its legislative novelty and its substantial federalism costs. But even if more searching scrutiny did not apply, section 3 is so unmoored from any concrete federal end that it fails even rational basis review. Like the state constitutional amendment struck down in *Romer*, DOMA's staggering breadth "confounds [the] normal process of judicial review" because it lacks even a rudimentary fit between "the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632, 633.

A. Section 3 Amends an Enormous Body of Federal Law Bearing No Relation to Specific Domestic Relations Policies.

DOMA is not a single legislative classification. It retroactively and prospectively amends all of federal law, denying same-sex marriages legal effect throughout more than a thousand federal statutes, regulations, and administrative rulings. The breadth of the statute is so sweeping that its scope and effects were unknown at the time of its enactment, and Congress made no attempt to even analyze DOMA's reach or budgetary impact. (*See* Windsor Merits Br. at 8-9.) *See also, e.g.*, 142 Cong. Rec. S10,100, S10,102 (daily ed. Sept. 10, 1996) (noting DOMA was "gratuitously brought before Congress 1 month before adjournment" and "placed on a suspiciously fast track to enactment despite the press of other business") (statement of Sen. Kennedy).

Further, the government's own reported efforts to catalog the effect and operation of DOMA on federal statutes—after enactment—have been incomplete. *See* General Accounting Office, *Defense of Marriage Act: Update to Prior Report*, GAO-04-353R, at 2 (Jan. 23, 2004) (letter to Senate Majority Leader Bill Frist) (cautioning that GAO's attempt to survey DOMA's impact on federal statutes may be under-inclusive because of the myriad ways in which the "the United States Code . . . deal[s] with marital status"). And those efforts did not even purport to catalog affected regulations and other federal actions.

Section 3 is so broad in scope that it exhibits vast indifference to actual legal effects and real world impact. Section 3 instead subordinates all federal statutory and regulatory interests—whatever the underlying governmental purpose or end, and however unrelated to substantively shaping or limiting domestic relations policy—to the single goal of denying recognition to lawful state same-sex marriages. At bottom, section 3 accomplishes only one coherent objective: making married same-sex couples "unequal to everyone else," *Romer*, 517 U.S. at 635, an aim that violates equal protection.

B. In Light of Its Enormous Breadth, Section 3 Does Not Advance a Coherent Federal Purpose.

As a direct result of DOMA's enormous breadth, the purported interests asserted in support of section 3 fail even a basic rationality test.

1. Congress's asserted interests in encouraging responsible procreation and child-rearing by different-sex biological parents (see BLAG Merits Br. at 43-48; H.R. Rep. No. 104-664, at 12-13), cannot justify section 3 of DOMA. Because Congress does not traditionally regulate marriages, families, or other domestic relations matters, see *supra* at 5-15, the immense body of federal law that DOMA amends was not enacted to encourage child-rearing by married couples of a specific type. BLAG and its *amici* do not even claim that the vast majority of federal requirements altered by DOMA can in any way be tied to procreation or encouraging marriage.[8]

2. The asserted interest in preserving federal resources and maintaining uniformity in providing federal benefits (*see* BLAG Merits Br. at 33-34, 38-41) is likewise insufficient. Section 3 does not merely amend federal benefit programs; rather, it captures a far wider swath of federal law having nothing to do with the provision of federal benefits or the expenditure of federal funds. *See* GAO Report, *supra*, at 4-5, 7-10.

Further, even where DOMA has an effect on federal expenditures, its effects are so varied it may well cost the government more than it saves. *Massachusetts*, 682 F.3d at 14 & n.9. For example, the Congressional Budget Office concluded that equal application of the federal income tax "marriage penalty" to same sex-married couples would likely result in annual *increases* in federal revenue of $500 million to $700 million—increases that section 3 eliminates by rejecting these marriages. Cong. Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* 3 (2004), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5559/06-21-samesexmarriage.pdf.

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[8] For similar reasons, section 3 of DOMA cannot be justified as a legitimate effort to avoid "reverse preempt[ion]" by the States. (BLAG Merits Br. at 37.) Since there is no federal law of domestic relations, *Boggs*, 520 U.S. at 848; *Haddock*, 201 U.S. at 575, the federal government has always relied on state definitions of marriage for federal statutes that refer to marital status. Even in enacting DOMA, Congress did not claim a general police power to regulate marital status that could somehow be "reverse preempted" by the exercise of state domestic relations authority.

For means-tested programs like Medicaid, failing to recognize the income of a same-sex spouse under DOMA may create greater eligibility for federal benefits, a result directly at odds with conserving scarce federal resources. And for programs like federal food stamps and section 8 housing vouchers, where a cohabiting couple need not even be married to qualify,[9] DOMA's refusal to recognize same-sex marriages does nothing to conserve federal resources, while inflicting stigmatic harm on married same-sex couples who are excluded from statutory definitions of marriage. *Cf. Romer*, 517 U.S. at 632 (no legitimate state interest where law is "inexplicable by anything but animus toward the class it affects").

Moreover, the immense sweep of DOMA means that it applies in areas where Congress has rejected any effort at "uniformity of benefits." *See Capitano*, 732 F.2d at 1068-69 (the Social Security Act is not designed to promote "uniformity" in the administration of benefits nationwide). Many federal programs, such as Medicaid, establish jointly funded federal-state schemes with "States, as first-line administrators" that "guide the distribution of substantial resources among their needy populations." *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2632 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). Programs like Medicaid were specifically designed to advance cooperative federalism by giving the States flexibility to implement their own policy choices. The intended result was not to compel uniformity. States are instead empowered to make "dramatically different" choices and to establish "a myriad" of different programs. *Id.* (quotation marks omitted). Under cooperative federal-state programs—all of which DOMA amends—state-by-state variation is the norm, not a problem to be eliminated.

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[9] *See* 7 U.S.C. § 2012(n)(1)(B) (food stamps); 42 U.S.C. § 1437f, 24 C.F.R. § 5.403 (section 8).

Indeed, while not advancing a coherent federal goal of uniformity, DOMA compels nonuniform treatment of married couples by the States. DOMA requires States that authorize same-sex marriage to treat same-sex married couples as unmarried for purposes of joint federal-state programs like Medicaid, imposing additional administrative burdens and requiring those States to violate their own deliberate and considered policies to accord equal treatment to all validly married couples. *See, e.g.*, *Massachusetts*, 682 F.3d at 12 (noting that Massachusetts "stands both to assume new administrative burdens and to lose funding for Medicaid . . . solely on account of its same-sex marriage laws").

And because section 3 applies to all of federal law, the administrative burdens and unequal treatment extend to many areas even outside joint federal-state programs. For example, States that provide health insurance benefits to same-sex spouses of public employees must treat those benefits as taxable income for federal purposes, incurring additional administrative burdens and denying the families of public employees equal benefits and uniform protection. *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 244 (D. Mass. 2010) (describing costs of complying with DOMA's requirement to treat as taxable income for federal purposes the health insurance that state employees provide to their same-sex spouses), *aff'd*, 682 F.3d 1.

3. BLAG's contention that DOMA serves a rational need for "caution" in the face of changing social institutions (BLAG Merits Br. at 41-43) is belied by the breadth of the statute itself. Congress evinced no caution in amending over a thousand statutes and regulations unrelated to judgments on the ideal form of social institutions or the virtues of encouraging opposite-sex couples to marry. In fact, Congress did not even *attempt* to determine what effects would result from this vast alteration of federal law. See *supra* at 18-19.

Further, there was nothing cautious about Congress's decision to break with more than two hundred years of equal treatment of state marriages and marriage laws. Prior to DOMA, a marriage authorized by a State was a marriage for purposes of federal law, subject only to additional requirements imposed in light of a targeted federal purpose—such as the prevention of fraud in granting a spousal benefit. See *supra* at 10-11. Section 3 departs from that tradition, and it does so with vast indifference to the actual aims of the federal statutes and regulations it amends; the results irrationally render federal law at war with itself.

4. Finally, DOMA's irrationality is shown by the fact that it undermines, rather than furthers, the purposes of many federal statutes. DOMA disregards the existence of same-sex married couples for purposes of, among many other examples: (1) federal criminal laws prohibiting harm against spouses; (2) a wide range of federal statutes and regulations prohibiting conflicts of interest and nepotism; (3) federal means-testing provisions that look to the income and assets of spouses in determining eligibility for federal benefits; and (4) federal laws that seek to protect families irrespective of their composition. In each of these areas, and countless more, section 3 impairs the intent and goals of federal law.

Section 3, for instance, exempts same-sex spouses from the federal criminal law that makes it a crime to intimidate a federal official by threatening to injure the official's spouse, 18 U.S.C. § 115. Exempting threats against same-sex spouses is directly contrary to the aims of the criminal prohibition—both public order and safety and ensuring that federal officials are not intimidated in fulfilling their public duties. Likewise, many federal laws are not concerned with encouraging marriage but instead with preventing conflicts of interest based on potential financial benefit to a spouse. Arbitrarily excluding same-sex couples from these conflict-of-interest provisions impairs the federal interest in impartiality—increasing the evils of favoritism and the appearance of conflict that Congress meant to prevent.

Similarly, many federal programs are means-tested; and in determining eligibility, Congress mandated that not only the applicant's financial resources, but also those of the applicant's spouse, be considered in assessing eligibility. Section 3 exempts same-sex couples from the same restrictions that apply to other married couples—making it easier for same-sex spouses to shield assets and qualify for federal benefits at taxpayer expense.

In addition, section 3 undermines federal statutes and regulations whose aim is protection of families and spouses. The Bankruptcy Code, for example, makes debts for alimony and spousal support nondischargeable. *See* 11 U.S.C. §§ 523(a)(5) (nondischargeability), 101(14A)(A)-(B) (definitions). And the federal government authorizes States to garnish portions of a federal employee's paychecks to "enforce the legal obligation of the individual to provide . . . . periodic payments of funds for the support and maintenance of the spouse (or former spouse) of the individual," 42 U.S.C. §§ 659(a) (permission to garnish), 659(*i*)(3)(A) (definition of obligation). Likewise, Department of the Navy regulations describe spousal and family support as "an inherent natural and moral obligation" of "[e]very member" of the Navy, 32 C.F.R. § 733.3(a)(2), and emphasize that "[t]he naval service will not be a haven or refuge for personnel who disregard or evade their obligations to their families," *id.* § 733.3(a)(1). Section 3 of DOMA, however, undermines these objectives, which are untied to any judgment about encouraging marriage or marriages of a specific type.

Section 3 also weakens the Family and Medical Leave Act (FMLA). One of the FMLA's several important goals is to better enable workers to care for seriously ill spouses without being forced to "choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home." 29 C.F.R. § 825.101(b). The FMLA thus requires employers, including state governments, to grant employees leave to care for a seriously ill or injured spouse. 29 U.S.C. § 2612(a)(1)(C). Section 3 denies that protection to same-sex spouses. DOMA's insistence on disregarding the legal existence of same-sex marriages throughout federal law, it seems, outweighs the FMLA's policy of "promot[ing] the stability and economic security of families, and ... promot[ing] national interests in preserving family integrity," 29 C.F.R. § 825.101(a).

* * *

In this case, the application of section 3 denied respondent Edith Windsor the benefit of a spousal tax deduction for estate taxes under federal law. New York has long recognized as valid same-sex marriages that were solemnized under the laws of other States or nations, such as Windsor's Canadian marriage to Thea Spyer. All three statewide elected executive officials—the Governor, the Attorney General, and the Comptroller—endorsed that conclusion prior to 2009, finding it to have deep roots in New York's general principle of marriage recognition. *See Godfrey v. Spano*, 13 N.Y.3d 358, 368 n.3 (2009) (describing 2004 opinions of the Attorney General and Comptroller); *Dickerson v. Thompson*, 73 A.D.3d 52, 54-55 (3d Dep't 2010) (citing 2008 directive of the Governor).

Every New York State appellate court that addressed the issue before New York began to permit its own same-sex marriages in 2011 agreed, rejecting the argument that same-sex marriages were contrary to New York's public policy. *See In re Estate of Ranftle*, 81 A.D.3d 566 (1st Dep't 2011) (Canadian same-sex marriage is valid in New York); *Lewis v. N.Y. State Dep't of Civil Serv.*, 60 A.D.3d

216 (3d Dep't Jan. 22, 2009) (agency recognition of same-sex marriage), *aff'd on other grounds sub nom. Godfrey v. Spano*, 13 N.Y.3d 358 (2009); *Martinez v. County of Monroe*, 50 A.D.3d 189 (4th Dep't 2008).[10] Indeed, recognizing out-of-state same-sex marriages is consistent with a long list of public policies of New York State, undertaken prior to 2009, to afford equal rights to same-sex couples—through nondiscrimination guarantees, Executive Law § 296 (relevant provision enacted in 2002); legal recognition of domestic partnerships for purposes such as hospital visitation rights, *see* Public Health Law § 2805-q (enacted 2004), and the September 11 Victim Compensation Fund, *see Cruz v. McAneney*, 31 A.D.3d 54, 58 (1st Dep't 2006); and the like.

Section 3's application to respondent and to other same-sex couples in New York and other *amici* States—now and in the future—does not survive constitutional scrutiny. Although Congress has the power to make sweeping changes in federal law, its asserted aims must match the sweep and scope of its legislative change. *Romer*, 517 U.S. at 635. To the extent Congress has passed laws in the past touching on marriage, see *supra* at 9-15, it has acted through statutes "narrow enough in scope and grounded in a sufficient factual context" to make the legitimate aim served by the statutory classification rationally discernable. *Romer*, 517 U.S. at 632-33. Section 3 of DOMA, by contrast, is so haphazard, and so broadly indifferent to the actual effect of denying same-sex marriages legal effect across all of federal law, that the only credible explanation for section 3 is a desire to supplant state policy choices regarding marriage in order to codify second-class status for married same-sex couples. The "sheer breadth" of section 3 is fatal under rational-basis review, *id.* at 632, and under the more searching scrutiny that section 3 merits because of its unprecedented intrusion into state regulation of marriage.

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[10] While the New York Court of Appeals found it unnecessary to reach the issue in *Godfrey*, the four-judge majority opinion said nothing to cast doubt on the uniform lower-court authority recognizing the validity of out-of-state same-sex marriages, *see Godfrey*, 13 N.Y.3d at 377 (declining to reach the question), and a three-judge concurrence expressly endorsed that line of cases, *id.* (Ciparick, J., concurring). *See generally Dickerson*, 73 A.D.3d at 54-56 (summarizing New York's "clear commitment to respect, uphold and protect parties to same-sex relationships" both through decisional law and executive action).

CONCLUSION

The Court should affirm the judgment of the circuit court.

Dated: New York, New York
March 1, 2013

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In The Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL., *Petitioners,*

v.

KRISTEN M. PERRY, ET AL., *Respondents.*

UNITED STATES, *Petitioner,*

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, AND BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Ninth and Second Circuits

BRIEF OF AMICUS CURIAE MATTHEW B. O'BRIEN IN SUPPORT OF HOLLINGSWORTH AND BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES ADDRESSING THE MERITS AND SUPPORTING REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT.................................. 1

ARGUMENT 5

I. Applying *Lawrence v. Texas,* some courts have held that controversial moral judgments are illegitimate grounds for public policies that limit individual liberties, and thus the law must pass a moral neutrality test. 5

II. The most influential and persuasive account of moral neutrality stems from the work of the philosopher John Rawls. 7

  A. Rawls demonstrates that the state has a legitimate interest in setting marriage policy to ensure the orderly reproduction of society. 8

  B. A conjugal union of husband and wife is uniquely suited to serving the state's interest in orderly reproduction, because it is intrinsically generative and the optimal context for rearing children........... 13

C. In defining marriage as a conjugal union, the state need not assert moral disapproval of any other forms of association or intimate relationships, including same-sex ones, and it need not appeal to any religious or traditionalist premises. 20

III. The Rawlsian justification of the conjugal definition of marriage finds confirmation in the recent decisions of American courts. 22

CONCLUSION 26

TABLE OF AUTHORITIES

Cases:

Andersen v. King County,
138 P.3d 963 (Wash. 2006) 23

Citizens for Equal Protection v. Bruning,
455 F.3d 859 (8th Cir. 2006) 23

Conaway v. Deane,
932 A.2d 571 (Md. 2007) 23

Goodridge v. Department of Public Health,
798 N.E.2d 941 (Mass. 2003) 8-9, 24, 25

Hernandez v. Robles,
855 N.E.2d 1 (N.Y. 2006) 23

In re Kandu,
315 B.R. 123 (Bankr. W.D. Wash. 2004) 23

In re Marriage Cases,
183 P.3d 384 (Cal. 2008) 23, 24, 25

Jackson v. Abercrombie,
No. 11-00734, 2012 WL 3255201 (D. Haw. Aug. 8, 2012) 25

Kerrigan v. Department of Public Health,
957 A.2d 407 (Conn. 2008) 23, 24

Lawrence v. Texas,
539 U.S. 558 (2003) 2, 5, 6

Lewis v. Harris,
908 A.2d 196 (N.J. 2006) 23, 24

Morrison v. Sadler,
821 N.E.2d 15 (Ind. Ct. App. 2005)...................23

Perry v. Brown,
671 F. 3d 1052 (9th Cir. 2012)..........................23

Planned Parenthood of Southeastern Pennsylvania v. Casey,
505 U.S. 833 (1992)...5

Standhardt v. Superior Court ex rel. County of Maricopa,
77 P.3d 451 (Ariz. Ct. 2003) 23

Varnum v. Brien,
763 N.W.2d 862 (Iowa 2009) 23, 24

Wilson v. Ake,
354 F. Supp. 2d 1298 (M.D. Fla. 2005) 23

Other Authorities:

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Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 Br. J. Am. Leg. Studies 411 (2012) 9

C. J. Patterson, *Lesbian and Gay Parents and their Children: Summary of Research Findings*, Lesbian and Gay Parenting: American Psychological Association (2005), *available at* http://www.apa.org/pi/lgbt/resources/parenting-full.pdf 19

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INTEREST OF AMICUS[1]

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SUMMARY OF ARGUMENT

Within the broad tradition of "liberal" political thought and constitutional scholarship, there is agreement that moral disapproval *as such* is an illegitimate ground for limiting liberty. When the law implicates questions about momentous issues in human life—marriage, sexuality, conscience, religion, death, and so on—these scholars argue that the law must prescind from imposing any given controversial moral judgment upon a citizenry marked by ethical pluralism.

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[1] The parties have consented to the filing of this brief and that consent is on file with the Clerk of the Court. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

In other words, they argue that the law ought not to criminalize conduct based solely on judgments about what makes for or detracts from a valuable and morally worthy way of life. Rather, the law should aspire to neutrality between competing visions of how best to live. The ideal of moral neutrality does not purport to expunge the law of its moral content, for this ideal is itself a moral injunction: it is fairness—a moral concept—that requires no one, particular moral vision be privileged by the state. Laws that merely aim to promote controversial judgments about morality, especially when they limit freedom, fail to manifest a legitimate state interest. Some courts have held that the law ought to pass a moral neutrality test based on *Lawrence v. Texas*, 539 U.S. 558 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."). The lower courts here applied this test as an implicit part of their rational basis standard of constitutional review.

Contrary to the decisions of the lower courts, however, the definition of marriage in California's Proposition 8 *does* pass the moral neutrality test just described. This conjugal definition of marriage as between one man and one woman passes the neutrality test, and satisfies the emerging constitutional standard of rational basis review.

Conjugal marriage uniquely contributes to the state's legitimate interest in ensuring the orderly reproduction of society over time.

Conjugal marriage is a unique form of human association because it is intrinsically generative, which makes it distinctively suited to serving the necessary task of orderly social reproduction. A union of two (or more) individuals of the same sex—whether the union consists of gay people who are in a romantic relationship, or siblings united by kinship, or friends animated by platonic admiration, etc.—cannot constitute an intrinsically generative union. Whether a female partner involved in such a union bears a child, or whether such a union happens to become a locus of child rearing, for example, are both incidental matters.

Marriage as a *conjugal* union, by contrast, is intrinsically generative, given its nature as a social-cum-biological identity. To put the point summarily: sex between men and women tends to make babies, and babies need moms and dads. Therefore, in seeking to promote orderly reproduction, the state may reasonably decide to single out and promote the distinctively conjugal partnership that has historically borne the label "marriage." This decision need not stem from any moral judgments about the superiority or inferiority of any one of these various forms of association in relation to the others. Nor does it require the criminalization of non-conjugal sexual relationships, whether same-sex, multi-partner, or anything else.

Previous discussions of conjugal marriage have typically failed to specify properly the legitimate state interest in ensuring orderly reproduction. This failure has inhibited both sides of the marriage debate from appreciating that laws such as Proposition 8 have a constitutional justification entirely independent from the fact that conjugal marriage happens to be the traditional definition of marriage.

In order to specify the state interest in orderly reproduction properly, one must consider the ideal of moral neutrality more thoroughly. The late Harvard philosopher John Rawls is universally regarded as the most important and influential proponent of moral neutrality—or to use his terms, the ideal of "public reason." Rawls's work is in large part responsible for the widespread recognition of moral neutrality as a constitutional principle. Courts in the United States and abroad have cited his work; his influence is palpable in *Lawrence* and in the decisions of the District and Circuit Courts here.

Rawls's account of "public reason" and his defense of the legitimate state interest in orderly reproduction, when rightly understood, provide a powerful justification for supporting the definition of marriage as a conjugal union. While the lower courts embraced a moral neutrality test akin to Rawls's idea of "public reason," they misapplied it. Rawls's doctrine accepts the notion that laws have an inherently moral component, but it requires that such laws find support among public values and standards that all citizens could reasonably accept. As explained in this brief and others filed in support of Petitioners, the state has a legitimate interest in orderly reproduction and that interest requires the state to ensure a sustainable birth rate and the effective rearing of children into responsible citizens. These interests find general acceptance as public values. They also form the basis for the state's definition of marriage as a conjugal union between a man and woman. Thus, these interests withstand constitutional scrutiny under the rational basis standard and this Court should reverse the lower court decisions.

ARGUMENT

I. Applying *Lawrence v. Texas*, some courts have held that controversial moral judgments are illegitimate grounds for public policies that limit individual liberties, and thus the law must pass a moral neutrality test.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992), this Court explained: "Our obligation is to define the liberty of all, not to mandate our own moral code." The Court further elaborated on this obligation in *Lawrence v. Texas*, 539 U.S. at 559, when it explained: "...the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[2]

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[2] *Id.* (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

Even if *Lawrence* in fact adopted a moral neutrality test in order to protect individual liberty, the Court carefully limited that interest primarily to *conduct*. In overturning the Texas anti-sodomy statute, the Court stated that it is "[w]hen sexuality finds overt expression in intimate *conduct* with another person, the *conduct* can be but one element in a personal bond that is more enduring." *Lawrence*, 539 U.S. at 567 (emphasis added). *Lawrence* focused on the liberty of "...adult persons in deciding how to conduct their *private* lives in matters pertaining to sex." *Id.* at 572 (emphasis added). Where the law seeks to promote legitimate public goals and preserve vital social institutions, individual claims to liberty may not be decisive. Thus it is in regard "to *personal* decisions relating to marriage. procreation, contraception, family relationships, child rearing, and education" that *Lawrence* noted "the respect the Constitution demands for the autonomy of the person in making these choices...." *Id.* at 574 (emphasis added).

Furthermore, the Court clarified that the liberty interest it referenced in *Lawrence* may protect private homosexual conduct, but it "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 578. This clarification is appropriate because marriage as a social institution. as opposed to the private sexual activity of adults, implicates legitimate state interests.

When the citizens of California voted decisively in favor of Proposition 8, they sought to define a social institution, and did nothing to regulate private conduct.

II. The most influential and persuasive account of moral neutrality stems from the work of the philosopher John Rawls.

State governments have always exercised the traditional "police powers" over public health, safety, and morals, however broadly or narrowly the courts have construed them. The ideal of neutrality is itself a moral ideal, because it is a requirement of fairness, which is a moral notion. Therefore, in limiting government action by a moral neutrality test, the Court has not abandoned the law's moral task. Rather, it has re-interpreted the scope of that task for a pluralistic democracy.

The late Harvard philosopher John Rawls's theory of "public reason" remains the most important account of moral neutrality; Rawls's work has been tremendously influential in constitutional and political theory.[3] Many, perhaps even most, liberal political and constitutional theorists are Rawlsians of one stripe or another. The idea of public reason provides a principled way to transcend the socially divisive, zero-sum terms of the current marriage debate. Public reason proposes an alternative deliberative framework for resolving such clashes between deeply held, but incompatible beliefs. This framework treats the opposing parties equally, because the framework's justification is neutral relative to divergent beliefs about how to live one's life. The "public reason" framework requires that arguments over the legal definition of marriage, like other arguments over matters of basic justice, find common ground among the different viewpoints that form the public political culture of liberal democracies.

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[3] For an account of Rawls's importance, *see* e.g., *The Cambridge Companion to Rawls* 1-61 (Samuel Freeman, ed. 2002).

It is unreasonable for people who serve in positions of power to attempt to impose what they see as the whole truth on their fellow citizens—political power must be used in ways that all citizens may reasonably be expected to endorse. Reciprocity is therefore a key aspect of public reason. Citizens and the lawmakers who represent them must be able to justify their policy decisions using publicly available values and standards.

The arguments used to justify legislation must not depend essentially upon controversial facets of any particular worldview. Rawls urges, "in a constitutional regime with judicial review, public reason is the reason of its supreme court," and "the supreme court is the branch of government that serves as the exemplar of public reason."[4]

A. Rawls demonstrates that the state has a legitimate interest in setting marriage policy to ensure the orderly reproduction of society.

Although Rawls died before the issue of same-sex marriage came to a head in *Goodridge v. Department*

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[4] John Rawls, *Political Liberalism* 231 (1995).

of Public Health, 798 N.E.2d 941 (Mass. 2003), his work provides compelling grounds for justifying the conjugal definition of marriage as a union of husband and wife.[5] Any definition of marriage based upon moral approbation or disapprobation of types of sexual acts or classes of persons violates Rawls's notion of public reason. The conjugal definition of marriage need not rely on such judgments.

Rawls shows that the state interest in the family is purely functional, even if families in their own self-image are not.

> The *primary function of the family* for Rawls—what makes it a basic social institution—has nothing to do with romantic love or even marriage between the natural or adoptive parents or caretakers of children. The family is rather regarded as a basic social institution since any society has to have some social structure for nurturing and raising its children. Without some kind of family formation, a society cannot *reproduce itself over time.*[6]

Appeals to the moral value of heterosexual sex as such or appeals to the moral value of same-sex unions as such, equally depend upon contestable judgments about morality. For the state to define marriage by either of these appeals would be to specify the state's interest in marriage improperly.

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[5] *See* Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 Br. J. Am. Leg. Studies 411 (2012).

[6] Samuel Freeman, *Rawls* 237 (2007).

Otherwise liberal advocates of redefining marriage often fail to appreciate that the state's interest in marriage does not include a mandate to impose their own moral vision through changing the law. For example, one prominent advocate of same-sex marriage, Professor Carlos A. Ball of Rutgers University School of Law, argues, "[i]f our society is going to recognize same-sex marriage, the supporters of such marriages must incorporate perfectionist ideals into their arguments." Accordingly, "[t]he struggle for societal acceptance of same-sex relationships entails a frontal attack on the deeply held views of many Americans...."[7] Professor Ball's moral perfectionism and his endorsement of a "frontal attack" on the worldviews of his fellow citizens is troubling.

Such common calls to enlist marriage law in the service of prosecuting a "culture war" violate the idea of public reason.[8] As Rawls emphasizes:

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[7] Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 Geo. L.J. 1871, 1881, 1927 (1997).

[8] *Cf.* Ellen Willis, *Can Marriage Be Saved? A Forum,* The Nation 16 (July 5, 2004) ("conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart"). Gay activist Michelangelo Signorile, for example, is even more explicit: he argues that gay couples "demand the right to marry not as a way of adhering to society's moral codes but rather to debunk a myth and radically alter an archaic institution." Michelangelo Signorile, *Bridal Wave*, Out 68, 161 (Dec.-Jan. 1994). The strategy is for gay couples "to fight for same-sex marriage and

> Central to the idea of public reason is that it neither criticizes nor attacks any comprehensive doctrine [i.e., worldview], religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity.
>
> [In a pluralistic democracy] no one is expected to put his or her religious or nonreligious doctrine in danger, but we must each give up forever the hope of changing the constitution so as to establish our religion's hegemony, or of qualifying our obligations so as to ensure its influence and success. To retain such hopes and aims would be inconsistent with the idea of equal basic liberties for all free and equal citizens.[9]

Rawls grounds a properly specified marriage policy in the publicly reasonable state interest ensuring the orderly reproduction of society over time. Political responsibility for ensuring the orderly reproduction of society is not optional. Unlike many liberal theorists, Rawls attends to the social imperative of providing for society's future generations:

> [A] political society is always regarded as a scheme of cooperation over time indefinitely;

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its benefits and then, once granted, redefine the institution of marriage completely [, because the] ... most subversive action lesbians and gay men can undertake ... is to transform the notion of 'family' entirely." *Id.*

[9] John Rawls, *The Idea of Public Reason Revisited*, 64 Chicago L. Rev. 765, 776 (1997).

> the idea of a future time when its affairs are to be wound up and society disbanded is foreign to our conception of society. Reproductive labor is socially necessary labor. Accepting this, essential to the role of the family is the arrangement in a reasonable and effective way of the raising and caring for children, ensuring their moral development and education into the wider culture.[10]

The state interest in orderly reproduction entails two public responsibilities: first, ensuring a sufficient and sustainable birth rate, and second, ensuring the just and effective rearing of children into capable citizens. The second responsibility requires that citizens develop basic psychological maturity, which Rawls argues includes two key abilities or what he calls moral powers: the ability to exercise a sense of justice and the ability to form one's own reasonable worldview about how to live one's life.

In *A Theory of Justice* Rawls states: "However attractive a conception of justice might be on other grounds, it is seriously defective if the principles of moral psychology are such that it fails to engender in human beings the requisite desire to act upon it."[11] To generalize Rawls's point in sociological terms, however attractive a conception of justice might be on other grounds, it is seriously defective if a "just" society fails to reproduce itself in an orderly way over time.

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[10] *Id.* at 782.

[11] John Rawls, *A Theory of Justice* 162-63 (2d ed., 1997).

Rawls's argument implies that the state has no legitimate interest in promoting the personal intimate relationships of adults *as such*. Consequently, in a pluralistic democracy regulated by the ideal of public reason, no morally neutral reason supports the recognition and promotion of homosexual relationships as civil marriages. Such recognition and promotion unjustifiably privileges homosexual relationships above other intimate relationships.

B. A conjugal union of husband and wife is uniquely suited to serving the state's interest in orderly reproduction, because it is intrinsically generative and the optimal context for rearing children.

A liberal democratic society needs sufficient children and it needs them to be educated. Therefore, a liberal democratic society needs families headed by two married parents who are the biological mother and father of the children, because such families are (i) intrinsically generative and (ii) optimal for childrearing. In other words, sex between men and women tends to make babies; society needs sufficient babies; babies need moms and dads.[12]

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[12] *Cf.* Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post-*Lawrence *World*, 23 Quinnipiac L. Rev. 447, 451 (2004) (arguing that heterosexual marriage "is about uniting these three dimensions of human social life: creating the conditions under which sex between men and women can

Certainly, not every family arrangement in which children are raised will or can conform to this pattern, but the state has a legitimate interest in encouraging people to form families that do so. States have reasonably determined that they can accomplish this by enshrining the conjugal conception of marriage in the law. Why are heterosexual unions intrinsically generative and what does this entail? Many viable forms of parenting partnerships are not generative. Consider, for example, an order of nuns who partner together to run an orphanage, or a widower and his brother who raise the children from the widower's marriage. These arrangements may qualify as viable parenting partnerships, but they are not intrinsically generative, so they could not answer society's need for orderly reproduction over time.

Conjugal heterosexual relationships are intrinsically generative, because children characteristically result from sexual intercourse between a man and a woman in a statistically significant sense, and sexual intercourse is of course partly constitutive of marriage as a relation. In making this functional claim about heterosexual sex's generative character, it is not necessary to any controversial metaphysical biology about "natural purposes" in the way that traditional natural law theorists might. Neither must or should every marriage beget children. Rather, the intrinsically

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make babies safely, in which the fundamental interests of children in the care and protection of their own mother and father will be protected, and so that women receive the protections they need to compensate for the high and gendered (*i.e.*, nonreciprocal) costs of childbearing").

generative nature of heterosexual unions rests upon an incontrovertible observation about a social fact, which has implications for the orderly reproduction of a democratic society.

Some might object that the availability of contraception for heterosexuals and biological advances in artificial gamete donation for homosexuals makes procreation a voluntary choice, not a given feature of relationships that happen to have the biological complementarity that makes them naturally reproductive. This inference is mistaken. It remains a social fact that sex—even contraceptive sex—tends to make babies.[13] Irrespective of access to contraceptives, it is a social fact that heterosexual relationships result in children.

It is also important to recognize that the advent of artificial gamete donation does not change the fact that relationships other than heterosexual unions remain non-generative. Neither does gamete donation provide a public reason for the Court to single out just some of the people who could use the procedure and empowering them to enter into civil marriage just because they happen to be involved in a same-sex romantic partnership. For to do so would be to assume that homosexual relationships have some special intrinsic value (and the order of nuns or a widower and his brother, for example, do not), and this assumption is an illegitimate grounds for state action, because it violates public reason. There is an analogy between gamete donation and ordinary adoption. Both of these practices remain available to anybody, whether he or she is a partner in a conjugal marriage or a non-traditional relationship. Neither practice, therefore, gives any reason for uniquely picking out homosexual relationships as a class from among non-traditional relationships generally, and privileging just those with eligibility for civil marriage.

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[13] *See e.g.*, J. Abma et al., *Fertility, Family Planning, and Women's Health: New Data from the 1995 National Survey of Family Growth*, Nat'l Ctr. For Health Stats. 19, 28 (1997); Stanley K. Henshaw, *Unintended Pregnancies in the United States*, 30 Family Planning Perspectives 28 (1998).

People choose to make many different and valid domestic arrangements of mutual dependency and intimacy. The law is justified in singling out conjugal unions from among these arrangements and defining them as eligible for marriage. When courts seek to privilege just those relationships that happen to be characterized by homosexual intimacy, however, they rely upon their own private moral code and fail to abide by public values that all reasonable citizens could share. In this regard, homosexual orientation is on a constitutional par with, say, a traditional order of chivalry or theology of sacramental rites. The Knights of Malta and the Jesuits, for example, may be legally recognized as non-profit charitable associations that contribute to society's common good, but they cannot, for a publicly reasonable state, be recognized *as* a titled nobility or *as* a sacramental priesthood, respectively. In the same way, a legislature may choose to provide domestic partnerships because two adults are domestically dependent, but not because homosexual intimacy *as such* has a special value. Such matters are not within the purview of the state.

In addition to being intrinsically generative, families headed by a husband and wife who are the biological mother and father of their children also provide the optimal structure for childrearing. According to Child Trends, a liberal think tank:

> [R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in step-families or cohabitating relationships face higher risks of poor outcomes.... There is thus value for children in promoting strong, stable marriages between biological parents.... [I]t is not simply the presence of two parents, ... but the presence of two biological parents that seems to support children's development.[14]

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[14] *See* Kristin Andersen Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, Child Trends Res. Brief 1-2, 6 (June 2002), *available at* www.childtrends.org/files/marriage rb602.pdf; *see also* Witherspoon Inst., *Marriage and the Public Good: Ten Principles* (2008), *available at* http://www.winst.org/ family_marriage_and_democracy/WI_Marriage.pdf (summarizing research in a statement on marriage signed by various scholars across multiple disciplines).

Sara McLanahan and Gary Sandefur, sociologists from Princeton University and the University of Wisconsin, respectively, argue:

> If we were asked to design a system for making sure that children's basic needs were met, we would probably come up with something quite similar to the two-parent ideal. Such a design, in theory, would not only ensure that children had access to the time and money of two adults, it would also provide a system of checks and balances that promoted equality parenting. The fact that both parents have a *biological* connection to the child would increase the likelihood that parents would identify with the child and be willing to sacrifice for that child, and it would reduce the likelihood that either parent would abuse the child.[15]

The claim that children do best when reared by the married mother and father who bore them, like any empirical claim whatsoever, is of course contestable. When social scientists do contest it, however, they often mischaracterize what alternative sociological data would have to show in order to support specifically homosexual parenting, or polyamorous parenting for that matter.

Only if conclusive social scientific evidence were to show that children do as well or better with two homosexual parents in comparison to two heterosexual parents, *and in comparison to two parents of the same sex who were not homosexual*, could the data be taken as evidence that grounded a publicly reasonable argument on behalf of homosexual marriage as such.

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[15] Sarah McLanahan & Gary Sandefur, *Growing Up with a Single Parent* 38 (1994).

Otherwise, studies that purported to show the benefits of homosexual parenting would really just show at best the benefits of having two parents of whatever sexual relation, because they would not control for parenting couples such as a widower and his brother, for example, who are neither homosexual nor husband and wife. This mistake along with many others vitiates the force of the American Psychological Association's unjustly influential 2005 brief on lesbian and gay parenting. The brief asserts: "Not a single study has found children of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents."[16] But this assertion is extremely misleading, because the 59 studies cited in the brief do not really examine the "children of lesbian or gay parents" and furthermore they fail to use a stable and well-defined conception of "heterosexual parents" as a comparison class.[17] The studies overwhelmingly examine small, non-representative convenience samples of well-educated, wealthy, white lesbian mothers who live in cities on the East or West coast. The studies fail to investigate how children fare beyond adolescence, which precludes the studies from registering dysfunctions that typically arise in adulthood, and they evaluate children by documenting their *parents'* perceptions about the children's wellbeing, rather than evaluating the children themselves.

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[16] C. J. Patterson, *Lesbian and Gay Parents and their Children: Summary of Research Findings*, Lesbian and Gay Parenting: American Psychological Association 5-22 (2005), *available at* http://www.apa.org/pi/lgbt/resources/parenting-full.pdf.

[17] *See* Loren Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*, 41 Social Science Research, Issue 4, July 2012, Pages 735–751, *available at* http://dx.doi.org/10.1016/j.ssresearch.2012.03.006.

In summary, the conjugal definition of marriage serves the state interest in orderly reproduction over time. The intrinsically generative nature of heterosexual unions contributes to society's need for children to come into being, and the optimality of conjugal marriage as a child-rearing institution serves society's need for children to be educated into mature and functioning citizens.

C. In defining marriage as a conjugal union, the state need not assert moral disapproval of any other forms of association or intimate relationships, including same-sex ones, and it need not appeal to any religious or traditionalist premises.

Some of the voters in California who passed Proposition 8 were no doubt motivated to reaffirm the conjugal definition of marriage for various religious and moral reasons. These religious and moral reasons do not undermine the publicly reasonable and neutral justification for conjugal marriage. In order to appreciate this fact, consider the apt comparison between a publicly reasonable defense of conjugal marriage and of racial equality.

The mid-twentieth century civil rights movement for racial equality in the United States was deeply Christian. Many participants in the movement were not Christians of course, and there were specifically Christian arguments that some segregationists made *against* racial equality. Nevertheless, Rev. Martin Luther King and other key leaders in the movement made Christian arguments in the public square for racial equality in a biblical idiom that echoed the arguments of the anti-slavery movement in the 19th century, which were even more confessionally Christian.[18] These arguments motivated legislative reform. The reliance of Rev. King and others upon the Christian moral tradition did not violate the canons of public reason, however, because the case for racial equality could be restated in nonsectarian terms that expressed a generally accessible conception of justice.

The same is true for the traditional marriage movement. Some members of this movement deploy specifically religious arguments in its defense, and appeal to the value of tradition, but these facts are unproblematic, because such religious and tradition-based arguments are additional to the publicly reasonable and neutral case for conjugal marriage, such as the one sketched here. Indeed, just as Rawls argues that the Rev. Martin Luther King and his fellow civil rights activists could have translated their Christian case for racial equality into public reasons, so could today the religious and traditionalist advocates of conjugal marriage do the same.

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[18] On the Christian character of abolitionism, *see* James M. McPherson, *Battle Cry of Freedom: The Civil War Era* 8 (1988); Eric Foner, *Politics and Ideology in the Age of the Civil War* 72 (1980); Aileen S. Kraditor, *Means and Ends in American Abolitionism* (1967). *See also* Michael Sandel, *Liberalism and the Limits of Justice* 213 n.74 (2d ed. 1998).

This point merits emphasis because liberal proponents of same-sex marriage habitually refer to the religious motivations of some advocates for traditional marriage as if these motivations implied a *reductio ad absurdum* of any political argument in favor of marriage as a conjugal union. (This in part explains why liberal followers of Rawls have often failed to appreciate that his theory of public reason supports conjugal marriage.[19]) But if the Christian inspiration of the anti-slavery and civil rights movements did not render those movements incompatible with political liberalism, then neither should the religious inspiration of members of the traditional marriage movement.

III. The Rawlsian justification of the conjugal definition of marriage finds confirmation in the recent decisions of American courts.

The state's legitimate interest in ensuring orderly social reproduction by defining marriage as a conjugal union constitutes an emerging theme in American jurisprudence. State and federal courts decisions from 2000 to 2012 that deal with same-sex unions reflect this theme. During this period, eight decisions upheld the conjugal definition of civil marriage.[20] One state court decision mandated "civil unions" that are equivalent in all but name to conjugal marriage.[21] Four decisions redefined the conjugal conception of marriage and mandated same-sex marriage.[22] All eight decisions upholding conjugal marriage accepted the defendants' appeal to the legitimate state interest in procreation and childrearing. Indeed, even in the New Jersey Supreme Court case that ordered civil unions, the majority notes:

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[19] *See e.g.*, Linda C. McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66 Fordham L. Rev. 1241, 1244-52 (1998) (arguing that Rawlsian liberalism requires gay marriage).

> The State does not argue that limiting marriage to the union of a man and a woman is needed to encourage procreation or to create the optimal living environment for children. Other than sustaining the traditional definition of marriage, which is

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[20] *See Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (en banc); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004); *Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451 (Ariz. Ct. 2003).

[21] *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

[22] *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Dep't of Pub. Health*. 957 A.2d 407 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Goodrich v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). In February 2012, the Ninth Circuit decided the fifth case in *Perry v. Brown*, which affirmed the district court's overturning of California's Proposition 8. *Perry v. Brown*, 671 F. 3d 1052 (9th Cir. 2012).

> not implicated in this discussion, the State has not articulated any legitimate public need [for attaching specific benefits and burdens to married heterosexual couples].[23]

Thus, the Court implies that the State *could* have justifiably argued against homosexual civil unions if it had appealed to encouraging procreation or childrearing. The Connecticut Supreme Court mandated same-sex marriages in *Kerrigan v. Department of Public Health*, but here too, the majority decision emphasizes:

> we note that the defendants expressly have disavowed any ... belief that the preservation of marriage as a heterosexual institution is in the best interest of children, or that prohibiting same-sex couples from marrying promotes responsible heterosexual procreation....[24]

Therefore, only three decisions out of thirteen rejected the state defense of defining marriage as a conjugal union when that defense was expressed in terms of promoting procreation and childrearing. Furthermore, the three anomalous cases—*Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003), *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), and *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)—were decided explicitly on the basis of contestable moral assertions that violated the ideal of public reason.[25] When the courts have attended to the state interest in orderly reproduction, and respected a standard like public reason as an aspect of rational basis review, they have reaffirmed the definition of marriage as a conjugal union of husband and wife.

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[23] *Lewis*, 908 A.2d at 217.

[24] *Kerrigan*, 957 A.2d at 478.

Most recently, in *Jackson v. Abercrombie*, the federal district court in Hawaii held that conjugal marriage satisfies both publicly reasonable criteria for the state interest in marriage:

> the legislature could rationally conclude that defining marriage as a union between a man and woman provides an inducement for opposite-sex couples to marry, thereby decreasing the percentage of children accidently conceived outside of a stable, long-term relationship.... It is undisputed opposite-sex couples can naturally procreate and same-sex couples cannot. Thus, allowing opposite-sex couples to marry furthers this interest and allowing same-sex couples to marry would not do so.[26]

It is unsurprising that courts have reaffirmed the conjugal definition of marriage when they have abided by constitutional standards that are publicly available to all reasonable citizens.

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[25] *See* Adam MacLeod, *The Search for Moral Neutrality in Same-Sex Marriage Decisions*, 23 BYU J. Pub. L. 1 (2008). (discussing the "perfectionist ambitions" of *Goodridge* and *In re Marriage Cases*).

[26] *Jackson v. Abercrombie*, No. 11-00734 , 2012 WL 3255201, at *3 (D. Haw. August 8, 2012).

CONCLUSION

Most lawmakers, judges, and citizens do not need the work of John Rawls to teach them that members of a pluralistic society must accept a particular set of basic laws, which they hold in common regard. Without this basic solidarity, the very possibility of political life dissolves. A court deciding on a same-sex marriage law would violate public reason were it to base its opinion on the book of Leviticus in the Bible, for example. Why? Because the values and standards of Leviticus are not public. Not all members of society can reasonably be expected to accept Judeo-Christian scriptures as an authoritative source of political values, even if many people may find in them profound religious truth.

Rawls's work teaches that the constitutional principle of public reason applies universally—to secular values as much as religious ones. Therefore, just as a court could not reasonably expect all citizens to accept a decision based upon Leviticus, neither could it expect everyone to accept a decision based upon theories of "liberated" sexuality or moral philosophies of individual autonomy and egalitarianism. Perhaps Andrew Sullivan, the noted writer and gay activist, has put this point best. Liberalism, he says,

> has most to lose when it abandons the high ground of liberal neutrality. Perhaps especially in areas where passion and emotion are so deep, such as homosexuality, the liberal should be wary of identifying his

> or her tradition with a particular way of life, or a particular cause; for in that process, the whole potential for liberalism's appeal is lost. Liberalism works—and is the most resilient modern politics—precisely because it is the only politics that seeks to avoid these irresolvable and contentious conflicts.[27]

If liberalism retains the high ground by abiding by public reason, then it will reaffirm the conjugal definition of marriage as a union of husband and wife.

Given the foregoing argument, *amicus* respectfully requests that this Court reverse the decisions of the courts below.

Respectfully submitted,

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January 29, 2013.

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[27] Andrew Sullivan, *Virtually Normal: An Argument About Homosexuality* 162-136 (1996).

AMICUS
CURIAE
BRIEF

No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* THE HONORABLE JOHN K. OLSON IN SUPPORT OF RESPONDENT ADDRESSING JURISDICTION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT 2

SUMMARY OF THE ARGUMENT 8

ARGUMENT 12

- A. The Executive Branch's Agreement with the Court Below that DOMA Is Unconstitutional Does Not Deprive this Court of Jurisdiction 12
  - 1. The Court Has Statutory Jurisdiction 12
    - a. *Chadha* was decided correctly 16
    - b. *Chadha* is controlling 18
  - 2. The Court Has Jurisdiction Under Article III 19
    - a. The Constitutionality of DOMA Continues To Be Zealously Litigated 19
    - b. *Chadha* and *Lovett* Support Justiciability 23

TABLE OF CONTENTS
(continued)

Page

c. The Court Has Jurisdiction Under Article III Because Its Decision Will Resolve a Concrete Dispute Between Windsor and the United States 26

3. The Exercise of Jurisdiction Respects Separation of Powers 29

4. The Court Should Decide this Case Because the Constitutionality of Section 3 of DOMA Is Capable of Repetition Yet Evading Review 31

B. BLAG Has Standing 32

CONCLUSION 34

TABLE OF AUTHORITIES

Page

CASES

Alliance to End Repression v. City of Chicago,
820 F.2d 873 (7th Cir. 1987) 27

Bender v. Williamsport Area Sch. Dist.,
475 U.S. 534 (1986) 26

Bowsher v. Synar,
478 U.S. 714 (1986) 32

Camreta v. Greene,
131 S. Ct. 2020 (2011) 12, 22, 26

Chadha v. INS,
634 F.2d 408 (9th Cir. 1980) 21

Cohens v. Virginia,
19 U.S. (6 Wheat.) 264 (1821) 17

Danforth v. Minnesota,
552 U.S. 264 (2008) 30

Deposit Guar. Nat'l Bank v. Roper,
445 U.S. 326 (1980) 12

Diamond v. Charles,
476 U.S. 54 (1986) 32

TABLE OF AUTHORITIES
(continued)

Page

Dist. of Columbia v. Heller,
554 U.S. 570 (2008) 20

Granville-Smith v. Granville-Smith,
349 U.S. 1 (1955) 20, 21

INS v. Chadha,
462 U.S. 919 (1983) ....*passim*

Lewis v. Casey,
518 U.S. 343 (1996) 23, 25

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 20, 30

Marshall v. Marshall,
547 U.S. 293 (2006) 17

Princeton University v. Schmid,
455 U.S. 100 (1982) 28

Stern v. Marshall,
131 S. Ct. 2594 (2011) 30

United States v. Lovett,
328 U.S. 303 (1946) 23, 25, 27, 31

United States v. Miller,
307 U.S. 174 (1939) 20

TABLE OF AUTHORITIES
(continued)

Page

Zivotofsky ex rel. Zivotofsky v. Clinton,
132 S. Ct. 1421 (2012) 30

CONSTITUTION, STATUTES AND RULES

U.S. CONST. art. III 8

1 U.S.C. § 7 .... 2, 3

26 U.S.C. § 2056(a)..................................3

26 U.S.C. § 7422(f)(1) 14

28 U.S.C. § 530D 4

28 U.S.C. § 1254(1).................. 8, 10, 12, 13, 16

28 U.S.C. § 1291 .... 18, 19

28 U.S.C. § 2414 26

FED. R. CIV. P. 24(a)(2) 5

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American Bar Ass'n, *Preview of the United States Supreme Court Cases: U.S. v. Windsor*, http://www. American bar.org/publications /preview_home /12-307.html.................................. 20

TABLE OF AUTHORITIES
(continued)

Page

Mark Hamblett, *Amicus Briefs Pour Into Second Circuit for Review of DOMA Validity*, NEW YORK LAW JOURNAL, Sept. 13, 2012, *available at* http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202571134398&Amicus_Briefs_Pour_Into_Second_Circuit_for_Review_of_DOMA_Validity 20

H.R. Res. 5, 113th Cong. § 4(a)(1) (2013)............8

INTEREST OF THE *AMICUS CURIAE*[1]

The undersigned *amicus curiae* is the Honorable John Karl Olson, a United States Bankruptcy Judge. In November 2010, Judge Olson married G. Steven Fender in the Commonwealth of Massachusetts. On December 1, 2010, Judge Olson filled out and submitted AO Form 162, Election to Participate in the Judicial Survivors' Annuities System ("JSAS"). Judge Olson named Steven as his spouse on this form, and also designated Steven as his husband and 100% beneficiary on the related Designation of Beneficiary Judicial Survivors' Annuities System Form.

Initially, the Administrative Office of the United States Courts ("AO") accepted Judge Olson's designations and began deducting the required premiums from his paycheck. Thereafter, however, the AO sent Judge Olson a letter stating that "the governing law does not currently permit your enrollment in JSAS based upon a same-sex marriage." The letter continued, "[t]his interpretation is consistent with the 1996 'Defense of Marriage Act ["DOMA"],' 1 U.S.C. § 7...[and] we must interpret the statute to preclude an opportunity to elect participation in JSAS based on a same-sex marriage, and to preclude survivors of same-sex marriages from qualifying for a JSAS annuity." The letter advised Judge Olson that the AO had cancelled his JSAS election, and the AO returned his premium payments. DOMA is the only reason the AO gave for rejecting Judge Olson's JSAS benefit for Steven. Judge Olson has a direct and personal interest in the outcome of this case.

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both Petitioner and Respondent have consented to the filing of this brief. Petitioner's blanket consent has been filed with this Court, and a copy of Respondent's consent is filed herewith.

In addition to addressing generally the issues of jurisdiction and standing, the distinct contribution of this brief is to discuss (1) the Court's use of *amicus curiae* to ensure adversarial presentations, and (2) the correctness and relevance of the Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983).

STATEMENT

Respondent Edith Schlain Windsor married Thea Clara Spyer, her late spouse, in Toronto, Canada on May 22, 2007. Joint Appendix ("JA") 160, Amended Complaint. Windsor and Spyer remained married until February 5, 2009, when Spyer passed away after a decades-long battle with multiple sclerosis. JA158, 163.

Spyer's Last Will and Testament appointed Windsor as executor of Spyer's estate, as well as the sole beneficiary. JA164. A provision of the Tax Code, 26 U.S.C. § 2056(a), provides a marital deduction for property passing from a decedent to a surviving spouse, meaning that such property generally passes free of the federal estate tax. JA165. However, the Internal Revenue Service ("IRS") determined that property passing from Spyer to Windsor was subject to the federal estate tax because of Section 3 of DOMA, Pub. L. No. 104-199, 110 Stat. 2419 (1996). JA164, 166.

Section 3 of DOMA provides that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7. The IRS determined that the marital deduction did not apply as between Spyer and Windsor because their marriage was between two women, instead of a man and a woman. JA170. As a result, Windsor was required to pay a $363,053.00 federal estate tax. JA166.

In November 2010, Windsor, in her capacity as executor of Spyer's estate, filed suit against the United States in the United States District

Court for the Southern District of New York, seeking a refund of the $363,053.00 imposed on Spyer's estate. JA77, District Court Docket Entries; JA173. Windsor argued that Section 3 of DOMA violates the equal protection component of the Fifth Amendment and is therefore unconstitutional. JA172.

Shortly thereafter, in February 2011, Attorney General Eric H. Holder, Jr. sent a letter to the Honorable John A. Boehner, Speaker of the House of Representatives, pursuant to 28 U.S.C. § 530D. JA183-194. After referencing two lawsuits challenging the constitutionality of DOMA, including the one brought by Windsor, the Attorney General wrote that he and President Obama had "concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional." JA184-185.

The Attorney General's letter further stated that pursuant to the President's directive, the Department of Justice ("DOJ") would cease defense of DOMA in cases such as Windsor's. JA193. The Attorney General explained that the Executive Branch would, consistent with its obligation to take care that the laws be faithfully executed, continue to enforce the statute "unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality." JA192. The Attorney General also stated that DOJ would provide Congress a full and fair opportunity to participate in DOMA litigation. JA193. Finally, the Attorney General stated that he would "instruct Department attorneys to advise courts in other pending DOMA litigation...that the Department will cease defense of Section 3." JA193.

Following the Attorney General's letter, the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG"), a five-member bipartisan leadership group, voted 3-2 to intervene in the litigation to defend the constitutionality of DOMA. JA195-196 & n.1, Unopposed Mot. of BLAG to Intervene for a Limited Purpose. The District Court permitted BLAG to intervene as of right and as a full party under Federal Rule of Civil Procedure 24(a)(2), finding that "BLAG has a cognizable interest in defending the enforceability of statutes the House has passed when the President declines to enforce them." JA223, June 2, 2011 Mem. and Order of the District Court. The District Court also held that BLAG had Article III standing. JA226-227.

The District Court subsequently granted summary judgment for Windsor, holding that Section 3 of DOMA was unconstitutional. The court awarded Windsor a $363,053.00 refund for the estate tax she paid. Pet. App. 22a.

DOJ noticed an appeal to the Second Circuit. JA524-525, DOJ Notice of Appeal. BLAG also noticed an appeal, JA522-523, and moved to dismiss DOJ's appeal for lack of appellate standing, arguing that the United States had prevailed before the District Court and was therefore not an aggrieved party entitled to appeal. JA526-527, BLAG's Mot. to Dismiss Appeal. DOJ opposed the motion, arguing that because the District Court's judgment prevented the Executive Branch from taking enforcement action it would otherwise take, i.e., the enforcement of DOMA, it was aggrieved by the judgment and therefore had appellate standing. JA532-533, DOJ's Opp'n to Mot. to Dismiss Appeal. Prior to the Second Circuit's decision, Windsor and DOJ petitioned this Court separately for certiorari before judgment.

On October 18, 2012, the Second Circuit denied BLAG's motion to dismiss DOJ's appeal and affirmed the District Court's decision that Section 3 of DOMA is unconstitutional. Supp. App. 3a. The Second Circuit held that "[n]otwithstanding the withdrawal of its advocacy, the United States continues to enforce Section 3 of DOMA, which is indeed why Windsor does not have her money. The constitutionality of the statute will have a considerable impact on many operations of the United States." *Id.* at 4a (citing *INS v. Chadha*, 462 U.S. 919, 931 (1983)).

Shortly thereafter, DOJ filed a supplemental brief advising this Court of the Second Circuit's decision and suggesting that the Court consider its petition as one for certiorari after judgment, and to review the judgment of the court of appeals. U.S. Supp. Br. 7. Windsor also asked the Court to grant the United States' petition, Windsor Supp. Br. 1, while BLAG opposed the request. BLAG Supp. Br. 2.

This Court granted the United States' petition for a writ of certiorari before judgment on December 7, 2012, on the question of DOMA's constitutionality. The Court also directed the parties to brief two jurisdictional questions. The first is "[w]hether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case." The second is "whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case."

On December 28, 2012, BLAG filed a petition for a writ of certiorari from the Second Circuit decision. On January 3, 2013, the House of Representatives adopted a resolution authorizing the 113th Congress's BLAG to act as successor-in-interest to the 112th Congress's BLAG in civil actions in which BLAG had intervened during the 112th Congress to defend the constitutionality of DOMA Section 3, including this case.

H.R. Res. 5, 113th Cong. § 4(a)(1) (2013). The resolution further states that BLAG continues to speak for, and articulate the institutional position of, the House in all litigation matters in which it appears, including *United States v. Windsor*. *Id.*

SUMMARY OF THE ARGUMENT

Regardless of whether BLAG has standing, this matter presents a live, justiciable controversy over which the Court possesses jurisdiction under 28 U.S.C. § 1254(1) and Article III of the U.S. Constitution. The United States continues to enforce DOMA, inflicting a tangible, pecuniary loss on Respondent in the form of the $363,053.00 in taxes she was obligated to pay, and for which she is seeking a refund. Moreover, the Court's resolution of the matter is outcome determinative: if this Court upholds the decision below, Windsor will receive her refund; if not, then not. At the end of the day, the Court's exercise of jurisdiction in this case *matters* to the parties in a direct, tangible way and would not serve merely to address a generalized grievance or resolve a purely abstract inquiry.

Moreover, the merits of this live controversy have been, and will continue to be, vigorously litigated in this Court, and the issues have been, and will continue to be, presented and joined in a manner fully consistent with traditional notions of adversarial resolution. Although Windsor and

DOJ both argue that DOMA is unconstitutional, that position has been vigorously disputed by BLAG since it intervened in the district court. And regardless of whether BLAG has standing as a party, or whether BLAG were designated simply as an *amicus curiae*, its vigorous advocacy (together with the advocacy of the various other *amici* that urge reversal of the decision below) ensures that the issues will be fully vetted. Because an actual, live controversy exists between Windsor and the United States, and because the participation of BLAG and its *amici* ensure vigorous adversarial advocacy, the case and controversy requirement of Article III is satisfied.

This Court's decision in *INS v. Chadha*, 462 U.S. 919, 931 (1983), is instructive and controlling. First, *Chadha* was decided correctly. The government is not a monolithic institution. It performs many discrete tasks, including administrative functions (such as routinely collecting and refunding taxes) and litigation functions (such as defending lawsuits brought against it in court challenging the constitutionality of a federal statute). *Chadha* recognizes that, although the government must take care to enforce the laws faithfully in its administrative capacity, it may in good faith argue the unconstitutionality of a law where the United States has been sued and a litigant has raised the issue. The government does not thereby deprive a court of jurisdiction where, as here, a live controversy actually exists. This only makes sense. If DOJ believes in good faith that a federal statute is unconstitutional, it does not have to feign opposition in order to render the matter justiciable. In addition, *Chadha* was decided correctly because it is faithful to the governing statutory provision, 28 U.S.C. § 1254(1), conferring broad jurisdiction on this Court to review the decisions of the lower federal courts; it properly respects the role of this Court in determining the meaning of the Constitution; and it adheres to the longstanding principle that a federal court should accept jurisdiction where Congress has conferred it.

Second, this case is substantively similar to *Chadha*. As in *Chadha*, the United States here remains aggrieved: the IRS would not issue a refund to Windsor except for the decisions of the courts below. The fact that DOJ agrees with Windsor that the statute is unconstitutional does not alter this fundamental jurisdictional fact.

Prudential concerns further weigh in favor of exercising jurisdiction here and ruling on DOMA's constitutionality. Because the United States is enforcing but not defending DOMA, innumerable individuals like Windsor will continue to be harmed by the statute for the foreseeable future and will be in need of filing suit to vindicate their rights. In other words, this issue is classically capable of repetition yet evading review if the courts lack appellate jurisdiction because the United States will no longer defend DOMA's constitutionality in ensuing ligation. Where, as here, a live controversy exists involving a matter of pecuniary interest to a litigant and the United States, but DOJ has aligned itself with the litigant in asserting a statute's unconstitutionality, the appropriate route to assure adversarial presentation is for the Court either to recognize a representative of the legislature to urge the statute's constitutionality or appoint an *amicus curiae* to do so.

Over the past several decades, this Court has often appointed an *amicus curiae* to fill the shoes of a litigant who has declined to defend the merits of a judgment below. Because the option of recognizing BLAG as a participant and/or the option of recognizing BLAG as an *amicus curiae* are both available and efficacious in this instance, the exercise of jurisdiction is warranted.

Alternatively, BLAG has standing to participate in this case as a party, removing any jurisdictional concerns. It may do so because it represents an entity with a legitimate, tangible interest in the outcome of this case, and because it may acquire the standing of the United States where, as here, DOJ has abandoned its initial defense of DOMA's constitutionality.

ARGUMENT

A. The Executive Branch's Agreement with the Court Below that DOMA Is Unconstitutional Does Not Deprive this Court of Jurisdiction.

1. The Court Has Statutory Jurisdiction.

The Court has statutory jurisdiction over this controversy under 28 U.S.C. § 1254(1), which provides in relevant part that "[c]ases in the courts of appeals may be reviewed by the Supreme Court...(1) [b]y writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of the judgment or decree...." 28 U.S.C. § 1254(1). This provision "confers unqualified power on this Court to grant certiorari 'upon the petition of *any* party.'" *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) (emphasis in original) (quoting 28 U.S.C. § 1254(1)). Likewise, the statutory "language covers petitions brought by litigants who have prevailed, as well as those who have lost, in the court below." *Id.* (citation omitted). These statutory requirements are satisfied here.

Although the Court has noted in the past that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it," *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S.

326, 333 (1980), that general prudential consideration is not expressed anywhere in section 1254(1) and is not controlling in this instance where (1) the IRS would not issue Windsor a tax refund except for the decisions of the courts below, (2) a live controversy thus exists between the parties and a decision on the merits by this Court will be outcome determinative, and (3) the issues will be presented in a manner consistent with traditional notions of adversarial resolution.

It is true, of course, that the judgment below affords relief to both Windsor and DOJ in the narrow sense that it vindicates a particular *legal position* on the constitutionality of DOMA that both advocate, but that hardly ends or controls the analysis. The United States will still enforce DOMA absent judicial intervention, and Windsor remains without her tax refund. In turn, whether the federal courts may afford relief to Windsor and litigants like her turns on the constitutionality of DOMA, and *that* question, properly presented here, is one only this Court can finally settle authoritatively. In the context of this case, prudential concerns do not override the plain breadth of section 1254(1).

Moreover, the United States is an indispensible party in this litigation. The government is in possession of the refund Windsor seeks, and no one may sue it for a tax refund without naming the United States as a party. *See* 26 U.S.C. § 7422(f)(1). It is axiomatic that the United States may properly insist on this requirement as an incident to its waiver of sovereign immunity to suit.

Amica Jackson argues that, because Windsor and DOJ agree that DOMA is unconstitutional, they may simply settle this controversy. Brief for Court Appointed *Amica Curiae* Addressing Jurisdiction ("Jackson Br.") 32. Respectfully, the possibility of settlement is irrelevant because it exists in virtually *every* case, and if the possibility of settlement could deprive a federal court of jurisdiction there would be little left for the federal courts to do. Here the United States and Windsor have not settled, and a live controversy remains for the Court to adjudicate.

Likewise, it does not matter that Windsor and DOJ both agree that the Second Circuit in this case decided the matter correctly. *See* Jackson Br. 24. Windsor still does not have her refund, and it is for this Court to decide whether, in fact, the court below was correct in its judgment.

In *INS v. Chadha*, 462 U.S. 919 (1983), the Court upheld jurisdiction under similar circumstances. There, the House of Representatives exercised its statutory right under Section 244(c)(2) of the Immigration and Nationality Act to legislatively veto the Attorney General's decision to suspend Chadha's deportation. *Id.* at 926-27. In the ensuing litigation, the Immigration and Naturalization Service ("INS") agreed with Chadha that Section 244(c)(2) was unconstitutional. *Id.* at 928. Nonetheless, because it had no authority to decide unilaterally the constitutionality of the statute, INS continued processing Chadha's removal. *Id.* at 930. Both the Senate and House of Representatives intervened in the Ninth Circuit to defend the statute. After the Ninth Circuit agreed with Chadha and INS that Section 244(c)(2) was unconstitutional (and directed INS to cease its deportation efforts), INS filed a petition for certiorari review. *Id.* at 928.

The Senate and House moved to dismiss INS's appeal, arguing that because INS agreed with Chadha that Section 244(c)(2) was unconstitutional, this Court lacked jurisdiction under the *Deposit Guaranty* rule. *Id.* at 930. The Congressional parties argued that INS had received all it sought before the Ninth Circuit and was therefore not an aggrieved party. *Id.* at 930 & n.5. The Court, however, rejected this argument, holding that INS was sufficiently aggrieved by the Ninth Circuit's decision because that decision prohibited INS from taking action it otherwise would take, namely the deportation of Chadha. *Id.* at 930-31. That analysis applies here.

a. *Chadha* was decided correctly.

The Court's decision in *Chadha* was decided correctly for several reasons. To begin with, the federal government is not a monolithic institution. It performs many discrete functions, including those of an administrative nature (such as the routine collection and refund of taxes), and those involving litigation defense and management (such as the defense of a lawsuit brought against it claiming a federal statute is unconstitutional). In the exercise of its administrative functions, and consistent with the Constitution, the government routinely takes care to apply federal law as it is written. On the other hand, in the exercise of its litigation function, DOJ acting in good faith may arrive at the considered conclusion that a federal statute that the government has been enforcing is, in fact, unconstitutional. Where it does so, the United States (acting through DOJ) need not feign the statute's constitutionality to preserve federal jurisdiction. Where, as here, a live controversy remains between the parties, DOJ may candidly argue its position. *Chadha* respects these constitutional divisions of labor.

In addition, *Chadha* is faithful to the governing statutory jurisdictional provision, 28 U.S.C. § 1254(1), which confers broad authority on this Court to review the decisions of the lower federal courts—a function that is especially important where a lower court had determined a statute of the United States to be unconstitutional. Similarly, *Chadha* properly preserves for this Court the ultimate authority to settle the constitutionality of a particular statute, regardless of whether another branch of government agrees or disagrees with the litigation posture of a particular litigant on a constitutional question. In addition, it adheres to the longstanding principle that a federal court should accept jurisdiction where Congress had conferred it. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."); *see also Marshall v. Marshall*, 547 U.S. 293, 298 (2006) (same).

b. *Chadha* is controlling.

This case is substantially no different from *Chadha*. The United States remains aggrieved here essentially for the same reason INS in *Chadha* was aggrieved: in this case IRS would not issue Windsor her tax refund except for the decisions of the courts below. It is the decisions below that require the refund. As noted, the Executive Branch continues to enforce DOMA as part of its obligation to take care that the laws be faithfully executed. It also acknowledges that it cannot unilaterally determine the constitutionality of Section 3 of DOMA. Because the constitutionality of Section 3 is ultimately for the courts to resolve, the United States remains an aggrieved party for purposes of this Court's appellate jurisdiction. *Chadha*, 462 U.S. at 931; Supp. App. 4a-5a.

It bears noting that the Second Circuit also had appellate jurisdiction over this case. 28 U.S.C. § 1291 provides that "[t]he courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decision of the district courts of the United States...." This provision conferred jurisdiction on the Court of Appeals to hear the appeal from the District Court. For the same reason that *Deposit Guaranty* does not defeat jurisdiction in this Court, it likewise did not divest the Second Circuit of jurisdiction. Supp. App. 4a-5a (citing *Chadha* in concluding that the United States is an aggrieved party for purposes of taking an appeal because it "continues to enforce Section 3 of DOMA" and "[t]he constitutionality of the statute will have a considerable impact on many operations of the United States"); *see also* Jackson Br. 38-39 (noting that the *Deposit Guaranty* rule applies to 28 U.S.C. § 1291).

2. The Court Has Jurisdiction Under Article III.

This Court also has Article III jurisdiction because (1) the constitutionality of DOMA continues to be zealously litigated in a manner fully consistent with traditional notions of adversarial resolution, (2) the controversy is justiciable under traditional case or controversy doctrine, and (3) the Court's decision will resolve a concrete, particularized dispute between Windsor and the United States.

a. The Constitutionality of DOMA Continues To Be Zealously Litigated.

Although DOJ and Windsor both argue that DOMA is unconstitutional, BLAG vigorously opposes their position and did so in the courts below. In addition, at least twenty-five *amici* have filed briefs in this Court in support of

BLAG on the merits,[2] and at least nineteen *amici* filed briefs in the court of appeals.[3]

As an historical fact, this Court has often heard and determined cases in which opposing parties have agreed on an issue, or where only one party defends the case. For example, the Court issued its landmark decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) in spite of James Madison's failure to participate. *See id.* at 139, 154. Similarly, the Court decided *United States v. Miller*, 307 U.S. 174 (1939), even though the defendants did not file a brief or appear at oral argument, and "the Court heard from no one but the Government." *Dist. of Columbia v. Heller*, 554 U.S. 570, 623 (2008).

Since *Marbury* and *Miller*, this Court has often appointed an *amicus curiae* to brief and argue the matter when one party does not respond. For example, in *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955), the respondent did not file a brief and the Court noted "the lack of genuine adversary proceedings at any stage in th[e] litigation." *Id.* at 2, 4. Nevertheless, the Court "invited specially qualified counsel to appear and present oral argument as *amicus curiae* in support of the judgment below," and proceeded to decide the merits. *Id.* at 4 (internal quotation marks omitted). There is no reason to abandon that tradition here.

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[2] *See* American Bar Ass'n, *Preview of the United States Supreme Court Cases: U.S. v. Windsor*, http://www.americanbar.org/publications/preview_home/12-307.html.

[3] *See* Mark Hamblett, *Amicus Briefs Pour Into Second Circuit for Review of DOMA Validity*, NEW YORK LAW JOURNAL, Sept. 13, 2012, *available at* http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202571134398&Amicus_Briefs_Pour_Into_Second_Circuit_for_Review_of_DOMA_Validity.

Given the stakes in this case and the extensive presentation of the issues in a manner fully consistent with traditional notions of adversarial resolution, the bare fact that Windsor and DOJ agree that DOMA is unconstitutional does not render this "a friendly, non-adversary, proceeding" beyond this Court's jurisdictional reach. *Chadha,* 462 U.S. at 939 (citation omitted). As the Court observed in *Chadha*, "it would be a curious result if, in the administration of justice, a person could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments asserted by the individual." *Id.*; *accord Chadha v. INS*, 634 F.2d 408, 420 (9th Cir. 1980) (Kennedy, J.) (rejecting notion "that all agencies could insulate unconstitutional orders and procedures from appellate review simply by agreeing that what they did was unconstitutional.").

Amica Jackson argues that there is no case or controversy here because the parties seek "precisely the same result." Jackson Br. 31 (citing *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 383 (1980)). But that is not the test, nor should it be. Regardless of whether DOJ agrees with Windsor regarding the constitutionality of DOMA, it acknowledges that, as an administrative matter, the government is powerless to unilaterally give her a tax refund. On the contrary, without judicial intervention, it would not do so. As a consequence, a live controversy exists as to which the decision of the courts—including this Court—is outcome determinative, and, thus, a case or controversy exists within the meaning of Article III.

Even where all the litigants in a particular case desire precisely the same result, this does not necessitate a finding that the Court lacks jurisdiction. *See Camreta*, 131 S. Ct. at 2029 n.3 ("this Court has previously identified no special Article III bar on review of appeals brought by parties who obtained a judgment in their favor below."). Again, what matters is the existence of an actual controversy in need of judicial resolution. *See Chadha*, 462 U.S. at 939 ("[P]rior to Congress' intervention, there was adequate Art. III adverseness even though the only parties were the INS and Chadha.").

b. *Chadha* and *Lovett* Support Justiciability.

In both *Chadha* and *United States v. Lovett*, 328 U.S. 303 (1946), the Court reached the merits of the questions presented, and overturned the statutes at issue on constitutional grounds, even though both the United States and the particular plaintiffs agreed arm-in-arm that the Court should do so.[4] Because the Court's opinions in *Chadha* and *Lovett* did not expressly state that the United States had Article III standing under the circumstances, *amica* Jackson argues that those precedents do not support a finding that the United States has Article III standing in this case. *See* Jackson Br. at 25, 28 (citing *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996)). Jackson then appears to take the view that because the United States lacked Article III *standing* in *Chadha* and *Lovett* (and likewise here), the Court also lacked Article III *jurisdiction* in those cases (and likewise here). *See* Jackson Br. 25-28. But the latter does not follow from the former, and, in any event, the United States possesses Article III standing in this controversy and the Court possesses Article III jurisdiction.

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[4] In *Lovett*, an appeal was taken from a judgment in favor of federal employees whose compensation had been terminated by an act of Congress. 328 U.S. at 304-05.

The question of Article III standing focuses on whether a particular litigant has a sufficient stake in a particular dispute so that it may argue the matter in court. The question of Article III jurisdiction focuses on whether the court faces an actual case or controversy. Here the United States has Article III standing to litigate this matter because Windsor seeks to recover a tax refund from the Treasury. The Court has Article III jurisdiction because a case or controversy actually exists: whether Windsor prevails and receives her tax refund depends on how the Court rules. The fact that the United States agrees with Windsor that Section 3 of DOMA is unconstitutional does not strip the United States of its standing because it remains an indispensible party and still has much at stake in spite of its agreement on the discrete constitutional issue. The Court does not lose jurisdiction because the agreement of the United States does not resolve the controversy—it remains for the Court to decide DOMA's constitutionality, whether the Second Circuit was right, and whether Windsor gets her refund.

Even if the United States bowed out of the litigation altogether and refused to participate (thereby *de facto* agreeing that judgment could enter against it), that still would not destroy jurisdiction. If refusing to participate could destroy jurisdiction, default judgments would not be possible in federal court and a litigant could always terminate the litigation at will at any point simply by refusing to show up and participate in any further proceedings. That, of course, is not the law. As noted, when a litigant refuses to participate in this Court in a case selected for certiorari review, the Court simply appoints an *amicus* to participate in its stead.

In support of her argument, Jackson recites footnote 2 in *Lewis*, 518 U.S. at 352 n.2, where the Court stated that "we have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect." Jackson Br. 25. But this comment on the precedential effect of unaddressed issues in no way requires the jurisdictional rule Jackson urges. Moreover, *Lewis* itself acknowledged that, in many cases, actual injury (and standing to sue) will often be "apparent on the face of" the relevant decisions. *Id.* at 351. That is the case here, just as it was "apparent" in *Chadha* and *Lovett*.

Inasmuch as the Court in *Chadha* expressly held that Article III adverseness existed in the Ninth Circuit, 462 U.S. at 939, the Court impliedly held that Article III adverseness existed in this Court, particularly given the intervention of Congress. *See id.* at 939-40. Likewise, the Court in *Lovett* impliedly held that Congress as *amicus curiae* supplied the requisite Article III adverseness. 328 U.S. at 306-07, 313. Those conclusions are sound, and respecting them here gives meaning to the Court's responsibility (undoubtedly exercised in *Lovett* and *Chadha*) of examining its own jurisdiction.[5]

c. The Court Has Jurisdiction Under Article III Because Its Decision Will Resolve a Concrete Dispute Between Windsor and the United States.

As noted, Windsor seeks a refund of $363,053 in federal tax she paid because the United States refused to recognize her marriage to another woman. Because Windsor prevailed below, the United States must pay Windsor her tax refund if this Court does not reverse.[6] Thus, the United States has suffered a concrete injury to its financial interest. *Camreta*, 131 S. Ct. at 2028 (to establish Article III standing, party seeking review must demonstrate "'injury in fact'...caused by 'the conduct complained of' and that 'will be redressed by a favorable decision.'") (citation omitted). In addition, as the Court of Appeals recognized, "[t]he constitutionality of the statute will have a considerable impact on many operations of the United States." Supp. App. 4a.

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[5] *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it.") (citation omitted).

[6] Although Windsor prevailed in the courts below, the judgment in her favor is not final because the United States has appealed it. *See* 28 U.S.C. § 2414 ("Whenever the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final.").

The Executive Branch's decision to stop defending DOMA in court has not diminished the concrete injury Windsor suffered in having to pay the tax in question, or the adverse monetary judgment the United States incurred in the courts below. In *Lovett*, the United States and various federal employees agreed that the relevant statute denying those employees compensation was unconstitutional, but the Court did not find the parties' agreement on the issue to be equivalent to a monetary settlement of the case mooting the appeal. *See Lovett*, 328 U.S. at 307, 313.

Despite Jackson's urging to the contrary, Jackson Br. 32., *Alliance to End Repression v. City of Chicago*, 820 F.2d 873 (7th Cir. 1987), does not compel a different conclusion. In *Alliance to End Repression*, the appeal challenged the award of attorneys' fees for time worked after the parties agreed on money damages. *Id.* at 874. Here, the United States and Windsor have not agreed to settle the case for a certain amount.

Jackson asserts that the United States' "only real interest here is in obtaining a precedent from a higher court." Jackson Br. 29. In support of this contention, she discusses *Princeton University v. Schmid*, 455 U.S. 100, 103 (1982). Jackson Br. 29-30. In that case, the Court held that Princeton's appeal of a state court decision invalidating its old regulations was moot because "the regulation at issue [wa]s no longer in force" and "the lower court's opinion was careful not to pass on the validity of the revised regulation under either the Federal or the State Constitution." *Schmid*, 455 U.S. at 103. No analogous legislative amendment has occurred here, and for this reason this case is vastly different.

Jackson also makes much of the hypothetical issue of whether the Court in *Schmid* would have accepted the appeal if the state had been the only appellant. Jackson Br. 29-30. But in *Schmid*, the state declined to take *any* position on the merits of the case,[7] whereas here the United States has argued that DOMA is unconstitutional. In *Schmid*, the state was no longer required to enforce the unconstitutional regulations by the time review was sought in this Court (because those regulations had been amended), whereas here the Executive Branch must continue enforcing DOMA unless and until this Court strikes it down or Congress repeals it.

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[7] *Schmid*, 455 U.S. at 102 ("The State of New Jersey has filed a brief in this Court asking us to review and decide the issues presented, but stating that it 'deems it neither necessary nor appropriate to express an opinion on the merits of the respective positions of the private parties to this action.'").

3. The Exercise of Jurisdiction Respects Separation of Powers.

The Executive Branch's decision to enforce but not defend Section 3 of DOMA not only maintains its active interest in this case, but respects the constitutional limitations on its own power and the proper roles of co-equal branches. Through its continued enforcement of DOMA and its participation in this litigation, the Executive Branch is fulfilling its own constitutional mandate to faithfully execute the laws, while respecting the authority of Congress to enact legislation and the authority of the courts to determine its constitutionality.

A finding that this Court does not have jurisdiction based on the Executive Branch's agreement with the court below would result in an unwarranted expansion of Executive power at the expense of Congress and the Judiciary, creating an imbalance: by simply agreeing with a litigant that a law is constitutionally invalid (all the while continuing to enforcing the same law out of court), judicial review is foreclosed. Nothing in the Constitution requires such an odd anomaly.

It is this Court that is "the final arbiter of federal law," *Danforth v. Minnesota*, 552 U.S. 264, 291-92 (2008) (Roberts, C.J., dissenting); *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427-28 (2012), and it is "the province and duty" of this Court "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). It follows that "[u]nder the basic concept of separation of powers...the judicial Power of the United States...can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the power to override a Presidential veto." *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011) (quoting *United States v. Nixon*, 418 U.S. 683, 704 (1974) (internal quotations omitted)).

Consistent with this fundamental principle, DOJ has properly brought this matter to this Court to determine "what the law is." Until the Court issues a final determination, Executive agencies will continue to enforce DOMA. As noted, there is nothing untoward about the United States, acting through DOJ, seeking a decision by this Court on the constitutionality of a federal statute where, as here, there exists a live controversy with actual, meaningful consequences to the litigants.

4. The Court Should Decide this Case Because the Constitutionality of Section 3 of DOMA Is Capable of Repetition Yet Evading Review.

The Court should also decide this case because if it does not, the pressing and significant question of DOMA's constitutionality will not be resolved authoritatively, and the issue will continue to fester. As the Court stated in an analogous setting, "[o]ur Constitution did not contemplate such a result." *Lovett*, 328 U.S. at 314.

Because the government continues to enforce DOMA, it is inevitable that absent an authoritative decision by this Court, homosexual married couples will be denied federal marital benefits; those couples will sue the United States and/or its agencies challenging the constitutionality of the deprivation of marital benefits under DOMA; DOJ will not defend the constitutionality of DOMA; and a judgment will likely be entered against the United States. If appellate jurisdiction is lacking, this sequence of events will repeat over and over again—classically capable of repetition yet evading appellate review. Nothing in the Constitution requires this extraordinarily wasteful result.

B. BLAG Has Standing.

As discussed, this Court has statutory and constitutional jurisdiction over this matter regardless of whether BLAG has standing. Accordingly, the Court need not reach this issue. In any event, BLAG does have standing because it can "ride 'piggyback' on the State's undoubted standing" given the ongoing controversy between Windsor and the United States. *Diamond v. Charles*, 476 U.S. 54, 64 (1986). In *Diamond*, this Court explained that an intervening defendant is "entitled to seek review,...file a brief on the merits, and to seek leave to argue orally...if the State is in fact an appellant before the Court." *Id.* "To appear before the Court as an appellant, a party must file a notice of appeal...." *Id.* at 63 (citing 28 U.S.C. § 2101(c), which requires a writ of certiorari to be filed within ninety days of a civil judgment or decree).

Here, in contrast to the State of Illinois in *Diamond*, the Solicitor General filed for a writ of certiorari, rendering the United States an appealing party. Because a case or controversy exists and the United States properly invoked this Court's jurisdiction, BLAG can piggyback onto this appeal. This Court has consistently applied *Diamond* and should do so here. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (holding that because members of the National Treasury Employees Union had Article III and statutory standing, the Court "therefore need not consider the standing issue as to the Union or Members of Congress").

BLAG and DOJ agree that intervenors can piggyback onto a case without establishing independent standing. *See* JA207, Def.'s Resp. to Mot. to Intervene ("[T]he Executive Branch's continuing role in the litigation...makes it unnecessary for BLAG to have an independent basis for standing in order to participate in the litigation to present arguments in support of the constitutionality of Section 3."); JA213, Reply of BLAG to Def.'s Resp. to Mot. to Intervene (stating that whether the House has standing is "beside the point" because "[a]s long as the United States is a defendant in this action...the House need not demonstrate any standing whatever"). Consistent with this Court's precedents, the lower court found that BLAG had intervenor standing because there is an ongoing case and controversy between Windsor and DOJ. *See* JA226-227 (quoting *Chadha*, 462 U.S. at 939). This conclusion was correct, and the Court should reject *amica* Jackson's arguments to the contrary.

CONCLUSION

For the foregoing reasons, as well as those offered by Respondent, this Court possesses jurisdiction, and the decision of the court below should be affirmed.

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Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* THE HONORABLE JOHN K. OLSON IN SUPPORT OF RESPONDENT ADDRESSING THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS .... *i*

TABLE OF AUTHORITIES .... *v*

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

- A. The History of Discrimination Against Homosexuals Is Ancient, Pervasive, Violent, Abusive, and Ongoing 6
  - 1. The History of Discrimination Against Homosexuals Is One of Violent Criminalization 6
  - 2. Discrimination Has Persisted Since the Class Became Identifiable 7
  - 3. Discriminatory Violence Against Homosexuals Continues 10
- B. The Legislative History of DOMA Reveals that It Is an Outgrowth of, and Perpetuates, Prejudice Against Homosexuals 13
  - 1. DOMA Arose To Stifle a Nascent Effort in Hawaii To Recognize Marriage Equality 15

TABLE OF CONTENTS
(continued)

Page

2. DOMA Was Designed To Discourage Marriage Equality 16

3. In Considering DOMA, Sponsoring Legislators Depicted Homosexuality as Immoral and Aberrant, and Same-Sex Marriage as a Threat to the Survival of the Nation 17

4. In Considering DOMA, Sponsoring Legislators Analogized Same-Sex Marriage to Polygamy, Incest, Bestiality, and Pedophilia 18

5. The House Report Itself Identifies the Discriminatory Animus Behind the Legislation 20

C. Over the Last Century, Discriminatory Animus of the Kind that Motivated DOMA Has Doomed Other Invidiously Discriminatory Legislation 21

1. The Grounds Used To Justify DOMA Are Substantially Similar to the Invidious Grounds Used To Justify Anti-Miscegenation Statutes 22

TABLE OF CONTENTS
(continued)

Page

2. The Grounds Used To Justify DOMA Track the Invidious Grounds Used To Justify Discrimination Against Women 25
3. The Grounds Used To Justify DOMA Are Substantially the Same as Those Used To Justify Discrimination Against Illegitimate Children 27
4. The Grounds Used To Justify DOMA Are as Pretextual as Those Used To Justify Discrimination Against Aliens 29

D. Given the Reality that DOMA Embodies Invidious Discrimination, It Should Be Subject to Intermediate Scrutiny 30

1. Homosexuals Have Suffered a History of Discrimination.................. 34
2. Sexual Orientation Is an Immutable Characteristic...................... 34
3. Homosexuals Lack Significant Political Power 36

TABLE OF CONTENTS
(continued)

Page

4. Sexual Orientation Has No Relation to an Individual's Ability To Contribute to Society.....38

E. Animus Toward a Class, as Revealed in DOMA's Legislative History, Can Never Serve a Legitimate, Important, or Compelling Interest.....39

1. DOMA Does Nothing To Legitimately Defend or Nurture the Institution of Traditional, Heterosexual Marriage.....40

2. Tradition, Alone, Cannot Save DOMA.....43

3. DOMA Does Not Protect State Sovereignty.....43

4. The Goal of Conserving Government Resources Cannot Properly Shelter Discriminatory Treatment.....44

5. DOMA Creates Administrative Burdens and Destroys Uniformity.....44

CONCLUSION.....46

TABLE OF AUTHORITIES

Page

CASES

Able v. United States,
968 F. Supp. 850 (E.D.N.Y. 1997), *rev'd on other grounds*, 155 F.3d 628 (2d Cir. 1998) 6, 7

Baehr v. Lewin,
852 P.2d 44 (Haw. 1993) 15

Baehr v. Miike,
No. 91-1394, 1996 WL 694235 (Haw. Ct. App. Dec. 3, 1996) 15

Ben-Shalom v. Marsh,
881 F.2d 454 (7th Cir. 1989) 32

Bolling v. Sharpe,
347 U.S. 497 (1954) 30

Boutilier v. INS,
363 F.2d 488 (2d Cir. 1966), *aff'd*, 387 U.S. 118 (1967) 9

Bowen v. Gilliard,
483 U.S. 587 (1987) 3, 33, 34

Bowers v. Hardwick,
478 U.S. 186 (1986) 24, 32

TABLE OF AUTHORITIES
(continued)

Page

Bradwell v. Illinois,
83 U.S. 130 (1872) 25

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) .... *passim*

Clark v. Jeter,
486 U.S. 456 (1988) 34

Eggers v. Olson,
231 P. 483 (Okla. 1924) 22

Frontiero v. Richardson,
411 U.S. 677 (1973) 37

Graham v. Richardson,
403 U.S. 365 (1971) 44

Green v. State,
58 Ala. 190 (1877) 23

High Tech Gays v. Def. Indus. Sec. Clearance Office,
895 F.2d 563 (9th Cir. 1990) 32

J.E.B. v. Alabama,
511 U.S. 127 (1994) 32, 37

Kerrigan v. Comm'r of Pub. Health,
957 A.2d 407 (Conn. 2008) 3, 37

TABLE OF AUTHORITIES
(continued)

Page

Kinney v. Commonwealth,
71 Va. 858 (1878)....................................23

Lalli v. Lalli,
439 U.S. 259 (1978)....................................27

Lawrence v. Texas,
539 U.S. 558 (2003)....................................7, 32

Levy v. Louisiana,
391 U.S. 68 (1968)....................................28

Levy v. State,
192 So. 2d 193 (La. Ct. App. 1966)................27

Loving v. Virginia,
388 U.S. 1 (1967)....................................22

Matthews v. Lucas,
427 U.S. 495 (1976)....................................28

Pedersen v. OPM,
881 F. Supp. 2d 294
(D. Conn. 2012)..............................3, 7, 8, 9, 10

Pennegar v. State,
10 S.W. 305 (Tenn. 1889)..............................23

Perry v. Schwarzenegger,
704 F. Supp. 2d 921 (N.D. Cal. 2010)...........10

TABLE OF AUTHORITIES
(continued)

Page

Plyler v. Doe,
457 U.S. 202 (1982)........................2, 30, 31, 36

Regents of the Univ. of Cal. v. Bakke,
438 U.S. 265 (1978)..36

Romer v. Evans,
517 U.S. 620 (1996)..33

Rowland v. Mad River Local Sch. Dist.,
470 U.S. 1009 (1985)..6

San Antonio Indep. Sch. Dist. v. Rodriguez,
411 U.S. 1 (1973)..28

Scott v. State,
39 Ga. 321 (1869) 24

Sosna v. Iowa,
419 U.S. 393 (1975)..42

Stanton v. Stanton,
517 P.2d 1010 (Utah 1974), *rev'd*,
421 U.S. 7 (1975)..26

State v. Bell,
66 Tenn. 9 (1872)..18

Sugarman v. Dougall,
413 U.S. 634 (1973)..29

TABLE OF AUTHORITIES
(continued)

Page

Takahashi v. Fish & Game Comm'n,
334 U.S. 410 (1948) 29, 30

U.S. Dep't of Agric. v. Moreno,
413 U.S. 528 (1973) 5, 39

United States v. Virginia,
518 U.S. 515 (1996) 4, 32, 34, 38, 40

Watkins v. United States Army,
875 F. 2d 699 (9th Cir. 1989) 43

Weber v. Aetna Cas. & Sur. Co.,
406 U.S. 164 (1972) 27

STATUTES

1 U.S.C. § 7 2

10 U.S.C. § 1062 42

26 U.S.C § 2(b)(2)(B) 42

26 U.S.C. § 7448(a)(8)(B) 42

38 U.S.C. § 101(3) 42

LEGISLATIVE MATERIALS

2 CONG. REC. 4342 (1874) 26

142 CONG. REC. 16,969 (1996) 5, 20

TABLE OF AUTHORITIES
(continued)

Page

142 CONG. REC. 16,971 (1996) 18, 19

142 CONG. REC. 16,972 (1996) 17, 18, 20, 21

142 CONG. REC. 16,974 (1996) 19

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TABLE OF AUTHORITIES
(continued)

Page

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TABLE OF AUTHORITIES
(continued)

Page

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TABLE OF AUTHORITIES
(continued)

Page

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TABLE OF AUTHORITIES
(continued)

Page

Kendall Thomas, *Beyond the Privacy Principle*,
92 COLUM. L. REV. 1431 (1992) 11

Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*,
52 VA. L. REV. 1189 (1966) 22

Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*,
96 COLUM. L. REV. 1753 (1996).......................11

INTEREST OF THE *AMICUS CURIAE*[1]

The undersigned *amicus curiae* is the Honorable John Karl Olson, a United States Bankruptcy Judge. In November 2010, Judge Olson married G. Steven Fender in the Commonwealth of Massachusetts. On December 1, 2010, Judge Olson filled out and submitted AO Form 162, Election to Participate in the Judicial Survivors' Annuities System ("JSAS"). Judge Olson named Steven as his spouse on this form and also designated Steven as his husband and 100% beneficiary on the related Designation of Beneficiary Judicial Survivors' Annuities System Form.

Initially, the Administrative Office of the United States Courts ("AO") accepted Judge Olson's designations and began deducting the required premiums from his paycheck. Thereafter, however, the AO sent Judge Olson a letter stating that "the governing law does not currently permit your enrollment in JSAS based upon a same-sex marriage." The letter continued, "[t]his interpretation is consistent with the 1996 'Defense of Marriage Act ["DOMA"],' 1 U.S.C. § 7 ...[and] we must interpret the statute to preclude an opportunity to elect participation in JSAS based on a same-sex marriage, and to preclude survivors of same-sex marriages from qualifying for a JSAS annuity." The letter advised Judge Olson that the AO had cancelled his JSAS election, and the AO returned his premium payments. DOMA is the only reason the AO gave for rejecting Judge Olson's JSAS benefit for Steven. Judge Olson has a direct and personal interest in the outcome of this case.

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both Petitioner and Respondent have consented to the filing of this brief. Petitioner's blanket consent has been filed with the Court, and a copy of Respondent's consent is filed herewith.

In addition to addressing the history of discrimination against homosexuals, the distinct contribution of this brief is to demonstrate the discriminatory origins and rationalizations for DOMA in comparison with the substantially similar discriminatory origins and rationalizations for a variety of other unconstitutional legislation, namely various anti-miscegenation statutes and other laws discriminating against women, aliens, and illegitimate children. In this way, DOMA may be placed in proper context, and its origins and rationalizations understood for what they truly are.

SUMMARY OF THE ARGUMENT

The Equal Protection Clause mandates that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). While the general rule is that a statute satisfies equal protection if it has a rational basis, where a statute categorizes on the basis of certain "suspect" or "quasi-suspect" classes, courts apply heightened scrutiny and require the government to demonstrate that the legislation furthers an important or compelling government interest. This Court has enumerated four factors that determine if a class is subject to heightened scrutiny: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals within the group "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group;" (3) whether the group is a minority or is politically powerless, *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987)); and (4) whether the characteristic distinguishing the group "bears [any] relation to ability to perform or contribute to society." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985); *see also Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 426 (Conn. 2008) (explaining that factors (1) and (3) are mandatory, and (2) and (4) are optional).

An examination of these four factors in relation to sexual orientation makes clear that homosexuals are a suspect or quasi-suspect class and that the Second Circuit appropriately subjected DOMA to intermediate scrutiny. In particular, homosexuals have been the victims of a dehumanizing history of discrimination that dates back to at least the Middle Ages. *Pedersen v. OPM*, 881 F. Supp. 2d 294, 317 (D. Conn.

2012). Discrimination against homosexuals only increased as individuals became more open about their sexual orientation, and the history of discrimination is one that is marked by violent hate crimes and brutal harassment. This long history of discrimination, together with the fact that the group is a minority that lacks political power, establishes that DOMA must be subject to intermediate scrutiny. Moreover, sexual orientation satisfies the other factors this Court looks to in deciding whether to apply intermediate scrutiny: homosexuality is well-recognized as an immutable characteristic; and homosexuality has no bearing on an individual's ability to contribute to society.

Where, as here, intermediate scrutiny is applicable, Congress must, at a minimum, provide an "exceedingly persuasive" justification that the legislation "serves important governmental objectives and the discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Critically, the justification must be "genuine" and must not have been "invented post hoc in response to litigation." *Id.* Congress set forth four "governmental interests" that are allegedly served by DOMA: (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending the traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources. Additionally, the Second Circuit found that certain statements in the House Report implicate a fifth interest in enforcing uniformity in the distribution of federal benefits. Supp. App. 24a. None of these justifications is rationally related to a legitimate government interest, let alone substantially related to an important interest.

Furthermore, legislation that "rest[s] on irrational prejudice," *Cleburne*, 473 U.S. at 450, or "a bare congressional desire to harm a politically unpopular group," *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973), cannot survive any level of scrutiny, let alone intermediate scrutiny. An examination of the legislative history of DOMA demonstrates that it is precisely the kind of prejudicial legislation that cannot be tolerated under equal protection. Far from furthering an important government interest, DOMA was motivated by a belief that the "law should not treat homosexual relationships as the moral equivalent of the heterosexual relationships on which the family is based." 142 CONG. REC. 16,969 (1996) (statement of Rep. Canady). Opponents of interracial marriage, women's rights, and the rights of aliens and illegitimate children once defended discriminatory laws on prejudicial grounds strikingly similar to those used to defend DOMA. These laws are now universally recognized as historical errors that violate equal protection, and DOMA should share their fate.

ARGUMENT

A. The History of Discrimination Against Homosexuals Is Ancient, Pervasive, Violent, Abusive, and Ongoing.

As the Second Circuit held below, "[i]t is easy to conclude that homosexuals have suffered a history of discrimination." Supp. App. 16a; *see also Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) ("homosexuals have historically been the object of pernicious and sustained hostility..."). That conclusion, however, is an understatement. In order to avoid minimizing or trivializing the suffering of the minority that is now before the Court, it is important to consider carefully the breadth and scope of the persecution of homosexuals that began before this Country's founding and continues to this day.

1. The History of Discrimination Against Homosexuals Is One of Violent Criminalization.

The "virulent hostility" toward homosexuals dates back to at least the second half of the twelfth century. *Able v. United States*, 968 F. Supp. 850, 854 (E.D.N.Y. 1997), *rev'd on other grounds*, 155 F.3d 628 (2d Cir. 1998). By the Middle Ages, "homosexuality became more and more associated with heresy," and laws were passed which "imposed death by burning on homosexual men." *Id.* (citing JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY 281 (1980)).

The earliest English laws forbidding homosexual conduct, including a 1533 statute that criminalized sodomy, were based on ancient Judeo-Christian prohibitions. *Pedersen*, 881 F. Supp. 2d at 315. The American colonies followed the English tradition, *id.*, upholding the so-called "Levitical Mandate," which pronounced that "[i]f a man also lie with mankind, as he lieth with a woman, both of them shall have committed an abomination; they shall surely be put to death." William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 687 (2011). The historic criminalization of homosexual conduct in America, beginning with the Massachusetts Bay Colony in 1641, *Pedersen,* 881 F. Supp. 2d at 315, and lasting until this Court's 2003 decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), constitutes "telling proof of animus and discrimination against homosexuals in this country...." Supp. App. 16a.

2. Discrimination Has Persisted Since the Class Became Identifiable.

Historians generally agree that the conceptualization of homosexuals as a class began in the nineteenth century and coincided with individuals becoming more open about their sexual identity. *E.g.*, Eskridge, *supra*, at 685; *Pedersen*, 881 F. Supp. 2d at 315-16 (explaining that conceptions of homosexual identity emerged in the late nineteenth century "as gay Americans moved into cities and began tentatively stepping out of the closet"). Coextensive with the emergence of this new class, society's disapproval of homosexual conduct evolved into government discrimination against homosexuals themselves. *Id.*; *see also* Eskridge, *supra*, at 689 ("Between 1921 and 1961, state and federal governments adopted hundred of statutes imposing civil disabilities on 'homosexuals and other sex perverts,' to use the terminology of the era."). A particularly hostile account of discrimination is contained in an infamous 1950 Congressional report investigating federal government employment of homosexuals. SUBCOMM. ON INVESTIGATIONS TO COMM. ON EXPENDITURES IN THE EXEC. DEP'TS, EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT, S. DOC. NO. 81-241 (1950) (the "Report"). In the Report, the subcommittee stated that "homosexuals are perverts who may be broadly defined as 'persons of either sex who as adults engage in sexual activities with persons of the same sex.'" *Id.* at 2.

The Report warned that "[t]hese perverts will frequently attempt to entice normal individuals to engage in perverted practices," *id.* at 4, and that "[o]ne homosexual can pollute a Government office." *Id.* at 4. The subcommittee concluded that homosexuals were unsuited for employment in the federal government because "persons who indulge in such degraded activity are committing not only illegal and immoral acts, but they also constitute security risks in positions of public trust." *Id.* at 19. Tellingly, the Report recognized that homosexuals were "looked upon as outcasts by society generally." *Id.* at 3. The idea that homosexuals were "sex perverts" and unfit for federal employment was given a Presidential seal of approval in the form of an Executive Order from President Eisenhower in 1953. *Pedersen*, 881 F. Supp. 2d at 316 (citing Exec. Order No. 10450, 3 C.F.R. 936, 938 (1953), which added "sexual perversion" as a ground for investigation and dismissal from federal employment).

Contemporaneous Congressional enactments such as the Immigration and Nationality Act of 1952 refused to allow homosexuals to enter the Country on account of their "psychopathic" personalities. *Boutilier v. INS*, 363 F.2d 488, 493-94 (2d Cir. 1966), *aff'd*, 387 U.S. 118, 120 (1967) (Congress considered homosexuals "mental[] defectives" and included them in the term "psychopathic personality"). Moreover, discrimination against homosexuals as a class was not limited to the federal government; state and local governments share equally in this "long history." *Pedersen*, 881 F. Supp. 2d at 317 (citing to evidence of discrimination against gays and lesbians in public employment; child custodial and visitation rights; the ability to associate freely;

and legislative efforts to repeal laws that protect homosexuals from discrimination).

3. Discriminatory Violence Against Homosexuals Continues.

The history of discrimination against homosexuals has long been marked by violence and they "continue to be among the most frequent victims of all reported hate crimes." *Pedersen*, 881 F. Supp. 2d at 317 (citing H.R. REP. NO. 111-86, at 10 (2009)). In *Perry v. Schwarzenegger*, the court cited evidence showing that from 2004 to 2008, between 246 and 283 hate crime events motivated by sexual orientation bias occurred each year and accounted for between 17% and 20% of all hate crimes in the state of California. 704 F. Supp. 2d 921, 981 (N.D. Cal. 2010). According to the FBI's 2011 Hate Crime Statistics, 20.8% of the hate crimes committed in 2011 were motivated by a sexual orientation bias.[2]

Moreover, hate crimes against homosexuals have been particularly violent and brutal. Reports have found that "'attacks against gay men were the most heinous and brutal...encountered,'" which "'frequently involved torture, cutting, mutilation, and beating," and "often d[id] not stop at killing the victim...." Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1824-25 (1996) (citation omitted); *see also* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1462-64 (1992).

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[2] *See* Press Release, Fed. Bureau of Investigation, FBI Releases 2011 Hate Crime Statistics (Dec. 10, 2012), *available at* http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2011-hate-crime-statistics.

Studies also show that lesbian, gay, bisexual, and transgender ("LGBT") students continue to face physical and verbal abuse at alarming levels. The latest report of the Gay, Lesbian, and Straight Education Network's biennial National School Climate Survey (the "GLSEN Survey") showed that in 2011, a shocking 81.9% of LGBT students surveyed were verbally harassed because of their sexual orientation, 38.3% were physically harassed because of their sexual orientation, and 18.3% were physically assaulted because of their sexual orientation.[3]

The majority of these students did not report the harassment. For example, an 8th grade student in Idaho did not report the abuse "[b]ecause those people that did harass me threatened to either make my life hell (which they were already doing) or to kill me." GLSEN Survey at 30.

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[3] *See* GLSEN Survey at 24-25, *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/002/2105-1.pdf.

Discrimination and abuse inflicted on homosexual students has contributed to a tragic trend of youth suicide. Brandon Elizares was an openly gay high school sophomore in El Paso, Texas, who came out about his sexuality in 2010.[4] On June 2, 2012, unable to withstand the bullying he endured because of his sexual orientation, Brandon took his own life. He left his family a suicide note, which said: "My name is Brandon Elizares and I couldn't make it. I love you guys with all my heart. I am sorry but that I felt terrible because I had to hide under my skin."[5] Brandon's suicide is a tragically common response to the kind of discriminatory abuse frequently inflicted upon homosexual youths.

BLAG and others essentially urge the Court to ignore the unpleasant historical and contemporary details outlined above. The reason why this history is particularly pressing, however, is that—as the ensuing discussion reveals—

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[4] Adrianna M. Chavez, *El Paso Gay Teen Commits Suicide After Being Bulled*, EL PASO TIMES, *available at* http://www.elpasotimes.com/ci_20847745/.

[5] Daniel Borunda, *Memorial Held for Gay El Paso Teen Who Committed Suicide After Being Bullied*, EL PASO TIMES, *available at* http://www.elpasotimes.com/ci_20869646/.

DOMA is entirely a product of it and actively perpetuates it in the same manner that anti-miscegenation laws were a product of and perpetuated illicit racial bias, and legislation discriminating against women, aliens, and illegitimate children arose out of and perpetuated their own discredited forms of bigotry. In addition, ignoring the details of the relevant history in a case such as this would unavoidably trivialize its victims. Just as the Court has not done so in evaluating discriminatory bias in other areas, it should not do so here.

B. The Legislative History of DOMA Reveals that It Is an Outgrowth of, and Perpetuates, Prejudice Against Homosexuals.

On the surface, DOMA was intended to advance four goals: "(1) defending and nurturing the institution of traditional heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources." H.R. REP. 104-664, at 12 (1996). As discussed below, however, goals (1), (3), and (4) are entirely illusory—DOMA in fact does none of these things. It provides no legitimate additional benefits to heterosexual couples; it denigrates the democratic ability of the States to define for themselves what constitutes marriage; and it only increases governmental administrative burdens by mandating exclusionary practices at the federal level to deny benefits and recognition to legally married same-sex couples. Rather, what is clear from the pejorative language used to describe homosexuals in the congressional record is that DOMA was primarily concerned with only the second goal—the defense of "traditional notions of morality." What this embodies, of course, is the overtly discriminatory notion that homosexuals are inherently immoral—a view that permeates the commentary in the legislative record. In particular, the record vilifies the struggle for marriage equality as an "orchestrated legal assault." *Id.* at 2-3. To any student of history, of course, this characterization will sound entirely familiar: nearly the same thing was said sixty years ago in opposition to efforts to eliminate racial segregation.

Today, BLAG does not ask the Court to agree that defending traditional notions of morality or promoting heterosexuality are legitimate government interests that DOMA serves.[6] But BLAG cannot ignore the severe prejudice that DOMA embodies and perpetuates. In short, DOMA's legislative history shows that DOMA is an intentionally and illicitly discriminatory statute.

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[6] *See* Pet. App. 172 n.4.

1. DOMA Arose To Stifle a Nascent Effort in Hawaii To Recognize Marriage Equality.

DOMA arose as a congressional reaction to a May 1993 judgment of the Hawaiian Supreme Court. The judgment presumed that the state's refusal to issue marriage licenses to same-sex couples violated the Hawaiian Constitution. *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993). The Hawaiian Supreme Court remanded the matter to the lower court for trial. *Id.* at 68.

Pending trial, Congress hurried to enact DOMA in an effort to discourage the Hawaiian judiciary from "foist[ing] the newly-coined institution of homosexual 'marriage' upon an unwilling Hawaiian public." H.R. REP. NO. 104-664, at 6 (1996). On September 21, 1996, DOMA was signed into law. Shortly thereafter, on December 3, 1996, the Hawaiian trial court handed down its judgment in favor of the petitioning same-sex couples. *See Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *22 (Haw. Ct. App. Dec. 3, 1996). Subsequently, however, no marriage licenses were issued to same-sex couples in Hawaii because the judgment was stayed pending appeal, and in the interim, Hawaii amended its Constitution to permit its legislature to define marriage as between a man and a woman (which it did), thereby removing the plaintiffs' legal challenge to the State's marriage laws.

2. DOMA Was Designed To Discourage Marriage Equality.

The report of the House Judiciary Committee (the "House Report") outlines the "Committee's concerns that motivated [DOMA]." H.R. REP. NO. 104-664, at 3 (1996). It states that DOMA was a response to a perceived "legal assault against traditional heterosexual marriage laws" by gay rights groups. *Id.* at 4. The report warns: "[t]he gay rights organizations and lawyers driving the Hawaiian lawsuit have made plain that they consider Hawaii to be only the first step in a national effort to win by judicial fiat the right to same-sex 'marriage.'" *Id.* at 7.

The report strongly urges the passage of DOMA as a means to prevent "gay rights groups and gay men and lesbians across the country [from]...tak[ing] advantage of the Hawaii victory." *Id* at 7, 17. It states in unequivocal terms that "the Committee does not believe that passivity is an appropriate or responsible reaction to the orchestrated legal campaign by homosexual groups to redefine the institution of marriage through the judicial process." *Id.* at 12.

3. In Considering DOMA, Sponsoring Legislators Depicted Homosexuality as Immoral and Aberrant, and Same-Sex Marriage as a Threat to the Survival of the Nation.

Consistent with the tone of the House Report, the floor debates reveal additional discriminatory animus of peculiar dimensions. Senator Byrd characterized the "drive for same-sex marriage" as "an effort to make a sneak attack on society by encoding this aberrant behavior in legal form..." 142 CONG. REC. S10,110 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd). Senator Lott spoke of "threatening possibilities" for the country should it accept same-sex marriage. *Id.* at S10,101 (statement of Sen. Lott). Senator Byrd even argued that same-sex marriages could cause America to decline, stating:

> Indeed, as history teaches us too often in the past, when cultures waxed casual about the uniqueness and sanctity of the marriage commitment between men and women, those cultures have been shown to be in decline. This was particularly true in the ancient world in Greece, and more particularly, in Rome.

Id. at S10,109 (statement of Sen. Byrd).

In related fashion, Congressman Coburn insisted that "[t]he fact is, no society...has lived through the transition to homosexuality and the perversion which it lives [sic] and what it brought forth." 142 CONG. REC. 16,972 (1996) (statement of Rep. Coburn). In the same vein, Lynn D. Wardle, an expert consulted by the House Judiciary Committee, advised that federal recognition of same-sex marriage could "weaken and severely undermine the cohesiveness of (if not begin the dismemberment of) the union." *Defense of Marriage Act: Hearing Before the Sub. Comm. on the Constitution of the Comm. on the Judiciary of the House of Representatives on H.R. 3396*, 104th Cong. 176 (1996) (statement of Prof. Lynn Wardle). These and similar comments reveal fierce prejudice toward homosexuals, undoubtedly a "politically unpopular group." *Cleburne*, 473 U.S. at 446-47.

4. In Considering DOMA, Sponsoring Legislators Analogized Same-Sex Marriage to Polygamy, Incest, Bestiality, and Pedophilia.

Like the debates over the various anti-miscegenation laws, the congressional debates on DOMA were punctuated with warnings that acceptance of same-sex marriage would open the floodgates to polygamy, incest, bestiality, and pedophilia. *See State v. Bell*, 66 Tenn. 9 (1872) (warning that permitting inter-racial marriage would lead to "the father living with his daughter, the son with the mother"); 142 CONG. REC. 16,971 (1996) (statement of Rep. Largent); *id.* at

16,974 (statement of Rep. Talent). This misinformation was clearly intended to "appeal to [Congress's] worst fears and emotions" by "fan[ning] the flames of intolerance and prejudice." *Id.* at 16,978 (statement of Rep. Waxman).

Legislators warned that alteration of the traditional concept of marriage would start the country on a slippery slope toward eventually permitting unions between any odd combination, including "adult incestuous marriages." *Id.* at 16,974 (statement of Rep. Talent). Representative Largent asked rhetorically: "[w]hat logical reason is there to keep us from stopping expansion of that definition to include three people or an adult and a child or any other odd combination that we want to have?...and it doesn't even have to be limited to human beings, by the way. I mean it could be anything." *Id.* at 16,971 (statement of Rep. Largent).

By linking marriage equality to polygamy, incest, bestiality, and pedophilia, these comments explicitly and intentionally trivialized and denigrated same-sex unions. *See also* 142 CONG. REC. S10,117 (daily ed. Sept. 10, 1996) (statement of Sen. Faircloth) (characterizing marriage equality as "just another means of securing government benefits"). In doing so, these and similar comments served only to heap moral condemnation on homosexual relationships. These views were summed up by Representative Canady when he opened the House of Representatives debate on DOMA by stating that, ultimately, the "law should not treat homosexual relationships as the moral equivalent of the heterosexual relationships on which the family is based. That is why we are here today." 142 CONG. REC. 16,969 (1996) (statement of Rep. Canady).

5. The House Report Itself Identifies the Discriminatory Animus Behind the Legislation.

The House Report identifies an intense disapproval of homosexuality as the fundamental rationale for DOMA. It states:

> Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional...morality. ...[DOMA] serves the government's legitimate interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.

H.R. REP. NO. 104-664, at 15-16 (1996). In similar fashion, Representative Coburn embellished this stereotypical disapproval with his own unfortunate stereotype of homosexuals as largely promiscuous. 142 CONG. REC. 16,972 (1996) (statement of Rep. Coburn). He summarized:

"[t]he real debate is about homosexuality and whether or not we sanction homosexuality in this country." *Id.*; *see also id.* ("We hear about diversity, but we do not hear about perversity, and I think that we should not be afraid to talk about the very issues that are at the core of this.").

In sum, the legislative record is transparent: DOMA was enacted as an intentionally and illicitly discriminatory statute.

C. Over the Last Century, Discriminatory Animus of the Kind that Motivated DOMA Has Doomed Other Invidiously Discriminatory Legislation.

For over a century, opponents of interracial marriage, women's rights, and the rights of aliens and illegitimate children have defended discriminatory laws on grounds strikingly similar to those used to justify DOMA in 1996 and today. Indeed, in language that could have been pulled wholesale from the anti-miscegenation case law, Henry Hyde, the Chairman of the House Judiciary Committee, stated during the Subcommittee markup of DOMA: "[S]ame-sex marriage, if sanctified by the law, if approved by the law, legitimates a public union, a legal status that most people...feel ought to be illegitimate....And in so doing...put[s] a stamp of approval...on a union that many people...think is immoral." H.R. REP. NO. 104-664, at 16 (1996). Just as these grounds hold no water in the areas of interracial marriage, women's rights, and the rights of aliens and illegitimate children, they hold no water here.

1. The Grounds Used To Justify DOMA Are Substantially Similar to the Invidious Grounds Used To Justify Anti-Miscegenation Statutes.

DOMA is just the most recent example of a statute ostensibly based on traditional, majoritarian morality, but whose true origins spring from invidious discriminatory intent. The anti-miscegenation laws invalidated in *Loving v. Virginia*, 388 U.S. 1, 12 (1967), are classic examples of this type of legislation.

In 1691, Virginia passed the first anti-miscegenation law to prevent "abominable mixture and spurious issue." Walter Wadlington, *The* Loving *Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1191 & n.17 (1966) (quoting 3 LAWS OF VA. 86-87 (Hening 1823)). Nearly two centuries later, Senator James Doolittle justified treating interracial marriage as "criminal" on the ground that "natural instinct revolts at it as wrong." CONG. GLOBE, 37TH CONG., 2d Sess., app. 84 (1862). Similarly, in *Eggers v. Olson*, the court derided the "amalgamation of the races" as "unnatural, [and] always productive of deplorable results." 231 P. 483, 484 (Okla. 1924) (citation omitted); *see also Pennegar v. State*, 10 S.W. 305, 307 (Tenn. 1889) (stating that the penal statutes criminalizing interracial marriage represented the "very pronounced convictions of the people...as to the demoralization and debauchery involved in such alliances"); *Kinney v. Commonwealth*, 71 Va. 858, 865-66 (1878) (similarly rationalizing criminal ban on interracial marriage).

These invidious majoritarian "moral" sentiments used to justify anti-miscegenation laws are substantially indistinguishable from those used to justify DOMA. Indeed, the parallels are uncanny. The DOMA House Report contends that DOMA is necessary to defend and nurture the institution of traditional marriage. H.R. REP. NO. 104-664, at 15 (1996). Similarly, over a century ago in *Green v. State*, the court justified a ban on interracial marriage on the same terms:

> It is through the marriage relation that the *homes* of a people are created.... These homes, in which the virtues are most cultivated and happiness most abounds, are the true...nurseries of States.

58 Ala. 190, 194 (1877). The House Report essentially co-opts this very view, citing traditional marriage as "the best guaranty of that reverent morality which is the source of all beneficent progress." H.R. REP. NO. 104-664, at 12 (1996)

(quoting *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885)).

BLAG, relying on "presumptions" and "common sense," echoes these arguments. BLAG Br. at 47-48. And just as BLAG invokes stereotypical observations of "human experience" to sanctify DOMA, *id.* at 47, so too did the court in *Scott v. State* in condemning interracial unions: "[o]ur daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race." 39 Ga. 321, 323 (1869).

As Justice Blackmun noted in his dissent in *Bowers v. Hardwick*, the Court's "prior cases make...abundantly clear [that] the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." 478 U.S. 186, 216 (1986) (Blackmun, J., dissenting). Nor can any "practical" rationale based on "common sense" of the kind that BLAG offers legitimate DOMA's discriminatory intent. *See* BLAG Br. at 47.

2. The Grounds Used To Justify DOMA Track the Invidious Grounds Used To Justify Discrimination Against Women.

As noted, justifications for DOMA appearing in the legislative record include (1) to protect the institution of marriage and the "traditional" family unit, (2) to comport with moral tradition, and (3) to promote the superiority of heterosexuality.[7] Courts and legislative bodies have similarly sought to justify the disparate treatment of women based on notions of the "traditional family" and fear that the family unit would disintegrate if that "tradition" were altered, as well as sexist beliefs that men are more suited for civil roles outside the home.

In 1872, Justice Bradley remarked that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother." *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring). He further opined that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life…." *Id.* Justice Bradley was not alone in his thinking. When debating women's suffrage, members of the House and Senate also voiced the opinion that a woman's place in society was strictly limited to the domestic sphere. In 1874, in opposing a proposed amendment to extend the right of suffrage to women in the Pembina Territory (today, North Dakota), Senator Bayard stated:

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[7] *E.g.*, H.R. REP. NO. 104-664, at 7 n.21, 13, 15 n.53 (1996).

> Under the operation of this amendment what will become of the family[?]...You will no longer have that healthful and necessary subordination of wife to husband...I can see in this proposition for female suffrage the end of all that home-life and education which are the best nursery for a nation's virtue.

2 CONG. REC. 4342 (1874).

Such views have long been discredited as legitimate grounds for disparity of gender treatment. *See Stanton v. Stanton*, 517 P.2d 1010, 1012-13 (Utah 1974), *rev'd*, 421 U.S. 7, 17-18 (1975) (holding that statute setting out disparate age for majority for men and women based on "traditional" gender roles could not survive an equal protection attack). Yet essentially the same justifications are being offered in support of DOMA. They are as transparently invalid in the context of marriage equality as they are in the context of gender equality.

3. The Grounds Used To Justify DOMA Are Substantially the Same as Those Used To Justify Discrimination Against Illegitimate Children.

Under the common law, illegitimate children were considered *filii nullius*, "sons of nobody," and thus denied, *inter alia*, rights of inheritance. There was no doubt that the status of illegitimacy reflected "society's condemnation of irresponsible liaisons beyond the bonds of marriage." *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972); *see also* Susan E. Satava, *Comment: Discrimination Against the Unacknowledged Illegitimate Child and the Wrongful Death Statute*, 25 CAP. U. L. REV. 933, 933-39 (1996) (providing a history of the persecution of illegitimate children).

Historically, the classification of children as illegitimate was justified "as a means of encouraging legitimate family relationships." *Lalli v. Lalli*, 439 U.S. 259, 267 (1978). Consequently, statutes were enacted (and upheld) on the belief that denying illegitimate children certain rights, *e.g.*, the right to recover for the wrongful deaths of their mothers, would promote the general welfare by discouraging the "bringing [of] children into the world out of wedlock." *Levy v. State*, 192 So. 2d 193, 195 (La. Ct. App. 1966).

On appeal, this Court reversed, striking down a statute that discriminated on the basis of legitimacy as a violation of equal protection. *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968). Extension of equal treatment to illegitimate children began with the "premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being." *Id.* at 70. From there, recognition of these children as a suspect class began to evolve. Justice Powell noted in *San Antonio Independent School District v. Rodriguez* that the immutable trait of illegitimacy bears all the traditional indicia of suspectness: "[s]tatus of birth, like the color of one's skin, is something which the individual cannot control, and should generally be irrelevant in legislative considerations." 411 U.S. 1, 109 (1973); *see also Matthews v. Lucas*, 427 U.S. 495, 505 (1976).

Once again, the parallels with DOMA are uncanny. Just as a legislature's desire to promote child-rearing within the confines of a traditional marriage cannot justify discriminatory treatment against illegitimate children, it likewise cannot justify discriminatory treatment against homosexuals.

4. The Grounds Used To Justify DOMA Are as Pretextual as Those Used To Justify Discrimination Against Aliens.

Although BLAG offers a variety of alternative explanations for DOMA, the Court should reject these as pretextual for the same reason the Court rejected as pretextual various superficial justifications offered to legitimate invidious discrimination against aliens. *See, e.g.*, *Sugarman v. Dougall*, 413 U.S. 634, 642-43 (1973); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

In *Takahashi*, the Court struck down a California statute prohibiting the issuance of fishing licenses to "any 'person ineligible to citizenship.'" 334 U.S. at 413. California argued that the law was passed "solely as a fish conservation measure" intended to reduce the number of fishermen, starting first with aliens who had "no community interest in the fish owned in the State." *Id.* at 418. But the Court had no trouble "unbutton[ing] the seemingly innocent words of [the statute] to discover beneath them the very negation of all the ideals of the equal protection clause." *Id.* at 427 (Murphy, J., concurring). As the trial court noted, Japanese aliens were "the only aliens ineligible to citizenship who engaged in commercial fishing…in California" at the time the statute was passed. *Id.* at 426.

Recognizing this history of discrimination against Japanese aliens, Justice Murphy described the statute as "but one more manifestation of the anti-Japanese fever" in California. *Id.* at 422. Further, he viewed California's alleged "conservation" justification as simply "a thin veil used to conceal a purpose being too transparent"—discrimination against persons of Japanese ancestry which had "no relation whatever to any constitutionally cognizable interest of California." *Id.* at 426-27.

As in *Takahashi*, the Court should ignore the veil BLAG seeks to spread over DOMA. BLAG's justifications should be viewed for what they truly are: pretextual recitations of manufactured legitimacy.

D. Given the Reality that DOMA Embodies Invidious Discrimination, It Should Be Subject to Intermediate Scrutiny.

The Equal Protection Clause of the Fourteenth Amendment mandates that "[n]o state shall...deny to any person within its jurisdiction the equal protection of the laws." Made applicable to the federal government through the Due Process Clause of the Fifth Amendment, *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), equal protection requires "that 'all persons similarly circumstanced shall be treated alike.'" *Plyler*, 457 U.S. at 216 (*quoting F. S. Royster Guano Co. v.*

Virginia, 253 U.S. 412, 415 (1920)). In determining whether a statute that distinguishes between two classes of people satisfies equal protection, the "general rule" is that "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440.

This "rational basis" rule, however, does not apply where a statute classifies on the basis of certain "suspect" or "quasi-suspect" classifications that "are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," and "tend to be irrelevant to any proper legislative goal." *Plyler*, 457 U.S. at 218 n.14. Suspect classifications based on factors such as race, alienage, or national origin "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy" and therefore "will be sustained only if they are suitably tailored to serve a compelling state interest." *Cleburne*, 473 U.S. at 440. Classifications based on "quasi-suspect" classes such as gender and illegitimacy "generally provide[] no sensible ground for differential treatment" and will be upheld only if found to be "substantially related to a sufficiently important governmental interest." *Id.* at 440-41. In such cases, the burden is on the government to demonstrate an "exceedingly persuasive" justification for the classification that is "genuine, not hypothesized or invented *post hoc* in response to litigation." *Virginia*, 518 U.S. at 533. Classifications violate equal protection where they are based on "archaic and overbroad generalizations" or "outdated misconceptions" concerning a class. *J.E.B. v. Alabama*, 511 U.S. 127, 135 (1994) (internal quotations omitted).

BLAG argues that rational basis review is appropriate for classifications based on sexual orientation and that the Second Circuit's decision to the contrary "is truly an outlier." BLAG Br. 50. Many of the cases BLAG cites, however, predate this Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). *See* BLAG Br. 13 n.4. *Lawrence* overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld a Georgia statute making sodomy a criminal offense. Prior to *Lawrence*, courts relied on *Bowers* in holding that sexual orientation could not be a basis for heightened scrutiny because "[i]f homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes." *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *see also High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990). Following *Lawrence*, these decisions are no longer sound.

Moreover, none of the cases BLAG cites conduct an analysis of the appropriate level of scrutiny applicable to sexual orientation based on the factors this Court has enumerated as relevant to such a determination: (1) whether the particular group has suffered a history of discrimination; (2) whether individuals within the group "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group;" (3) whether the group is a minority or politically powerless, *Bowen*, 483 U.S. at 602-03 (*citing Lyng v. Castillo*, 477 U.S. 635, 638 (1986)); and (4) whether the characteristic distinguishing the group "bears [any] relation to ability to perform or contribute to society." *Cleburne*, 473 U.S. at 441.

While this Court has yet to establish the appropriate level of scrutiny to apply to a classification based on sexual orientation,[8] consideration of the determining factors makes clear that such classifications should be subject to at least intermediate scrutiny. In particular, the history of discrimination against homosexuals mirrors that suffered by other suspect and quasi-suspect classes and warrants the application of intermediate scrutiny to statutes that classify based on sexual orientation. Thus, to satisfy equal protection, it must be demonstrated, at a minimum, that DOMA is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

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[8] BLAG mischaracterizes this Court's decisions by stating that the Court "has gone out of its way to apply rational basis review" to classifications based on sexual orientation. BLAG Br. 25. Only once did this Court apply rational basis to an equal protection challenge based on sexual orientation, *Romer v. Evans*, 517 U.S. 620 (1996), and in that case, the Court had no need to consider any level of scrutiny aside from rational basis, finding that the amendment "fails, indeed defies, *even this conventional inquiry*." *Id.* at 632 (emphasis added).

1. Homosexuals Have Suffered a History of Discrimination.

As discussed above, the history of discrimination against homosexuals is both severe and well documented.

2. Sexual Orientation Is an Immutable Characteristic.

This Court has established that legislation distinguishing between classes based on an immutable characteristic determined solely by the accident of birth is properly subject to heightened scrutiny. *Virginia*, 518 U.S. at 533-34; *Bowen*, 283 U.S. at 602-03. BLAG argues that sexual orientation is not the kind of immutable characteristic for which intermediate scrutiny should be applied because "[i]t is defined by a propensity to engage in a certain kind of conduct," the cause of which "is not understood by science." BLAG Br. 55. Sexual orientation, however, is not, as BLAG maintains, "synonymous with sexual activity or sexual behavior." Barbara L. Frankowski, *Sexual Orientation and Adolescents*, 113 PEDIATRICS 1827, 1828 (June 2004), *available at* http://pediatrics.aappublications.org/content/113/6/1827.full.html. A person's sexual orientation reflects that "individual's pattern of physical and emotional arousal toward other persons," rather than a course of conduct. *Id.* at 1827.

Moreover, BLAG's claim that "for at least some, sexual orientation is a fluid characteristic capable of changing over a person's lifetime," BLAG Br. 55, is belied by the fact that "the significant majority of adults exhibit a consistent and enduring sexual orientation." Joint Appendix ("JA") 262, Expert Aff. of Letitia Anne Peplau, Ph.D. ("Peplau Aff.") ¶ 23 (citing Chandra, A. Mosher, et al., *Sexual Behavior, Sexual Attraction and Sexual Identity in the United States: Data from the 2006-2008 Survey of Family Growth*, National Health Statistics Reports, No. 36 U.S. Centers for Disease Control (March 3, 2011)). While it is true that the cause of sexual orientation is still unknown, most experts in the field of psychology agree that sexual orientation is not a choice. *See* Frankowski, *supra*, at 1828; Gregory M. Herek et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a U.S. Probability Sample*, SEXUALITY RES. & SOC. POL'Y 7:176-200 (2010). In fact, while a small minority of people may experience changes in their sexual orientation over the course of their lives, studies show that "enduring change to an individual's sexual orientation is uncommon," and efforts to change an individual's sexual orientation produce harmful effects, including depression, anxiety, and suicidal tendencies. AM. PSYCHOLOGICAL ASS'N, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 2-3 (2009).

3. Homosexuals Lack Significant Political Power.

Although the fact that a group is "a 'discrete and insular minority'...has never been invoked in [this Court's] decisions as a prerequisite" to applying heightened scrutiny, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978), this Court has at times also found heightened scrutiny to be warranted where legislation distinguishes a class of people that "have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Plyler*, 457 at 216 n.14 (quoting *San Antonio Indep. Sch. Dist.*, 411 U.S. at 28). Because homosexuals "do not possess a meaningful degree of political power, and are politically vulnerable," JA397, Expert Aff. of Gary Segura, Ph.D. ¶ 9, this factor weighs in favor of applying intermediate scrutiny to an equal protection analysis of DOMA.

BLAG argues that "the political power of gays and lesbians has increased exponentially" in the last twenty years. BLAG Br. 51. In spite of this allegedly increased support, however, only nine states and the District of Columbia currently allow same-sex marriage, compared with 37 states that have either enacted a state statute or constitutional provision banning it. *See Defining Marriage: Defense of Marriage Acts and Same Sex Marriage Laws*, National Conference of State Legislatures ("NCSL"), *available at* http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx.

Moreover, that the political power of homosexuals may have increased in recent years clearly does not prevent that class from being suspect or quasi-suspect. *See Frontiero v. Richardson*, 411 U.S. 677, 685-86 (1973) (finding gender to be a quasi-suspect class and noting that while "the position of women in America has improved markedly in recent decades...women still face pervasive, though at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena"); *cf. J.E.B.*, 511 U.S. at 136; *Kerrigan*, 947 A.2d at 456 (citing United States Census Bureau, *Democratic Trends in the 20th Century* A-9 (November 2002)).

4. Sexual Orientation Has No Relation to an Individual's Ability To Contribute to Society.

This Court has established that heightened scrutiny is warranted where a characteristic bears no relation to ability to contribute to society, but nonetheless is used to "den[y]…full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *Virginia*, 511 U.S. at 532. BLAG does not dispute that "being gay or lesbian has no inherent association with a person's ability to participate in or contribute to society," or that homosexuals are "as capable as heterosexuals of leading a happy, healthy and productive life….[and] of doing well in their jobs and of excelling in school." JA267-68, Peplau Aff. ¶ 29. Instead, BLAG argues that DOMA should be subject only to rational basis review because homosexuals have the "distinguishing characteristic" of "engag[ing] in relationships that do not produce unplanned and unintended offspring." BLAG Br. 54.

That same-sex couples do not have unplanned pregnancies in no way constitutes the type of "distinguishing characteristics relevant to interests the State has authority to implement" that affect a group's ability to contribute to society. *Cleburne*, 473 U.S. at 441. As BLAG concedes, there is nothing about a person's sexual orientation that impacts his or her ability to function in or contribute to everyday life and society as a whole.

E. Animus Toward a Class, as Revealed in DOMA's Legislative History, Can Never Serve a Legitimate, Important, or Compelling Interest.

Congress did not enact DOMA to serve an important or compelling government interest, but rather as a knee-jerk reaction grounded in prejudice and animosity toward homosexuals. Legislation such as this, that "rest[s] on irrational prejudice," cannot survive any level of scrutiny, let alone intermediate scrutiny. *Cleburne*, 473 U.S. at 450. But under even the more lenient rational basis level of review, this Court has held that "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest." *Moreno*, 413 U.S. at 534.

As noted above, Congress identified four "governmental interests" allegedly served by DOMA: "(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources."[9] Additionally, the Second Circuit found that certain statements in the House Report implicate a fifth interest in enforcing uniformity in the distribution of federal benefits. Supp. App. 24a. Any other interests advanced by BLAG or its *amici* are not found in the legislative history and are therefore "post-hoc" justifications that are irrelevant under intermediate scrutiny. *Virginia*, 518 U.S. at 533. Moreover, none of the considerations actually identified in the legislative history are related to a legitimate government interest, let alone substantially related to an important government interest, and thus do not survive *any* level of scrutiny.

1. DOMA Does Nothing To Legitimately Defend or Nurture the Institution of Traditional, Heterosexual Marriage.

Even assuming, *arguendo*, that the federal government could have a legitimate interest in providing benefits to heterosexual couples in order to incentivize them to get married, thus creating allegedly ideal circumstances for responsible procreation and childrearing, DOMA does not advance this interest because it does not provide a single benefit to heterosexual couples.[10] Any federal incentive for heterosexual couples to get married is the product of other statutes, most of which pre-date DOMA and would have continued to provide the same incentives in the absence of DOMA. The sole effect of DOMA is to preclude married gay couples from receiving the same benefits as married straight couples, and DOMA's supporters have never provided a logical explanation how excluding homosexual couples somehow incentivizes heterosexual couples to get married.

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[9] H.R. REP. NO. 104-664, at 12 (1996).

Moreover, the suggestion that the government provides marriage benefits for the purpose of encouraging childrearing in the context of a traditional marriage is dubious since the government continues to provide benefits even to marital relationships that do not fit this paradigm. For example, the IRS considers couples in the following relationships to be married (and thus able to file joint tax returns): (1) couples living together in a common law marriage recognized either in the state where they now live or in the state where the common law marriage was formed; (2) couples who are married but live apart; and (3) couples separated under an interlocutory, but not final, decree of divorce.[11] *See* Dep't of the Treasury, *Internal Revenue Service Publication 17: Tax Guide 2012*, at 20. Additionally, numerous federal laws provide benefits to "surviving" spouses, but explicitly condition the benefits on the surviving spouse *remaining unmarried.*[12] And of course, married couples do not lose their federal marital benefits when they opt to relinquish their children for adoption or undergo surgical procedures resulting in sterilization, nor are they required to pass a fertility test prior to getting married.

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[10] In addition, numerous studies dispute the suggestion that heterosexual marriages provide a better environment for child development than homosexual marriages. *See e.g.*, Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AM. PSYCHOL. 607, 614 (2006); Canadian Psychological Association, *Marriage of Same-Sex Couples – 2006 Position Statement*, at 2, *available at* http://www.cpa.ca/cpasite/userfiles/Documents/Practice_ Page/Marriage_SameSex_Couples_PositionStatement.pdf.

The sudden and unprecedented federal interest in regulating marriage and procreation is suspicious.[13] In any event, because DOMA does not actually provide any legitimate benefits to heterosexual couples by excluding homosexuals, this cannot serve as a legitimate basis to sustain the statute.

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[11] The IRS also refuses to recognize marriages where one of the spouses is a nonresident alien at any point during a taxable year, even though such relationships could still provide for responsible procreation and childrearing. 26 U.S.C § 2(b)(2)(B).

[12] *See, e.g.*, 10 U.S.C. § 1062; 26 U.S.C. § 7448(a)(8)(B); 38 U.S.C. § 101(3).

[13] *See Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("domestic relations" are "an area that has long been regarded as a virtually exclusive province of the States").

2. Tradition, Alone, Cannot Save DOMA.

The purpose of the Equal Protection Clause is "not to protect traditional values and practices, but to *call into question* such values and practices when they operate to burden disadvantaged minorities." *Watkins v. United States Army*, 875 F.2d 699, 718 (9th Cir. 1989) (emphasis in original) (Norris, J., concurring). BLAG has appropriately abandoned "tradition" as a defense of DOMA.

3. DOMA Does Not Protect State Sovereignty.

BLAG argues that the federal government has an interest in preserving each "sovereign's" ability to define marriage and, in doing so, effectively seeks to place the federal government on equal footing with the States in marriage regulation. BLAG Br. 30. But this argument begs the question whether the federal government has any interest in defining marriage in the first place. Such an interest certainly is not recognized in any court decision or statute, and the federal government never invoked it in the more than 220 years preceding DOMA's enactment.

In any event, DOMA does not actually advance the preservation of sovereignty—it undermines it by refusing to honor the decisions of those States that have recognized same-sex marriages. This only serves to underscore the discriminatory animus of the statute.

4. The Goal of Conserving Government Resources Cannot Properly Shelter Discriminatory Treatment.

Bestowing benefits on one group while denying them to others *always* conserves resources, and thus cannot be used to justify discriminatory treatment. *See Graham v. Richardson*, 403 U.S. 365, 375 (1971) ("[A] concern for fiscal integrity is [not a] compelling...justification for [a] questioned classification"). Indeed, as the District Court aptly recognized, such a justification could not even satisfy rational basis review. Pet. App. 21a-22a.

5. DOMA Creates Administrative Burdens and Destroys Uniformity.

The only "uniformity" DOMA promotes is discriminatory bias against homosexuals. BLAG maintains that this discrimination is desirable because without DOMA, "same-sex couples would lose (or gain) federal marital status simply by moving between states with different marriage policies on recognition of same-sex marriages." BLAG Br. 33. This problem, however, is entirely illusory.

Consider, for example, the way the IRS treats common-law marriages. For tax purposes, a couple is considered married if they are "living together in a common law marriage that is recognized in the state where [they] now live *or in the state where the common law marriage began.*" Dep't of the Treasury, *Internal Revenue Service Publication 17: Tax Guide 2012*, at 20 (emphasis added). As long as the marriage was valid when formed, then at least for federal purposes, that marriage stays valid even if the couple moves. There is no reason why homosexual marriage could not be treated the same way.[14]

In addition, DOMA actually *increases* administrative burdens. Under DOMA, proof of marriage is no longer sufficient to demonstrate an entitlement to marital benefits. DOMA requires the government to take the additional step of determining whether the couple is heterosexual or homosexual. Consequently, DOMA does not rationally reduce administrative costs.

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[14] This practice, which the government already uses for common law marriages, would also alleviate BLAG's concerns regarding the need for "complex choice-of-law" determinations. BLAG Br. 34.

CONCLUSION

DOMA is an edifice of bigotry that cannot stand. For all of the foregoing reasons, as well as those offered by Respondent, the decision of the court below should be affirmed.

Respectfully submitted,

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No. 12-307

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF OF 172 MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES AND 40 U.S. SENATORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT EDITH SCHLAIN WINDSOR, URGING AFFIRMANCE ON THE MERITS

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A complete list of the 172 Members of the House of Representatives and 40 U.S. Senators participating as *amici* is provided in an appendix to this brief. Among them are:

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HARRY REID *Senate Majority Leader*	RICHARD J. DURBIN *Assistant Senate Majority Leader*
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JARED POLIS, DAVID N. CICILLINE, SEAN PATRICK MALONEY, MARK POCAN, KYRSTEN SINEMA, AND MARK TAKANO
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TABLE OF CONTENTS

Table of Authorities iii

Interest of the *Amici Curiae* 1

Introduction and Summary of the Argument 2

Argument 4

I. Gay men and lesbians lack meaningful political power. 4

  A. Just as heightened review applies to sex-based classifications, it should apply here 5

  B. Gay men and lesbians could not prevent DOMA, and their marriages remain the subject of unfavorable congressional attention 6

  C. Lesbians and gay men have yet to obtain basic civil-rights protections. 10

II. DOMA Section 3 is unconstitutional 12

  A. DOMA is not the rational result of impartial lawmaking. 12

  B. None of the arguments advanced in DOMA's defense justifies the denial of federal recognition for married gay and lesbian couples. 21

    1. Preservation of tradition is not a valid basis for DOMA. 22

    2. DOMA harms American families and serves no legitimate federal interest in procreation or child-rearing 23

    3. DOMA undercuts Congress's long-standing practice of deferring to the States on matters of family law. 27

TABLE OF CONTENTS—continued

4. The supposed interest in conserving public resources does not justify DOMA. 29
5. The asserted desire for federal "uniformity" does not justify DOMA. 31

Conclusion 35

Appendix – Complete list of Members of Congress participating as *Amici*

TABLE OF AUTHORITIES

Cases

Bd. of Trs. of Univ. of Ala. v. *Garrett*,
531 U.S. 356 (2001) 3

Bowers v. *Hardwick*,
478 U.S. 186 (1986) 2

Bradwell v. *State*,
83 U.S. (16 Wall.) 130 (1873) 6

Civil Rights Cases,
109 U.S. 3 (1883) 12

Cleburne v. *Cleburne Living Ctr.*,
473 U.S. 432 (1985) 4, 25, 29, 34

Cruzan v. *Mo. Dep't of Health*,
497 U.S. 261 (1990) 34

De Sylva v. *Ballentine*,
351 U.S. 570 (1956) 32

Frontiero v. *Richardson*,
411 U.S. 677 (1973) 5, 6

Gill v. *Office of Pers. Mgmt.*,
699 F. Supp. 2d 374 (D. Mass. 2010) 25

Golinski v. *U.S. Office of Pers. Mgmt.*,
824 F. Supp. 2d 968 (N.D. Cal. 2012) 7

Graham v. *Richardson*,
403 U.S. 365 (1971) 29

Haddock v. *Haddock*,
201 U.S. 562 (1906) 32

Heller v. *Doe*,
509 U.S. 312 (1993) 22

Lawrence v. *Texas*,
539 U.S. 558 (2003) 4, 21, 22, 24

TABLE OF AUTHORITIES—continued

Lehr v. *Robertson*,
463 U.S. 248 (1983) 31

Lembcke v. *United States*,
181 F.2d 703 (2d Cir. 1950) 32

Log Cabin Republicans v. *United States*,
716 F. Supp. 2d 884 (C.D. Cal. 2010) 11

Loving v. *Virginia*,
388 U.S. 1 (1967) 31

Mass. v. *U.S. Dep't of Health & Human Servs.*,
698 F. Supp. 2d 234 (D. Mass. 2010) 27

Mass. v. *U.S. Dep't of Health & Human Servs.*,
682 F.3d 1 (1st Cir. 2012) .... *passim*

Money v. *Office of Pers. Mgmt.*,
811 F.2d 1474 (Fed. Cir. 1987) 34

Nat'l Fed'n of Indep. Bus. v. *Sebelius*,
132 S. Ct. 2566 (2012) 16

Pedersen v. *Office of Pers. Mgmt.*,
881 F. Supp. 2d 294 (D. Conn. 2012) 7, 25

Plessy v. *Ferguson*,
163 U.S. 537 (1896) 12

Plyler v. *Doe*,
457 U.S. 202 (1982) 23, 27, 29

Renshaw v. *Heckler*,
787 F.2d 50 (2d Cir. 1986) 32

Romer v. *Evans*,
517 U.S. 620 (1996) .... *passim*

Ry. Express Agency v. *New York*,
336 U.S. 106 (1949) 34

TABLE OF AUTHORITIES—continued

Seaboard Air Line Ry. v. *Kenney*,
240 U.S. 489 (1916) 32

Slessinger v. *Dep't of Health & Human Servs.*,
835 F.2d 937 (1st Cir. 1987) (per curiam) 34

Strauss v. *Horton*,
207 P.3d 48 (Cal. 2009) 4

Sugarman v. *Dougall*,
413 U.S. 634 (1973) 20

U.S. Dep't of Agriculture v. *Moreno*,
413 U.S. 528 (1973) 22, 29, 30

Weinberger v. *Weisenfeld*,
420 U.S. 636 (1975) 18

Weiner v. *Astrue*,
2010 WL 691938 (S.D.N.Y. 2010) 34

Williams v. *North Carolina*,
317 U.S. 287 (1942) 32

Windsor v. *United States*,
699 F.3d 169 (2d Cir. 2012) 9

Witt v. *Dep't of Air Force*,
739 F. Supp. 2d 1308 (W.D. Wash. 2010) 11

Statutes & Regulations

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11 U.S.C. § 302(a) 26

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What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?: Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of S. Comm. on the Judiciary, 108th Cong. (2003) 8

INTEREST OF THE *AMICI CURIAE*[*]

Amici are 172 Members of the U.S. House of Representatives and 40 U.S. Senators.[1] Some of us voted against the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996); others voted for it; still others were not yet in Congress when it was enacted. But we all agree that Section 3 of DOMA—which divides married couples into two classes and denies all federal responsibilities and rights to one of them—lacks a rational connection to any legitimate federal purpose, and is therefore unconstitutional.[2]

Members of Congress are bound by oath to support and defend the Constitution. Thus, this Court's interpretation of the Fifth Amendment's equal-protection guarantee directly affects how Congress drafts, considers, and enacts laws. We urge the Court to clarify that legislative classifications based on sexual orientation do not enjoy the presumption of validity appropriately afforded to most legislative acts. That guidance will help ensure that legislative classifications receive sufficient reflection. We also want to explain why, in this rare case, the Court should find an Act of Congress unconstitutional.

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[*] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

[1] A complete list of the Members of Congress participating as *amici* appears in an appendix to this brief.

[2] We refer collectively to DOMA as enacted and Section 3 of DOMA as "DOMA." Section 2 of DOMA, 28 U.S.C. § 1738C, is not before the Court.

Although we support legislative standing to defend legislation in appropriate cases, we disagree with the arguments made by the Bipartisan Legal Advisory Group in DOMA's defense. Having repeatedly urged Congress (including the Speaker of the House) to revisit DOMA legislatively, we believe it important to dispel the notion that BLAG speaks for the entire Congress on the merits. It does not. In fact, many Members believe that Section 3 of DOMA is a violation of the Fifth Amendment's equal-protection guarantee and should be struck down.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

When Congress enacted DOMA, gay and lesbian couples could not marry anywhere in the world. Some States still criminalized same-sex relationships, inviting further discrimination against gay men and lesbians in employment, family relations, and housing.[3] Gay men and lesbians were still often portrayed as mentally unstable, sexually promiscuous, and morally deficient.[4] In short, it was a different world for gay men and lesbians, and many were understandably reluctant to speak openly about themselves or their families. A number of Members, like the constituents we serve, did not personally know many (if any) people who were openly gay, and majority attitudes toward that minority group were often viscerally fearful and negative.

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[3] The House Judiciary Committee relied on *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), as support for DOMA. See H.R. Rep. No. 104-664 at 16 n.54 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2920 n.54 ("House Report").

[4] See Affidavit of George Chauncey, Ph.D. (JA338).

As a result, when the question of same-sex marriage arose in 1996, reflexive beliefs and discomfort about same-sex relationships dominated congressional debate. From our perspective—including those of us who voted for DOMA—debate and passage of the law did not necessarily arise "from malice or hostile animus," but instead from "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). While fear and distrust of families different from our own may explain why DOMA passed by comfortable majorities in 1996, it does not obviate the need for a constitutionally permissible justification for the law.

We agree that heightened review is appropriate here, and that DOMA must be struck down under that standard. We offer our unique perspective on why gay men and lesbians lack the meaningful political power that some (including BLAG) have argued might justify denying heightened judicial scrutiny.

We also believe that DOMA must fail even if it does not trigger heightened review. Virtually every aspect of DOMA and its legislative history—the lack of objective, rational fact-finding to connect the exclusion of married same-sex couples to a legitimate federal interest; the sweeping exclusion of gay men and lesbians based on a single identifiable trait; and the open desire of some to express disapproval of that minority group—distinguishes it from routine Acts of Congress. None of the arguments advanced in its defense is sufficient. DOMA lacks the required rational connection to a legitimate federal interest: "It is a status-based enactment divorced from any factual context from which [the Court] could discern a relationship to legitimate [federal] interests." *Romer* v. *Evans*, 517 U.S. 620, 635 (1996).

Although the unsupported claims that were asserted to justify DOMA in 1996 went unchecked by reality then, gay and lesbian couples can now marry in nine states and the District of Columbia, and 18,000 such couples remain legally married in California as well. See *Strauss* v. *Horton*, 207 P.3d 48 (Cal. 2009). The harm that DOMA causes those couples, their families, and their States is very real today. As a result—and as more Americans have come to realize that they have a lesbian or gay relative, friend, or colleague—attitudes have shifted.

We are part of the communities we represent, and our understanding reflects the same arc of experience, making clear what should have been apparent in 1996. Put simply, DOMA is one of those laws that was enacted when "times * * * blind[ed] us to certain truths," but that "later generations can see * * * in fact serve only to oppress." *Lawrence* v. *Texas*, 539 U.S. 558, 579 (2003). It must be struck down.

ARGUMENT

I. Gay men and lesbians lack meaningful political power.

We agree with the Solicitor General and Ms. Windsor that laws that single out lesbians and gay men should be reviewed under heightened scrutiny. Congress has come to recognize that sexual orientation is not a characteristic that bears on one's "ability to perform or contribute to society." *Cleburne* v. *Cle-*

burne Living Ctr., 473 U.S. 432, 441 (1985).[5] Nevertheless, gay men and lesbians have been unable to obtain basic protections routinely afforded to others, or to prevent hostile legislation on matters that significantly affect their lives.

A. Just as heightened review applies to sex-based classifications, it should apply here.

BLAG suggests (at 50-54) that gay men and lesbians have "political strength," and that their "power to participate in the democratic process" alone is enough to deny heightened review of laws that harm them. But BLAG exaggerates the importance of political power as both a legal and a factual matter, as this Court's treatment of sex-based classifications makes clear. When this Court ruled that sex-based classifications should be subject to heightened review, "the position of women in America [had already] improved markedly." *Frontiero* v. *Richardson*, 411 U.S. 677, 685 (1973). Women made up over 50% of the electorate in each presidential election between 1964 and 1972. See http://tinyurl.com/doma01 (census data on voter participation). Congress had passed Title VII and the Equal Pay Act and had voted to propose the Equal Rights Amendment to the

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[5] Testimony concerning legislation to extend employment-discrimination protection to gay and lesbian Americans confirms that sexual orientation has no relation to ability in the workplace. *Employment Non-Discrimination: Hearing Before the S. Comm. on Health, Education, Labor and Pensions*, 111th Cong. (2009) (testimony of Helen Norton). Congress's debate over the repeal of "Don't Ask, Don't Tell" confirmed that sexual orientation does not predict one's ability to serve. See generally *Testimony Relating to the "Don't Ask, Don't Tell" Policy: Hearing Before S. Comm. on Armed Services*, 111th Cong. (2010).

States for ratification. *Frontiero*, 411 U.S. at 687 & nn. 19-20.

Yet this Court remained troubled by sex-based classifications because they often reflect lingering "paternalistic attitude[s]" or "gross, stereotyped" notions about women. *Frontiero*, 411 U.S. at 684-689. Because such views too often replace rational reflection, this Court appropriately concluded that sex-based classifications must be viewed with skepticism, and did not view women's increasing political power as any reason to conclude otherwise. *Id.* (citing *Bradwell* v. *State*, 83 U.S. (16 Wall.) 130, 141 (1873)).

That same conclusion is warranted here. Unlike women, gay men and lesbians represent only a small percentage of the electorate. They have enjoyed nothing close to the degree of favorable legislative attention that women had received by the time this Court held that sex-based classifications warrant heightened scrutiny. And legislative treatment of gay men and lesbians has frequently been driven by fear, stereotypes, and reflexive adherence to traditional beliefs. Indeed, DOMA itself confirms the need for heightened review of laws that disfavor gay men and lesbians.

B. Gay men and lesbians could not prevent DOMA, and their marriages remain the subject of unfavorable congressional attention.

Gay men and lesbians were unable to prevent enactment of DOMA—a rare contemporary example of *de jure* discrimination that is remarkable in its sweeping exclusion of a historically disfavored minority group.

Nor have gay men and lesbians fared better in their efforts to have DOMA repealed. In 1996, the statute's proponents made no effort to analyze its far-ranging effects either on federal programs or on families. See, *e.g.*, *Mass.* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 13 (1st Cir. 2012); *Golinski* v. *U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 980 (N.D. Cal. 2012); *Pedersen* v. *Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 299 (D. Conn. 2012). Yet the House majority leadership still refuses to permit reexamination of the law, despite repeated calls from Members to do so. See *Defending Marriage: Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary*, 112th Cong. 6 (2011) (statement of Rep. Nadler).[6]

At the same time, Congress has devoted considerable time and resources to prohibiting same-sex marriage altogether. Since 1996, Congress has held at least nine hearings dedicated to exploring ways to prevent States from marrying gay and lesbian couples.[7] Joint Resolutions to amend the Constitution to prohibit any State from marrying same-sex couples were introduced in *every* Congress between 2002 and 2012. As recently as 2006, the proposed constitutional amendment was the subject of floor votes in the House and Senate; it garnered a 236-vote majority in the House (see H.R.J. Res. 88, 109th Cong. (2006)), and the Senate failed to invoke cloture on the motion to proceed by a vote of 49-48 (see S.J. Res. 1, 109th Cong. (2006)).

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[6] BLAG suggests (at 51) that the submission of an *amicus* brief by members of Congress evidences meaningful political power. That is wrong. Not only has the House Majority steadfastly refused to reexamine DOMA, but the House has voted repeatedly to reaffirm it. H.R. 1540, 112th Cong. § 534 (2011) ("Congress reaffirms the policy of section 3 of the Defense of Marriage Act") (provision offered by Rep. Vicky Hartzler (R-Mo.) and adopted in Armed Services Committee markup by vote of 39-22); H.R. 5326, 112th Cong. § 561 (2011) (provision adopted on vote of 245-171 as an amendment offered by Rep. Tim Huelskamp (R-Kan.)). And, in the resolution adopting the House Rules for the 113th Congress, the House voted to defend DOMA in court. H.R. Res. 5, 113th Cong. § 4(a)(1) (2013).

Still, BLAG asserts (at 58) that "[s]ame-sex marriage is being actively debated" at "every level of government and society across the country," suggesting that the issue should be resolved by "persua[sion]," outside the courts. That misses the point. Gay men and lesbians have been participating in the public debate, and public opinion has started to shift to some degree. But for a range of complex political and sociological reasons, increased public support cannot be equated with real political power and does not guarantee meaningful legislative change. As Stanford political-science professor Gary Segura testified in this case, "gay men and lesbians are powerless to secure basic rights within the normal political processes" for a range of reasons, including vulnerability to harmful ballot initiatives, underrepresentation in office, geographic dispersion, and entrenched opposition to their political advancement. JA393-436.

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[7] Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of S. Comm. on the Judiciary, 109th Cong. (Oct. 20, 2005); Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary, 108th Cong. (June 24, 2004); Hearing Before S. Comm. on the Judiciary, 108th Cong. (June 22, 2004); Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary, 108th Cong. (May 13, 2004); Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary, 108th Cong. (Apr. 22, 2004); Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary, 108th Cong. (Mar. 30, 2004); Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of S. Comm. on the Judiciary, 108th Cong. (Mar. 3, 2004); Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of S. Comm. on the Judiciary, 108th Cong. (Jan. 27, 2004); Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of S. Comm. on the Judiciary, 108th Cong. (Sept. 4, 2003).

Thus, although gay men and lesbians have achieved limited recent success at the ballot box in some parts of the country, *thirty-nine* States have enacted constitutional amendments or statutes prohibiting same-sex marriage (Gov't Merits Br. 33-34), with 68 percent of voters in North Carolina enacting one such constitutional amendment in 2012. Those stark facts further undermine BLAG's claim concerning political power, including at the federal level. Gay men, lesbians, and their allies will unquestionably continue their work to bring objective facts to the fore in legislative debate. But that is a separate matter. It is the role of the courts to ensure that the government affords all citizens equal protection of the law, regardless of public opinion.

As the Second Circuit observed below, gay men and lesbians simply lack "the strength to politically protect themselves from wrongful discrimination." *Windsor* v. *United States*, 699 F.3d 169, 184 (2d Cir. 2012). As legislators who for years have supported bills both to repeal laws that disfavor gay men and lesbians and to provide them with basic protections against discrimination, we know first hand the obstacles they face in the legislative process.

C. Lesbians and gay men have yet to obtain basic civil-rights protections.

Gay men and lesbians have also been unable to secure legislative protections against discrimination in housing, employment, public accommodation, public education, or federally funded programs. Efforts to pass such legislation began in 1977, with the introduction of a bill to amend the Civil Rights Act of 1964 and the Fair Housing Act. See H.R. 8269, 95th Cong. (1977). That bill was reintroduced in every Congress over the next two decades, but it never gained sufficient traction.

After failing to make progress in securing those protections, gay men and lesbians focused more narrowly on protection from discrimination in employment. The Employment Non-Discrimination Act (ENDA) has been introduced in nine of the last ten Congresses. See, *e.g.*, H.R. 1397, 112th Cong. (2011); S. 811, 112th Cong. (2011). Gay men and lesbians have shown a continued willingness to accept compromises and limitations that are not included in other civil-rights laws, but still have been unable to secure the bill's enactment. In fact, in the nearly twenty years since it was first introduced, ENDA passed only *once* in the House and *never* in the Senate. That gay men and lesbians have been unable to achieve even the modest goal of obtaining basic protection against employment discrimination—despite the fact that 89 percent of the American people supports such protection (see *Gay and Lesbian Rights*, Gallup, 2008, http://tinyurl.com/doma03)—shows that BLAG is flat wrong in contending that gay men and lesbians enjoy "remarkable political clout."

BLAG's citation (at 52) to the repeal of "Don't Ask, Don't Tell" provides no basis for concluding otherwise. DADT resulted in the discharge of more than 13,000 members of the armed forces. See Dep't of Defense, *Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell,"* at 23 (Nov. 30, 2010), http://tinyurl.com/-doma06. It squandered between $190.5 and $363.8 million in recruiting and training costs. See USA Today, *Report: 'Don't Ask, Don't Tell' costs $363M* (Feb. 14, 2006), http://tinyurl.com/doma05. Yet Congress authorized the policy's repeal only in a lame-duck session, and only after two federal courts had already declared it unconstitutional. See *Witt* v. *Dep't of Air Force*, 739 F. Supp. 2d 1308 (W.D. Wash. 2010); *Log Cabin Republicans* v. *United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010), vacated on mootness grounds, 658 F.3d 1162 (9th Cir. 2011) (per curiam). Elimination of a costly, discriminatory policy that resulted in the discharge of valuable servicemembers during wartime hardly illustrates political power.[8]

We urge the Court to hold that sexual orientation is not a presumptively valid ground on which to legislate. The pervasive history of discrimination against gay men and lesbians, based on a trait that bears no relation to their ability to contribute to society, calls for heightened review of laws that target them for harm. Far from warranting a *denial* of such review, that identifiable minority's relative lack of political power underscores the *need* for it.

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[8] A Department of Defense report on the effect of DADT's repeal confirms that the rationales justifying the law's enactment in 1993 were not, in fact, furthered by the policy. As Secretary of Defense Leon Panetta said in announcing the results of the study: "It's not impacting on morale. It's not impacting on unit cohesion. It is not impacting on readiness." Karen Parrish, *Report Shows Success of "Don't Ask, Don't Tell" Repeal*, Am. Forces Press Serv. (May 10, 2012), http://tinyurl.com/doma07.

II. DOMA Section 3 is unconstitutional.

Justice Harlan famously said in his dissent in *Plessy* v. *Ferguson* that "the Constitution 'neither knows nor tolerates classes among citizens.'" 163 U.S. 537, 559 (1896) (Harlan, J. dissenting). That unassailable principle, which lies at the very heart of this Nation's character, dictates the outcome here: DOMA is constitutionally impermissible "class legislation" (*Romer*, 517 U.S. at 635 (quoting *Civil Rights Cases*, 109 U.S. 3, 24 (1883))), plain and simple.

Virtually every feature of DOMA distinguishes it from routine "statutory definitions and other line-drawing exercises." BLAG Br. 29. It was enacted without any genuine effort to discern a connection to a legitimate federal interest. It singles out married same-sex couples by one trait alone and denies them protection across the board. And a purpose for its enactment, clearly stated in the House Report and during floor debates, was moral disapproval of the minority group that it burdens. None of the arguments advanced in DOMA's defense comes remotely close to justifying it. Thus, even if the Court does not apply heightened review, DOMA must be struck down. "It is not within our constitutional tradition to enact laws of this sort." *Romer*, 517 U.S. at 633.

A. DOMA is not the rational result of impartial lawmaking.

In its consideration of DOMA, Congress failed to engage in the type of impartial, fact-based reflection that serves as a bulwark against unconstitutional discrimination. In fact, Congress deliberately chose to forgo any examination of how DOMA would affect the many federal laws that take marital status into account, the families that it hurts, or the federal government's long history of respecting the significant variability in state marriage laws for purposes of federal law.

1.a. DOMA affects *thousands* of Federal statutes and regulatory materials covering virtually every subject within the federal sphere, including Social Security, housing, nutrition, veterans' and military benefits, employment, immigration, and many other areas. Yet Congress did not study a single affected law or program or refer the bill to committees with jurisdiction over those and many other relevant subjects. As the dissenting views in the House Report stated, DOMA's "consequences [were] not adequately analyzed," and because the "committees of the Congress [did not] hold[] hearings on the various aspects of" the law, the majority was able to "use ignorance as an excuse for haste." House Report at 42.

In fact, Congress did not even know which, or how many, federal laws were affected when it voted on the bill. It was not until nearly two months after DOMA passed the House, and just five days before it passed the Senate, that House Judiciary Committee Chairman Henry Hyde even *asked* the GAO to analyze DOMA's effects on federal laws and programs. See Defense of Marriage Act, B-275860, GAO/OGC-97-16 (Jan. 31, 1997), at 1.[9] And Congress did not wait for GAO's answer, which came nearly four months after DOMA was signed into law. *Ibid.* The Congressional Budget Office did not release an estimate of DOMA's potential budgetary impact until June 2004—nearly eight years later.

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[9] The GAO's January 1997 report identified 1,049 Federal statutes, classified into subject-matter categories, for which marital status was a factor. See Defense of Marriage Act, B-275860, GAO/OGC-97-16 (Jan. 31, 1997). The GAO's more

b. Similarly unexamined were sweeping and unsupported assertions that denying federal recognition to same-sex couples would serve the welfare of children. The House Report claimed that because of "the possibility of begetting children inherent in heterosexual unions," the federal government has an interest in promoting marriage as a means of "encouraging [different-sex] citizens to come together in a committed relationship." House Report at 14. As discussed more fully below, that misstates Congress's interest in marriage. Moreover, DOMA's proponents, then and now, have failed to explain how the federal government's refusal to recognize the marriages of committed *same-sex* couples in any way encourages *different-sex* couples to marry or affects their parenting behavior.

The asserted interest in defending "traditional marriage" was also deemed "[c]losely related" to "a corresponding interest in *promoting heterosexuality*," according to the official House Report (at 15 n.53 (emphasis added)). Relying heavily on an opinion piece in *Commentary Magazine*, the House Report posited that "sexual identity confusion" was increasing and that homosexuality could and should be discouraged. *Ibid.* According to the Report, "[m]aintaining a preferred societal status of heterosexual mar-

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recent assessment, now nine years old, increased that number to 1,138. See Defense of Marriage Act: Update to Prior Report, GAO-04-353R (Jan. 23, 2004). No one has examined DOMA's full effect on the vast body of administrative law.

riage thus will also serve to encourage heterosexuality." *Ibid.* The Report continued: "reason suggest[s] that we guard against doing anything which might mislead wavering children into perceiving society as indifferent to the sexual orientation they develop." *Ibid.* That acknowledged hostility toward homosexuality "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 634.

c. The discussion of DOMA's purported advancement of Congress's interest in child welfare reveals the troubling desire of some lawmakers to prevent same-sex couples from parenting at all—a question that was not before Congress and lies beyond our authority—and an equally disturbing disregard for the welfare of children already being raised in households headed by same-sex couples. House Report at 7 n.21 ("recognizing same-sex 'marriages' would almost certainly have implications on the ability of homosexuals to adopt").

To be sure, some members questioned and objected to the unsupported and illogical assertions regarding same-sex couples and their families. But Congress declined to consult any family- or child-welfare experts on whether denying federal recognition to married gay and lesbian couples would serve child welfare or promote stability of American families. And, of course, DOMA does neither of those things. As the leading national associations of psychological, psychiatric, and family-therapy professions confirm: "the scientific research that has directly compared gay and lesbian parents with heterosexual parents has consistently shown that the former are as fit and capable parents as the latter and that their children are as psychologically healthy and well adjusted." C.A. Am. Psychological Ass'n *Amicus* Br. 16.

d. Congress also failed to evaluate critically the many mistaken assertions about the supposed need for a "uniform" federal definition of marriage. BLAG and the U.S. Senators participating as *amici* in support of BLAG repeat that mistake, relying heavily on Congress's alleged interest in such uniformity. See BLAG Br. 8, 33-37; Sen. Hatch *Amicus* Br. 16. But as explained more fully in Section II.B.5 below, there was no single, uniform federal definition of marriage before DOMA, and there still is none today.

Indeed, invocations of "uniformity" should cause DOMA's defenders concern, rather than give them comfort. That DOMA represented an unprecedented break from Congress's long-standing deference to state marriage determinations was mentioned repeatedly during consideration of the bill. Professor Cass Sunstein testified that DOMA represented "a unique disability insofar as Congress has enacted no similar measure about any other kind of socially disapproved 'marriage,'" and that Congress was intruding on matters "traditionally handled at the state level." *S. 1740: A Bill to Define and Protect the Institution of Marriage: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 48 (1996). Many members echoed that concern on the House and Senate floors. For example, Senator Dianne Feinstein warned that "never in the history of this Nation—for over 200 years—has Congress usurped States' authority to define marriage." 142 Cong. Rec. S10118.

Often, "the most telling indication of a severe constitutional problem is the lack of historical precedent for Congress's action." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2586 (2012) (alterations omitted); see also *Romer*, 517 U.S. at 633 ("The absence of precedent * * * is itself instructive."). Just so here: Congress's stark departure from the long-standing practice of deferring to the States on matters of family law, and the resulting interference with state regulation of marriage (see *infra* Section II.B.3) are additional reasons why Congress should have viewed (and this Court *should* view) DOMA with deep skepticism.

Despite those red flags, DOMA's proponents insisted that the supposed harms of same-sex marriage were so self-evident that there was no need for Congress to look beyond reflexive beliefs. The predominant view was, as Representative Robert Inglis put it, that "no debate" was necessary because "there are some things that are true and right and some things that are wrong." *Defense of Marriage Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 36 (1996).

2. Congress's minimal consideration of whether DOMA actually serves legitimate federal interests unsurprisingly produced a sweeping, discriminatory law that is utterly divorced from those interests.

"[E]ven in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. Given that DOMA is neither "narrow * * * in scope" nor "grounded in [an objective] factual context" (*ibid.*), it is hardly surprising that such a relationship is lacking here.

Like Colorado's discriminatory Amendment 2 invalidated in *Romer*, DOMA "is a status-based enactment divorced from any factual context" from which a "relationship to legitimate state interests" can be discerned. 517 U.S. at 635. It classifies married same-sex couples simply "for its own sake" and "then denies them protection across the board" (*id.* at 633, 635); it applies no matter the statute, no matter the regulation, and no matter the administrative interpretation; and it affects thousands of laws and regulations—many more than the eight laws and policies identified by the petitioners in *Romer*. Brief for Petrs. 5-6, *Romer* v. *Evans*, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17008429.

Given the lack of grounding in any of the affected statutes or regulations, it is impossible to discern a rational connection between DOMA and any of the legitimate purposes that those laws are designed to achieve. In fact, and as revealed by the only hearing ever held to explore the statute's effect on American families—taking place fifteen years after the law's enactment—DOMA does not serve, but *undermines*, the federal laws and programs that it affects. See generally *S. 598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families*, 112th Cong. (2011) ("Respect for Marriage Hrg.").

For example, the purposes of the Social Security program are not served when denial of survivor benefits to a lesbian's or a gay man's surviving spouse leaves the spouse destitute even though both spouses paid into the Social Security system on the same terms as other citizens.[10] Cf. *Weinberger* v. *Weisen-*

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[10] Testifying in the Senate Judiciary Committee, Ron Wallen from California stated: "[B]eyond the emptiness caused by the loss of the man I have spent my entire adult life with, my life has also been thrown into financial turmoil, because of DOMA." Respect for Marriage Hrg. at 312.

feld, 420 U.S. 636, 651 (1975) ("Given the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of § 402(g) is entirely irrational."). The goal of maximizing the financial well-being and independence of widows is not furthered by depriving Edie Windsor and others like her of the estate-tax exemption that other married Americans receive.[11] The policy of encouraging employers to provide family health benefits is not served either by denying to employers the tax deduction for providing those benefits to married gay and lesbian couples or by refusing to cover spouses of gay and lesbian federal employees. Our national security is undermined by denying spousal benefits to gay and lesbian servicemembers, especially during periods of armed conflict.[12] Our veterans are dishonored when we deny them the right to have their spouses buried alongside them in our national cemeteries.[13]

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[11] Mark Kalend and Steven Kazan from California testified in the Senate Judiciary Committee that Mr. Kalend had to pay more than $2 million in estate and gift taxes because of DOMA. Respect for Marriage Hrg. at 180-85.

[12] S. Rep. No. 93-235, at 7 (1973) ("No soldier can be and remain at his best with the constant realization that his family and loved ones are in dire need of financial assistance.").

[13] Jill Johnson-Young from California testified in the Senate Judiciary Committee that her late wife, Linda, was a veteran, but that "despite her service, our country made her unwelcome in our national cemetery." Respect for Marriage Hrg. at 178.

Other examples abound. In striking down DOMA as unconstitutional, the First Circuit observed:

> DOMA's definition of marriage arguably undermines both federal ethics laws, and abuse reporting requirements in the military, insofar as it facially excludes same-sex married couples from their strictures. Other curiosities likely unintended are possible impacts on anti-nepotism provisions; judicial recusals, restrictions on receipt of gifts, and on travel reimbursement; and the crimes of bribery of federal officials, and threats to family members of federal officials.

Mass., 682 F.3d at 13 n.8 (citations omitted).

The arbitrary results of the many applications of DOMA demonstrate that the statute lacks any rational relationship to the objectives of the laws and programs that it affects. DOMA "is so far removed from [the] particular justifications [offered in its defense] that * * * it [is] impossible to credit them." *Romer*, 517 U.S. at 635. And the "immediate, continuing, and real injuries" caused by DOMA "outrun and belie any legitimate justifications that may be claimed" for it. *Ibid.*; cf. *Sugarman* v. *Dougall*, 413 U.S. 634, 642 (1973) ("[T]he State's broad prohibition" applies "to many positions with respect to which" the "proffered justification has little, if any, relationship").

4. DOMA is also unlike most other Acts of Congress in another critical respect: A clearly stated purpose for its enactment was to express moral disapproval of a disfavored minority group. Many proponents repeatedly stated their intent to "honor a collective moral judgment" reflecting "moral disap-

proval of homosexuality" (House Report at 15-16). Chairman Hyde explained, for example, that "most people do not approve of homosexual conduct * * * and they express their disapprobation through the law." 142 Cong. Rec. H7501 (July 12, 1996). Lead Senate sponsor Don Nickles likewise stated that "we find ourselves at the point today that this legislation is needed" because of the "erosion of values." 142 Cong. Rec. S4870 (May 8, 1996).

Those views no doubt reflect "profound and deep convictions," reflecting the "ethical and moral principles" of those who hold them. *Lawrence*, 539 U.S. at 571. But this Court has made clear that such "considerations do not answer the question before us." *Ibid*. No matter how sincerely held,[14] such beliefs are not a constitutionally valid basis for enacting "a classification of persons undertaken for its own sake" and "den[ying] them protection across the board." *Romer*, 517 U.S. at 633, 635.

B. None of the arguments advanced in DOMA's defense justifies the denial of federal recognition for married gay and lesbian couples.

BLAG advances a number of purported justifications for DOMA, but none provides a sufficient basis to uphold the statute. BLAG mistakenly assumes that the law will survive rational-basis review as long as married different-sex couples benefit from federal recognition. That gets matters backwards. The point of DOMA is not to recognize different-sex marriages; federal recognition of those marriages was the status quo ante. Rather, DOMA classifies and excludes married same-sex couples. It is *that* exclusion that must rationally serve a legitimate federal interest. Cf. *U.S. Dep't of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973) (exclusion of "unrelated" households, not inclusion of "related" ones, must rationally serve a legitimate federal interest). It does not do so.

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[14] As the participation of many religious organizations as *amici curiae* on both sides in this case demonstrates, there is no single religious view about same-sex marriage. The Constitution encourages and protects that diversity and prohibits governmental interference or endorsement. The Constitution also demands, however, that civil laws afford equal protection to all persons, which DOMA fails to do.

1. *Preservation of tradition is not a valid basis for DOMA.*

BLAG argues (at 43-48) that the desire to preserve "traditional marriage" (which, in BLAG's view, includes only married heterosexual couples) suffices to justify imposing DOMA's sweeping disability on gay men and lesbians.

That same-sex couples were previously excluded from marriage, and therefore from federal responsibilities and rights that hinge on marriage, cannot itself justify their *continued* exclusion. After all, there is no guarantee that tradition—which often reflects fallible social norms and biases—is itself rational. Thus, "[t]hat the governing majority * * * has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice" (*Lawrence*, 539 U.S. at 577), and "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis" (*Heller* v. *Doe*, 509 U.S. 312, 326 (1993)). DOMA must rationally serve legitimate federal interests independent of consistency with tradition or historical practice. It doesn't.

2. *DOMA harms American families and serves no legitimate federal interest in procreation or child-rearing.*

DOMA's supporters in 1996 argued that Congress's primary interest in marriage is "encouraging responsible procreation and child-rearing," and that limiting federal marriage-based rights to different-sex couples is rational because of "the possibility of begetting children inherent in heterosexual unions." House Report at 13-14. BLAG now narrows the meaning of marriage still more, and in a manner that degrades its true significance, as being geared only to "providing a stable structure to raise unintended and unplanned offspring." BLAG Br. 44 (emphasis and capitalization omitted). But far from serving any legitimate governmental interest in procreation or child-rearing, DOMA *harms* the children of married same-sex couples, providing an additional basis to find it unconstitutional. See *Plyler* v. *Doe* 457 U.S. 202, 230 (1982).

1. DOMA does not affect, much less benefit, different-sex couples or their children. The reason why is plain: federal benefits of marriage are available to those families regardless of DOMA. And as common sense would predict, the trends in marriage and divorce in States that now allow same-sex couples to marry remain unchanged. As one study shows, "laws permitting same-sex marriage or civil unions have no adverse effect on marriage, divorce, and abortion rates, the percent of children born out of wedlock, or the percent of households with children under 18 headed by women." Laura Langbein & Mark A. Yost, Jr., *Same-Sex Marriage and Negative Externalities*, 90 Soc. Sci. Q. 292, 305-306 (June 1, 2009); *see also* Chris Kirk & Hanna Rosin, *Does Gay Marriage De-*

stroy Marriage? A Look at the Data, Slate, May 23, 2012 http://tinyurl.com/doma09 ("In 2010, four of the five states [that then recognized same-sex marriage] had a divorce rate that was lower than both the national divorce rate and the divorce rate of the average state."). There is no rational connection between excluding lesbian and gay couples from federal marriage recognition, on the one hand, and fostering beneficial marital or parenting behavior of heterosexual couples, on the other.

What is more, the harms that DOMA inflicts on gay and lesbian couples and their children are not justified by the "tendency of opposite sex relationships to produce unplanned and unintended pregnancies," as BLAG would have it (at 44). Marriage's purpose is not so limited; "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Lawrence*, 539 U.S. at 567. See also *id.* at 605 (Scalia, J., dissenting) ("encouragement of procreation" is no justification "for denying the benefits of marriage to homosexual couples" since "the sterile and the elderly are allowed to marry"). And DOMA does not advance even that artificially constrained view of Congress's interest in marriage: Excluding same-sex couples from federal marriage recognition does not benefit heterosexual couples who marry because of an unplanned pregnancy.

Like their same-sex counterparts, many married different-sex couples plan for children through adoption, surrogacy, *in vitro* fertilization, egg donation, and other methods of assisted reproduction. But Congress has never distinguished among married different-sex couples based on whether they can or do have "unintended and unplanned offspring"

(BLAG Br. 44 (emphasis and capitalization omitted)), nor would any such classification make sense. Indeed, the grant of federal recognition to different-sex couples who cannot have unplanned pregnancies—but not to same-sex married couples who are similarly situated—suggests precisely the sort of irrational exclusion that this Court has deemed unconstitutional before. See *Cleburne*, 473 U.S. at 450.

2. The evidence is clear, moreover, that DOMA harms children raised in the households of married same-sex couples. It "ham-fistedly deprives * * * children of government services and benefits desirable, if not necessary, to their physical and emotional well-being and development[,] creating an increased potential that they will become a burden on society." *Pedersen*, 881 F. Supp. 2d at 338. That is because DOMA denies children of same-sex couples "the immeasurable advantages that flow from the assurance of a stable family structure when afforded equal recognition under federal law." *Gill* v. *Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 389 (D. Mass. 2010) (internal quotation marks omitted), aff'd *sub nom Mass.* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012). Those advantages promote stability for households, including by providing favorable tax treatment, the ability to take medical leave to care for a spouse, inclusion of all family members under a family health-insurance plan, receipt of Social Security benefits, and so forth. See *Mass.*, 682 F.3d at 6.[15]

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[15] In response to a question from Chairman Patrick Leahy, a witness called in DOMA's defense conceded that DOMA harms the children of married same-sex couples. Respect for Marriage Hrg. at 21.

Beyond harm to children, DOMA unquestionably disadvantages married adults, whose welfare is an equally important aspect of marriage. Federal laws and federal programs routinely use marital status to allocate responsibilities and rights, regardless of whether there are children in the family. For example, Social Security spousal survivor benefits (42 U.S.C. § 7385s-3(d)(1)) and ability to file joint tax returns (26 U.S.C. § 6013) are not limited to spouses who have procreated. The Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.*, recognizes that spouses care for one another during times of illness, whether or not they have children. The Federal Employee Compensation Act, 5 U.S.C. §§ 8101 *et seq.*, acknowledges the financial interdependence of spouses regardless of the presence of children, and it provides spousal survivor benefits if a federal employee is killed on the job. And the bankruptcy code permits an individual debtor and "such individual's spouse" to file a joint bankruptcy petition, whether or not the couple has children. See 11 U.S.C. § 302(a). DOMA's sweeping exclusion of married gay and lesbian couples thus undermines Congress's legitimate interests in ensuring economic and health security for adults.[16]

Many married lesbians and gay men raise children together. DOMA harms them and their children, and affords no benefit to different-sex couples or their children. It thus cannot survive equal-protection review. Cf. *Plyler*, 457 U.S. at 238-240 (Powell, J., concurring) (rejecting proffered state interest that is undermined or poorly served by state law at issue).

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[16] Susan Murray, a Vermont lawyer testifying about how DOMA affects her family and her clients, said: "All of these things, large and small, add up over time, and it is like waves hitting the sand on a beach, over and over. They have the effect of eroding our financial security." Respect for Marriage Hrg. at 18.

3. DOMA undercuts Congress's long-standing practice of deferring to the States on matters of family law.

Although DOMA's proponents asserted that the law would protect state sovereignty over marriage, it does the opposite. Before DOMA, "Congress ha[d] never purported to lay down a general code defining marriage or purporting to bind the states to such a regime." *Mass.*, 682 F.3d at 12. Rather, Congress recognized *state* definitions of marriage for federal-law purposes.

Nine States—Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington—and the District of Columbia allow same-sex couples to marry. DOMA interferes with the ability of those States to ensure equal treatment of their married citizens, and to carry out their laws fully. See *Mass.*, 682 F.3d at 12 ("the denial of federal benefits to same-sex couples lawfully married does burden the choice of states like Massachusetts").

For example, veterans' cemeteries operated by the States receive funding from the Department of Veterans Affairs, but VA regulations forbid the States to allow same-sex spouses to be buried in those cemeteries—on pain of losing the federal funds. See *Mass.* v. *Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 239-240 (D. Mass. 2010), aff'd, 682 F.3d 1 (1st Cir. 2012); 38 C.F.R. § 39.10(a), (c). When Massachusetts asked the federal government about that issue, the government replied that it believed itself to "be entitled to recapture Federal grant funds" if Massachusetts permitted same-sex spouses to buried in a veterans' cemetery. *Mass.*, 698 F. Supp. at 240.[17]

Having now witnessed DOMA's encroachment on state autonomy, many Members who supported the law in 1996 have changed their minds about its legitimacy. For example, DOMA's author, former Georgia Congressman Bob Barr, has since concluded that:

> DOMA is neither meeting the principles of federalism it was supposed to, nor is its impact limited to federal law. In effect, DOMA's language reflects one-way federalism: * * * [T]he heterosexual definition of marriage for purposes of federal laws—including immigration, Social Security survivor rights and veteran's benefits—has become a de facto club used to limit, if not thwart, the ability of a state to choose to recognize same-sex unions.

Bob Barr, *No Defending the Defense of Marriage Act*, L.A. Times, Jan. 5, 2009; see also *Mass.*, 682 F.3d at 12-13 ("Congress' effort to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws does bear on how the justifications are assessed.").

DOMA's intrusion into a matter that Congress had previously left to the States contradicts traditional principles of federalism by conditioning federal respect on a State's agreement with Congress. In that light, DOMA is more naturally explained by a desire to preclude marriage between same-sex couples than by any genuine interest in protecting state sovereignty.

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[17] Then-Governor Mitt Romney raised a similar issue before the Senate Judiciary Committee: "[W]e have been told that we cannot use federal funds to provide meals for an elderly same-sex spouse if the person's eligibility for the services is due to their spousal status." *Preserving Traditional Marriage: A View from the States: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 90 (2004).

4. *The supposed interest in conserving public resources does not justify DOMA.*

"[P]reserving scarce government resources" was also advanced as a justification for DOMA. House Report at 18. But "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler*, 457 U.S. at 227. That is particularly true when the justification is advanced to defend a law that singles out a politically unpopular minority for unfavorable treatment under more than 1,100 federal laws, many of which having nothing to do with financial support. See *Moreno*, 413 U.S. at 534; cf. *Cleburne*, 473 U.S. at 450 (interest accorded less weight when used to single out a particular group for unfavorable treatment). While the government "may legitimately attempt to limit its expenditures," it "may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Graham* v. *Richardson*, 403 U.S. 365, 374-375 (1971).

Here, the legislative history reveals that many members simply wanted to ensure that federal funds would not flow to married gay and lesbian couples and their families, thus imposing special burdens on them that the general public does not bear. As Representative Charles Canady said, "I believe that it is certainly within our prerogative to determine that [federal] funds will not be used to support an institution which is rejected by the vast majority of the

American people." 142 Cong. Rec. H7489 (July 12, 1996). And as Representative Dave Weldon said, "I think it would be wrong to take money out of the pockets of working families across America and use those tax dollars to give Federal acceptance and financial support to same-sex marriages." *Id.* at H7493. Representative William Lipinski expressed a similar concern, stating that "[u]nless this bill is passed establishing a Federal definition of marriage, all Americans will then be paying for benefits for homosexual marriages." *Id.* at H7495. All of that dooms DOMA: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534.

BLAG nevertheless contends that Congress acted prudently in enacting DOMA because there was uncertainty over the budgetary effects of recognizing married same-sex couples. We are aware of no other instance in which Congress has sought to reduce the number of married couples or discourage marriage. This casts further doubt on the credibility of the claimed budgetary concerns here. And as explained above, Congress did not seek any information about DOMA's actual effects on federal programs or the federal budget when it considered the bill in 1996. Just one paragraph in the House Report is devoted to the topic, and it blithely asserts that providing federal benefits to same-sex spouses would "cost the federal government money." House Report at 18.

Congress did not bother to ask for any assessment of the budgetary impact until 2004—eight years after DOMA's enactment. That assessment, delivered by the Congressional Budget Office, shows that federal recognition of married gay and lesbian couples would not cost the federal government *any* money, and likely would *improve* the federal balance sheet. U.S. Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, June 21, 2004, http://tinyurl.com/doma12. Other studies project similar positive net effects on state budgets.[18]

5. *The asserted desire for federal "uniformity" does not justify DOMA.*

Differences in state marriage and family laws have always existed. It is well understood that "[r]ules governing the inheritance of property, adoption, and child custody are generally specified in statutory enactments that vary from State to State," and that "equally varied state laws governing marriage and divorce affect a multitude of parent-child relationships." *Lehr* v. *Robertson*, 463 U.S. 248, 256 (1983). Those differences are sometimes significant and controversial. States have disagreed, for example, over whether interracial couples may marry (*Loving* v. *Virginia*, 388 U.S. 1 (1967)) and the circumstances under which couples may divorce (*Haddock* v. *Haddock*, 201 U.S. 562 (1906); *Williams* v. *North Carolina*, 317 U.S. 287 (1942)). Other important differences—including age and consanguinity restrictions and the legality of common-law marriage—continue to this day.

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[18] See M.V. Lee Badgett & R. Bradley Sears, *Putting A Price on Equality? The Impact of Same-Sex Marriage on California's Budget*, 16 Stan. L. & Pol'y Rev. 197 (2005); Brad Sears *et al.*, *The Impact of Extending Marriage to Same-Sex Couples on the New Jersey Budget*, The Williams Institute (Dec. 2009), http://tinyurl.com/doma11; M.V. Lee Badgett *et al.*, *The Impact On Oregon's Budget Of Introducing Same-Sex Domestic Partnerships* (Feb. 2008), http://tinyurl.com/doma10.

Such differences have always resulted in "geographical disparities in the eligibility for federal benefits." BLAG Br. 8 (emphasis omitted). Variations in state marriage laws, and corresponding inconsistencies in eligibility for marriage-based federal benefits, were certainly not new in 1996. Nor do they provide a credible or legitimate justification for DOMA, an unprecedented federal foray into family law.

Before DOMA, Congress never thought it necessary to override differences in state marriage rules. Instead, Congress consistently deferred to the States on issues of marriage and family law. See, *e.g.*, *De Sylva* v. *Ballentine*, 351 U.S. 570, 581 (1956); *Seaboard Air Line Ry.* v. *Kenney*, 240 U.S. 489, 493-494 (1916); *Renshaw* v. *Heckler*, 787 F.2d 50, 53-54 (2d Cir. 1986); *Lembcke* v. *United States*, 181 F.2d 703, 706 (2d Cir. 1950). Even when some States imposed race-based restrictions on marriage, the federal government applied state law to determine federal eligibility for marriage-based benefits. See, *e.g.*, 20 C.F.R. § 404.1101 (Supp. 1952) (recognizing that application of choice-of-law rules would mean that some married interracial couples would be ineligible for federal benefits).

BLAG nevertheless asserts (at 33-34) that marriage of gay and lesbian couples poses new challenges because those couples may move to other States. The Senate *amici* defending DOMA before this Court echo that concern, arguing that "marriage tourism"—a term intended to describe couples who travel to a State that permits same-sex marriage and subsequently seek recognition of their marriage upon returning home to a State that does not—would give rise to unprecedented uncertainty. Sen. Hatch *Amicus* Br. 18.

Congress has faced similar issues in the past, yet it has never before adopted its own definition as a substitute for state marital determinations. For example, it was not until the 1980s that most States adopted provisions for no-fault divorce. Before then, there was tremendous diversity in state fault-based divorce laws, producing the so-called migratory divorce phenomenon. See, *e.g.*, C.A. Family Law Professors *Amicus* Br. 9-11. Because the number of divorces in the United States each year far exceeds the number of same-sex marriages, migratory divorce would appear to have presented far more uncertainty than so-called marriage tourism would today. Yet Congress did not enact a sweeping, general federal divorce standard to determine whose divorces would receive federal recognition and whose would not. "It never—in the name of caution, uniformity, administrative expediency, defending the status quo, or preserving traditional marriage—denied states the right to define the status of 'divorced' as they choose." *Id.* at 11.[19]

To this day, with full understanding that married couples may be treated differently in different States, the federal government continues to defer to state law to determine marital status and resolve disputes related to divorce, using choice-of-law rules when needed. See, *e.g.*, *Slessinger* v. *Dep't of Health & Human Servs.*, 835 F.2d 937, 939 (1st Cir. 1987) (per curiam); *Money* v. *Office of Pers. Mgmt*, 811 F.2d 1474, 1477 (Fed. Cir. 1987); *Weiner* v. *Astrue*, 2010 WL 691938, at *4 (S.D.N.Y. 2010).

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[19] BLAG likewise asserts (at 35-37) that Congress wanted to treat all gay and lesbian couples uniformly. But the benefits at issue in this case turn on marital status, not the sexual orientation of one's spouse or partner. Married same-sex and different-sex couples are similarly situated in that regard. BLAG's point thus acknowledges that DOMA singles out all gay and lesbian couples for uniformly unfavorable treatment, confirming that it must be struck down.

That Congress had never before substituted its own definition of marriage for those of the States casts considerable doubt on the credibility of any asserted interest in uniformity here. When the newfound interest in uniformity focuses solely on gay and lesbian couples and imposes burdens exclusively on a historically disfavored minority group, it is "wholly unconvincing" under the Equal Protection Clause. *Cleburne*, 473 U.S. at 455 (Stevens, J., concurring); accord *id.* at 447-450 (majority opinion). As Justice Jackson recognized decades ago, "nothing opens the door to arbitrary action so effectively as to allow [public] officials to pick and choose only a few to whom they will apply legislation." *Ry. Express Agency* v. *New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring). As Justice Scalia more recently observed: "Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan* v. *Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). DOMA fails that basic test.

CONCLUSION

DOMA imposes a sweeping and unjustifiable federal disability on married same-sex couples. It is "class legislation" that lacks any rational connection to legitimate federal interests, thus violating the Fifth Amendment's equal-protection guarantee.

The judgment of the court of appeals accordingly should be affirmed.

Respectfully submitted.

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MARCH 2013

APPENDIX

The Members of Congress participating as *amici* are:

United States Senators

Tammy Baldwin
Michael F. Bennet
Richard Blumenthal
Barbara Boxer
Sherrod Brown
Maria Cantwell
Benjamin Cardin
Thomas R. Carper
Christopher Coons
William "Mo" Cowan
Richard J. Durbin
Dianne Feinstein
Al Franken
Kirsten Gillibrand
Tom Harkin
Martin Heinrich
Mazie K. Hirono
Tim Kaine
Angus S. King, Jr.
Amy Klobuchar
Frank R. Lautenberg
Patrick J. Leahy
Claire McCaskill
Robert Menendez
Jeff Merkley
Barbara A. Mikulski
Christopher S. Murphy
Patty Murray
Harry Reid
Bernie Sanders
Brian Schatz
Charles E. Schumer
Jeanne Shaheen
Debbie Stabenow
Jon Tester
Mark Udall
Mark R. Warner
Elizabeth Warren
Sheldon Whitehouse
Ron Wyden

Members of the U.S. House of Representatives

Robert E. Andrews
Ron Barber
Karen Bass
Joyce Beatty
Xavier Becerra
Ami Bera
Timothy H. Bishop
Earl Blumenauer
Suzanne Bonamici
Robert A. Brady
Bruce L. Braley
Corinne Brown
Julia Brownley
Cheri Bustos
Lois Capps
Michael E. Capuano

Members of the U.S. House of Representatives (continued)

Tony Cárdenas
John C. Carney, Jr.
André Carson
Matthew A. Cartwright
Kathy Castor
Joaquin Castro
Judy Chu
David N. Cicilline
Yvette D. Clarke
Wm. Lacy Clay
Emanuel Cleaver
James E. Clyburn
Steve Cohen
Gerald E. Connolly
John Conyers, Jr.
Joe Courtney
Joseph Crowley
Elijah E. Cummings
Danny K. Davis
Susan A. Davis
Diana DeGette
John K. Delaney
Rosa L. DeLauro
Suzan K. DelBene
Theodore E. Deutch
John D. Dingell
Lloyd Doggett
Michael F. Doyle
Tammy Duckworth
Donna F. Edwards
Keith Ellison
Eliot L. Engel
Anna G. Eshoo
Elizabeth H. Esty
Sam Farr
Chaka Fattah
Bill Foster
Lois Frankel
Marcia L. Fudge
Tulsi Gabbard
John Garamendi
Joe Garcia
Alan Grayson
Al Green
Raúl M. Grijalva
Luis V. Gutierrez
Janice Hahn
Colleen W. Hanabusa
Alcee L. Hastings
Denny Heck
Brian Higgins
James A. Himes
Rush Holt
Michael M. Honda
Steven A. Horsford
Steny H. Hoyer
Jared Huffman
Steve Israel
Sheila Jackson Lee
Hakeem S. Jeffries
Eddie Bernice Johnson
Henry C. "Hank" Johnson, Jr.
Marcy Kaptur
William R. Keating

Members of the U.S. House of Representatives (continued)

Joseph P. Kennedy III
Daniel T. Kildee
Derek Kilmer
Ann Kirkpatrick
Ann M. Kuster
James R. Langevin
John B. Larson
Barbara Lee
Sander M. Levin
John Lewis
David Loebsack
Zoe Lofgren
Alan S. Lowenthal
Nita M. Lowey
Michelle Lujan Grisham
Daniel B. Maffei
Carolyn B. Maloney
Sean Patrick Maloney
Edward J. Markey
Doris O. Matsui
Carolyn McCarthy
Betty McCollum
Jim McDermott
James P. McGovern
Jerry McNerney
Gregory W. Meeks
Grace Meng
Michael H. Michaud
George Miller
Gwen Moore
James P. Moran
Patrick Murphy
Jerrold Nadler
Grace F. Napolitano
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AMICUS
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No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR
AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE ORGANIZATION OF AMERICAN HISTORIANS AND THE AMERICAN STUDIES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT EDITH WINDSOR

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

- I. GAY AND LESBIAN PEOPLE HAVE BEEN SUBJECT TO WIDESPREAD AND SIGNIFICANT DISCRIMINATION IN THE UNITED STATES 6
  - A. The Historical Roots of Discrimination Against Gay People 6
  - B. Modern American History: 1890-1940 7
  - C. World War II and Its Aftermath 12
  - D. The Gay Rights Movement and Its Opponents in the 1960s, 1970s, and 1980s 17
  - E. The Persistence of Anti-Gay Discrimination from the 1990s to the Present 20
- II. HISTORY PLAYS A CRITICAL ROLE IN THE COURT'S EQUAL-PROTECTION ANALYSIS 35

CONCLUSION 37

TABLE OF AUTHORITIES

Page(s)

CASES:

Baehr v. *Lewin*,
852 P.2d 44 (Haw. 1993) 31

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Civ. No. 20371, 1999 Haw. LEXIS 391
(Haw. Dec. 9, 1999) 31

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704 S.E.2d 494 (N.C. 2010) 30

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457 S.E.2d 102 (Va. 1995) 29

Bowen v. *Gilliard*,
483 U.S. 587 (1987) 3

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530 U.S. 640 (2000) 26

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473 U.S. 432 (1985) 35

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413 U.S. 528 (1973) 35

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830 So. 2d 21 (Ala. 2002) 30

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45 So. 3d 79 (Fla. Ct. App. 2010) 20

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Page(s)

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539 U.S. 558 (2003) 3, 36

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388 U.S. 1 (1967) 35, 36

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332 U.S. 633 (1948) 36

Palmore v. *Sidoti*,
466 U.S. 429 (1984) 29

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517 U.S. 620 (1996) 22, 35

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207 P.3d 48 (Cal. 2009) 34

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518 U.S. 515 (1996) 36

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763 N.W.2d 862 (Iowa 2009) 32

STATE CONSTITUTION:

HAWAII CONST. art. I, § 23 31

STATUTES:

1 U.S.C. § 7 31

8 U.S.C. § 1151(b)(2)(A)(i) 24

8 U.S.C. § 1154 24

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 1738C..31

Pub. L. No. 103-160, 107 Stat. 1547 (1993)..............23

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NARTH and Civil Rights, NATIONAL ASS'N FOR RESEARCH & THERAPY OF HOMOSEXUALITY (NARTH) 28

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Page(s)

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MARC STEIN, CITY OF SISTERLY AND BROTHERLY LOVES: LESBIAN AND GAY PHILADELPHIA, 1945-1972 (2000) 17

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Page(s)

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BRIEF OF THE ORGANIZATION OF AMERICAN HISTORIANS AND THE AMERICAN STUDIES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT EDITH WINDSOR

STATEMENT OF INTEREST[1]

The Organization of American Historians (OAH) and the American Studies Association (ASA) respectfully submit this brief as *amici curiae* in support of Respondent Edith Windsor.

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[1] No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. All parties have filed blanket *amicus* consent letters.

Founded in 1907, the OAH is the largest scholarly organization devoted to promoting the study and teaching of American history. Its distinguished *Journal of American History*, annual meetings, and public service activities aim to promote excellence in the scholarship, teaching, and presentation of American history. The OAH is an international, nonprofit membership organization, whose 7,800 historian members include university and college professors in the United States and abroad, as well as individuals employed in a variety of scholarly and institutional settings, such as libraries, museums, and historical societies.

The ASA is the nation's oldest and largest association devoted to the interdisciplinary study of American culture and history. It exists to encourage the study of American culture—past and present. Chartered in 1951, the ASA now has 5,000 individual members and 2,200 institutional members. These members represent many fields of inquiry, including history, religion, philosophy, science, anthropology, sociology, gender studies, and popular culture, among others. The membership includes faculty, researchers, and students; museum directors and librarians; and public officials and administrators.

The late Kenneth M. Stampp, historian and past president of OAH, wrote: "With the historian it is an article of faith that knowledge of the past is a key to understanding the present." THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH vii (1956). Both the OAH and the ASA adhere to this principle, and both organizations have an interest—not as advocates of a particular legal standard, but as stewards of history—to ensure that the Court is presented with an accurate description of the history of discrimination against gay men and lesbians in America.

INTRODUCTION AND SUMMARY OF ARGUMENT

In answering the question presented in this case, the Court will consider, among other things, whether "[a]s a historical matter" a particular class of persons "ha[s] been subjected to discrimination." *Bowen* v. *Gilliard*, 483 U.S. 587, 602 (1987) (citation omitted). *Amici* offer this Brief as historians to inform the Court that gay and lesbian people have been subject to widespread and significant discrimination and hostility in the United States.

Sexual intimacy between people of the same sex has been condemned by "powerful voices" for centuries. *Lawrence* v. *Texas*, 539 U.S. 558, 571 (2003). In twentieth century America, discrimination against gay people reached remarkable proportions. In the 1920s, for example, the State of New York prohibited theaters from staging plays with lesbian or gay characters. Beginning in the 1930s and 1940s, many states prohibited bars and restaurants from serving gay people. In the 1950s, the federal government banned homosexuals from employment, insisted that its private contractors ferret out and dismiss gay employees, and prohibited gay citizens of other countries from entering the country or securing American citizenship. Until the 1960s, all states outlawed sexual intimacy between men. And throughout the twentieth century, many municipalities launched police campaigns to suppress gay meeting places and sought to purge gay civil servants from employment. These policies worked to create and reinforce the belief that gay men and lesbians comprised an inferior class of people to be shunned by other Americans.

Discrimination at the state and federal levels was accompanied by private condemnation of homosexuality and discrimination against gay people, with a similarly enduring negative effect. In the 1930s, for example, Hollywood studios enacted a censorship code that for decades prohibited the discussion of gay issues or the appearance of gay or lesbian characters in film. In the 1940s and 1950s, state officials and the press fostered frightening stereotypes of homosexuals as child molesters. And until the 1970s, leading physicians and medical researchers claimed that homosexuality was a pathological condition or disease. These stereotypes have had profound consequences, and they continue to inspire public fears and hostility.

Gay men and lesbians saw their situation begin to improve in the 1970s—but also saw many of their gains reversed when they precipitated a powerful opposition movement. Movie censorship relaxed in the 1960s, but Hollywood studios still made few films featuring gay or lesbian characters; even into the 1990s, television networks were subject to boycott threats if they featured such characters. Beginning in the mid-1970s, gay activists persuaded some towns and cities to enact civil rights protections for gay people, but that soon prompted a series of referendum campaigns to repeal or prohibit such protections. And in the 1980s, the early press coverage of AIDS reinforced the view that homosexuals were diseased and threatened other Americans.

Discrimination continues today. In most states, gay men and lesbians still lack protection from discrimination in schools, employment, housing, and public accommodations. Gay men and lesbians cannot sponsor their same-sex spouses for immigration purposes. Same-sex spouses of service members are ineligible to receive certain survivorship and health insurance benefits available to their heterosexual counterparts. State laws discriminating against gay men and lesbians remain on the books. Two states formally prohibit adoptions by same-sex couples, and adoption agencies in many other states continue to favor heterosexual couples over same-sex couples. Well over a thousand gay men, lesbians, bisexuals, and transgendered people are the victims of hate crimes every year.

Despite social and legal progress in the past thirty years, gay men and lesbians continue to live with the legacy of anti-gay laws and hostility. When marriage emerged as the new flashpoint in debates over gay civil rights, the debate was shaped by this legacy—one that initially prompted many Americans to respond to the idea of same-sex marriage with the same hostility with which they previously greeted the idea of gay teachers or television characters. Opponents of marriage equality have deployed enduring anti-gay stereotypes to great effect. The approval of Proposition 8 in California, and similar laws and constitutional amendments in a total of forty-one states, demonstrates the continuing influence of anti-gay hostility and the persistence of ideas about the inequality of gay people and their relationships. No other group in American history has been confronted with as many referenda designed to take away its rights.

The federal Defense of Marriage Act (DOMA), the subject of this litigation, also is among the present-day legacies of this long history of discrimination against gay men and lesbians. DOMA prohibits the federal government from recognizing and providing tax, social security, and other marriage-related benefits to lawfully married same-sex couples.

The brief for Respondent Bipartisan Legal Advisory Group (BLAG) mentions this long and pervasive history of discrimination barely in passing. *See* BLAG Br. 56-57. BLAG's arguments give impermissibly short shrift to the historical record of widespread and insidious discrimination faced by gay men and lesbians, only one manifestation of which is the denial of equal marriage rights.

ARGUMENT

I. GAY AND LESBIAN PEOPLE HAVE BEEN SUBJECT TO WIDESPREAD AND SIGNIFICANT DISCRIMINATION IN THE UNITED STATES.

A. The Historical Roots of Discrimination Against Gay People

The first laws against sex between men in the American colonies were rooted in the earliest settlers' understanding of ancient Judeo-Christian prohibitions against sodomy and "unnatural acts." In the Massachusetts Bay Colony, for example, sodomy was prohibited since 1641 by a statute with language taken directly from Leviticus: "If any man lyeth with mankind, as he lyeth with a woman, both of them have committed abomination; they both shall surely be put to death." JONATHAN NED KATZ, GAY/LESBIAN ALMANAC 76-78 (1983) (citation omitted). The southern and middle colonies, for their part, generally drew on the secular laws against "buggery" enacted by the English Reformation Parliament of 1533. William Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1012-13 (1997).

"Sodomy" did not mean precisely the same thing as today's "homosexual conduct," and colonial laws penalized many other forms of non-procreative sexual behavior. But Puritan clergy vigorously condemned the "unnatural uncleanness * * * when men with men commit filthiness, and women with women," in part because they worried that all people were subject to such temptations. Richard Godbeer, *"The Cry of Sodom": Discourse, Intercourse, and Desire in Colonial New England*, 52 WILLIAM & MARY Q. 259, 264-265 (1995).

B. Modern American History: 1890-1940

Most historians now agree that the concept of the homosexual and the heterosexual as distinct categories of people emerged only in the late nineteenth century. JONATHAN NED KATZ, THE INVENTION OF HETEROSEXUALITY 10 (1995). The dramatic growth of American cities in the same period permitted homosexuals to develop an extensive collective life. Some Americans responded to the growing visibility of gay life with fascination and sympathy, regarding it as one more sign of the freedom from tradition characteristic of a burgeoning metropolitan culture. Many others regarded the growing visibility of lesbian and gay life with dread. Prosecutions for sodomy and related offenses increased dramatically in the late nineteenth century, and the policing of gay life escalated considerably in the first decades of the twentieth century. *See* GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF

THE GAY MALE WORLD, 1890-1940, at 132-141, 147, 256, 271-273 (1994).

Hostile Medical and Religious Views Encouraged the Escalation of Anti-Gay Policing. Hostility to homosexuals was at times motivated by uneasiness about the dramatic changes underway in gender roles at the turn of the last century. In this era—indeed until 1973—homosexuality was classified as a disease, defect, or disorder. Many physicians initially argued that the homosexual (or "sexual invert") was characterized as much by his or her violation of conventional gender roles as by sexual interests. Numerous doctors identified suffragists, women entering the professions, and other women challenging the limits placed on their sex as victims of a medical disorder. Thus, doctors explained that "the female possessed of masculine ideas of independence" was a "degenerate" and that "a decided taste and tolerance for cigars, * * * [the] dislike and sometimes incapacity for needlework * * * and some capacity for athletics" were all signs of female "sexual inversion." Similarly, a doctor thought it significant that a male "pervert" "never smoked and never married; and was entirely averse to outdoor games." George Chauncey, *From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance*, 58-59 SALMAGUNDI 114, 119-121, 124, 139-141 (1982-1983) (brackets, citations, and quotation marks omitted).

Doctors for decades continued to identify homosexuality per se as a "disease," "mental defect," "disorder," or "degeneration." Such medical pronouncements provided "a powerful source of legitimation to anti-homosexual sentiment, much as medical science had previously legitimized widely held (and subsequently discarded) beliefs about male superiority and white racial superiority." GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 17 (2004).

Religiously inspired hostility to homosexuality also inspired an escalation in anti-gay policing. In the late nineteenth century, native-born Protestants organized numerous "anti-vice" societies to suppress what they regarded as the sexual immorality and social disorder of the nation's burgeoning Catholic and Jewish immigrant neighborhoods. Although these organizations focused on female prostitution, they also opposed the growing visibility of homosexuality, which they regarded as an egregious sign of the loosening of social controls on sexual expression under urban conditions. In New York City in the 1910s and 1920s, for instance, the Society for the Suppression of Vice (also known as the Comstock Society) worked closely with the police to arrest several hundred men for homosexual conduct. In Massachusetts, the Watch and Ward Society, established as the New England Society for the Suppression of Vice, conducted surveillance on virtually all the popular gay bars and gathering places of the time. *See* PAUL BOYER, URBAN MASSES AND MORAL ORDER IN AMERICA, 1820-1920, at 207 (1978); CHAUNCEY, GAY NEW YORK 137-141, 146-147, 249-250; JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 150-153 (2d ed. 1997); THE HISTORY PROJECT, IMPROPER BOSTONIANS: LESBIAN AND GAY HISTORY FROM THE PURITANS TO PLAYLAND 121-122 (1998).

Police Harassment. Responding to pressure from Protestant moral reform organizations, municipal police forces began using misdemeanor charges—

disorderly conduct, vagrancy, lewdness, loitering, and the like—to harass homosexuals and keep them from meeting in public. CHAUNCEY, WHY MARRIAGE? 10. In 1923, the New York State Legislature specified that a man's "frequent[ing] or loiter[ing] about any public place soliciting men for the purpose of committing a crime against nature or other lewdness" was a form of disorderly conduct. Many more men were arrested and prosecuted under this charge than for sodomy; in the next forty years, there were more than 50,000 arrests on this charge in New York City alone. CHAUNCEY, GAY NEW YORK 172; George Chauncey, *A Gay World, Vibrant and Forgotten*, N.Y. TIMES, June 26, 1994, at E17.

The earliest gay activists also fell victim to police harassment. In 1924, for example, Chicago police raided the home of the founder of the nation's earliest known gay political group and seized the group's files. JONATHAN NED KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. 385, 388-391 (1976).

Censorship. The growing visibility of lesbian and gay life in the early twentieth century precipitated censorship campaigns designed to curtail gay people's freedom of speech and the freedom of all Americans to discuss gay issues. In 1927, police arrested the cast of "The Captive," an acclaimed Broadway drama exploring one woman's unrequited love for another. New York State then passed a "padlock law" forbidding theaters from staging plays with gay or lesbian characters; any theater violating the law would be shut down for a year. CHAUNCEY, GAY NEW YORK 352; KAIER CURTIN, WE CAN ALWAYS CALL THEM BULGARIANS: THE EMERGENCE OF LESBIANS AND GAY MEN ON THE AMERICAN STAGE 100 (1987);

KATZ, GAY AMERICAN HISTORY 83, 87. Officials in other cities also took up the cause. In 1935, for instance, Boston's Mayor banned "The Children's Hour," a play dealing with lesbianism, because, in his words, it "showed moral perversion, the unnatural appetite of two women for each other." THE HISTORY PROJECT, IMPROPER BOSTONIANS 121-122.

Censorship had even wider-reaching effects when it spread to the movies. A mass movement led by religious leaders threatened the Hollywood studios with boycotts and restrictive federal legislation if they did not begin censoring their films. This prompted the studios to establish a production code that, beginning in 1934, prohibited the inclusion of gay or lesbian characters or even the "inference" of "sex perversion" in Hollywood films. This code remained in effect for some thirty years, effectively prohibiting discussion of homosexuality in one of the nation's most powerful media for more than a generation. CHAUNCEY, GAY NEW YORK 353 & n.57. *See generally* GREGORY D. BLACK, THE CATHOLIC CRUSADE AGAINST THE MOVIES, 1940-1975 (1997); Richard Maltby, *The Production Code and the Hays Office*, *in* 5 TINO BALIO, GRAND DESIGN: HOLLYWOOD AS A MODERN BUSINESS ENTERPRISE, 1930-1939, at 37-72 (Charles Harpole ed., 1993); VITO RUSSO, THE CELLULOID CLOSET: HOMOSEXUALITY IN THE MOVIES (1991).

Constraints on Freedom of Association. New regulations began to curtail gay people's freedom of association at the same time they were pushed off the stage and screen. The New York State Liquor Authority, for instance, issued regulations shortly after Prohibition's repeal in 1933 prohibiting bars, restaurants, cabarets, and other establishments with liquor licenses from serving or employing homosexuals or even allowing them to congregate on their premises. When courts rejected the Authority's argument that the mere presence of homosexuals made an establishment "disorderly," the Authority began using evidence of unconventional gender behavior or homosexual solicitation to establish a bar's "disorderly" character, closing hundreds of bars on this basis in the next thirty years. CHAUNCEY, GAY NEW YORK 335-349. Similar regulations and laws were enacted elsewhere. In the 1950s, for example, California's Alcoholic Beverage Control Board ruled that acts of touching, women wearing mannish attire, and men with limp wrists, high-pitched voices, and/or tight clothing were evidence of a bar's "dubious character" and grounds for closing it. NAN ALAMILLA BOYD, WIDE-OPEN TOWN: A HISTORY OF QUEER SAN FRANCISCO TO 1965, at 136-137 (2003).

C. World War II and Its Aftermath

Many gay men and lesbians served honorably in the Armed Forces in the first half of the twentieth century. *See* ALLAN BERUBE, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO 3 (1990). But discrimination against gay men and lesbians by federal and state governments dramatically increased during the Second World War and postwar years.

Discrimination in the Military. The U.S. military had long criminalized homosexual sodomy. But during World War II, the Armed Forces decided for the first time to exclude gay people as a class from military service. Officials put in place new screening mechanisms designed to identify homosexuals during the induction process. Military authorities also collaborated with local police to monitor gay bars near bases; servicemen caught in these establishments risked discharge. BERUBE, COMING OUT UNDER FIRE 2, 8-18, 121-126, 143-148, 260-262; BOYD, WIDE-OPEN TOWN 113-117.

Despite these barriers to service, many gay men and lesbians served heroically in the military during the War. But the Veterans Administration denied G.I. Bill benefits to soldiers undesirably discharged for being homosexual. These gay veterans thus were denied the educational, housing, and readjustment allowances provided to millions of their peers. *See* Margot Canady, ***Building a Straight State: Sexuality and Social Citizenship Under the 1944 G.I. Bill***, 90 J. AM. HIST. 935, 937, 947 (2003).

Discrimination in the Federal Government. The persecution of gay men and lesbians dramatically increased at every level of government after the War. In 1950, following Senator Joseph McCarthy's denunciation of the employment of gay people in the State Department, a Senate subcommittee conducted a special investigation into "the employment of homosexuals and other sex perverts in government." S. REP. NO. 81-241, at 1 (1950). The subcommittee recommended excluding gay men and lesbians from all federal employment. To support this recommendation, the subcommittee stated that "those who engage in overt acts of perversion lack the emotional stability of normal persons" and that homosexuals "constitute security risks." *Id.* at 3, 4. The subcommittee also portrayed homosexuals as predators: "These perverts will frequently attempt to entice normal individuals to engage in perverted practices." *Id.*

The Senate investigation and report were only one part of a massive anti-homosexual campaign launched by the federal government after the war. The Senate subcommittee reported that "between January 1, 1947, and August 1, 1950, approximately 1,700 applicants for Federal positions were denied employment because they had a record of homosexuality or other sex perversion." *Id.* at 9. In 1953, President Eisenhower issued an executive order banning gay men and lesbians from civilian and military employment and requiring private corporations with federal contracts to ferret out and discharge their homosexual employees or risk losing their contracts. Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953); JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY, 1940-1970, at 44, 46-47 (1981). At the height of the McCarthy era, the State Department discharged more homosexuals than communists. DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT 76 (2004).

Two years after the Senate subcommittee recommended that homosexuals be purged from government employment, Congress further signaled its conviction that gay men and lesbians had no place in American society by denying them entry into the country. In 1952, Congress prohibited homosexuals (whom it called "psychopaths") from entering the United States, much as it previously had prohibited immigration from Asia and curtailed the immigration of Jews and Catholics from eastern and southern Europe. CHAUNCEY, WHY MARRIAGE? 21.

State and Local Discrimination. Many state and local governments also sought to ferret out and fire their gay employees; countless state employees, teachers, hospital workers, and others lost their jobs as a result. *Id.* at 7. A 1958 investigation at the University of Florida, for instance, led to the interrogation of hundreds of suspected gay men and lesbians and the dismissal of sixteen faculty and staff members. Stacy Braukman, *"Nothing Else Matters But Sex": Cold War Narratives of Deviance and the Search for Lesbian Teachers in Florida, 1959-1963*, 27 FEMINIST STUD. 553, 555 (2001); D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 46, 48.

The policing of gay life sharply escalated across the country in the 1950s and 1960s. Police departments from Seattle and Dallas to New Orleans and Baltimore stepped up their raids on bars and private parties attended by gay men and lesbians, and police made thousands of arrests for "disorderly conduct." By 1950, Philadelphia had a six-man "morals squad" arresting more gay men than the courts knew how to handle, some 200 a month. In the District of Columbia alone, there were more than a thousand arrests every year. In 1955, officials in Boise, Idaho, interrogated 1400 people in the course of an investigation of gay men in the community. Police raids on gay bars were so common that some bars posted signs announcing "We Do Not Serve Homosexuals." George Chauncey, *The Postwar Sex Crime Panic*, *in* TRUE STORIES FROM THE AMERICAN PAST 177 (William Graebner ed., 1993); CHAUNCEY, WHY MARRIAGE? 7-8; John D'Emilio, *The Homosexual Menace: The Politics of Sexuality in Cold War America*, *in* PASSION AND POWER: SEXUALITY IN HISTORY 226, 231 (Kathy Peiss *et al.*, eds. 1989); D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 182-84, 208.

Demonization and Censorship. The harassment of gay people was justified by a series of police and press campaigns in the 1940s and 1950s that fomented demonic stereotypes of homosexuals as child molesters intent on recruiting the young into their way of life. *See* Estelle Freedman, *"Uncontrolled Desires": The Response to the Sexual Psychopath, 1920-1960*, 74 J. AM. HIST. 83, 92 (1987); *see also* Chauncey, *The Postwar Sex Crime Panic* 172. A Special Assistant Attorney General of California claimed in 1949, for example, that "[t]he sex pervert, in his more innocuous form, is too frequently regarded as merely a queer individual who never hurts anyone but himself. All too often we lose sight of the fact that the homosexual is an inveterate seducer of the young of both sexes, and is ever seeking for younger victims." Chauncey, *The Postwar Sex Crime Panic* 170-171. In 1950, *Coronet*, a popular national magazine, claimed that "Some male sex deviants do not stop with infecting their often-innocent partners: they descend through perversions to other forms of depravity, such as drug addiction, burglary, sadism, and even murder." Ralph H. Major, Jr., *New Moral Menace to Our Youth*, CORONET, Sept. 1950, at 101-108. Vicious stereotypes of homosexuals as child molesters fostered by such campaigns continue even today to stoke public fears about gay teachers and parents. CHAUNCEY, WHY MARRIAGE? 150-151.

Between the late 1930s and late 1950s, public hysteria prompted more than half the states to enact laws empowering the police or courts to force people convicted of certain sexual offenses—or, in some states, merely suspected of being "sexual deviants"—to undergo psychiatric examinations. In some cases, those examinations could result in indeterminate civil confinements for individuals deemed in need of a "cure" for their homosexual "pathology." *See* Freedman, *"Uncontrolled Desires,"* 74 J. AM. HIST. at 95-

98; MARC STEIN, CITY OF SISTERLY AND BROTHERLY LOVES: LESBIAN AND GAY PHILADELPHIA, 1945-1972, at 124-127 (2000); Chauncey, *The Postwar Sex Crime Panic* 166-167.

Censorship, government-sanctioned discrimination, and the fear of both made it difficult for gay people to organize and speak on their own behalf. In 1954, Los Angeles postal officials banned an issue of the first gay political magazine, *One*, from the mail. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 115. Although the ban was overturned by this Court in 1958, *One, Inc.* v. *Oleson*, 355 U.S. 371 (1958), police in some cities warned newsstands not to carry the magazine. A few weeks after the Mattachine Society—the most significant gay-rights organization in the 1950s—held a national convention in Denver and staged its first press conference, police raided the homes of three of its organizers; one lost his job and was jailed. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 119-121.

D. The Gay Rights Movement and Its Opponents in the 1960s, 1970s, and 1980s

Gay people received more support in some parts of the country in the 1960s and 1970s, but the pace of change varied enormously. In 1966, New York's Mayor Lindsay put an end to the widespread police entrapment of gay New Yorkers. *Id.* at 206-207; Chauncey, *A Gay World*, at E17. New York and California state court rulings finally curtailed the policing of gay bars in the 1960s, although in other parts of the country the police continued to raid gay bars well into the 1970s. CHAUNCEY, WHY MARRIAGE? 36. Forty municipalities passed laws protecting gay people from certain forms of discrimination in the 1970s, and another forty did so in the 1980s. *Id.* at 45; WAYNE VAN DER MEIDE, NATIONAL GAY & LESBIAN TASKFORCE, LEGISLATING EQUALITY: A REVIEW OF LAWS AFFECTING GAY, LESBIAN, BISEXUAL, AND TRANSGENDERED PEOPLE IN THE UNITED STATES (2000). The Hollywood studios became free to make films with gay characters in the early 1960s—but few did so. *See* CHAUNCEY, WHY MARRIAGE? 52-53; LARRY GROSS, UP FROM INVISIBILITY: LESBIANS, GAY MEN, AND THE MEDIA IN AMERICA 60-61 (2001). The American Psychiatric Association voted to remove homosexuality from its list of mental disorders in 1973—although dissident psychoanalysts continued to contest that opinion. American Psychiatric Ass'n, *Position Statement on Homosexuality and Civil Rights* (Dec. 15, 1973), *reprinted in* 131 AM. J. PSYCHIATRY 497, 497 (1974). In the 1970s, seven mainline Protestant denominations affirmed that homosexuals should enjoy equal protection under criminal and civil law. But those denominations accounted for only about ten percent of the American population; at the same time, leaders of Catholic and evangelical Protestant faith traditions, who had five times as many adherents, stepped up their opposition to gay civil rights. CHAUNCEY, WHY MARRIAGE? 37, 40.

As the gay movement grew stronger in the late 1960s and 1970s, so, too, did its opponents. Beginning in the late 1970s, the initial success of the gay movement in securing local gay-rights legislation provoked a sharp reaction. The anti-gay-rights campaign of this era was effectively launched in 1977, when the prominent Baptist singer Anita Bryant led a campaign to "Save Our Children" by repealing newly enacted civil-rights protections for gay men and lesbians in Dade County, Florida. The "Save Our Children" campaign warned about the influence openly gay teachers might have on young students and relied heavily on the stereotype of the homosexual as child molester: One of its full-page advertisements warned that the "OTHER SIDE OF THE HOMOSEXUAL COIN IS A HAIR-RAISING PATTERN OF RECRUITMENT AND OUTRIGHT SEDUCTIONS AND MOLESTATION." DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 291-299, 303-304 (1999). Bryant's campaign succeeded, and her victory prompted other groups to start similar campaigns. In the next three years, local laws extending civil rights protections to gay men and lesbians were repealed in more than a half-dozen bitterly fought referenda. Gay-rights supporters won only two referenda. CHAUNCEY, WHY MARRIAGE? 39.

The "Save Our Children" campaign had other far-reaching effects. The day after the Dade County vote, Florida's governor signed into law a ban on adoption by gay men and lesbians—the first such statewide prohibition. FLA. STAT. ANN. § 63.042 (West 2001). Similarly, in 1985 the Massachusetts Department of Social Services removed two boys from their foster care placement with a gay male couple and implemented a policy of preferred placement in "traditional family settings." Philip W. Johnston, *Policy Statement on Foster Care* (May 24, 1985), *reprinted in* BOSTON GLOBE, May 25, 1985, at 24; Kenneth J. Cooper, *Placement of Foster Children with Gay Couple Is Revoked*, BOSTON GLOBE, May 9, 1985, at 1. Massachusetts' ban was reversed in 1990 as a result of litigation. *See* Patti Doten, *They Want* *a Chance to Care; Gay Couple Still Hurts from Decision That Took Away Their Foster Children*, BOSTON GLOBE, Sept. 27, 1990. The Florida ban remained in effect until 2010. *See Florida Dep't of Children & Families* v. *Adoption of X.X.G.*, 45 So. 3d 79, 81 (Fla. Ct. App. 2010).

Across the country, the unfounded fear that homosexuals posed a threat to children *itself* threatened children being raised by gay men and lesbians. In a growing number of child-custody battles, the courts took custody away from mothers and fathers whose estranged husbands and wives used their former spouses' gay identities against them. *See* Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 660-664 (1996). Some courts confronting such disputes articulated a "per se" rule denying all custody and visitation claims made by gay and lesbian parents, holding as a matter of law that homosexuality was inherently inconsistent with parenthood. Karla J. Starr, *Adoption by Homosexuals: A Look at Differing State Court Opinions*, 40 ARIZ. L. REV. 1497, 1501-03 (1998).

E. The Persistence of Anti-Gay Discrimination from the 1990s to the Present

Inequality Under State Law. The spread of AIDS and the debate over gay rights led to increasing national polarization over homosexuality in the 1980s and 1990s. The media's initial sensationalist coverage of AIDS frequently depicted homosexuals as bearers of a deadly disease threatening others. *See, e.g.*, JOHN-MANUEL ANDRIOTE, VICTORY DEFERRED: HOW AIDS CHANGED GAY LIFE IN AMERICA 65-71 (1999); STEVEN EPSTEIN, IMPURE SCIENCE: AIDS, AC-

TIVISM, AND THE POLITICS OF KNOWLEDGE 52 (1996). Cities and states that had passed gay-rights laws found those laws under attack from an increasingly well-organized and well-funded opposition. In the twenty-five years after Anita Bryant's campaign in Florida, anti-gay activists introduced and campaigned for more than sixty anti-gay-rights referenda around the country. Gay-rights supporters lost almost three-quarters of these contests. CHAUNCEY, WHY MARRIAGE? 45-46. *See generally* JOHN GALLAGHER & CHRIS BULL, PERFECT ENEMIES: THE RELIGIOUS RIGHT, THE GAY MOVEMENT, AND THE POLITICS OF THE 1990S (1996).

Following Anita Bryant's lead, anti-gay-rights activists frequently fomented public fear of gay people by deploying vicious stereotypes of homosexuals as perverts threatening the nation's children and moral character. Two videos repeatedly screened in churches and on cable television in the early 1990s, "The Gay Agenda" and "Gay Rights, Special Rights," juxtaposed discussions of pedophilia with images of gay teachers and gay parents marching with their children in Gay Pride parades. This message was reinforced by mass mailings and door-to-door distribution of anti-gay pamphlets supporting the anti-gay-rights campaign efforts, all of which fostered a climate of hostility and fear. CHAUNCEY, WHY MARRIAGE? 47; GALLAGHER & BULL, PERFECT ENEMIES 26, 46, 52, 115, 171, 266.

In 1992, Colorado voters passed Amendment Two, which amended the state constitution to prohibit any municipality or government unit from enacting anti-gay-discrimination ordinances or policies. Amendment Two repealed ordinances already enacted by Denver, Boulder, and Aspen, and it removed from the Colorado political arena any future effort to secure anti-discrimination legislation for gay people. This Court struck down the amendment for violating the Equal Protection Clause, explaining that the amendment unconstitutionally "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else"—a "denial of equal protection of the laws in the most literal sense." *Romer* v. *Evans*, 517 U.S. 620, 633, 635-636 (1996). As the Court put it, "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634.

A number of states now have extended basic anti-discrimination protections to gay men and lesbians. But more than half the states lack any statutory protection against such discrimination in employment, housing, or public accommodations, and twenty have no statutory or administrative protection against such discrimination in state government employment. HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS & POLICIES (June 12, 2012);[2] HUMAN RIGHTS CAMPAIGN, STATEWIDE HOUSING LAWS & POLICIES (June 12, 2012);[3] *LGBT-Inclusive Public Accommodations Laws*, HUMAN RIGHTS CAMPAIGN.[4]

Discrimination in the Federal Government and the Military. Although the outright ban on hiring gay federal employees ended in 1975, federal agencies remained free for over two decades after that to discriminate against gay people in employment. D'EMILIO & FREEDMAN, INTIMATE MATTERS 324. It was not until 1998 that President Clinton issued an executive order forbidding such discrimination. *See* Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998).

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[2] http://www.hrc.org/files/assets/resources/Employment_Laws_and_Policies.pdf.

[3] http://www.hrc.org/files/assets/resources/Housing_Laws_and_Policies.pdf.

[4] http://www.hrc.org/resources/entry/lgbt-inclusive-public-accommodations-laws1 (last visited Feb. 26, 2013).

Discrimination against gay people remained solidly entrenched in the military until very recently. In 1992, then-candidate Bill Clinton called for an end to the military's policy banning gay men and lesbians from serving in the military. The proposal sparked a national firestorm, with calls to Congress and the White House running a-hundred-to-one against the plan. President Clinton and Congress implemented a compromise called "Don't Ask, Don't Tell," which required the military to discharge gay men or lesbians if they acknowledged their sexual orientation under any circumstance—even during private counseling. Pub. L. No. 103-160, 107 Stat. 1547 (1993); GALLAGHER & BULL, PERFECT ENEMIES 129-131, 149, 157. More than 13,000 service members were discharged during the "Don't Ask, Don't Tell" era. The law's repeal in 2011 did not restore their careers, nor those of the 19,000 other active-duty service members discharged since 1980 on the basis of their sexual orientation. *See* DEPARTMENT OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" 23 (2010).[5]

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[5] http://www.defense.gov/home/features/2010/0610_dadt/DADTReport_FINAL_20101130(secure-hires).pdf.

Federal law continues to leave gay men and lesbians exposed to anti-gay discrimination in schools, employment, housing, and public accommodations. The Employment Non-Discrimination Act, which would extend employment protections to sexual orientation, has been introduced in Congress repeatedly since 1994. It has never been passed. *See History of Nondiscrimination Bills in Congress*, NATIONAL GAY & LESBIAN TASK FORCE.[6] Government-sanctioned discrimination against gay men and lesbians also still exists in federal immigration law, which prohibits gay and lesbian Americans from sponsoring their same-sex spouses or registered partners from other countries for immigration purposes. *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1154.

Public Awareness and Targeted Violence. Starting in the 1990s, the visibility of gay people on television and in movies significantly increased. GROSS, UP FROM INVISIBILITY 156-183. The urgency of the AIDS crisis and the relative openness of the 1990s also prompted many more Americans to "come out" to their families, friends, and colleagues. In 1985, only a quarter of Americans reported that an acquaintance had told them they were gay; more than half believed they did not know anyone gay. Fifteen years later, three-quarters reported that they knew someone openly gay—a shift that led many heterosexuals to become more supportive of gay people. But a significant majority of Americans still expressed moral disapproval of homosexuality. KARLYN H. BOWMAN & ADAM FOSTER, AMERICAN EN-

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[6] http://www.thetaskforce.org/issues/nondiscrimination/timeline (last visited Feb. 26, 2013).

TER. INST., ATTITUDES ABOUT HOMOSEXUALITY AND GAY MARRIAGE 2, 4, 17-18 (2008).[7]

Some expressed that view violently. The FBI documented more than a thousand hate crimes based on perceived sexual orientation every year from 1996 to 2011, the most recent year for which this data is available. *See Uniform Crime Reports, Hate Crime Statistics*, FBI.[8] In 1997, a lesbian nightclub in Atlanta was bombed by a man who called homosexuality "aberrant sexual behavior." *Rudolph Reveals Motives*, CNN (Apr. 19, 2005).[9] The following year, Matthew Shepard, a gay Wyoming college student, was tied to a fence, beaten with a pistol, and abandoned. He died a few days later from his injuries. James Brooke, *Gay Man Dies From Attack, Fanning Outrage and Debate*, N.Y. TIMES, Oct. 13, 1998. Ten years later, Larry King, an openly gay 15-year-old student in Oxnard, California, was shot and killed at school by a fellow student. Rebecca Cathcart, *Boy's Killing, Labeled a Hate Crime, Stuns a Town*, N.Y. TIMES, Feb. 23, 2008.

The most vulnerable victims of discrimination are youth. A 2001 national study found that gay and lesbian youths were more than twice as likely to attempt suicide and more likely to suffer from depression and alcohol abuse than their heterosexual peers.

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[7] http://www.aei.org/files/2008/06/03/20080603-Homosexuality.pdf.

[8] http://www.fbi.gov/about-us/cjis/ucr/ucr#cius_hatecrime (last visited Feb. 26, 2013).

[9] http://articles.cnn.com/2005-04-13/justice/eric.rudolph_1_emily-lyons-pipe-bomb-attack-eric-robert-rudolph?_s=PM:LAW.

Stephen T. Russell & Kara Joyner, *Adolescent Sexual Orientation and Suicide Risk*, 91 AM. J. PUB. HEALTH 1276, 1278 (2001). A thorough 2006 study discovered that 20 to 40 percent of all homeless youth identify as lesbian, gay, bisexual, or transgender (LGBT). NICHOLAS RAY, NATIONAL GAY & LESBIAN TASK FORCE, LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 1 (2006).[10] And according to a national 2011 study, 63.5 percent of LGBT students felt unsafe at school because of their sexual orientation. A stunning 81.9 percent of LGBT students reported verbal harassment, 38.3 percent reported physical harassment, and 18.3 percent were physically assaulted in the past year because of their sexual orientation. JOSEPH G. KOSCIW ET AL., GAY, LESBIAN & STRAIGHT EDUCATION NETWORK, THE 2011 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS xiv-xv (2012).[11]

Continued Condemnation of Homosexuality. Gay people also continue to face discrimination and opprobrium from highly regarded private organizations. The Boy Scouts of America, a federally chartered group, continues to take the position that "homosexual conduct is not morally straight," and refuses to allow gay boys and men into the organization. *Boy Scouts of America* v. *Dale*, 530 U.S. 640, 651 (2000) (citation omitted). Earlier this year, when the Boy Scouts announced that it would consider changing its policy to permit local leaders to decide whether to allow openly gay participants, the proposal drew a firestorm of opposition. Dozens of conservative and religious groups lobbied against the proposed change as a "grave mistake" and petitioned the Boy Scouts to "show courage" and "stand firm for timeless values"; the Boy Scouts have delayed a vote on the issue. Casey Wian & Michael Pearson, *Boy Scout Leaders Put Off Vote on Gay Membership*, CNN (Feb. 6, 2013).[12]

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[10] http://www.thetaskforce.org/downloads/HomelessYouth.pdf.

[11] http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/002/2105-1.pdf.

Although the American Psychiatric Association removed homosexuality from its list of mental disorders in 1973, dissident psychiatrists and psychologists established the National Association for Research & Therapy of Homosexuality (NARTH) in 1992. Disagreeing with prevailing professional opinion, NARTH continues to disseminate materials claiming a scientific basis for believing that homosexuality is a psychological disorder and a "potentially deadly lifestyle," and that homosexuals can be "healed." NARTH also lectures, partners with religious organizations, supports conversion therapy activities, and files amicus briefs in court cases. *The Three Myths About Homosexuality*, NARTH;[13] *see also NARTH Mission Statement*, NARTH;[14] *Our*

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[12] http://www.cnn.com/2013/02/06/us/boy-scouts-policy.

[13] http://narth.com/menus/myths.html (last visited Feb. 26, 2013).

[14] http://narth.com/menus/mission.html (last visited Feb. 26, 2013).

Track Record, NARTH;[15] *NARTH and Civil Rights*, NARTH.[16]

Police harassment of gay men and lesbians and their meeting places is not as common as it once was—but it still occurs. In 2009, for example, there were highly publicized police raids of gay bars in Atlanta, Georgia, and Fort Worth, Texas, where one patron was critically injured. *See* Bill Rankin, *Employees to Fight Charges in Gay Bar Raid*, ATLANTA J.-CONST., Nov. 4, 2009; P.J. Huffstutter, *Police Raid at Gay Club in Texas Stirs Ugly Memories*, L.A. TIMES, July 6, 2009.

Discrimination in Parenting and Family Life. Increasing numbers of gay men and lesbians revealed their homosexuality to their families, friends, neighbors, and co-workers in the 1990s. *See* BOWMAN & FOSTER, ATTITUDES ABOUT HOMOSEXUALITY 16-17. But parents who came out to their family members took a serious risk, since many states did not provide equal parenting rights to gay people. This was particularly dangerous in custody cases, where courts had to evaluate the "fitness" of each parent when making decisions on custody or visitation rights. *See* Shapiro, *Custody and Conduct*, 71 IND. L.J. at 628, 659. A 1996 national study of custody cases revealed that many were decided against the gay parent due to the presiding judge's prejudice against homosexuality. Courts were especially disapproving of gay parents who were honest with their children about their sexual orientation. *Id.* at 660-664.

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[15] http://narth.com/menus/history.html (last visited Feb. 26, 2013).

[16] http://narth.com/menus/civil.html (last visited Feb. 26, 2013).

In a widely publicized case, for example, a Virginia trial court granted a grandmother's petition to take a lesbian's two-year-old son away from her because, as the trial court judge explained, the mother's "conduct is illegal * * * in the Commonwealth of Virginia." *Bottoms* v. *Bottoms*, 457 S.E.2d 102, 109 (Va. 1995) (Keenan, J., dissenting). The trial judge declared "that it is the opinion of this Court that [the mother's] conduct is immoral" and "renders her an unfit parent." *Id.* Virginia's Supreme Court upheld the trial court's decision, concluding that the mother's lesbianism would subject her child to social condemnation and disturb the child's relationships with peers. *Id.* at 107-109. This reasoning harkens back to prior courts' removals of children from the homes of divorced white mothers who married or lived with black men—before this Court ruled the practice unconstitutional. *See Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

Other courts have offered religious justifications for discriminatory custody rulings. As recently as 2002, when the Supreme Court of Alabama reversed the Alabama Court of Civil Appeals' decision to grant a lesbian mother custody of her children, the Chief Justice of the Supreme Court of Alabama said this in his concurring opinion:

> Homosexuality is strongly condemned in the common law because it violates both natural and revealed law. * * * The law of the Old Testament enforced this distinction between the genders by stating that "[i]f a man lies with a male as he lies with a woman, both of them have committed an abomination." *Leviticus*

> 20:13 (King James). * * * The common law designates homosexuality as an inherent evil, and if a person openly engages in such a practice, that fact alone would render him or her an unfit parent. [*Ex parte H.H.*, 830 So. 2d 21, 33, 35 (Ala. 2002).]

Prominent "traditional family values" group Focus on the Family continues to staunchly oppose adoption by same-sex couples as "threaten[ing] the adoption arena and children's best interests," asserting that such adoptions "deny God's design for the family." *Cause for Concern (Adoption)*, FOCUS ON THE FAMILY (2009).[17]

State and popular efforts that began in the 1970s to ban gay men and lesbians from adopting or serving as foster parents continued throughout the 1990s and 2000s. For example, in 2000, Mississippi's legislature passed, and the governor signed, a ban on adoption by same-sex couples. *See* MISS. CODE ANN. § 93-17-3(2). And some states refuse to allow a biological parent's same-sex partner to adopt the children they raise together. *See Boseman* v. *Jarrell*, 704 S.E.2d 494, 505 (N.C. 2010) (invalidating a second parent adoption by a woman's same-sex partner, on the ground that North Carolina law prohibits a same-sex partner from adopting a child without also terminating the biological parent's parental rights).

Marriage. Gay men and lesbians are still prohibited from marrying in the vast majority of states.

Same-sex marriage first reached the national stage in 1993, when Hawaii's Supreme Court ruled that the state's ban on marriages between same-sex couples presumptively violated the state's equal rights amendment and remanded the case. *Baehr* v. *Lewin*, 852 P.2d 44, 67-68 (Haw. 1993). By 1996, when a second trial began in the lower court, the prospect of gay couples winning the right to marry had galvanized considerable opposition. CHAUNCEY, WHY MARRIAGE? 125-126. Ultimately, while the litigation was pending, Hawaii amended its constitution to give the legislature the authority to limit marriage to different-sex couples, *see* HAWAII CONST. art. I, § 23, which it did. The Hawaii Supreme Court then dismissed the case as moot. *Baehr* v. *Miike*, Civ. No. 20371, 1999 Haw. LEXIS 391, at *1, 6, 8 (Haw. Dec. 9, 1999) (taking notice of constitutional amendment).

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[17] http://www.focusonthefamily.com/socialissues/social-issues/adoption/cause-for-concern.aspx.

Under pressure from organizations proclaiming support for "traditional family values," and in the throes of an election year, the bill that became the Defense of Marriage Act (DOMA) was introduced in Congress. The Senate passed DOMA on the day the Hawaii trial began; it was later signed into law. Pub. L. No. 104-199, 110 Stat. 2419 (1996); CHAUNCEY, WHY MARRIAGE? 125-126. DOMA provides a federal definition of marriage as the union of one man and one woman, and declares that no state needs to give "full faith and credit" to "same-sex marriages" licensed in another state. 1 U.S.C. § 7; 28 U.S.C. § 1738C. DOMA also denies tax, social security, pension, immigration, and other federal benefits to such married couples. Fourteen states passed state-level prohibitions of same-sex marriage recognition that year, and another nine passed similar statutes the following year. AMERICAN BAR ASS'N, AN ANALYSIS OF THE LAW REGARDING SAME-SEX MAR-

RIAGE, CIVIL UNIONS, AND DOMESTIC PARTNERSHIPS 33-36 (2005).[18]

In 2004, when Massachusetts became the first state to permit gay couples to marry, thirteen states passed constitutional amendments banning such marriages. (Twelve of those states already had enacted statutory same-sex marriage prohibitions.) *Statewide Votes on Same-Sex Marriage, 1998-Present*, NATIONAL CONFERENCE OF STATE LEGISLATURES;[19] AMERICAN BAR ASS'N, AN ANALYSIS OF THE LAW 33-36. In many states where same-sex marriage became legal, public backlash followed shortly thereafter. In 2009, for example, a unanimous Iowa Supreme Court struck down the exclusion of qualified same-sex couples from civil marriage. *Varnum* v. *Brien*, 763 N.W.2d 862 (Iowa 2009). In response, national organizations opposed to same-sex marriage, such as the National Organization for Marriage and the American Family Association, campaigned to remove three of the judges who had joined that decision. The campaign was successful; all three were ousted from the bench the following year. A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 3, 2010.

California provides an especially pertinent example of the contentious nature of state-level marriage debates. In 2000, California voters passed Proposition 22, providing that "[o]nly marriage between a man and a woman is valid or recognized in California." *In*

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[18] http://www.americanbar.org/content/dam/aba/migrated/family/reports/WhitePaper.authcheckdam.pdf.

[19] http://www.ncsl.org/legislatures-elections/elections/same-sex-marriage-on-the-ballot.aspx#3 (last visited Feb. 26, 2013).

re Marriage Cases, 183 P.3d 384, 409 (Cal. 2008). In February 2004—three months after the Massachusetts Supreme Judicial Court issued *Goodridge*—the City of San Francisco began issuing marriage licenses to same-sex couples. *Id.* at 402. A few weeks later, the California Supreme Court directed the city to stop the practice, ultimately holding that the San Francisco City officials had "exceeded their authority in issuing marriage licenses to same-sex couples in the absence of a judicial determination" and voiding the approximately 4,000 same-sex marriages performed in San Francisco. *Id.* at 403.

Meanwhile, plaintiffs filed suit challenging California's laws prohibiting same-sex marriage. *Id.* at 402-403. In May 2008, the California Supreme Court held that same-sex couples had the right to marry under the state constitution's equal protection clause. *Id.* at 433-434, 451-453. In the wake of the court's decision, "California counties issued more than 18,000 marriage licenses to same-sex couples." Pet. App. 25a, *Hollingsworth* v. *Perry*, No. 12-144 (U.S.) (hereinafter "*Perry* Pet. App.").

Also in the wake of the ruling, five California residents petitioned the state government to place Proposition 8 on the 2008 ballot. *Perry* Pet. App. 25a-26a. In the combative campaign that followed, proponents of Proposition 8 drew heavily on the historic demonization of gay people as threats to children to win support for the measure. Key talking points in the Proposition 8 voter pamphlet echoed Anita Bryant's "Save Our Children" campaign: "[The proposition] *protects our children* from being taught in public schools that 'same-sex marriage' is the same as traditional marriage." CALIFORNIA SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GEN-

ERAL ELECTION ON NOV. 4, 2008, PROP 8, at 56 (2008).[20] Some public statements supporting Proposition 8's passage overtly asserted the immorality or perversion of gay people. *See, e.g.*, J.A. Exh. 97, *Hollingsworth* v. *Perry*, No. 12-144 (U.S.) (hereinafter "*Perry* J.A.") (transcript of campaign event asserting that if same-sex couples can marry, "any combination would have to be allowed," including marriages to children and horses); *Perry* J.A. Exh. 177 (print materials claiming that "[h]omosexuality is linked to pedophilia" and that "[h]omosexuals are 12 times more likely to molest children"); *Perry* J.A. Exh. 81 (claiming that same-sex relationships "harm the body of society"); *Perry* J.A. Exh. 103 (message from official proponent that the "gay agenda" is "Satan[ic]" and wishes to "legalize prostitution" and "legalize having sex with children"). The last line of the pro-Proposition 8 pamphlet summed it up: "Voting YES *protects our children*." CALIFORNIA SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE 56 (emphasis added).

The tactics worked. In November 2008, voters passed Proposition 8 by a slim margin. *See Strauss* v. *Horton*, 207 P.3d 48, 68 (Cal. 2009).

The approval of Proposition 8, along with similar laws and constitutional amendments in forty other states, demonstrates the enduring influence of anti-gay hostility and the persistence of ideas about the inequality of gay people and their relationships. These state constitutional amendments serve as a firewall against changes in public opinion; such amendments make it very difficult for gay couples to obtain the right to marry even if public opinion continues to shift in their favor.

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[20] http://vig.cdn.sos.ca.gov/2008/general/argu-rebut/pdf/prop8-a-and-r.pdf.

II. HISTORY PLAYS A CRITICAL ROLE IN THE COURT'S EQUAL-PROTECTION ANALYSIS.

This Court gives great weight to the presence of historical discrimination against an identifiable group in evaluating the constitutionality of a challenged law—regardless of the level of scrutiny ultimately applied.[21] *See Hernandez* v. *Texas*, 347 U.S. 475, 477-480 (1954) (relying in part on historical segregation to determine that Mexican-Americans constituted a distinct class denied equal protection); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985); *id.* at 454 (Stevens, J., concurring); *id.* at 461-464, 473 (Marshall, J., concurring in the judgment in part and dissenting in part).

In *Loving* v. *Virginia*, 388 U.S. 1 (1967), for instance, the Court observed that anti-miscegenation laws "arose as an incident to slavery"; the Court ultimately held that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 10; *see also, e.g., Oyama* v. *California*, 332 U.S. 633, 650-663 (1948) (Murphy, J., concurring) (detailing the history of racist discrimination against Japanese-Americans in an equal-protection analysis).

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[21] History also helps determine whether a particular statute or constitutional amendment is based on animus toward the affected class. This Court has, in the past, taken a particularly hard look at such laws and amendments. *See, e.g.*, *Romer*, 517 U.S. at 632 ("[T]he amendment seems inexplicable by anything but animus toward the class it affects."); *Cleburne*, 473 U.S. at 450 (holding unconstitutional an ordinance that "appears to us to rest on an irrational prejudice against the mentally retarded"); *Department of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973) (holding unconstitutional a statutory provision "intended to prevent so called 'hippies' and 'hippie communes' from participating in the food stamp program" (citation omitted)); *see also* CALIFORNIA SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE 56 (urging that "Voting YES protects our children").

The Court similarly has evaluated government action differentiating between men and women through the lens of the "Nation['s] long and unfortunate history of sex discrimination." *United States* v. *Virginia*, 518 U.S. 515, 531-532 (1996) (citation omitted); *see also Frontiero* v. *Richardson*, 411 U.S. 677, 685 (1973) (plurality opinion) (acknowledging that "the position of women in America has improved markedly in recent decades," but observing that "throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes"). This Court's previous gay-rights decisions also emphasize the historical record undergirding the analysis. The majority opinion in *Lawrence* devotes nearly a third of its pages to the history of anti-sodomy laws. *See Lawrence*, 539 U.S. at 567-573. The Court acknowledged that the *Bowers* majority had erred in "rel[ying] upon" "historical premises [that] are not without doubt and, at the very least, are overstated." *Id.* at 571. After correcting this historical record, the Court concluded that *Bowers* was wrongly decided. *Id.*

As professional organizations devoted to the study of American history and culture, *amici* are not before the Court to advocate a particular legal doctrine or standard. But they wish to advise the Court that the historical record is clear. Gay men and lesbians in America have been subjected to generations of intense, irrational, and often violent discrimination, commencing as soon as they emerged as a group into American public consciousness and continuing today.

CONCLUSION

Today the civil rights enjoyed by gay and lesbian Americans still vary substantially from region to region and still are subject to the vicissitudes of public opinion. And like other minority groups before them, gay men and lesbians often must rely on judicial decisions to secure equal rights over public opposition. In 1948, when the California Supreme Court became the first in the nation to overturn a state law banning interracial marriage, it ruled in the face of majority public opposition to such marriages. This Court in 1967 overturned the remaining state bans on interracial marriage in *Loving*; it took more than thirty years after that decision to reach the point where more Americans approved than disapproved of interracial marriage. History has vindicated the judges with the courage and foresight to declare certain emerging truths to be self-evident, even in the face of majoritarian hostility.

Respectfully submitted,

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UNITED STATES,

Petitioner,

v.

EDITH S. WINDSOR, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICUS CURIAE* OUTSERVE-SLDN INC. ON THE MERITS IN SUPPORT OF RESPONDENT EDITH WINDSOR

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TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

DOMA HARMS MILITARY FAMILIES AND UNDERMINES NATIONAL SECURITY 7

A. DOMA Harms Military Families..................... 7

B. In Enacting DOMA, Congress Never Considered Its Impact On The Military 12

C. Denying "Spousal" Benefits to Same-Sex Military Spouses Threatens Core Military Values And National Security 14

1. DOMA's Application To Spousal Benefits Threatens The Military Family And National Security 19

2. DOMA's Application To Military Spousal Benefits Undermines Recruitment And Retention 28

3. DOMA Creates Inconsistencies In The Disbursement Of Military Spousal Benefits, And Threatens Uniformity, Fairness And Unit Cohesion 32

CONCLUSION 35

TABLE OF AUTHORITIES

CASES **Page(s)**

Anderson v. United States,
16 Cl. Ct. 530
(Ct. Cl. 1989)..28-29, 33

Goldman v. Weinberger,
475 U.S. 503 (1986) 33

Hartmann v. Stone,
68 F.3d 973 (6th Cir. 1995) 32

Log Cabin Republicans v. United States,
658 F.3d 1162 (9th Cir. 2011) 13-14

Log Cabin Republicans v. United States,
716 F. Supp. 2d 884 (C.D. Cal. 2010)........... 13, 31

Massachusetts v. U.S. Dep't of HHS,
682 F.3d 1 (1st Cir. 2012)..................................... 12

Sierra Mil. Health Servs, Inc. v. United States,
58 Fed. Cl. 573 (Fed. Cl. 2003)...........................29

Windsor v. United States,
699 F.3d 169 (2d Cir. 2012)...................................12

STATUTES

1 U.S.C. § 7..5, 8

10 U.S.C. § 101(f)(5)..8

10 U.S.C. § 654.. 12

10 U.S.C. § 1071...20

32 U.S.C. § 101(18) 8

38 U.S.C. § 101(3) 9

38 U.S.C. § 101(31) 9

LEGISLATIVE MATERIALS

105 Cong. Rec. 18,439 (1959) 29

127 Cong. Rec. 15,133 (1981) 29

127 Cong. Rec. 21,378 (1981) 20

H.R. Rep. No. 106-270 (1999) 33-34

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S. Rep. No. 94-568 (1975) 9

S. Rep. No. 97-502 (1982) 19-20

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JUDICIAL PLEADINGS

Complaint, *Cooper-Harris v. United States*, No. cv-12-0887 (C.D. Cal. 2012) 28

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OutServe-SLDN, *Military Spousal Benefits Denied by DOMA*, http://www.sldn.org/DOMAdenies 8

Secretary of Defense, *Memorandum: Extending Benefits to Same-Sex Domestic Partners of Military Members* (Feb. 11, 2013) 16-17, 34

Andrea Stone, *Soldier's Last Wish: Let DOMA Die Before I Do*, Washington Post (Nov. 23, 2012) 28

Paul Szoldra, *Pentagon Decision on Benefits Sets Up Huge Fight Over Defense of Marriage Act*, Business Insider (Feb. 15, 2013) 11

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INTEREST OF AMICUS CURIAE [1]

OutServe-SLDN Inc. is a non-profit organization that supports lesbian, gay, bisexual and transgender ("LGBT") current and former members of the United States military. OutServe-SLDN submits this amicus curiae brief to highlight the significant implications of the Court's decision in this case for the physical, psychological and financial well-being of gay and lesbian veterans and members of the armed forces, and for the vitality of our nation's military as a whole.

OutServe-SLDN comprises two formerly separate organizations, which merged in 2012: Servicemembers Legal Defense Network ("SLDN") and OutServe. SLDN was founded in 1993, in response to Congress enacting "Don't Ask, Don't Tell" ("DADT"), to provide free, confidential and direct legal services to LGBT service members and veterans affected by DADT and by the previous ban on gay and lesbian service. SLDN assisted more than 12,000 active and former service members, and was instrumental in the successful effort to repeal DADT. After DADT's repeal, SLDN assisted veterans discharged under DADT by correcting discharge records and helping those who wished to return to service; supported transgender military service; helped defend LGBT service members and veterans facing discrimination; and worked to secure equal benefits for LGBT service members, veterans and their families.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution to fund the preparation or submission of this brief. No one other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

As part of that effort, SLDN sued the United States on behalf of current and former members of the military and their same-sex spouses, alleging the Defense of Marriage Act unconstitutionally denies same-sex spousal benefits for active duty members of the military, members of the National Guard and veterans. Complaint, *McLaughlin v. Panetta*, No. 1:11-cv-11905-RGS (D. Mass. Oct. 27, 2011) ("*McLaughlin*"). The constitutional challenges brought against DOMA in *McLaughlin* overlap substantially with the challenges brought by Ms. Windsor in the case presently before the Court.

OutServe began as an underground network of LGBT service members connected via Facebook in 2010, and had more than 6,000 members worldwide. During the fight to repeal DADT, OutServe facilitated telling the stories of active duty gay and lesbian service members in the media and at the Pentagon, allowing the voices of those who were serving in silence to be heard.

As a unified organization, OutServe-SLDN continues to work toward open service for all LGBT members of the military and to ensure that they, and their families, receive the same benefits as their opposite-sex counterparts. Given the pending *McLaughlin* lawsuit and its long history in assisting LGBT service members, OutServe-SLDN believes its perspective may be of assistance to the Court.

SUMMARY OF ARGUMENT

The military often highlights the importance of the "military family" by emphasizing that it "recruits soldiers, but retains families." The military provides financial benefits and support services to service members' families that are invaluable, particularly in trying times when service members are deployed, wounded or die serving their country.

The military demands far more from those who serve and their families than does a typical employer. To protect their country, service members accept that they may be deployed far from their families and loved ones, and they must prepare for the possibility that their service may cost them their lives. The separation and sacrifice caused by a distant deployment often puts a considerable strain on military families, and service members often worry whether their families will be provided for in their absence or, even more troubling, in the event they should die protecting this country.

In asking so much from its service members and their families, the military extends a promise in return. The military assures service members it will provide for their families in their absence, whether that absence results from a temporary deployment or death. It keeps that promise by providing military families a host of benefits and family support services, many of which hinge upon a person's status as a "spouse" of a service member.

The so-called Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, prevents the military from honoring its promise to certain military families because it nullifies marriages between persons of the same sex for federal purposes. Even where a same-sex couple is legally married under state law, DOMA prevents the military from recognizing that marriage and acknowledging a service member's same-sex spouse as a "spouse" in providing benefits. These military spouses cannot be designated the next-of-kin to receive notice of the service member's death and do not receive a surviving spouse death benefit. They are not included in family support programs for families of deployed service members. They are denied housing, health care and other benefits that are important to military families and essential for attracting and retaining well-qualified military personnel. When they die, these military spouses do not have the right to be buried in a military cemetery next to the veteran they married.

In the military context, the denial of equal benefits for equal service and equal sacrifice is more than a fairness issue. The military consistently has emphasized that providing benefits to military spouses improves morale and is critical to national security. These benefits address an important source of worry for service members, allowing them to focus on the tasks at hand. A Marine who is ordered to kick down a door or to take a hill in the midst of incoming gunfire should not have to worry about what would happen to his or her spouse if the Marine were to die in battle. The military knows this and has explicitly made that point to Congress in seeking spousal benefits in the past. Accordingly, the military also has committed itself to provide equal benefits to the same-sex spouses of its service members in the event this Court invalidates DOMA.

In addition to recognizing the need for spousal benefits, the military recognizes the importance of uniformity in benefits. Uniformity is a bedrock military principle, which fosters the unit cohesion necessary for the military to function effectively. Providing disparate benefits to service members, who are performing the same service and making the same sacrifices, sends the wrong signal that the military does not value all service members or their families equally.

Finally, the provision of spousal benefits is critical for the military to compete with other employers in recruitment and retention. It is a well-established fact that many people do not enlist, or choose to leave the military, when they believe they would receive better benefits in the private sector. There also is no question that more and more private sector employers provide benefits to same-sex spouses. Numerous gay and lesbian service members have reported to OutServe-SLDN that the absence of spousal benefits has caused them to leave the military or to consider doing so. They report that the issue is not just one of financial security, but also is grounded in a desire to be part of an organization that values them as equals.

ARGUMENT

DOMA HARMS MILITARY FAMILIES AND UNDERMINES NATIONAL SECURITY

The military context perhaps best illustrates the irrationality of DOMA's broad sweep. By preventing same-sex spouses from being recognized as "spouses" who are entitled to military benefits and family support services, DOMA not only harms military families, it threatens core military values and undermines the military as a whole.

A. DOMA Harms Military Families

Spousal benefits related to military service are conferred through nearly 100 provisions of the U.S. Code, primarily in Title 10, concerning active-duty benefits; Title 32, concerning National Guard benefits; Title 37, concerning service member pay and allowances; and Title 38, concerning veterans' benefits. OutServe-SLDN, *Military Spousal Benefits Denied by DOMA*, http://www.sldn.org/DOMAdenies (listing 94 provisions). Service members who have a "spouse" and persons who are recognized as a "spouse" are entitled to numerous benefits under these titles.

Although same-sex spouses appear covered as "spouses" under Title 10 and Title 32, which define "spouse" as "husband or wife, as the case may be," 10 U.S.C. § 101(f)(5); 32 U.S.C. § 101(18), DOMA limits those definitions to opposite-sex spouses. DOMA modifies the definition of "spouse" throughout the U.S. Code by requiring that

> [i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7. DOMA also defines "spouse" for Title 37, which does not independently define the term, but adjusts pay and allowances by whether

a service member has a "spouse." Title 38 defines "spouse" and "surviving spouse" in terms similar to DOMA,[2] restricting the definitions to persons of the "opposite sex."[3]

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[2] In Title 38, "[t]he term 'spouse' means a person of the opposite sex who is a wife or husband." 38 U.S.C. § 101(31), and "[t]he term 'surviving spouse' means . . a person of the opposite sex who was the spouse of a veteran at the time of the veteran's death . ." 38 U.S.C. § 101(3). Unlike DOMA, however, there is nothing in the legislative history to indicate that, when this language was added in 1975, there was any concern with persons of the same sex marrying. Rather, it was "part of the effort to rewrite the statute to conform with emerging Constitutional mandates for gender equality." Br. of *Amici Curiae* Family Law Professors at 12 n.8, *Massachusetts v. U.S. Dep't of HHS*, 682 F.3d 1 (1st Cir. 2012); *see McLaughlin*, Dkt. 28-2 (D. Mass. Feb. 21, 2012) (Letter from Attorney General Holder to the Speaker of the House explaining the legislative record offers "no rationale" for including opposite-sex spouses but not legally married same-sex spouses in Title 38). Congress was trying to rid the statute of "unnecessary gender references" by eliminating the terms "wife" and "widow." S. Rep. No. 94-568 at 19-22 (1975). Congress defined "spouse" in Title 38 to emphasize its breadth, reaching all marriages as defined at that time.

[3] The plaintiffs in *McLaughlin* challenged the constitutionality of these definitions in Title 38 on the same grounds they challenged DOMA. *McLaughlin*, Dkt. 1 (D. Mass. Oct. 27, 2011). The United States agreed Title 38 is

Those provisions, as modified by DOMA, are inconsistent with the values of the modern military. They were crafted at a time when gays and lesbians were precluded from openly serving in the military, and when same-sex couples could not legally marry in the United States. While those provisions effectively covered all military spouses in the past, that is no longer true. Now that persons of the same sex can legally marry, and gays and lesbians now serve openly in the military, service members with same-sex spouses do serve in the ranks. To maintain the uniformity of benefits that Congress believed it created, the definition of "spouse" must include these spouses as well.

The death of Staff Sergeant Donna Johnson illustrates the real-world impact of DOMA. While on her third deployment in Afghanistan, Sgt. Johnson was killed in October 2012, along with two other married soldiers, when a Taliban suicide bomber drove a motorcycle packed with explosives into their patrol. Because of DOMA, the military did not notify Sgt. Johnson's wife of her death, but instead notified Sgt. Johnson's

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unconstitutional. *McLaughlin*, Dkt. 28-2 (D. Mass. Feb. 21, 2012) (Letter from Attorney General Holder to the Speaker of the House explaining these provisions of Title 38 are unconstitutional for the same reasons DOMA is unconstitutional).

mother. Sgt. Johnson's wedding ring was not returned to her wife, but was given to her mother along with her personal effects. The flag that draped Sgt. Johnson's coffin was handed to her mother, not to her spouse. And her spouse was denied the spousal death benefits and support services that opposite-sex spouses of fallen soldiers are entitled to receive, including the opposite-sex spouses of the other soldiers killed in the same attack.[4] The military's inability to notify the spouses of fallen soldiers of their deaths, to return the soldiers' wedding rings to their spouses, or to extend other benefits to compensate military spouses for their loss—solely because Congress disapproves of the gender of their spouses—is indefensible, and an insult to those who give their lives serving this country.

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[4] The Military Times has a moving video interview with Sgt. Johnson's wife and mother about their ordeal. ***She Lost Her Wife To War*** (2013), http://link.brightcove.com/services/player/bcpid53221775001?bckey=AQ~~,AAAACnIIBGk~,NZYO3xUDM_HmzYYpFSh6tKdqfRye3V9a&bctid=2071265587001; *see also* Paul Szoldra, ***Pentagon Decision on Benefits Sets Up Huge Fight Over Defense of Marriage Act***, Business Insider (Feb. 15, 2013).

B. In Enacting DOMA, Congress Never Considered Its Impact On The Military

As the Courts of Appeals have observed, the scope of change DOMA brought to the U.S. Code was "broad, touching more than a thousand federal laws." *Windsor v. United States*, 699 F.3d 169, 187 (2d Cir. 2012); *see Massachusetts v. U.S. Dep't of HHS*, 682 F.3d 1, 6 (1st Cir. 2012) ("DOMA affects a thousand or more generic cross-references to marriage in myriad federal laws."). But "despite its ramifying application throughout the U.S. Code, only one day of hearings was held on DOMA . . . and none of the testimony concerned DOMA's effects on the numerous federal programs at issue." *Massachusetts*, 682 F.3d at 13.

It does not appear that any thought was given to how DOMA would impact same-sex married couples in the military when it was enacted in 1996. That is not surprising. At that time, marriage between persons of the same sex was not permitted anywhere in the United States. Moreover, because DADT had been enacted previously, in 1993, and made marriage to a person of the same sex grounds for a discharge,[5] even the legalization of such

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[5] DADT, formerly codified at 10 U.S.C. § 654, was enacted as a compromise. President Clinton sought to lift the ban on gay and lesbian military service, but was

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opposed by those who supported maintaining the ban. DADT allowed gays and lesbians to serve in the military, so long as their sexual identity was concealed. The military was no longer to "ask" whether service members were gay or lesbian, and service members were not supposed to "tell" whether they were. Nevertheless, "[t]he policy generally required a service member be separated from the military if he had engaged or attempted to engage in homosexual acts, stated that he is a homosexual, or married or attempted to marry a person of the same sex." *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1165 (9th Cir. 2011); *see* 10 U.S.C. § 654(b)(3) (repealed) (attempt to marry someone of the same sex was grounds for discharge). Despite the hope that DADT would reduce discharges, the opposite occurred. Investigations opened at an increased pace and more than 13,000 service members were discharged, despite troop shortages and the fact that many who were discharged had critical skills. *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 949-52 (C.D. Cal. 2010), *vacated as moot following DADT repeal*, 658 F.3d 1162 (9th Cir. 2011). The policy was widely regarded as a failure, and many who supported its passage came to favor its repeal. The DADT Repeal Act was enacted in 2010, making repeal effective after the Secretary of Defense received a report addressing the impact of repeal and recommending policy changes, and "the President, Secretary of Defense and Chairman of the Joint Chiefs of Staff certified they had considered the report's recommendations and were prepared to implement the repeal consistent with military readiness, military effectiveness, and unit cohesion." *Log Cabin Republicans*, 658 F.3d at 1165. Certification occurred, and repeal marriages would not have been thought to implicate military spousal benefits at the time DOMA was enacted.

C. Denying "Spousal" Benefits to Same-Sex Military Spouses Threatens Core Military Values And National Security

There is no question that paying unequal benefits to service members runs directly counter to the military values of uniformity, fairness and unit cohesion. While there was once a debate as to whether gay and lesbian service members should be allowed to serve openly in the armed forces—just as there were similar debates regarding integrating the military by race, and later by gender[6]—there never has been any

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became effective in September 2011. *Id.* The Secretary of Defense noted: "One of the great successes at the Department of Defense has been the implementation of DADT repeal. It has been highly professional and has strengthened our military community." U.S. Dep't of Defense, *News Release: Statement from Secretary of Defense Leon E. Panetta on the Extension of Benefits to Same-Sex Partners,* No. 077-13 (Feb. 11, 2013) ("DOD 2/11/13 News Release").

[6] The military recently announced the last remaining barrier to military service by women, related to service in combat, will be lifted. U.S. Dep't of Defense, *Defense Department Rescinds Direct Combat Exclusion Rule; Services to Expand Integration of Women into Previously*

debate as to whether similarly situated service members deserve the same benefits. Once admitted to the military, each service member should be treated the same. DOMA, however, is a significant barrier to this principle of equality.

Since gay and lesbian service members became able to serve openly, the United States military *never* has advocated discrimination against them in terms of entitlement to spousal benefits. *McLaughlin*, Dkt. 28-2, at 2. (D. Mass. Feb. 21, 2012) (Letter from Attorney General Holder to the Speaker of the House explaining "[n]either the Department of Defense nor the Department of Veterans Affairs identified any justifications for that distinction" in paying veterans benefits to opposite-sex, but not same-sex, spouses). Indeed, the Attorney General, "in consultation with the Department of Defense and the Department of Veterans Affairs," notified the court in *McLaughlin* that it cannot defend DOMA's application to the military. *Id.* at 1.

Since the *McLaughlin* suit was filed, the President and Secretary of Defense have made clear there is no military interest served by discriminating against the families of gay and lesbian service members, and they have sought

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Restricted Occupations and Units, News Release No. 037-13 (Jan. 24, 2013).

to equalize benefits where possible. On February 11, 2013, Secretary Panetta announced the military would extend numerous benefits to same-sex spouses, although he noted that DOMA would continue to deny many significant benefits. DOD 2/11/13 News Release. In doing so, Secretary Panetta emphasized:

> It is a matter of fundamental equity that we provide similar benefits to all those men and women in uniform who serve their country. . . . Extending these benefits is an appropriate next step under current law to ensure that all service members receive equal support for what they do to protect this nation.

Id. Secretary Panetta advised the military:

> Today, our military leaders are ensuring that all America's sons and daughters who volunteer to serve our Nation in uniform are treated with equal dignity and respect, regardless of their sexual orientation. Our work must now expand to changing our policies and practices to ensure fairness and equal treatment and to taking care of all of our Service

> members and their families, to the extent allowable under law.

Secretary of Defense, ***Memorandum: Extending Benefits to Same-Sex Domestic Partners of Military Members*** at 1 (Feb. 11, 2013) ("DOD 2/11/13 Mem.").

Despite the military's desire to extend equal benefits to the spouses of all its members, Secretary Panetta explained "[t]here are certain benefits that can only be provided to spouses as defined by [DOMA], which is now being reviewed by the Supreme Court." DOD 2/11/13 News Release. He added:

> In the event that the Defense of Marriage Act is no longer applicable to the Department of Defense, it will be the policy of the Department to construe the words "spouse" and "marriage" without regard to sexual orientation, and married couples, irrespective of sexual orientation, and their dependents, will be granted full military benefits.

DOD 2/11/13 Mem. at 2.

In the most recent State of the Union, President Obama made clear that extending equal benefits remains a priority for him in his role as Commander-in-Chief:

> As long as I'm Commander-in-Chief, we will do whatever we must to protect those who serve their country abroad, and we will maintain the best military the world has ever known . . . . We will ensure equal treatment for all servicemembers, and equal benefits for their families—gay and straight.

State of the Union Address (Feb. 13, 2013), *available at* http://www.whitehouse.gov/state-of-the-union-2013.

The irrationality of DOMA's broad sweep is made clear in the military context. At the time DOMA was enacted, no thought whatsoever appears to have been given to how it could impact the military. Now that DOMA's adverse impacts on the military are clear, the military is working to minimize DOMA's harm where possible and is calling for DOMA to be overturned.[7]

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[7] One brief in support of BLAG addresses DOMA in the military context, and argues narrowly that overturning DOMA would adversely affect the military chaplaincy. *See* Br. of *Amici Curiae* the Chaplain Alliance for Religious Liberty et al. There is no basis for this conclusion, and the *amici* fundamentally misstate Defense Department policy. The brief ignores the fact that the

1. DOMA's Application To Spousal Benefits Threatens The Military Family And National Security

Although the toll that service takes on members of our military cannot be overstated, their spouses and families also bear heavy burdens:

> The theme of the "military family" and its importance to military life is widespread and well publicized. Military spouses are still expected to fulfill an important role in the social life and welfare of the military community. Child care and management of the family household are many times solely the spouse's responsibility. The military spouse lends a cohesiveness to the family

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military has made clear that, "a chaplain is not required to participate in or officiate a private ceremony if doing so would be in variance with the tenets of his or her religion or personal beliefs." Undersecretary of Defense, *Memorandum: Military Chaplains* (Sept. 30, 2011). The Forum on the Military Chaplaincy has published a rebuttal, disproving the claims made in the *Amici's* brief. Jeff Hersh, *The Defense of Marriage Act Must Go: The Forum's Response*, http://forumonthemilitarychaplaincy.org/2013/02/the-defense-of-marriage-act-must-go-the-forums-response.

> facing the rigors of military life, including protracted and stressful separations. The committee finds that frequent change-of-station moves and the special pressures placed on the military spouse as a homemaker make it extremely difficult to pursue a career affording economic security, job skills and pension protection.

S. Rep. No. 97-502, at 6 (1982); *see also* John McHugh & Raymond Odierno, *A Statement on the Posture of the United States Army 2012*, at 12 ("We will not walk away from our commitment to our Families . . . . We must fulfill our moral obligation to the health, welfare and care of our Soldiers, Civilians and Families.").

Recognizing that support from spouses bolsters service members' morale, Congress sought to improve the standard of living for military spouses. *See, e.g.*, 10 U.S.C. § 1071 (benefits "maintain high morale"); 127 Cong. Rec. 21,378 (1981) ("[A] spouse who is secure in the knowledge of his or her entitlement to a portion of the member's retirement benefit is likely to be more supportive of that member, encourage the member to participate in the military until retirement age and generally add to the stability of the military family.") (Sen. DeConcini). Family stability fosters troop morale. *Id.* As

President Eisenhower (a former five-star general) said of a law providing medical benefits to military families, knowing one's family will be provided for "removes one of the greatest sources of worry to our servicemen and servicewomen around the world." Statement by the President Concerning the Medical Care Program for Dependents of Members of the Uniformed Services (1956) (*McLaughlin*, Dkt. 14-3 (D. Mass. Nov. 21, 2011)).

When troops know their spouses are cared for through benefits like healthcare, housing and family support programs, their combat-readiness improves. "Success in modern warfare demands the full utilization of every ounce of both the physical and mental strength and stamina of its participants. No soldier can be and remain at his best with the constant realization that his family and loved ones are in dire need of financial assistance." S. Rep. No. 93-235 (1973). As Congress was recently told:

> For an Army at war, care of our families is critical. The warrior must know that his or her family is safe and is being cared for, and the warrior and their families must be confident that if that warrior is injured or ill in the course of their duties that they are going to survive,

> they are going to return home, and they will have the best chance at full recovery and an active or productive life, either in uniform or out.

The Military Health System: Hearing Before The Mil. Pers. Subcomm. of the H. Comm. on Armed Servs., 111th Cong. 8 (2009) (Lt. Gen. Schoomaker).

Conversely, service members who fear their spouses will not be cared for are less likely to risk their lives in battle, potentially jeopardizing their comrades and their mission.

> [F]amily care is mission impact. When our men and women are in harm's way, if they are not confident their families are fully cared for, they will not be focused on what is in front of them. And that has mission impact. So family care plays directly into the mission.

Id. at 19 (Vice Adm. Robinson).

President Eisenhower and the senior military officials who persuaded Congress to provide generous spousal benefits were not wrong. Indeed, the very problems they said would occur if spousal benefits were not provided are now reported by gay and lesbian service members who are denied spousal benefits because of DOMA.

The plaintiffs' declarations in *McLaughlin* are illustrative. Lieutenant Colonel Victoria Hudson, USAR (Ret.), addressed these issues at length in her declaration. Lt. Col. Hudson risked her military career by marrying her wife, Monika Poxon, in 2004, while DADT was in effect. She volunteered for deployment to Iraq in 2005, where she served as a convoy commander for approximately 19 convoys. *McLaughlin*, Dkt. 17 ¶¶ 11 & 12 (D. Mass. Nov. 21, 2011). Lt. Col. Hudson found that "[e]ach time I left the safety of the compound, I wondered if I would return. Each time I wondered whether Monika would be notified if I were injured or killed." *Id.* ¶ 13. Among other things, she worried that

> since the Army does not recognize Monika as my legal spouse, if something were to happen to her, I might not be allowed to return from deployment to care for her. If I were wounded, she might not be able to have an active role in the decisions attendant to that situation.

Id. ¶ 20. Lt. Col. Hudson explained:

> For an Army Reserve Soldier, the experience of being ripped away from your usual life and thrust into the stress and challenges of mobilized status on active duty is intense.

> Accessing the same benefits and support that heterosexual Soldiers receive is crucial to Monika and me. We are just like every other Army couple. We want the same things. Monika wants me to come home from war safe and whole. While I serve, I want to know that she is safe and will be cared for and protected. This improves my readiness and ensures that I am a Soldier focused on the mission rather than on what is needed at home. I know that during the uncertainty of deployment to hostile areas, the knowledge that my wife will have access to all the same benefits and support afforded to every other Army wife will go far to alleviate the anxieties inherent in deployment.

Id. ¶ 22.

Similarly, Captain Steve Hill married his husband, Joshua Snyder, in 2011, after his first deployment, and he was redeployed to Iraq shortly after their wedding. ***McLaughlin***, Dkt. 20 ¶¶ 8 & 9 (D. Mass. Nov. 21, 2011). Capt. Hill explained the spousal benefits he seeks

> are critical to me and to Joshua and to our future together. Being safe and secure in the knowledge that

> Joshua is cared for and will benefit from my service will make me a more focused soldier, will help alleviate the anxieties I experience while on deployment, will improve my morale, will provide us with an improved standard of living and sense of stability, and will allow us to plan our futures together the way opposite-sex couples can.

Id. ¶ 12; *see also McLaughlin*, Dkt. 16 ¶ 9 (D. Mass. Nov. 21, 2011) (declaration of Major Shannon McLaughlin conveying the same concerns for her wife, Casey McLaughlin).

DOMA's discrimination even follows distinguished service members to their graves. Colonel Stewart Bornhoft graduated from West Point, completed two tours in Vietnam, returned to teach at West Point, and concluded a 26-year career in the Army with numerous commendations for his service. *McLaughlin*, Dkt. 18 ¶¶ 2-4 (D. Mass. Nov. 21, 2011). Yet his husband, Stephen McNabb, was denied access to base facilities and other important benefits, including medical coverage. *Id.* ¶ 9. Col. Bornhoft laments the fact that, despite his extraordinary military career, he may decide not to be buried in a military cemetery because

DOMA denies him "the right for Stephen to be buried next to me." *Id.*[8]

Many service members report their concerns are particularly severe when their spouses have been denied health insurance. Lieutenant Gary Ross, a graduate of the Naval Academy, explains that his same-sex spouse, Dan Ross, did not have access to affordable health care and had to travel to Mexico to obtain health care. ***McLaughlin***, Dkt. 19 ¶ 7 (D. Mass. Nov. 21, 2011).

> Two days after our marriage, Dan was returning from a medical procedure in Mexico when gunfire broke out at the border. A customs agent and many civilians were hurt, and we both feared for Dan's life that day. Ever since, we have been especially anxious about Dan's health, knowing he will have to cross the border to obtain care.

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[8] The Secretary of Veterans Affairs recently granted a waiver for a same-sex spouse to be buried in a veterans' cemetery, but there is no guarantee such waivers will be granted in the future. Mike Francis, *In a First, Veterans Affairs Approves Request By Oregon Woman to Bury Same-Sex Spouse in National Cemetery*, The Oregonian (Feb. 14, 2013).

Id. ¶ 7. Lt. Ross emphasizes that knowing his spouse has access to medical care, among other benefits, would be a tremendous comfort and allow him to remain focused on his service, particularly during deployments. *Id.* ¶ 10; *see also McLaughlin*, Dkt. 16 ¶ 9 (D. Mass. Nov. 21, 2011) (declaration of Airman First Class Daniel Henderson, noting his husband, Jerret Henderson, lacks health insurance to cover a needed surgery).

The denial of spousal benefits is particularly distressing for service members who know their deaths are imminent. Chief Warrant Officer Charlie Morgan served in Kuwait, Qatar and Iraq. *McLaughlin*, Dkt. 1 ¶ 55 (D. Mass. Oct. 27, 2011). When her wife, Karen Morgan, began staying home to raise their young daughter, CWO Morgan became the family's "sole bread-winner." *McLaughlin*, Dkt. 22 ¶ 9 (D. Mass. Nov. 21, 2011). In 2008, CWO Morgan was diagnosed with breast cancer and chose to do everything possible to improve her chances of survival. She underwent chemotherapy, radiation and had a double mastectomy. *Id.* ¶ 9. The treatment appeared effective, and CWO Morgan deployed to Kuwait for a year. Upon her return in 2011, however, she was diagnosed with end-stage cancer, which had spread throughout her body. *Id.* Her doctors advised it would be unlikely for her to survive past October 2012, but she held on. She said her "motivation for staying alive" was to see DOMA overturned, so she could die with the comfort of knowing her family would be provided for when she was gone. Andrea Stone, *Soldier's Last Wish: Let DOMA Die Before I Do*, Washington Post (Nov. 23, 2012).[9] Unfortunately, CWO Morgan died on February 10, 2013, without any assurance the benefits she fought so hard to secure for her family would be provided.

2. DOMA's Application To Military Spousal Benefits Undermines Recruitment And Retention

Our armed services must compete with the private sector in recruiting and retaining well-qualified employees. To the extent the military does not extend spousal benefits comparable to those offered by the private sector, the military risks losing qualified candidates and troops. *Anderson v. United States*, 16 Cl. Ct. 530, 535 n.10 (Ct. Cl. 1989) ("It is recognized that the federal government must compete with private industry for the recruitment and retention of overseas employees. Employees who are dissatisfied or believe they are being treated unfairly are more inclined to leave the government than those who are satisfied or believe otherwise."); 127 Cong. Rec. 15,133 (1981) ("Morale, motivation, and reenlistment of our armed services depend on more than take-home pay. Long-range benefits which insure the future financial security of both partners in a military marriage will improve morale and increase reenlistment . . . . The purpose of this chapter is to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and for their dependents.") (Sen. Hatfield); 105 Cong. Rec. 18,439 (1959) (Rep. Lane) (benefits needed to compete with private sector); Don Jansen, *CRS Report for Congress: Military Medical Care*, at 1-2 (2008) ("[R]ecruitment and retention are supported by the provision of health benefits to military retirees and their dependents."); *see also Sierra Mil. Health Servs, Inc. v. United States*, 58 Fed. Cl. 573, 585 (Fed. Cl. 2003) (noting the "public interest in maintaining the morale of our military personnel by providing improved health care benefits to dependents").

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[9] The end-of-life decisions CWO Morgan faced are similar to those other service members confront. *See* Complaint, *Cooper-Harris v. United States*, No. cv-12-0887 (C.D. Cal. Feb. 1, 2012) (lesbian veteran with multiple sclerosis challenges DOMA to secure additional disability benefits, and survivor benefits for her same-sex spouse).

Gay and lesbian service members often report to OutServe-SLDN that they are considering leaving the military for the private sector to obtain spousal benefits, particularly health care. In contrast to the military, a substantial and increasing number of private employers provide benefits to same-sex spouses and domestic partners. More than half of Fortune 500 companies—and eight of the top ten—provide domestic partner health insurance benefits to their employees. Human Rights Campaign, *Corporate Equality Index*, at 8 (2013), *available at* http://www.hrc.org/files/assets/resources/CEI_2013_Final_low.pdf.pdf.

After DADT was repealed, the military actively began recruiting gays and lesbians, but the lack of equal benefits hinders those efforts. Elisabeth Bumiller, *Marines Hit the Ground Running in Seeking Recruits at Gay Center*, N.Y. Times (Sept. 20, 2011). To recruit qualified gay and lesbian candidates, as well as heterosexual candidates who oppose discrimination, the military must offer attractive and equitable benefits. *See* Lawrence J. Korb et al., *Ending "Don't Ask, Don't Tell"*, June 24, 2009 (*McLaughlin*, Dkt. 14-6 (D. Mass. 2/21/12)) ("Perhaps most important, this outmoded policy sends the wrong signal to the young people—straight or gay—that the military is trying to recruit. It tells them that the military is an intolerant place that does not value what they value, namely, diversity, fairness, and equality.") (commenting on DADT).

Our nation's experience with DADT is instructive. By some estimates, approximately 4,000 service members voluntarily chose not to reenlist each year due to DADT, while it was in effect. *Log Cabin Republicans*, 716 F. Supp. 2d at 951-52 (also noting the General Accounting Office estimated it cost $95 million to replace and train soldiers who left service due to DADT). The repeal of DADT has improved these numbers substantially, but there can be no doubt that denying equal benefits for equal work undermines recruitment and retention, particularly when same-sex spousal benefits are available in the private sector, including from many defense contractors that recruit top military talent.

The experience of Captain Joan Darrah, USN (Ret.), demonstrates that many of the problems that plagued recruitment and retention efforts prior to DADT's repeal remain due to DOMA. Capt. Darrah left a briefing in the Pentagon on 9/11 seven minutes before American Airlines flight #77 crashed into the building, killing 125 people inside (and another 59 on the plane). *McLaughlin*, Dkt. 23 ¶ 6 (D. Mass. Nov. 21, 2011). That day haunted Capt. Darrah, as it did most Americans. She had the added concern, however, that had she been killed, her same-sex partner whom she later married, Jacqueline Kennedy, would not have been notified and would not have received spousal benefits. *Id.* ¶6. That experience led Capt. Darrah to retire earlier than planned. *Id.*

Despite the repeal of DADT, the concerns that led Capt. Darrah to leave the military after 9/11 would not play out any differently now. If a married gay or lesbian service member were to die today, the military would still view his or her spouse as a legal stranger. There is no guarantee the military will notify the spouse of the death, and it certainly will not provide the benefits and family support services available to opposite-sex spouses. Given the current state of the law, service members who find themselves in Capt. Darrah's position may very well choose to leave the military or retire early, just as she did.

3. DOMA Creates Inconsistencies In The Disbursement Of Military Spousal Benefits, And Threatens Uniformity, Fairness And Unit Cohesion

Uniformity is a pillar of military culture. It is a necessary component of an effective, well-prepared national defense. *See Hartmann v. Stone*, 68 F.3d 973, 984-85 (6th Cir. 1995) ("[T]he military considers the maintenance of uniformity and the discipline it engenders to be a necessary ingredient of its preparedness . . . ."). To promote uniformity and preserve high morale, the military discourages all inequities and distinctions among its members. *See, e.g.*, *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (noting the military's broad discretion to "foster instinctive obedience, unity, commitment, and *esprit de corps*"); *Anderson*, 16 Cl. Ct. at 535 n.9 ("It is not difficult to appreciate the morale problem inherent in the case of two teachers, both recruited in the United States, who work at the same overseas [Defense Department] school, perform the same duties, receive the same salary [yet do not receive the same benefits.]"); S. Rep. No. 86-1647, at 3339-40 (1960) ("The effectiveness of their performance is directly related to the fairness and wisdom inherent in the policies under which personnel are employed . . . . [M]orale suffers when two employees arrive at a post together, are booked into the same hotel, pay the same room rate, but receive a different allowance.").[10]

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[10] The military historically has sought to prevent instances of inequality. The military has maintained uniformity even when abandoning that principle would have been popular. *See, e.g.*, H.R. Rep. No. 106-270, at 7 (1999) (stating the Defense Department's opposed H.R. 456, which would have provided special benefits to the families of soldiers who were mistakenly killed by friendly fire during an incident in Iraq, because "[w]e are concerned that enactment of this bill would create

The repeal of DADT reflects Congress' desire to redress inequality in the military and to better promote national security. *See* Secretary Panetta's Statement On Certification of Readiness to Implement Repeal of Don't Ask, Don't Tell (July 22, 2011) (finding repeal of DADT "is consistent with the standards of military readiness and effectiveness, unit cohesion, and military recruiting and retention"); Remarks by the President and Vice President at Signing of the Don't Ask, Don't Tell Repeal Act of 2010 (Dec. 22, 2010) (describing DADT as "a policy that actually weakens our national security, diminished our ability to have military readiness and violates a fundamental American principle of fairness and equality"). The military's recent efforts to extend same-sex spousal benefits as a matter of "fundamental equity" and to provide "fairness and equal treatment" to all service members, regardless of sexual orientation, is in keeping with that goal. DOD 2/11/13 News Release. But, as Secretary of Defense Panetta noted, it is DOMA and not any desire by the military that requires discrimination to remain within the armed forces. DOD 2/11/13 Mem. at 2.

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inequities in the treatment of survivors of service members dying on active duty").

CONCLUSION

The repeal of DADT was an important step in the military's march for equality, but true equality will not be achieved until the next step is taken and DOMA is invalidated. The military is prepared to take that step; only DOMA stands in its way. As long as DOMA remains in effect, both the families of gay and lesbian service members and the military itself will suffer.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL., *Petitioners,*
v.
KRISTIN M. PERRY, ET AL., *Respondents.*

UNITED STATES OF AMERICA, *Petitioner,*
v.
EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Ninth and Second Circuits

Amicus Curiae Brief of Parents and Friends of Ex-Gays & Gays in Support of Hollingsworth and Bipartisan Legal Advisory Group of the U.S. House of Representatives Addressing the Merits and Supporting Reversal.

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QUESTIONS PRESENTED

Hollingsworth, et al. v. Perry, et al.

Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.

United States v. Windsor, et al.

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Sexual orientation is not an immutable characteristic "determined solely by the accident of birth" and, thus, cannot be a suspect class 3

II. Government authorities and other organizations recognize ex-gays as a group, which undermines the assertion that sexual orientation is immutable 4

III. The life stories of thousands of ex-gays evidences conclusively that sexual orientation is not an immutable characteristic 6

   A. Story of Richard Cohen, M.A..............7

   B. Story of Alan Medinger 13

   C. Story of Kristin (Johnson) Tremba, M.Div. 19

D. Story of Brenna Kate Simonds 22

CONCLUSION 27

TABLE OF AUTHORITIES

Cases **Page(s)**

Frontiero v. Richardson,
411 U.S. 677 (1973)..................................3, 4

Gomez v. Perez,
409 U.S. 535 (1973)..................................3

Graham v. Richardson,
403 U.S. 365 (1971)..................................3

Lyng v. Castillo,
477 U.S. 635 (1986) 3

McLaughlin v. Florida,
379 U.S. 184 (1964) 3

Oyama v. California,
332 U.S. 633 (1948) 3

Parham v. Hughes,
441 U.S. 347 (1979) 3

Perry v. Schwarzenegger,
704 F. Supp. 2d 921 (N.D. Cal. 2010)............1

PFOX v. Government of the District Office of Human Rights, No. 2008 CA 003662, slip. op. (D.C. June 26, 2009) 5

Plyler v. Doe,
457 U.S. 202 (1982) 3

Quiban v. Veterans Administration,
928 F.2d 1154 (D.C. Cir. 1991) 3

Reed v. Reed,
404 U.S. 71 (1971) 3

Schweiker v. Wilson,
450 U.S. 221 (1981) 4

Other Materials

District of Columbia Superior Court orders the D.C. Office of Human Rights to recognize ex-gays as a protected class for purposes of sexual orientation nondiscrimination (June 26, 2009), (http://pfox.org/Court-Rules-Sexual-Orientation-Laws-Include-Former-Homosexuals.html)................5

Montgomery County Maryland public schools superintendent acknowledges the contributions of an ex-gay representative on the district's Citizens Advisory Committee for Family Life and Human Development (2011) (http://pfox-exgays.blogspot.com/2011/10/letter-posted.html)......5

NEA recognizes Ex-Gay Educators' Caucus (http://nea-exgay.org/about/)......................................6

Perry v. Schwarzenegger, No. 3:09-2292-VRW (N.D. Cal.), Proponents' Summary Judgment Br. 38-43, ECF No. 172-1 at 57-62 4

INTEREST OF AMICUS CURIAE[1]

Amicus Parents and Friends of Ex-Gays & Gays ("PFOX") is a national non-profit organization that has supported, since its inception, many thousands of families of individuals with unwanted same-sex attraction who have made the personal decision to leave homosexuality. PFOX advocates for the ex-gay community and educates the public about sexual orientation. PFOX appears as *amicus* to address the purported immutability of homosexuality, which is relevant to whether this Court should declare that sexual orientation is a new suspect class. PFOX affirms that sexual orientation is a transient, personal characteristic, and that individuals can and do change their sexual orientation.

SUMMARY OF ARGUMENT

In *Hollingsworth v. Perry*, the district court's finding of fact No. 46 states:

> Individuals do not generally choose their sexual orientation. No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.

Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 966 (N.D. Cal. 2010).

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk.

This brief confirms the growing recognition of the ex-gay community by the courts, government bodies, and business entities and presents the real-life, personal stories of four individuals who have done exactly what the district court wrongly concluded was impossible: they chose to change their orientation and now live in opposite-sex relationships despite having been deeply entrenched in same-sex relationships. The stories demonstrate that, in fact, sexual orientation is not immutable—either in the sense that it is a trait determined solely by "accident of birth" or in the sense that it cannot be changed—but is a transient, personal characteristic that can and does change.

The issue is important because a finding that sexual orientation is immutable could lead this Court to declare it a "suspect class" for purposes of the Equal Protection Clause, which is unwarranted. Such a declaration could improperly subject state laws or state Constitutional provisions like Proposition 8 and Congressional Statutes like DOMA to "strict scrutiny" rather than the existing, legally appropriate, "rational basis" review.

This brief does not detail the extensive medical and scientific evidence corroborating that sexual orientation in changeable and mutable, as that issue is thoroughly briefed by *Amicus* Dr. Paul McHugh, M.D., University Distinguished Service Professor of Psychiatry at the Johns Hopkins University School of Medicine. Rather, this brief personalizes the scientific and medical evidence through biographical stories representing the actual experiences of many thousands of ex-gays.

ARGUMENT

I. Sexual orientation is not an immutable characteristic "determined solely by the accident of birth" and, thus, cannot be a suspect class.

As expounded in Professor McHugh's brief, sexual orientation fails this Court's standard for heightened scrutiny because it is not immutable. Every class to which the Supreme Court has applied heightened scrutiny is defined by an immutable characteristic. *Parham v. Hughes,* 441 U.S. 347, 351 (1979) (*citing McLaughlin v. Florida,* 379 U.S. 184 (1964) (race); *Oyama v. California,* 332 U.S. 633 (1948) (national origin); *Graham v. Richardson,* 403 U.S. 365 (1971) (alienage); *Gomez v. Perez,* 409 U.S. 535 (1973) (illegitimacy); *Reed v. Reed,* 404 U.S. 71 (1971) (gender)). Moreover, the Supreme Court has refused to apply heightened scrutiny to classes that are not marked by an immutable characteristic. *E.g., Plyler v. Doe,* 457 U.S. 202, 220 (1982) (undocumented aliens); *Lyng v. Castillo,* 477 U.S. 635, 639 (1986) (close relatives). The Court's jurisprudence makes clear that immutability is a necessary condition for recognizing a new protected class.

The Court's precedents teach that immutability denotes a characteristic "determined solely by the accident of birth." *Frontiero v. Richardson,* 411 U.S. 677, 686 (1973). As then-Judge Ginsburg explained, "the 'immutable characteristic' notion . . . does not mean, broadly, something done that cannot be undone. Instead, it is a trait 'determined solely by accident of birth.'" *Quiban v. Veterans*

Administration, 928 F.2d 1154, 1160 n.13 (D.C. Cir. 1991) (*quoting Schweiker v. Wilson*, 450 U.S. 221, 229 n. 11 (1981)).

Far from being an immutable characteristic determined at birth like race or gender, sexual orientation is a complex and amorphous phenomenon that defies consistent and uniform definition. The evidence embodied in this brief adds to the scholarly record amassed by Professor McHugh to show that, however defined, sexual orientation can shift over time and does so for a significant number of people.[2] Indeed, many people freely choose to change their sexual orientation. Thus, while the nature and determinants of sexual orientation are not fully understood, orientation is ***mutable*** for purposes of Equal Protection analysis, as it is not "determined solely by accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality).

II. Government authorities and other organizations recognize ex-gays as a group, which undermines the assertion that sexual orientation is immutable.

In addition to the compelling personal stories of ex-gays discussed below, a growing number of governmental authorities and other organizations recognize the existence of ex-gays; that is, that there are individuals who have successfully changed their sexual orientation and are now living as heterosexuals even though they once lived as homosexuals.

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[2] The district court's Finding No. 46 in *Hollingsworth* that "No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation" disregards substantial evidence presented to the district court. For evidence presented in *Hollingsworth*, see *Perry v. Schwarzenegger*, No. 3:09-2292-VRW (N.D. Cal.), Proponents' Summary Judgment Br. 38-43, ECF No. 172-1 at 57-62.

In *PFOX v. Government of the District Office of Human Rights*, No. 2008 CA 003662, slip. op. at 12 (D.C. June 26, 2009), the District of Columbia Superior Court ordered the D.C. Office of Human Rights to recognize ex-gays as a protected class for purposes of sexual orientation nondiscrimination (http://pfox.org/Court-Rules-Sexual-Orientation-Laws-Include-Former-Homosexuals.html).

Likewise, Kevin Jennings, former Assistant Secretary of Safe and Drug Free Schools, U.S. Department of Education, agreed in 2010 that ex-gays should not be discriminated against during outreach efforts for students with unwanted same-sex attractions (http://www.prnewswire.com/news-releases/departing-safe-schools-czar-met-with-pfox-to-discuss-ex-gays-123447044.html).

And in 2011, the superintendent of Montgomery County, Maryland public schools, the 17th largest school district in the United States, acknowledged the contributions of an ex-gay representative who served on the district's Citizens Advisory Committee for Family Life and Human Development (http://pfox-exgays.blogspot.com/2011/10/letter-posted.html).

On December 28, 2012, PepsiCo, a Fortune 500 company, by and through its legal counsel, acknowledged in a written legal opinion memorandum that its workplace policy against sexual orientation discrimination includes nondiscrimination against former homosexuals as a protected class (http://pfox.org/CivilRights.pdf). And every year, the NEA's officially recognized Ex-Gay Educators Caucus participates in and hosts a booth at the National Education Association's conference (http://nea-exgay.org/about/).

III. The life stories of thousands of ex-gays evidences conclusively that sexual orientation is not an immutable characteristic.

Any assertion that homosexuality is immutable is perhaps best disputed by the existence of a multitude of organizations in the United States and around the world who, like *Amicus*, have helped thousands of men and women leave unwanted homosexuality, change their orientation, and live heterosexual lives.[3] Below are the stories of four individuals, two men and two women, each of whom represents many thousands of others who have successfully made this transition. The fact that there are well-adjusted ex-gays clearly demonstrates that sexual orientation is not an immutable characteristic.

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[3] In addition to *Amicus*, a partial list of the other organizations who in the United States and around the world provide assistance to those desiring to change their orientation is as follows: Courage (www.couragerc.net); The German Institute for Youth and Society (www.dijg.de); Homosexual Anonymous (www.ha-fs.org); International Healing Foundation (www.comingoutloved.com); Jews Offering New Alternatives for Healing, Inc. (http://jonahweb.org); National Association For Research & Therapy of Homosexuality (NARTH) (www.narth.com); Restored Hope Network (www.restoredhopenetwork.com); Voices of Change (www.voices-of-change.org); Witness Freedom Ministries (http://www.witnessfortheworld.org); Parakaleo (www.parakaleo.co.uk); People Can Change (http://www.peoplecanchange.com); Positive Alternatives to Homosexuality (PATH) (http://www.pathinfo.org); True Freedom Trust (http://www.truefreedomtrust.co.uk); VENSER

A. Story of Richard Cohen, M.A.

Richard Cohen, M.A., is an ex-gay who is now married with 3 children. He struggled for much of his life with unwanted same-sex attraction. Richard is the founder of the International Healing Foundation (IHF) and the author of *Coming Out Straight*, *Gay Children Straight Parents*, *Let's Talk About Sex*, and *Alfie's Home*. Richard's journey is found at www.comingoutloved.com/Richard-Cohens-Story. Following are excerpts from his story.

> From middle school, I began to experience same-sex attractions. . . .
>
> . . . My same-sex desires got stronger with each passing year. I had more sexual experiences with school friends. For them it was a novelty, but for me it was a growing obsession. At the same time, I tried to act "normal," so I had girlfriends. But this growing obsession for a man continued to haunt me.

(http://www.ver[illegible] Regeneration Ministries (http://www.regenerationministries.org).

. . . .

. . . In my first year of college, I had several boyfriends, each lasting several months.

After one visit home, my father wrote a letter that hurt me deeply. At the same time, I felt suffocated by my current boyfriend, Mike. Besides all that, my schoolwork was overwhelming. I decided to take a bottle of Bufferin and end it all. However, I woke up in the middle of the morning sick as a dog, and still alive. I called my sister, who lived nearby. She came over and took me to the emergency room at the hospital where they pumped my stomach and stabilized my condition.

I recovered, continued therapy, went back to school, ended my relationship with Mike, changed my major to theater, and felt a bit more hopeful. In my second year of school, I met Tim, an art major. We would become lovers for the next three years.

. . . .

. . . Since I loved Tim, I wanted to see why he loved . . . Jesus so much. For the first time in my life, I began reading the New Testament. As part of my Jewish upbringing, I was both barmitzvahed and confirmed, studying only the Old Testament.

I had always been on a spiritual quest, trying to find the meaning and purpose of life. I tried so many kinds of faiths and ways: Judaism, Buddhism, and therapies. Then I met Jesus. He was a remarkable individual. In fact, he was the kind of man I had always wanted to be myself. What I admired in him was that his thoughts, feelings, words, and deeds were one. He was a congruent man, the same inside as he was on the outside. He spoke of forgiveness and God's grace. These were new concepts for me. I wanted to be like him. This began my journey as a Christian. . . .

More and more, Tim and I knew that homosexuality was not compatible with God's Word, so we eliminated the physical part of our relationship . . . .

In 1982, Jae Sook and I married . . . . The first few months were wonderful. I told her about what I thought was my homosexual past. Then the problem resurfaced. I felt so much rage toward my wife. I projected onto Jae Sook all the pent-up hostility I had previously felt toward my mother.

. . . At home, Dr. Jekyll turned into Mr. Hyde, a rageaholic. I had become what I vowed I would never be—just like my father. My wife soon became pregnant with our first child. I knew I must begin therapy again. So, in May 1983, while living in New York City, I went to see a noted psychologist. For one year, I attended weekly individual and group sessions.

. . . .

Slowly, my heart began to heal as I grieved the effects of the sexual abuse [from my youth] . . . . However, there was still a deep wound in the pit of my soul. We had had a second child during all this. Jessica was a beautiful girl.

. . . .

. . . I found a . . . friend who was willing to help me heal the homo-emotional wounds of my past. He himself was quite stable and comfortable in his masculinity. . . .

. . . In that instant, the connection between my childhood abuser and I was cut, and I became free for the first time in my life. With that sense of freedom, I sobbed for about an hour in [my friend] David's arms. It was such a release and relief to know that I wasn't responsible for what had happened and that God had forgiven me. In those moments of release, I found my freedom from same-sex desires. Cutting this neurological connection to the sexual desires freed me from thirty years of relentless pain and an endless pursuit of men.

. . . .

At the same time, I began graduate school to obtain my master's degree in counseling psychology. After graduation . . . I founded the International Healing Foundation. My vision was to establish healing centers throughout the world to help men, women, and children to experience their value as children of God. This is still my vision, as we continue our journey.

I began to give public presentations on the process of transitioning from homosexuality to heterosexuality. I thought that, because of my heart toward the homosexual community, they would see that I was not their enemy, but just presenting another possibility for those who desire to change. I was naive. We received death threats at our home and at my office! We received obscene telephone calls at home with angry, venomous words of threat and accusation. The Gay and Lesbian Task Force of the mayor's office in Seattle requested that the American Red Cross fire me from my position as an HIV/AIDS educator. Many in the homosexual community have felt threatened by my work. I understand their fears and their pain.

Over the past 21 years, I have traveled extensively throughout the States, giving presentations about the healing of homosexuality on college and university campuses, in churches, in mental health institutions, at therapeutic conferences, and on TV and the radio.

Another blessing occurred 15 years ago. God gave us a precious son, Alfie. He came on the foundation of our (God's) battles and victories. Now, Jae Sook and I and our three children are growing more deeply in love.

I love God with all my heart, mind, and soul. I live to end His suffering and pain. I pray the understanding of same-sex attractions and the treatment plan for recovery that I am about to share is a blessing to you and those whose lives you will touch. I have learned over the past twelve years of counseling hundreds of men, women, and adolescents, and working with thousands of people in healing seminars around the world,

> that no matter what issue or issues we are facing in our lives, our wounds all originate from the same sources. . . .[4]

B. Alan Medinger's Story

Alan Medinger is an ex-gay who, after coming out of the homosexual lifestyle twenty five years ago, was married with two daughters and six grandchildren. Alan, who is now deceased, founded Regeneration and authored *Growth into Manhood*. Alan's journey is found at www.peoplecanchange.com/stories/alan.php. Following are excerpts from his story.

> My journey into homosexuality fits the same pattern that I have seen over and over again in many other men I have worked with. I was an unplanned child, born to parents who would have preferred a girl. My older brother was more athletic and generally fit the "all boy" model far better than I, and somehow, he became Dad's and I became Mom's.
>
> . . . My father was subject to severe depression, so severe that he was under psychiatric care for many years, and on a few occasions had to be hospitalized. He could barely cope with life, much less be the husband and father that we needed him to be. In his

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[4] www.comingoutloved.com/Richard-Cohens-Story.

bad times, he drank heavily and he and my mother fought verbally quite often.

My mother's life was difficult, and to a limited extent I became her comfort and confidant. I certainly identified with her more than with my father.

. . . .

I also retreated into a world of fantasy, sexual and otherwise. It became my secure retreat from the pain of life. In a typical fantasy I would be a boy hero leading men into battle, and then when the fighting was over, the men would use me sexually. I both longed for my own manhood and for the manhood of other men.

. . . .

Eventually, these longings for male contact turned sexual. A strong aggressive neighbor boy who was about a year older than I, when he found out I was more than willing to take care of him sexually, was delighted to let me do so. Although my fears of being found out limited my activity, I was homosexually active with other boys from about age 13 through high school.

My sexual activities stopped when I went to college. . . . I believe that my craving for male contact was at least partially satisfied through all of the activities that I had with my fraternity brothers.

Still, the direction of my sexual desires never changed and my fantasies abated very little. Although I dated some girls, there was never any doubt that my overwhelming desire was for a man.

I was blessed to grow up in a time and culture in which there was no gay alternative lifestyle out there calling me into it. . . . Like so many homosexually oriented men of that time, I would get a job, marry, have children and cope the best I could.

That's exactly what happened. Willa Benson had been my friend from elementary school days. We dated through high school, off and on during college, and two years after college we were married. I told Willa nothing of my homosexual desires . . . .

The first years of marriage went well. We had two daughters and I started to move up in the business world. We were active in our little neighborhood church, and we led an active social life. But gradually, the pressures of career and family started to build up on me, and at the same time a faulty thyroid gave Willa some emotional problems. My response was to retreat into my old means of finding comfort; homosexual fantasy and pornography, and five years into the marriage, sex with other men.

. . . .

For ten years I led the classic double life. Successful in business, vice-president and treasurer of a prestigious Baltimore company, a pillar of my local church. The front was masterfully constructed and maintained. In reality, my life was out of control and my marriage had become a sham. I was drinking heavily, and turned much of my guilt on Willa. We fought frequently. For the last two years of my homosexual activity, I was unable to function sexually in the marriage.

Although I believed in God and had an intellectual acceptance of most of the basics of my religion, my faith seemed to have no impact on my life. I prayed routinely and I did pray that I would be able to stop my homosexual behavior, but I was never aware of any of my prayers being answered. I suppose I prayed the way I did most things, out of duty.

I never justified what I was doing, but I felt powerless to stop it. Gradually sinking into a fatalistic attitude, I saw my life as being on a downward spiral which eventually would cost me my family, my job, maybe even my life, and there was nothing I could do about it.

But God could. Two things happened. Willa, searching for help, got herself into a prayer group. She did not tell them of the exact nature of our problems, but they started praying for me and for our marriage.

Not long after this, a friend at work had a profound religious conversion. As Jim tried to explain to me what had happened, I became certain that he had had a true spiritual experience. Somehow I knew that I could too . . . .

But things were desperate enough that after six or seven weeks of agonizing, on Tuesday, November 26, 1974, I went to an interdenominational meeting with Jim. He didn't know my problem, nor did anyone there. At some point during the evening, I prayed quietly, "God, I give up. My life is a total mess. I can't handle it any more. I don't care what You do; you take over." And He did.

Within a few days, I knew that some profound changes had taken place in me. First of all, I fell head over heals in love with Willa and I desired her physically. My homosexual fantasies that had almost never left me were gone. And most important of all, I knew that Jesus was real, that He loved me, and I was starting to love Him.

A few weeks later, I told Willa the whole truth about my life. . . . Being able to trust me and receive my love came very slowly. A part of the new start in life that we were both given was the birth of our son, Stephen, 18 months after my conversion.

. . . Today, I believe that my need for male friendships are [sic] as normal and healthy as any man's.

. . . .

This process took years, but today I am confident in and at total peace with my manhood.

. . . .

Although not too many people experience change the way I did, everything that happened to me—being set free to love, desexualizing my unmet emotional needs, breaking the power of my addiction, having the deep needs of

> my heart for masculine love met by Jesus, and growing into manhood—can happen to any man whose heart is ready to overcome homosexuality. I know this because I have seen it happen hundreds of times.
>
> . . . Our two daughters have grown up, married and provided us with six wonderful grandchildren. Steve, our little child of the promise, grew to be a strong man, was recently married and is teaching school.
>
> Today, 25 years later, if God were to bring me the best looking man in the world, and say, "Here, you can do whatever you want with him." My response would be, "No thank you, I'm not interested." . . .[5]

C. Story of Kristin Johnson Tremba, M.Div.

Kristin Johnson Tremba is a former homosexual who is now married with a child. Kristin holds a Master of Arts degree from Columbia University, as well as a Master of Divinity degree from Gordon-Conwell Theological Seminary. She is the author of *Sexual Wholeness in a Broken World*. Her journey is found at http://pfox.org/Grove City College.pdf. Following are excerpts from her story.

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[5] www.peoplecanchange.com/stories/alan.php.

> While my sister was attending [college], I was going to a small liberal arts college in Indiana. My freshman year I had high hopes to have fun at school, make lots of friends find my "calling" in life, and then get married. Instead, I found something unexpected and frightening happening: I was falling in love with my freshman roommate. The feelings I felt for her were the feelings I had hoped to have felt for the guys I had dated in high school. I was overwhelmed and confused and had nowhere to go. . . .
>
> . . . .
>
> . . . My roommate and I lived together all throughout college and one year after college, but we never talked about our feelings for one another or engaged in any physical sexual relationship. Regardless, we were a couple. We were emotionally dependent upon each other (we viewed other people as a threat to our relationship, preferred to spend time alone and were frustrated when this didn't happen, became angry or depressed when the other withdrew slightly, lost interest in other friendships, and experienced romantic and sexual feelings for the other) . . . .

After college, I entered the Peace Corps, which required me to leave my roommate. This was not easy for either of us. However, on my flight to Albania, I prayed that God would bring a man into my life. Thus began my search for love and the hopes to marry again. I was 23 years old. In Albania, I found myself having sexual feelings for both men and a particular woman as I served as a volunteer. I lost my virginity and became more promiscuous with men.

. . . .

It was not soon after this that I fell into a sexual relationship with a woman who was openly gay, and who pursued me. In my loneliness and neediness for intimacy, I gave in to her and found being with her to meet a deep emotional need inside of me. This relationship continued until I moved to a different state for work. When I heard that she would be coming to live with me, I was euphoric and ready to come "out" of the closet, so to speak. I began telling friends, and I even attended a gay-friendly church, but it all seemed so foreign and unsatisfying . . . .

. . . .

> [Ultimately,] God taught me that sexual sin was my attempt to meet legitimate emotional needs in sexually illegitimate ways. He showed me that there were some emotional needs that had not been met in my family relationships growing up, there were some wounds, and so I was attempting to meet these needs and cover these wounds in sexual relationships as an adult. He taught me that there were also things I was born with: a sin nature, a particular temperament, various weaknesses, and a negative body image and negative view of my femininity. He taught me that even though I did not choose all my circumstances and struggles, I could choose to overcome them. I could choose to let God change my life.
>
> . . . .
>
> People ask me, "Do you still struggle with same-sex attraction?" My answer is no, I don't, but I still struggle with worry and doubt and lots of other things . . . .[6]

D. Story of Brenna Kate Simonds

Brenna Kate Simonds is a former homosexual who has been married to her husband for eight years. She is the Director of an organization based in Boston, Massachusetts that helps men and women find freedom in their struggle with same-sex attraction. Brenna's journey is found at http://pfox-exgays.blogspot.com/2013/01/letting-others-help-on-journey.html. Following are excerpts from her story.

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[6] http://pfox.org/Grove_City_College.pdf.

> I was born in 1975, the second of two girls. My mother was an alcoholic who stayed home with me and my sister while my father worked long hours. . . . I'd quickly zero in on any themes of abandonment in everything I heard, and I carried those feelings of fear with me into my adulthood.
>
> Eventually, my parents divorced. . . . I began experimenting sexually with girls when I was a young age and this continued until, as a freshman in high school, I found myself physically attracted to my best friend. Before our relationship became physical, it was already emotionally unhealthy. When we began to act out our attraction physically, I became totally dependent on her for my self-worth.
>
> . . . .
>
> At college, it was much easier to be gay. My sexuality was affirmed and accepted. My girlfriend of three-and-a-half years and I broke up during my first semester, but within a year, I met

a much older woman, and we began dating. I dropped out of college and moved across the country to live with her. During the time we lived together, I became even more involved with the gay community. I spoke out for gay rights and further embraced my lesbian identity.

. . . .

After three months, [my girlfriend] said to me, "Listen—you can't be a Christian and be gay. The Bible says you must either be hot or cold—one or the other, but not lukewarm." She was quoting Scripture to me! With that, she ended our relationship.

After that, I just threw my arms up into the air, saying "Fine, God! I don't want to live like this. Please - take these desires away from me." And in many ways, He did. My attraction to women lessened greatly.

However, I soon realized that the events and circumstances of my life that led me in the direction of the lesbian lifestyle had not changed. I knew I needed help. .

. . . I somehow got my hands on a copy of "Pursuing Sexual Wholeness" by Andrew Comiskey. I just devoured that book and applied many of the principles presented to my life. I also opened up to my Christian friends about my struggle and asked for accountability. I committed to a few women that when I faced moments of temptation, I would call them, so that they could check in with me later and pray for me.

. . . .

I met a man through a ministry I was involved with, and he was interested in me! As ideal as the situation appeared, dating was much more difficult than I thought it would be! If dating was this difficult, I could only imagine that marriage would be exponentially more so. I recognized that though I could continue to survive as I was, I wouldn't thrive without additional help. At that difficult point, I made the decision to start seeing a Christian counselor.

. . . .

Looking back, I realize I needed my entire thought life to be transformed, but my patterns of thinking were so deeply ingrained that I couldn't have identified them by myself. It wasn't simply that I had moments of feeling worthless and unlovable; in the core of my being, I was sure it was true.

. . . .

Since I had been mistreated and abused by several men I had allowed to get close to me, I had a very difficult time trusting Roy and letting him in to my world. She [counselor] helped me realize that Roy was a safe person, and that I needed to be willing to trust him and be vulnerable with him. Later, when Roy & I were engaged to be married, she helped us to prepare for that transition by meeting with us together.

I believe that the majority of people who struggle with same-sex attraction are in that same place. Though they may be able to survive the struggle, only receiving support from a few groups, or by attending a support group, they could really thrive if they were willing to receive the intense, one-on-one help that therapy offers. Some people in recovery are hesitant to see a therapist or a counselor because they think that counseling is for the "world," that they just need to pray harder, expecting God to reveal everything to them personally and healing them in their prayer closets.

> . . . .
>
> My journey to recovery has been long and arduous, but more than worth it. God has helped me in many ways along the path to recovery. Therapy played a key role in expediting my experience of God's healing in my life. My own therapy taught me how to help others experience their own journey of healing and restoration.[7]

CONCLUSION

Same-sex attraction is not an immutable characteristic determined at birth, like race or gender. The growing public acknowledgment of ex-gays and the personal testimonies of the individuals included above clearly show that same-sex attraction is a phenomenon that can and does change. Homosexual sexual orientation is not predetermined and fixed by "the accident of birth," but is in fact subject to alteration and change. Therefore, *Amicus* asks this honorable Court to not declare that sexual orientation is a new suspect class.

For the foregoing reasons, this Court should reverse the decisions of United States Court of Appeals for the Ninth and Second Circuits.

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[7] http://pfox-exgays.blogspot.com/2013/01/letting-others-help-on-journey.html

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR
AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF ON THE MERITS FOR *AMICUS CURIAE* THE PARTNERSHIP FOR NEW YORK CITY IN SUPPORT OF RESPONDENT WINDSOR AND AFFIRMANCE OF THE SECOND CIRCUIT

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QUESTION PRESENTED

Section 3 of the Defense of Marriage Act (DOMA) defines the term "marriage" for all purposes under federal law, including the provision of federal benefits, as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. 7. It similarly defines the term "spouse" as "a person of the opposite sex who is a husband or a wife." *Id.* The question presented is:

Whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

BACKGROUND 5

ARGUMENT 10

I. DOMA ILLEGITIMATELY UNDERMINES STATES' HISTORIC ROLE IN DEFINING MARRIAGE. 10

II DOMA FAILS TO ADVANCE ITS OWN PURPORTED ENDS, AND INSTEAD IMPOSES SIGNIFICANT BURDENS ON THE NEW YORK BUSINESS COMMUNITY. 16

A. DOMA replaced a uniform regime, under which States set the definition of marriage, with an inconsistent dual regime. 17

B. DOMA imposes immense costs and burdens on New York employers and employees. 19

C. DOMA compels the New York business community to act as an agent of discrimination. 23

CONCLUSION 24

TABLE OF AUTHORITIES

Cases **Page(s)**

Chandler v. *Florida*,
449 U.S. 560 (1981) 24

Gregory v. *Ashcroft*,
501 U.S. 452 (1991) 13

Haddock v. *Haddock*,
201 U.S. 562 (1906) 11

Hisquierdo v. *Hisquierdo*,
439 U.S. 572 (1979) 10

In re Burrus,
136 U.S. 586 (1890) 10

Loving v. *Virginia*,
388 U.S. 1 (1967) 13n

Massachusetts v.
U.S. Dep't of Health & Human Servs.,
682 F.3d 1 (1st Cir. 2012) 10, 11, 12, 16

New State Ice Co. v. *Liebmann*,
285 U.S. 262 (1932) 24

Romer v. *Evans*,
517 U.S. 620 (1996) 10, 13n, 16

Sosna v. *Iowa*,
419 U.S. 393 (1975) 10-11

United States v. *Lopez*,
514 U.S. 549 (1995) 10

United States v. *Morrison*,
529 U.S. 598 (2000) 10

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317 U.S. 287 (1942) 11

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699 F.3d 169 (2d Cir. 2012) 11, 12, 17

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Page(s)

Constitution

U.S. Const. amend. V 4

U.S. Const. amend. XIV 13n, 16

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1 U.S.C. § 7 .... *passim*

8 U.S.C. § 1153(d) 7n

26 U.S.C. § 105 .... 7n

26 U.S.C. § 106(a) 7n

26 U.S.C. § 125(a) 7

26 U.S.C. § 3111 .... 19n

Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, 100 Stat. 82 .... 8n

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Page(s)

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Nicholas Confessore and Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, at A1 .... 14n

Page(s)

Nicholas Confessore, *Business Leaders, in Letter, Will Urge Albany to Legalize Gay Marriage*, N.Y. TIMES, April 29, 2011, at A23 .... 14n

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I.R.S. Priv. Ltr. Rul. 200524016 (Mar. 17, 2005) 7n

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Kathryn S. Wylde, President and CEO of Partnership for New York City, Letter to the Editor, N.Y. TIMES, May 25, 2011, at A26 .... 14n

IN THE
Supreme Court of the United States

No. 12-307

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR
AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF ON THE MERITS FOR *AMICUS CURIAE* THE PARTNERSHIP FOR NEW YORK CITY IN SUPPORT OF RESPONDENT WINDSOR AND AFFIRMANCE OF THE SECOND CIRCUIT

INTEREST OF *AMICUS CURIAE*[1]

The Partnership for New York City ("the Partnership") is a nonprofit membership organization comprised of 200 chief executive officers from many of the

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* or its counsel, made any monetary contribution to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk.

City's leading businesses. These businesses operate in a wide range of industries, including finance, consulting, healthcare, fashion, media, law, real estate, and entertainment.

The Partnership's mission is to engage the business community in efforts to advance the economy of New York City and maintain the City's position as the center of world commerce, finance, culture and innovation. The Partnership for New York City leverages its network of partners to formulate and advocate for policies aimed at advancing this mission and, in that capacity, advocated strongly for the passage of New York's Marriage Equality Act. The Partnership for New York City is thus well-positioned to inform the Court of the substantial, detrimental effects that Section 3 of the Defense of Marriage Act (DOMA) has on the New York business community's efforts to maintain the highest levels of competitiveness.[2]

The Partnership for New York City submits this *amicus* brief with the consent of all parties in support of respondent Windsor and in support of affirmance of the Second Circuit.

SUMMARY OF ARGUMENT

This case presents the important question of whether the federal government may intrude into the province of the States in order to deny the full benefits of marriage to loving same-sex couples who are legally married under state law. The Partnership for New York City exercised a pivotal advocacy role supporting the enactment of marriage equality in New York State. The Partnership did so because marriage equality is important to maintaining the State's and New York City's competitiveness. DOMA improperly stands in the way of the full accomplishment of these objectives. It denies same-sex couples who are legally married in New York the benefits and protections afforded to opposite-sex marriages. And it does so without advancing any legitimate purpose. The Partnership for New York City therefore urges the Court to affirm the Second Circuit's decision.

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[2] We understand that a group of business, professional and municipal employers as well as professional, trade and civic organizations representing employers is also submitting an *amicus* brief in support of respondent Windsor and in support of affirmance of the Second Circuit. The views expressed herein are consistent with those of the *amicus* brief submitted for the employers group.

There are two considerations that, from the perspective of the Partnership, bear particular emphasis in the Court's consideration of the important issues raised on this appeal.

First, DOMA's creation of a federal definition of marriage must be carefully reviewed because it is fundamentally inconsistent with basic principles of federalism. Since our nation was founded, the institution of marriage has been regulated by the States, not by Congress. Businesses have organized their affairs in reliance on this fundamental allocation of power and responsibility. And they have participated in the democratic process at the state level to promote marriage laws that make the communities in which they do business better places to work and live. As a pointed illustration of this, the Partnership for New York City was instrumental in building support for legislation in New York that entitles same-sex marriages to full legal rights and benefits, legislation that was enacted last year on a bipartisan basis.

New York City's business leaders urged the passage of marriage equality because they wanted to be located in a State where the legal environment matched their business values and interests, including their interest in recruiting a workforce that is diverse and from a labor pool that contains the greatest available business talent. Nevertheless, on a daily basis, DOMA's imposition of a federal definition of marriage flouts the results of this state-based democratic process and the deeply-rooted reservation to the States of the power to regulate the institution of marriage.

Second, the review of DOMA that the law requires demonstrates not only that it fails to advance its own purported ends in violation of the Fifth Amendment's guarantee of equal protection, but also that it imposes substantial burdens on the business community. New York employers must recognize employees' same-sex marriages for all state-law purposes. At the same time, they are prohibited from doing so for every way in which marital status implicates federal law. This dual regime undermines the very uniformity DOMA purports to advance, one of the statute's supposedly prime justifications. The burdens imposed by DOMA include not only significant administrative cost, but also the invidious harm inflicted by a mandate that effectively requires employers to act as agents of the federally-mandated discrimination against their gay and lesbian employees.

* * *

Congress purportedly adopted DOMA to promote uniformity and "traditional" marriage. Yet New York's business leaders can attest that DOMA does neither. Since DOMA's passage in 1996, same-sex marriages have become widely accepted. The notion that the extension of the benefits and protections afforded by marriage to loving and committed same-sex couples has undermined the institution of marriage is without substance. The extension of voting rights to women in individual States prior to the adoption of the Nineteenth Amendment did not weaken democracy, it strengthened it. The same is true for marriage. Indeed, rather than strengthen the institution of marriage, DOMA's discrimination against same-sex couples who have committed themselves to each other works to harm families. And by promoting dis-uniformity in the workplace, it harms New York business.

Same-sex marriages (and, for that matter, opposite-sex marriages) will proceed regardless of DOMA; so, too, will the business imperative — and commitment — to equal recognition of marriage in the workforce. All that is left in DOMA is a law that clings to a baseless distinction among married couples, one at odds with the results of New York State's democratic process, irreconcilable with the statute's purported ends, and a threat to the global competitiveness of the New York business community.

BACKGROUND

Section 3 of DOMA creates a federal definition of marriage as "a legal union between one man and one woman as husband and wife."[3] The effects of this definition, adopted by Congress with little debate and as an acknowledged preemptive measure before States could act upon their historical role in defining marriage, are sweeping. They ripple through the more than 1,100 federal statutes in which marital status is a factor in determining legal protections, rights, and benefits, many of which are administered by the members of the Partnership for New York City.[4]

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[3] 1 U.S.C. § 7.

The case before this Court lays bare just one potent example in the area of disparate tax treatment: DOMA's refusal to recognize that a married couple who lived together in a devoted and caring relationship for almost 50 years was entitled to the marital exemption provided under the federal estate tax laws. That exemption is designed to protect a surviving spouse from the potentially devastating consequences that the estate tax can have on couples who made true on their vow to care for each other for richer or poorer and in sickness and in health by pooling their financial resources.

But the marital exemption is just one area affected by DOMA's definition of marriage. Numerous other provisions of federal law turn on marital status.[5] By way of example only:

- *Non-Taxation of Spousal Health Benefits*: The Internal Revenue Code excludes from an employee's income the value of employer-provided spousal health benefits.[6] Under DOMA, same-sex spouses are not eligible for this exclusion; the fair market value of these benefits must be calculated and imputed as income to the employee.[7]

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[4] *See* Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (June 21, 2004), http://bit.ly/CBOImpact. These statutory provisions run the gamut and literally can affect an individual in all aspects of his or her life, far beyond the decision to have children and raise them in a two-parent family, another of Congress's purported justifications for the law. The CBO estimates that, on net, same-sex marriage would actually improve the federal government's bottom line by approximately $1 billion per year. *Id.*

[5] *Id.*

- *Flexible Spending Accounts (FSA)*: The Internal Revenue Code allows employees to use pre-tax income to pay for medical care for themselves as well as their spouses and dependents.[8] Under DOMA, same-sex spouses are ineligible to participate in this program.
- *Health Insurance Portability and Accountability Act (HIPAA)*: HIPAA provides employees the right to enroll additional individuals in their health plans outside the open enrollment period if there is a "qualifying event" such as a marriage.[9] Due to DOMA, same-sex marriage is not considered a qualifying event and an employer need not allow a same-sex spouse to be added to the policy.
- *Visa Rights*: When individuals are granted visas, their spouses are ordinarily provided with an equivalent immigration status.[10] DOMA, however, prevents the extension of such status to same-sex spouses.

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[6] *See* 26 U.S.C. §§ 105 & 106(a). Thus, both the employee and the employer must pay higher taxes.

[7] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 200524016 (Mar. 17, 2005).

[8] *See* 26 U.S.C. § 125(a).

[9] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered titles of the United States Code).

[10] *See* 8 U.S.C. § 1153(d).

- *Continuing Health Coverage*: Under COBRA (the Consolidated Omnibus Budget Reconciliation Act), most employers are required to provide terminated employees the option to continue their health insurance coverage for themselves, as well as spouses and dependents, for a defined period and at their own expense.[11] But because DOMA prohibits same-sex spouses from classification as spouses for any purpose under federal law, these employees are excluded from the same continued coverage protections that other married couples receive in the workforce.
- *Family Medical Leave Act (FMLA)*: Most employers are required under the FMLA to provide up to 12 weeks of unpaid leave during any 12-month period to care for an ill or injured parent, child, or spouse, or for the birth or adoption of a child. Under DOMA, however, an employer bears no obligation to provide this unpaid leave for employees who need to care for their same-sex spouses.
- *Employee Retirement Income Security Act (ERISA)*: Due to DOMA, companies that self-insure are under no ERISA obligation to provide insurance benefits to same-sex spouses on the same basis as opposite-sex spouses.[12]

Many of the rights and benefits affected by DOMA are implemented and provided by employers. It is the employer that must withhold additional taxes from the paycheck of an employee with same-sex spousal health benefits. It is the employer that must determine the marital status of employees who claim, or might even wish to claim, spousal protections or benefits. It is the employer that must identify which employees are entitled to particular health and retirement benefits under federal law. In short, due to the many ways in which federal law and DOMA's definition of marriage implicate employee benefits, businesses are necessarily thrust into the role as agents of the law and must maintain an administrative machinery to do so.

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[11] *See* Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, 100 Stat. 82 (codified in scattered titles of the United States Code).

[12] *See* Human Rights Campaign, *Federal Laws Impacting Domestic Partner Benefits*, http://bit.ly/humanrightscampaign.

Since the adoption of DOMA, same-sex marriages have become increasingly recognized.[13] In order to compete effectively for the diverse talent that they believe will promote their businesses, many employers in New York State — at their own cost — have extended to employees in same-sex relationships the benefits and protections that federal law provides to opposite-sex spouses. New York's Marriage Equality Act, adopted with wide business-community support, recognizes that development by providing that a marriage is valid and entitled to full legal rights and protections "regardless of whether the parties to the marriage are of the same or different sex."[14] In other words, under New York law it is illegal to treat married couples differently based on whether they are in same- or opposite-sex marriages. DOMA stands as an obstacle to that goal, a goal that the New York legislature endorsed when it acted in an area traditionally left to the States.

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[13] Julie Appleby, PBS Newshour, *The Rundown: Many Businesses Offer Health Benefits to Same-Sex Couples Ahead of Laws* (May 14, 2012), http://bit.ly/PBSRundown.

[14] Marriage Equality Act, 2011 N.Y. Sess. Laws. Ch. 95 (A. 8354) (McKinney 2011) (codified as N.Y. Dom. Rel. L., Art. 3, § 10-A).

ARGUMENT

I. DOMA ILLEGITIMATELY UNDERMINES STATES' HISTORIC ROLE IN DEFINING MARRIAGE.

"[E]ven in the ordinary equal protection case . . . [courts] insist on knowing the relation between the classification adopted and the object to be attained . . . [and] requir[e] that the classification bear a rational relationship to an independent and legitimate legislative end." *Romer* v. *Evans*, 517 U.S. 620, 632-33 (1996). Consistent with the constitutional guarantee to every citizen of equal protection of the laws, "the Supreme Court [has] scrutinized with special care federal statutes intruding on matters customarily within state control." *Massachusetts* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 13 (1st Cir. 2012) (citing *United States* v. *Morrison*, 529 U.S. 598 (2000) and *United States* v. *Lopez*, 514 U.S. 549 (1995)).

And specifically with respect to the issue presented here, this Court has recognized repeatedly that "'[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'" *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979) (*quoting In re Burrus*, 136 U.S. 586, 593-594 (1890)). *See also Morrison*, 529 U.S. at 599 (disapproving of federal regulation of "family law and other areas of state regulation" such as "marriage, divorce, and childrearing"); *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975) ("[D]omestic relations [is] an area that has long been regarded as a virtually exclusive province of the States. Cases decided by this Court over a period of more than a century bear witness to this historical fact."); *Haddock* v. *Haddock*, 201 U.S. 562, 575 (1906) ("[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce. . . . [T]he Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce."), *overruled on other grounds by Williams* v. *North Carolina*, 317 U.S. 287 (1942). Because marriage is the province of the States, BLAG's attempt to take up the mantle of federalism is founded on a false premise — *i.e.*, that "the federal government has the same latitude as the states to adopt its own definition of marriage"[15] — which is belied by this Court's precedents.

The Second Circuit therefore correctly recognized that "DOMA is an unprecedented breach of longstanding deference to federalism." *Windsor* v. *United States*, 699 F.3d 169, 186 (2d Cir. 2012). Similarly, Judge Boudin, writing for the First Circuit, observed that "DOMA intrudes extensively into a realm that has from the start of the nation been primarily confided to state regulation — domestic relations and the definition and incidents of lawful marriage — which is a leading instance of the states' exercise of their broad police-power authority over morality and culture." *Massachusetts* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d at 12.

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[15] Brief on the Merits for Respondent The Bipartisan Legal Advisory Group of the United States House of Representatives at 19.

These courts of appeals correctly have questioned the justifications offered for DOMA Section 3 and the legitimacy of its end. The First Circuit held that DOMA was not entitled to the "extreme deference accorded to ordinary economic legislation" and, instead, requires "a closer examination" of its justifications. *Id.* at 10-12, 13. The Second Circuit likewise recognized that in this area where state regulation has traditionally governed, the federal government's intrusion is not justified. *Windsor*, 699 F.3d at 186 ("Because DOMA is an unprecedented breach of longstanding deference to federalism that singles out same-sex marriage as the only inconsistency (among many) in state law that requires a federal rule to achieve uniformity, the rationale premised on uniformity is not an exceedingly persuasive justification for DOMA.").

From the perspective of the Partnership for New York City, this conclusion — that Section 3 of DOMA intrudes into a domain that has traditionally been subject to state regulation, and is therefore deserving of special scrutiny or is illegitimate — is particularly appropriate. By undermining state-based decision-making in an area traditionally left to the States, DOMA subverts the interests of businesses to determine, in response to state policy, where to locate. While New York has enacted marriage equality,[18] other States have chosen differently — and, to be sure, businesses may choose to locate in or to avoid such economic and legal landscapes. The existence of this range of legal regimes is a reflection of the historic reservation to the States of the power to define marriage.[17]

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[18] Marriage Equality Act, 2011 N.Y. Sess. Laws. Ch. 95 (A. 8354) (McKinney 2011).

This Court has emphasized that a key benefit of our nation's federalist structure is that it allows the very kind of decision-making for which the Partnership advocated in New York. Federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991). The Partnership for New York City's recent experience in supporting same-sex marriage legislation in New York pointedly demonstrates why respect for the virtues of federalism that this Court has highlighted, especially in this context, is so important.

The passage of the New York Marriage Equality Act was the result, in significant part, of the engagement of business leaders around New York State with the State's democratic processes. New York business leaders, through the Partnership for New York City, published an open letter expressing support for New York marriage equality legislation.[18] The letter explained that "[a]s other states, cities and countries across the world extend marriage rights regardless of sexual orientation, it will become increasingly difficult to recruit the best talent if New York cannot offer the same benefits and protections."[19] The Partnership continued to press its position in a subsequent letter published in *The New York Times*.[20] The Partnership's advocacy was singled out for recognition as influential in broadening the coalition of marriage equality advocates across political party lines.[21] And the support of the business community was critical to the New York State Legislature's passage of the Marriage Equality Act with bipartisan support.[22]

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[17] Of course, the Fourteenth Amendment imposes limits on a State's latitude under federalism. *See, e.g.*, *Romer*, 517 U.S. at 632; *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967).

[18] *An Open Letter from Business Leaders on the Importance of Marriage Equality* (April 28, 2011), http://bit.ly/BusinessLetter.

New York's business leaders advocated for the Marriage Equality Act because it would advance their interest in recruiting a workforce that is diverse and drawn from a labor pool with the greatest available talent. For many New York businesses, full equality is now essential to attracting and retaining employees. Location in a State that provides full recognition to same-sex couples sends a powerful signal that employers are committed to an inclusive work environment that does not draw distinctions among its employees based on anything other than merit.

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[19] *Id.*

[20] Kathryn S. Wylde, President and CEO of Partnership for New York City, Letter to the Editor, N.Y. TIMES, May 25, 2011, at A26.

[21] *See, e.g.*, Nicholas Confessore, *Business Leaders, in Letter, Will Urge Albany to Legalize Gay Marriage*, N.Y. TIMES, Apr. 29, 2011, at A23.

[22] Marriage Equality Act, 2011 N.Y. Sess. Laws. Ch. 95 (A. 8354) (McKinney 2011); Nicholas Confessore and Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, at A1.

As demographer Gary Gates explains, equal treatment of same-sex couples "signals a kind of openness to people who are different. It sends a signal to people, straight or gay, that this is a place where they can potentially thrive. That's especially critical for companies that rely on people who have to be creative, entrepreneurial and innovative."[23] John Berry, the Director of the Office of Personnel Management, has recently noted that providing full benefits for same-sex partners "has become a litmus test for this generation. I know because I've been out talking to college students at our recruitment and job fairs."[24]

The Partnership for New York City long has recognized that the choice of businesses to locate in New York is inextricably linked to the City's history as a magnet for talent. Competition to provide high-value services, and to attract the talented employees capable of providing them, has spilled well beyond state borders to reach international scope. As the Partnership's letter declared in support of marriage equality, "[t]o remain competitive" in this landscape "New York must continue to contend with other world cities to attract top talent."[25]

DOMA undermines the decision by New York to foster an environment that is open and welcoming to everyone, regardless of whom they love. And it does so in a way that, in this context involving marriage laws traditionally regulated by the States, subverts principles of federalism. It should therefore be subjected to a closer examination under the Equal Protection Clause.

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[23] *See* James B. Stewart, *Gay Marriage Bans May Come at a Price*, N.Y. TIMES, May 11, 2012, at B1.

[24] Ed O'Keefe, *Federal Diary: Domestic-Partner Benefits as a Recruiting and Retention Tool*, WASH. POST, Oct. 16, 2009, http://bit.ly/FederalDiary.

[25] *An Open Letter from Business Leaders on the Importance of Marriage Equality* (April 28, 2011).

II. DOMA FAILS TO ADVANCE ITS OWN PURPORTED ENDS, AND INSTEAD IMPOSES SIGNIFICANT BURDENS ON THE NEW YORK BUSINESS COMMUNITY.

A central justification offered for DOMA is that Congress had an "interest in uniformity" and therefore "decided to adopt a uniform rule."[26] Applying any level of review, it becomes clear that DOMA actually *undermines* uniformity by introducing a dual regime for marriage. Instead of advancing its purported objective, DOMA imposes significant burdens on New York businesses and employees and enlists employers as agents in its discrimination. The constitutional requirement of a "link between classification and objective" is therefore lacking. *Romer*, 517 U.S. at 632.[27] *Massachusetts* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d at 15 ("[T]he rationales offered do not provide adequate support for section 3 of DOMA."); *Windsor*, 699 F.3d at 186 (holding that the uniformity rationale does not justify DOMA).

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[26] Brief on the Merits for Respondent The Bipartisan Legal Advisory Group of the United States House of Representatives at 35.

[27] The experience of the Partnership also demonstrates that the other supposed justifications are without basis: New York's passage of marriage equality legislation and the expectations of today's labor force of equal treatment for same-sex marriages demonstrate that DOMA's definition of marriage, adopted preemptively before States had spoken on the subject, has not promoted a supposed "traditional" view of marriage, and many of the federal laws affected by the definition cannot possibly be said to have anything to do with either child-rearing or public expenditures.

A. DOMA replaced a uniform regime, under which States set the definition of marriage, with an inconsistent dual regime.

Prior to DOMA, the States and the federal government were in sync. A person who was deemed to be legally married in one State was deemed to be legally married for federal purposes. DOMA upended that longstanding regime. In its place, DOMA has created a dual scheme in which same-sex spouses are considered married for state-law purposes but single for federal-law purposes. Changing that consistency as States recognize same-sex marriage creates disuniformity.

The differential tax treatment of spousal health benefits is one key example of this dual regime. Under New York law, the value of a spouse's health coverage is not treated as taxable income of an employee.[28] Yet DOMA bars same-sex spouses from eligibility for a similar exclusion at the federal level. As an illustration of the complexity in this differential tax treatment, in 2010 Yale University — located in Connecticut, another State in the Second Circuit that recognizes same-sex marriage — failed to properly withhold federal income taxes covering the imputed income of same-sex spouses' health coverage.[29] The university was then required to find a way to deduct the taxes from employees' paychecks the following year.[30] Thus, the result of DOMA is that whereas employers long had implemented myriad federal and state benefit programs consistently, employers must now keep two sets of books: one for federal-law purposes and one for state.

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[28] *See* N.Y. Dep't of Taxation and Finance, *Withholding Tax Information Regarding Same-Sex Married Employees*, http://bit.ly/withholdingtaxinfo.

This is but one example. The members of the Partnership for New York City, based on their experience in navigating the dual regime of federal and state law, are particularly able to inform the Court about the lack of uniformity caused by DOMA's Section 3. For New York employers operating under both state law and DOMA, the number and complexity of provisions affected by DOMA make employers' efforts to provide the equal benefits required by New York law a daunting task. Because DOMA affects the operation of more than 1,100 different federal statutes,[31] employers are continually confronted with new and unforeseen ways in which DOMA requires them to treat their employers differently under federal and state law.[32]

As a result, the dual regime effectively compelled by DOMA thrusts upon New York businesses an inconsistent employment landscape that undermines uniformity by imposing a dual regime on employers. DOMA therefore fails to advance its own uniformity objective.

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[29] *See* Tara Siegel Bernard, *Yale Payroll Error Gives Gay Employees a New Year Surprise*, N.Y. TIMES Bucks Blog, Jan. 11, 2011, http://bit.ly/YalePayrollError.

[30] *Id.*

[31] *See* Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (June 21, 2004), http://bit.ly/CBOImpact.

[32] Marriage Equality Act, 2011 N.Y. Sess. Laws. Ch. 95 (A. 8354) (McKinney 2011).

B. DOMA imposes immense costs and burdens on New York employers and employees.

Even as DOMA undermines its stated objectives, the burden of operating under its dual regime is costly for the New York business community and its employees. The administrative costs alone are significant. Businesses must often revamp their entire benefits packages and reprogram or write new code for payroll and benefits software. They typically must hire or consult lawyers and ERISA-compliance experts. Human resources personnel must then be trained in the separate legal standards and in their application to classify the company's employees.

The dual regime also increases the payroll taxes New York employers must pay. The federal government's treatment of same-sex spousal benefits as taxable income increases employers' payroll tax burden because payroll taxes are calculated based on employee earnings. Employers who provide health benefits to their employees' same-sex spouses must pay a payroll tax of 7.65% of these benefits' fair market value.[33] It is estimated that U.S. employers pay $57 million per year in additional payroll taxes due to the inconsistent treatment of same-sex spousal benefits.[34] Yet New York law requires employers to provide these benefits to same- and opposite-sex spouses alike if they provide family health benefits through insurers. Not only must employers pay this additional payroll tax, but they also must incur the administrative complication and uncertainty of calculating the fair market value of the benefits provided.

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[33] *See* 26 U.S.C. § 3111.

[34] M.V. Lee Badgett, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits*, Williams Inst. (Dec. 2007), http://bit.ly/AmericanProgressDP.

DOMA is particularly burdensome for small businesses. Smaller businesses with fewer resources are less able to bear the additional payroll taxes incurred by providing healthcare benefits to same-sex spouses. Smaller businesses also have fewer employees over whom to spread the administrative costs of providing these benefits while simultaneously complying with DOMA.

Nonetheless, New York employers are providing benefits to same-sex couples in light of New York law and the competition they face in attracting and retaining the best employees. New York's Marriage Equality Act now entitles same-sex marriages to full rights and benefits.[35] But even before this law took effect, New York employers were required to treat parties to same-sex marriages as spouses for insurance law purposes, including all provisions governing health insurance.[36]

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[35] Marriage Equality Act, 2011 N.Y. Sess. Laws. Ch. 95 (A. 8354) (McKinney 2011).

[36] Since 2008, the State of New York Insurance Department has made clear that parties to same-sex marriages must be treated as spouses for purposes of New York insurance law, including all provisions governing health insurance. *See* N.Y. Office of Gen. Counsel, Op. No. 08-11-05, http://bit.ly/DFSNYGovInsurance.

Beyond these legal requirements, the demands of competition in the New York labor market effectively require that some employers provide equal benefits despite DOMA. The number of employers offering health benefits to the domestic partners of their employees has increased more than 12-fold since 1995,[37] such that 52% of all U.S. employers offered such benefits last year.[38] In many leading industries, benefits covering same-sex spouses are becoming par for the course.[39] Once a leading firm offers health benefits to same-sex partners, competing firms have quickly followed suit. This has been particularly notable in industries in which New York has a strong presence and that compete intensely for top talent, including financial services, law, technology, accounting and consulting.[40]

To pick one example of many, all of the "Big Four" accounting firms decided, in close proximity, to equalize the after-tax benefits received by their employees in same-sex relationships.[41] New York employers in numerous other industries also provide "true-ups" to compensate their employees for the additional federal taxes the employees must pay on their same-sex benefits.[42] The cost of these true-ups is estimated to average between $2,000 and $2,500 per employee.[43]

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[37] Human Rights Campaign, *Tax Parity for Health Plan Beneficiaries Act*, http://bit.ly/HRCTaxParity.

[38] Julie Appleby, PBS Newshour, *The Rundown: Many Businesses Offer Health Benefits to Same-Sex Couples Ahead of Laws*, http://bit.ly/PBSRundown.

[39] *Id*. (citing survey indicating that 96% of pharmaceutical companies extended benefits to same-sex partners of employees).

[40] *See* Katherine Reynolds Lewis, *Employers Boost Tax Benefits for Same-Sex Couples*, CNN Money (Mar. 26, 2012), http://bit.ly/CNNMoneyBenefits; Tara Siegel Bernard, *For Gay Employees, An Equalizer*, N.Y. TIMES, May 21, 2011, at B1, (identifying these industries as those with the most apparent competition to offer benefits to the same-sex spouses of employees).

Despite these costs, between 2010 and 2011 the number of large companies offering true-ups nearly tripled.[44] This is "raising the bar" for employee benefits packages. And the number of participating employers will continue to increase as they feel pressure to keep pace with competing firms.[45] The costs that DOMA imposes on businesses will therefore continue to increase as true-ups become the norm.

The provision of equal benefits and the use of true-ups make clear that DOMA is not advancing its purported objective of ensuring consistent eligibility for workplace benefits. In reality, New York businesses are increasingly compelled to provide equal benefits and after-tax compensation regardless of DOMA. From the employers' perspective, DOMA's effect is to increase the employer's costs of providing these benefits and protections. A statute with such burdensome classifications that fails to advance its own ends cannot pass constitutional muster, particularly when it infringes on an area traditionally left for the States.

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[41] *See* Michael Cohn, *KPMG Adds Tax Benefit for Same-Sex Domestic Partners*, Accounting Today, Feb. 13, 2012, http://bit.ly/KPMGAddsTaxBenefits (noting that KPMG's extension of these benefits occurred only a month after Ernst & Young's).

[42] For a list of these businesses, see Tara Siegel Bernard, *A Progress Report on Gay Employee Health Benefits*, N.Y. TIMES Bucks Blog, Jan. 11, 2011, http://bit.ly/BenefitsProgressReport; and GLAD, *How DOMA Hurts Americans*, http://bit.ly/GLADDOMAHurts.

[43] Tara Siegel Bernard, *For Gay Employees, An Equalizer*, N.Y. TIMES, May 21, 2011 at B1.

[44] *See* Katherine Reynolds Lewis, *Employers Boost Tax Benefits for Same-Sex Couples*, CNN Money (Mar. 26, 2012).

[45] Tara Siegel Bernard, *For Gay Employees, An Equalizer*, N.Y. TIMES, May 21, 2011, at B1 (noting that as companies like Google offer these benefits, "everyone has to jump a little higher to be average").

C. DOMA compels the New York business community to act as an agent of discrimination.

Beyond administrative costs and added expenses, DOMA harms employers more fundamentally by transforming them into agents of discrimination. DOMA forces employers to treat employees with same-sex spouses differently by withholding additional taxes from their paychecks when they receive spousal health benefits. Similarly, when an employee's same-sex spouse seeks a distribution from the employer's ERISA pension plan, the employer must make a determination as to what the spouse is entitled in light of DOMA.

Even when an employer seeks to provide equal treatment despite DOMA, the employer's efforts often serve to remind employees of the legal discrimination they face. In order to offset DOMA's effects, an employer may need to investigate who needs additional benefits or offsetting compensation and how much is required. This process makes clear to employees with same-sex spouses the value of the benefits and protections from which DOMA excludes them.

DOMA thus is a reminder to legally married same-sex couples that in the eyes of the federal government, their loving relationships do not deserve the same dignity and respect afforded to the marriages of their colleagues, friends, family members and neighbors. And because of the role that they play in administering DOMA's discriminatory treatment, employers are often forced to deliver that message. For New York employers whose human capital is their most valuable resource, the harm DOMA inflicts on employer-employee relations may be the most costly of all.

CONCLUSION

"'It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" *Chandler* v. *Florida*, 449 U.S. 560, 579 (1981) (quoting *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). No State has embraced this value more wholeheartedly than New York, which has a great tradition of leading the nation in promoting equality. That commitment to justice is one of the things that makes New York a magnet for talented and creative people and, in turn, makes New York City the leading business center in America, indeed the world.

The Partnership for New York City advocated for marriage equality in New York because it advanced all of these goals. DOMA stands as an impediment to the full achievement of these goals. And it does so in a way that undercuts one of the great strengths of our federalist system by imposing a federally-mandated regime on an area that has traditionally been left to the States. The Partnership therefore urges the Court to affirm the decision of the Second Circuit holding Section 3 of DOMA unconstitutional.

Respectfully submitted,

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March 1, 2013

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR POLITICAL SCIENCE PROFESSORS AS AMICI CURIAE IN SUPPORT OF RESPONDENT WINDSOR AND AFFIRMANCE ADDRESSING POLITICAL POWER OF GAY MEN AND LESBIANS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. A Minority Group Is Politically Powerless If It Cannot Form the Majority Coalitions Necessary to Protect Its Interests 6

II. Gay Men and Lesbians Lack Political Power 11

  A. Gay Men and Lesbians Are Underrepresented in Political Office 11

  B. Gay Men and Lesbians Are Viewed Negatively by a Majority of Americans Based on the Widespread Moral Opposition to Homosexuality. 16

  C. Gay Men and Lesbians Face Strong Opposition from Powerful, Well-Funded Groups that Rely Heavily on the Ballot Initiative Process. 22

D. Gay Men and Lesbians Have Limited Influence over Their Political Allies. 25

III. Recent Events and Statistics Do Not Demonstrate that Gay Men and Lesbians Have Political Power....................... 28

A. The Importance of Recent Events to the Political Power Inquiry Is Overstated. 29

B. Existing Laws Have Distorted the Political Process, Making Political Change Harder for Gay Men and Lesbians. 34

CONCLUSION 38

TABLE OF AUTHORITIES

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INTEREST OF AMICI CURIAE

Amici curiae are 13 political science professors who have professional and scholarly interests in the issues presented in this case. *Amici* have researched, studied, and written on issues relevant to whether gay men and lesbians have political power, including the ways in which minority groups exercise sufficient power to protect their interests through the legislative process. Their expertise in these issues will assist the Court in determining whether heightened scrutiny should apply to laws disadvantaging gay men and lesbians on the ground that the group lacks political power.[1]

Amici are **John Aldrich**, Pfizer-Pratt University Professor of Political Science, Duke University; **Shaun Bowler**, Professor of Political Science, University of California, Riverside; **Bruce Cain**, Charles Louis Ducommun Professor in Humanities and Sciences, Professor of Political Science, Stanford University; **Cornell W. Clayton**, Director of the Thomas S. Foley Institute for Public Policy and Public Service and Claudius O. Johnson Distinguished Professor of Political Science, Washington State University; **Donald P. Haider-Markel**, Professor of Political Science, University of

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amici* or their counsel made such a monetary contribution. The parties have consented in writing to the filing of this brief.

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SUMMARY OF ARGUMENT

I. The Framers envisioned a political process in which groups of citizens sharing a common interest would unite to advocate for laws favoring the group and against laws disfavoring it. Because the government was likely to consist of minority factions, laws would be passed only if their appeal was sufficiently broad to attract support of multiple factions. In the Framers' view, this process would protect the rights of minority groups because laws supported by majority coalitions were likely to promote the public good, rather than deprive minority groups of their rights.

Political theory and this Court's decisions both recognize that the political process will not always protect the rights of minority groups. Some groups can better protect their interests through the political process because they have greater resources than opposing groups. Other groups find themselves at a permanent disadvantage and are unable to protect their interests through the political process. When a minority group's lack of power prevents it from protecting its interests, laws disadvantaging the group cannot be given a presumption of legitimacy. As a result, this Court has long required a "more searching judicial inquiry" when the "political processes ordinarily to be relied upon to protect minorities" have been "curtail[ed]." *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

Determining whether a particular minority group has political power requires consideration of more than simply whether the group has ever achieved successful legislative outcomes. The political process will occasionally produce legislation favorable to a minority group lacking political power for numerous reasons. For one, politicians may take a position favorable to the minority group on a particular issue because it accords with their personal beliefs, without regard to the minority group's influence over the process. For another, politicians may disagree with the group's view, but nevertheless vote with them for reasons entirely unrelated to the group's interests. As a result, a group's political power can be measured only by considering the group's ability to influence the political process, not by whether the process sometimes produces results that the group supports.

II. Gay men and lesbians lack political power for numerous reasons. *First*, they are underrepresented in political office. Although gay men and lesbians make up approximately 3.5 percent of the U.S. population, they have never held more than about 1 percent of the legislative seats in Congress or state legislatures. As this Court has recognized, underrepresentation in political office can deprive a group of political power. *See Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973) (plurality).

Second, gay men and lesbians are viewed negatively by a majority of Americans, and rank among the least popular minority groups in the country. Because the group's unpopularity is based on moral opposition to homosexuality, politicians who are opposed to their interests are unlikely even to consider supporting the group's interests. This moral opposition also reduces the political power of gays and lesbians by making members of the group less likely to participate in the political process.

Third, the groups advocating against marriage for same-sex couples have significantly more resources than the groups supporting it. Because these opposition groups are able to generate support throughout the country, they have successfully used the ballot initiative process to achieve their goals. This strategy has allowed opposition groups to bypass legislative safeguards that protect minority interests. The ballot initiative process also forces gay men and lesbians to defend their legislative successes from repeated attempts to repeal them.

Fourth, the political allies of gay men and lesbians often prove unreliable. Because most Republican politicians strongly oppose gay rights, gay men and lesbians can generally look for support only from Democratic politicians. But these allies, even if generally supportive of gay rights, often have no incentive to push for legislation to protect gay men and lesbians. Because voting for a Republican candidate is often not a viable alternative for gay men and lesbians, Democratic candidates need not produce legislative results to keep the group's vote.

III. Recent events do not establish that gay men and lesbians have political power. The Court should not focus on isolated instances in which gay men and lesbians have achieved successful political outcomes because such a limited focus ignores the broader context in which the successes have occurred. Even counting the gay men and lesbians who were elected to office in 2012, the group is still vastly underrepresented in political office. Moreover, although ballot measures approving of marriage for same-sex couples passed in three states in November 2012, those victories pale in comparison to the many defeats—more than 30—that gay men and lesbians have suffered in ballot initiatives in other states.

Focusing on recent events also ignores the burdens imposed by the many existing laws that disadvantage gay men and lesbians. It is one thing for a group to have enough power that it can occasionally block passage of unfavorable laws, but it is quite another for the group to have the power to repeal existing laws. This problem is compounded by the fact that many state constitutions have been amended to disfavor gay men and lesbians. As a result, the group must first amend the state constitutions before they can even attempt to achieve their goals through the normal legislative process.

ARGUMENT

I. A MINORITY GROUP IS POLITICALLY POWERLESS IF IT CANNOT FORM THE MAJORITY COALITIONS NECESSARY TO PROTECT ITS INTERESTS.

1. In *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938), this Court held that, as a general matter, an Act of Congress is constitutional so long as Congress had a rational basis for enacting it. The Court noted, however, that a "more searching judicial inquiry" may be necessary in some circumstances, including when a law disfavors certain minority groups. *Id.* at 153 n.4. Heightened scrutiny may be warranted because "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *Id.*

This Court's subsequent decisions have adopted the framework of *Carolene Products*, and have held that heightened scrutiny applies when a law disadvantages a "suspect class." *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). To determine whether heightened scrutiny applies, the Court considers several "traditional indicia of suspectness," including whether the minority group has been "relegated to . . . a position of political powerlessness. *Id.*; *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985).

As these decisions demonstrate, a minority group is politically powerless if the "political processes ordinarily to be relied upon to protect minorities" have been "curtail[ed]." *Carolene Products*, 304 U.S. at 153 n.4. Making that determination requires consideration of how the "political processes" were designed to protect minorities.

The Framers recognized that the democratic principle of majority rule posed a serious threat to the rights of the minority. *See The Federalist No. 10* at 80 (J. Madison) (Rossiter ed. 1961). James Madison envisioned a pluralistic system of competing "factions," which he defined as a group of citizens that shared a common interest adverse to the rest of the population. *Id.* So long as a particular faction included only a minority of the population, it posed no threat to the rights of others because "the majority [could] defeat its sinister views by regular vote." *Id.* But "[i]f a majority be united by a common interest, the rights of the minority will be insecure." *The Federalist No. 51* at 323 (J. Madison).

Although the Framers understood that a majority faction was unlikely to protect the minority's rights, they nevertheless expected the political process to protect those rights because, in their view, permanent majority factions were unlikely to form. *Id.* at 323-34. Rather than a government controlled by a majority faction, the Framers envisioned a government of competing minority factions. Because a minority faction cannot enact laws on its own, laws would be passed only when a group of minority factions united to form a majority coalition. *Id.* Unlike a majority faction, a majority coalition would enact laws reflecting "justice and the general good," not depriving the minority of rights. *Id.* at 325.

Drawing on Madison's insights, political scientists have studied the way in which minority factions compete to form majority coalitions. These scholars typically address the issue by focusing on "interest groups." In an influential work, David Truman concluded that an interest group cannot gain permanent control of the political process in a pluralist system because, as that group gains power, opposing interests will mobilize to prevent the group from dominating the political process. *See* David Truman, THE GOVERNMENTAL PROCESS 26-44 (Alfred A. Knopf 1951). While this "disturbance theory" is widely accepted, other scholars have shown that not all groups are equally capable of protecting their interests. *See, e.g.*, Mancur Olson, THE LOGIC OF COLLECTIVE ACTION 117-31 (Harvard Univ. Press 1965). Based on differences in size and resources, some groups are necessarily in a better position than others to protect their interests. J.A. 398. In short, "[t]hose with greater resources—time, money, and numbers—exert greater influence on the political process. Minorities, by definition, are less numerous than the majority." *Id.*

In this pluralist framework, the term "power" is generally used to refer a group's ability to influence others to support its interests. Professor Robert Dahl has provided a widely accepted definition, which describes "power" as "A's capacity for acting in such a manner as to control B's responses." Robert Dahl, A PREFACE TO DEMOCRATIC THEORY 13 (Univ. of Chicago Press 1956); J.A. 399. Based on this understanding of power, a minority group is "politically powerless" when it cannot achieve positive legislative outcomes through the "political processes ordinarily to be relied upon to protect minorities." *Carolene Products*, 304 U.S. at 153 n.4.

2. A group's political power cannot be measured based solely on legislative outcomes. Legislatures can—and sometimes do—pass laws that benefit powerless minorities. Likewise, even powerful groups will sometimes fail to achieve the legislative outcomes they seek. Rather than looking only to legislative outcomes, a group's political power must be analyzed by looking at the group's ability to influence the legislative process.

This Court's decision in *Frontiero v. Richardson*, 411 U.S. 677 (1973), illustrates this point. In *Frontiero*, the Court noted that Congress had enacted legislation prohibiting employers from discriminating on the basis of sex, and had recently passed a constitutional amendment to prohibit such discrimination. *Id.* at 687. Notwithstanding these legislative outcomes, the Court concluded that women lacked sufficient political power to protect their interests in the legislative process. *Id.* at 688. As a result, the Court held that gender-based classifications are "inherently suspect," and therefore subject to heightened judicial scrutiny. *Id.* at 688.

A handful of positive legislative outcomes do not establish that a group has political power for numerous reasons. *First*, legislators may support a minority group on a particular issue because they agree with the group's view, not because the group exerted any influence over them. J.A. 399 ("One does not have power over those who, for other reasons, already agree."). As an example, Professor Segura explained that "in the last national election, millions voted for the same candidate I did, but this is not evidence of my electoral influence." *Id.*

Second, legislators may support a minority group for reasons unrelated to the group's interests. Indeed, a congressman may support the policies underlying a bill, but nevertheless vote against it because he thinks the bill is too costly or that the issue should be left to the states. Such opposition based on fiscal or federalism grounds does not establish that the interest groups opposing the bill have exercised political power.

Third, positive legislative outcomes may also result from legislators' affinity for a minority group. For example, a politician may oppose a law that discriminates against a particular minority group because the politician believes that discriminating against any minority group is wrong. This sort of general opposition to discrimination does not suggest that a minority group has exercised political power. J.A. 400.

When a particular legislative outcome is attributable to one or more of these factors, the outcome does not establish that a minority group has political power. As a result, the legislature may occasionally enact bills that respect a minority group's interests even when prejudice against the group has "curtail[ed] the operation of those political processes ordinarily to be relied upon to protect minorities." *Carolene Products Co.*, 304 U.S. at 153 n.4.

II. GAY MEN AND LESBIANS LACK POLITICAL POWER.

Gay men and lesbians lack political power because they are unable to form the majority coalitions necessary to protect their interests. This is true for at least four reasons. *First*, gay men and lesbians are underrepresented in political office. *Second*, moral opposition to homosexuality deprives gay men and lesbians of political power. *Third*, the interest groups opposing gay rights are significantly more powerful than the groups supporting them. *Fourth*, the political allies of gay men and lesbians often prove to be unreliable.

A. Gay Men and Lesbians Are Underrepresented in Political Office.

1. Gay men and lesbians were underrepresented in political office when the Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419 (1996), was enacted, and they continue to be underrepresented today. Studies have concluded that gay men and lesbians make up roughly 3.5 percent of the U.S. population. J.A. 415; *see also* Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender* at 1 (Williams Institute 2011). Their representation in political office has

never come close to their percentage of the population.

Prior to 1983, there were no openly gay members of Congress. *See* Donald P. Haider-Markel, OUT AND RUNNING 19 (Georgetown Univ. Press 2010). Although a few sitting congressmen announced that they were gay during the 1980s and 1990s, it was not until 1998—two years after DOMA was enacted—that a non-incumbent gay or lesbian candidate was elected to Congress. *See* Arthur Leonard, Editorial, *A Congressional First*, N.Y. TIMES, Nov. 6, 1998, at A32.

When DOMA was enacted in 1996, there were only four openly gay members of Congress, all serving in the House of Representatives. *See* David W. Dunlap, *A Republican Congressman Discloses He Is a Homosexual*, N.Y. TIMES, Aug. 3, 1996, at A6. The number of openly gay or lesbian members of Congress has increased since then, but the group remains vastly underrepresented. There are currently six openly gay, lesbian, or bisexual Representatives and one openly lesbian Senator. Jeremy W. Peters, *Openly Gay, and Openly Welcomed in Congress*, N.Y. TIMES , Jan. 26, 2013, at A1. These seven legislators account for just over 1 percent of the current Congress.

Gays and lesbians have also been consistently underrepresented in state legislatures. The first openly gay or lesbian state legislators were not elected until the 1970s. Haider-Markel, OUT AND RUNNING at 86. Overall, there have been approximately 200 openly gay or lesbian state legislators since 1974. *Id.* Although the number of gay and lesbian legislators has increased in recent years, they still hold only about 1 percent of the state legislative seats. *Id.* at 86-87.[2]

2. This Court has recognized that underrepresentation in political office can undermine a group's political power. *See Frontiero*, 411 U.S. at 686 n.17. Because women make up slightly more than half of the U.S. population, the Court acknowledged that, "when viewed in the abstract, women do not constitute a small and powerless minority." *Id.* But the Court nevertheless held that women were sufficiently powerless that laws disadvantaging them must be subject to heightened scrutiny. *Id.* at 688. In reaching this result, the Court relied on the fact that women are underrepresented in political office:

> [I]n part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. . . . [T]his under-representation is present throughout all

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[2] *See also* Nat'l Conf. of State Legislatures, *History Holds True in 2012 Legislative Elections*, *available at* http://www.ncsl.org/press-room/history-holds-true-in-2012-legislative-races.aspx.

> levels of our State and Federal Government.

Id. at 686 n.17.

Underrepresentation deprives a group of political power in numerous ways. ***First***, as a matter of simple arithmetic, underrepresentation makes forming a majority coalition more difficult. Consider a minority group that comprises 10 percent of the population. If that group also holds 10 percent of the seats in the legislature, it can create a majority coalition so long as it can gain support from another 40 percent (plus one) of the legislators. In contrast, if the same group is underrepresented and holds only 1 percent of the seats, creating a majority coalition requires substantially more political power because the group must gain support from another 49 percent (plus one) of the legislators.

Second, underrepresentation hinders a group's ability to influence the political agenda. Studies have shown that female representatives are more likely to introduce bills on issues important to women. *See* Haider-Markel, OUT AND RUNNING at 11-12. Similarly, African-American legislators are more likely to introduce bills of interest to African Americans. *See* Kathleen Bratton, *Legislative Collaboration and Descriptive Representation*, in REPRESENTATION OF MINORITY GROUPS IN THE U.S. 289, 305 (Charles E. Menifield, ed. 2001). Minority representatives also influence the political agenda by serving on committees that address issues relevant to their minority groups. *See* Haider-Markel, OUT AND RUNNING at 10 ("African American legislators are more likely to serve on committees that deal with social welfare and education issues, as well as defined black issues.").

Third, even apart from a legislator's deliberate efforts to influence the political agenda, "simply having representatives of a group in a policymaking body may influence other decision makers' attitudes about the group and subsequent support for policy proposals related to the group." Haider-Markel, OUT AND RUNNING at 85; *see also* Bruce E. Cain & Kenneth P. Miller, *The Populist Legacy: Initiatives and the Undermining of Representative Government*, in DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 50 (Larry J. Sabato et al., eds., 2001) ("mere presence of minorities in a legislature may deter the worst forms of legislative prejudice"). In addition, "the elected representatives of a group may likewise influence public perceptions of the group, and the public and legislator preferences concerning policies related to the group." Haider-Markel, OUT AND RUNNING at 85-86. This phenomenon—sometimes referred to as the "role model" effect (*id.* at 85)—is important because legislators are more supportive of gay rights when their constituents also support them. *See* Donald P. Haider-Markel, *Redistributing Values in Congress: Interest Group Influence Under Sub-Optimal Conditions*, 52 POLITICAL RESEARCH QUARTERLY 113, 131 (1999).

The empirical data confirm that under-representation deprives a group of political power. Studies of state legislatures have shown that an increase in the number of female representatives results in more proposed legislation relating to issues important to women. *See, e.g.*, Haider-Markel, OUT AND RUNNING at 85-86. Other studies have similarly shown that "the presence of elected black and Hispanic officials increases the likelihood that black and Hispanic interests are represented in policy processes." Donald P. Haider-Markel, et al., *Minority Group Interests and Political Representation: Gay Elected Officials in the Policy Process*, 62 J. OF POLITICS 568, 568 (2000).

A similar study recently determined that an increase in the number of gay men and lesbians in a state legislature leads to an increase in the number of pro-gay rights bills introduced and adopted. *See* Haider-Markel, OUT AND RUNNING at 127. The study also showed that increased representation creates a greater likelihood that a state will adopt antidiscrimination laws that protect gay men and lesbians. *Id.*; *see also* Haider-Markel, et al., *Minority Group Interests and Political Representation: Gay Elected Officials in the Policy Process*, 62 J. OF POLITICS at 573.

In sum, gay men and lesbians are underrepresented in political office at both the federal and state level. This underrepresentation deprives the group of political power.

B. Gay Men and Lesbians Are Viewed Negatively by a Majority of Americans Based on the Widespread Moral Opposition to Homosexuality.

Given their relatively small numbers and significant underrepresentation in political office, gay men and lesbians can protect their interests in the political process only by gaining support from other groups. Several factors prevent this from happening. The groups opposing gay rights strongly oppose homosexuality on moral grounds, and a majority of Americans hold negative views of gay men and lesbians. This moral opposition hinders the ability of gay men and lesbians to form majority coalitions to enact favorable laws and to block unfavorable ones.

1. When DOMA was enacted, a large majority of Americans viewed sex between two adults of the same sex as morally wrong. A 1996 survey conducted by the National Opinion Research Center ("NORC") showed that 60 percent of Americans thought that it was "always wrong," 5 percent thought it was "almost always wrong," and 6 percent thought it was "sometimes wrong." *See* Karlyn Bowman, *Attitudes About Homosexuality & Gay Marriage*, AEI Studies in Public Opinion 2 (2008). Although public opinion has shifted to some degree since 1996, a majority of Americans still are morally opposed to homosexuality. The most recent NORC study—conducted in 2010—showed that 54.4 percent of Americans thought that sex between two adults of the same sex was "always," "almost always" or "sometimes" wrong.[3]

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[3] Tom W. Smith, *Public Attitudes toward Homosexuality* at 2 (Sept. 2011), *available at* http://www.norc.org/PDFs/2011%20GSS%20Reports/GSS_Public%20Attitudes%20Toward%20Homosexuality_Sept2011.pdf.

A recent study showed that gay men and lesbians are one of the most negatively viewed groups in America. J.A. 424-27. This study asked Americans to rate their "warmness" towards certain groups on a scale of 0 to 100, with 100 indicating strong positive feelings for the group. *Id.* at 424-25. More than 65 percent of the respondents rated gay men and lesbians negatively (*i.e.*, below the mid-point rating of 50), and more than 13 percent gave gay men and lesbians a rating of zero. *Id.* at 426-27. Other groups—including "suspect classes" under the Court's equal protection jurisprudence—have significantly higher "warmness" scores. J.A. 426. Gay men and lesbians' rating of 49.4 is considerably lower than the ratings of African-Americans (68.8), Catholics (67.3), Latinos (65.2), and Jews (65.0), and slightly lower than the rating for Muslims (50.3). *Id.* Gay men and lesbians were ranked higher than only two groups: atheists (41.0) and undocumented aliens (39.3). *Id.*

2. Moral opposition to homosexuality prevents gay men and lesbians from exercising political power. A minority group generally is unable to influence politicians who are morally opposed to its interests because these politicians are unlikely to think that the group's interests deserve consideration or respect. *See* Donald P. Haider-Markel, et al., *The Politics of Gay and Lesbian Rights: Expanding the Scope of the Conflict*, 58 J. OF POLITICS 332, 334 (1996).

Gay men and lesbians face this issue in advocating for the freedom to marry. As the floor debates over DOMA demonstrate, many politicians oppose marriage for same-sex couples on moral and religious grounds. *See, e.g.*, 142 Cong. Rec. 22,447 (1996) ("One has only to turn to the Old Testament and read the word of God to understand how eternal is the true definition of marriage."); *id.* at 17,074 ("God laid down that one man and one woman is a legal union. That God-given principle is under attack."). As a result, gay men and lesbians have little chance of forming a majority coalition by convincing their opponents to change their views on this issue. *See* Haider-Markel, et al., *The Politics of Gay and Lesbian Rights: Expanding the Scope of the Conflict*, 58 J. OF POLITICS at 334.

The moral opposition to homosexuality also reduces the political power of gays and lesbians by making members of the group less likely to participate in the political process. Unlike members of other minority groups, gay men and lesbians can choose not to reveal their sexual orientation publicly, which results in others not identifying them as part of the minority group. The scholarship on this issue suggests that individuals will choose not to self-identify with a group when doing so imposes substantial costs, such as family disapproval, physical threats, and discrimination. J.A. 421-23; *see also* Scott S. Gartner & Gary M. Segura, *Appearances Can Be Deceiving: Self Selection, Social Group Identification, and Political Mobilization*, 9 RATIONALITY & SOC. 1043 (1997). The unwillingness of many gay men and lesbians to self-identify limits the group's political power because it causes the group to appear smaller than it actually is.

3. The inability to form majority coalitions through legislative compromise has prevented enactment of laws to protect gay men and lesbians from many forms of discrimination. For example, the Employment Non-Discrimination Act—which would extend the federal employment antidiscrimination laws to prohibit discrimination on the basis of sexual orientation—has been regularly introduced in Congress since 1994 but has never passed. J.A. 405-06. As a result of Congressional inaction, "there is no federal legislation prohibiting discrimination against gay men and lesbians in employment, education, access to public accommodations, or housing." *Id.* at 405. Similarly, the antidiscrimination laws in 29 states do not list sexual orientation as a protected characteristic.[4]

The moral opposition to homosexuality has also led to enactment of laws that disadvantage gay men and lesbians in other areas of the law. For example, numerous states limit the ability of gay men and lesbians to adopt children or become foster parents. J.A. 412; Sean Cahill, *The Anti-Gay Marriage Movement*, in THE POLITICS OF SAME-SEX MARRIAGE 167 (Rimmerman and Wilcox, eds., Univ. of Chicago Press 2007). Moreover, "[a] number of states have also passed laws preventing teachers from mentioning the word *homosexual* in the classroom or mandating that homosexuality be presented in an exclusively negative way." *Id.* at 166-67.

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[4] *State Nondiscrimination Laws in the U.S.*, National Gay and Lesbian Task Force, *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_1_12.pdf.

Hate crime legislation provides a particularly striking example of how the moral opposition to homosexuality makes forming a majority coalition so difficult. Gay men and lesbians are frequent victims of hate crimes. J.A. 419-20. Indeed, they are the most frequently victimized group on a per-capita basis, and the second most targeted group based on total crimes. *Id.*[5] Despite the frequency of such crimes, legislative efforts to expand the hate crime statutes to include crimes against gay men and lesbians have faced strong opposition. Efforts to amend state hate crime laws often have failed, as evidenced by the 14 states that have hate crime laws but do not protect gay men and lesbians.[6] Although Congress recently extended hate crime protection to gay men and lesbians, it took more than a decade of efforts before the federal law was amended, and the amendment was adopted only after it was attached to a defense appropriations bill. J.A. 406-07. Even then, the provision faced strong opposition. *Id.* at 407.

In short, gay men and lesbians are one of the most unpopular minority groups in America. Because of this unpopularity and the moral opposition to homosexuality, gay men and lesbians cannot form the majority coalitions necessary to enact the most basic types of antidiscrimination laws that have long protected other minority groups.

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[5] *See also* Federal Bureau of Investigation, Hate Crime Statistics 2011, *available at* http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/narratives/victims.

[6] *See State Laws & Policies*, Human Rights Campaign Foundation (Mar. 27, 2007), *available at* http://www.hrc.org/resources/entry/state-laws-policies.

C. Gay Men and Lesbians Face Strong Opposition from Powerful, Well-Funded Groups that Rely Heavily on the Ballot Initiative Process.

1. Gay men and lesbians also lack political power because the interest groups opposing marriage for same-sex couples "have substantial strategic, structural, and political advantages over groups that advocate full marriage rights." Mark Carl Rom, *Introduction*, in THE POLITICS OF SAME-SEX MARRIAGE at 16; *see also* J.A. 432 ("Gay men and lesbians lack the political resources . . . to counter th[e] kind of committed, organized opposition to their interests.").

By drawing on the moral opposition to homosexuality, interest groups opposing gay rights are able to generate support throughout the country. *See* Cahill, *The Anti-Gay Marriage Movement*, in THE POLITICS OF SAME-SEX MARRIAGE at 156-57. National religious organizations offer a network for coordinating activities—including fundraising and pressuring elected officials—across states and jurisdictions. J.A. 431; *see also* Rom, *Introduction*, in THE POLITICS OF SAME-SEX MARRIAGE at 16 (opposition "groups are often religion-based and so have ready access to a broad institutional network of individuals and resources that can be mobilized in opposition.").

The interest groups opposing marriage for same-sex couples are better funded than those groups supporting it. Studies have shown that "groups leading the charge against gay marriage today dramatically outspend groups promoting equal rights for lesbian, gay, bisexual, and transgender people." Cahill, *The Anti-Gay Marriage Movement*, in THE POLITICS OF SAME-SEX MARRIAGE at 175. For example, in 2003, 13 organizations organized a rally in Washington D.C. to oppose same-sex marriage. *Id.* at 157. Those organizations—which were not the 13 largest groups opposing same-sex marriage—reported income of $211 million in 2002. *Id.* In contrast, the 13 *largest* gay political organizations reported income totaling $53 million in 2002. *Id.*

2. The interest groups opposing marriage for same-sex couples frequently use their enormous political power to achieve their objectives through ballot initiatives. Indeed, "[t]he initiative process has been used specifically against gay men and lesbians more than against any other social group." J.A. 414. States have voted on marriage rights through ballot initiatives more than 30 times; the position favoring marriage for same-sex couples has lost nearly every time. J.A. 411. Because many of these initiatives resulted in amendments to state constitutions, the issue is no longer subject to the normal legislative process. *See infra* Part III.B.[7]

The use of ballot initiatives has deprived gay men and lesbians of political power in multiple ways.

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[7] These interest groups have also used ballot initiatives to repeal antidiscrimination laws and to prevent gay men and lesbians from adopting children. J.A. 412-14.

First, by using the ballot initiative process, opposition groups are able to bypass the legislative safeguards that protect minority interests. *See supra* Part I.A. As Professor Segura explained, "[s]mall minorities are even less able to protect their interests in [ballot initiatives] than they are in the legislative process, which—as a result of legislative districts, institutional rules, coalitional politics, and other factors—tends to give small minorities more of an opportunity to prevent undesirable outcomes." J.A. 413; *see also* Katie Lofton and Donald P. Haider-Markel, *The Politics of Same-Sex Marriage Versus The Politics of Gay Civil Rights*, in THE POLITICS OF SAME-SEX MARRIAGE at 316 ("Interest groups can indeed play a stronger role on the campaign trail than legislative office lobbying.").

Second, gay men and lesbians are repeatedly forced to defend their legislative successes from attempts to repeal them through the ballot initiatives process. For example, when anti-discrimination laws have been extended to prohibit discrimination on the basis of sexual orientation, opposition groups have repeatedly repealed those laws through ballot initiatives. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); J.A. 410-11. By using the ballot initiative process in this manner, opposition groups deprive gay men and lesbians of political power because they turn legislative victories into electoral defeats.

Third, the mere threat of repeal by ballot initiative makes it less likely that a law supporting gay rights will be enacted in the first place. As discussed below, *see infra* Part II.D, politicians often pay a substantial price for supporting gay rights. They are less willing to pay that price if the legislation is likely to be overturned. J.A. 412-13 (Past success of ballot initiatives "makes it less likely that legislatures will enact pro-gay policies in the first place.").

D. Gay Men and Lesbians Have Limited Influence over Their Political Allies.

The political parties are largely polarized on issues involving the rights of gay men and lesbians. Most Republican politicians strongly oppose marriage for same-sex couples and other issues of concern to gay people. *See* Cahill, *The Anti-Gay Marriage Movement*, in THE POLITICS OF SAME-SEX MARRIAGE at 168. In contrast, Democratic politicians generally are more supportive on these issues, *id.*, but that support does not necessarily translate into action.

Democratic politicians often prove to be unreliable allies based on a phenomenon known as "electoral capture." *See, e.g.*, Paul Frymer, UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA 8 (Princeton Univ. Press 1999). Electoral capture occurs when a group "votes overwhelmingly for one of the major political parties and subsequently finds the primary opposition party making little or no effort to appeal to its interests or attract its votes." *Id.* When electoral capture occurs, the group cannot exert political power over the sympathetic party because it cannot threaten defection:

> The opposing party does not want the group's vote, so the group cannot

> threaten its own party's leaders with defection. The party leadership, then, can take the group for granted because it recognizes that . . . [a captured] group has nowhere else to go. Placed in this position by the party system, a captured group will often find its interests neglected by their own party leaders.

Id.

This concept of electoral capture applies to gay men and lesbians because "the Republican party does not make any effort to compete for the group." Charles Anthony Smith, ***The Electoral Capture Of Gay And Lesbian Americans: Evidence and Implications from The 2004 Election***, 40 STUDIES IN LAW, POLITICS, AND SOC'Y 103, 105 (2007). The 2004 presidential election provides a good example. Facing no threat of losing the votes of gay men and lesbians, Democratic presidential candidate John Kerry announced his opposition to marriage for same-sex couples, even though he had voted against DOMA nearly a decade earlier. *Id.* at 110. Yet, despite his opposition on this issue, "an overwhelming number of [gay men and lesbians] supported Kerry." *Id.* at 105.

DOMA's enactment provides another example of the difficulty that gay men and lesbians face in attracting reliable allies. During the 1996 elections, the Republican party adopted a strategy of making same-sex marriage an issue. *See* Michael J. Klarman, FROM THE CLOSET TO THE ALTAR 60 (Oxford Univ. Press 2013). In the spring of 1996, Republicans introduced "defense of marriage bills" in 34 state legislatures, and the Republican presidential candidate, Senator Bob Dole, co-sponsored DOMA in the U.S. Senate. *Id.* at 59-61.

The floor debate over DOMA "quickly devolved into a general attack on homosexuality." *Id.* at 61. "Many Republican lawmakers declared that homosexuality was morally wrong and that the state should not endorse it." *Id.* One of the bill's co-sponsors in the House defended its necessity by arguing that "[t]he flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit." 142 Cong. Rec. 17,070 (1996). Other members defended the bill on similar grounds: "Homosexuality has been discouraged in all cultures because it is inherently wrong and harmful to individuals, families, and societies. *Id.* at 17,075; *see also id.* at 16,802 ("[W]e can look at history and show that no culture that has ever embraced homosexuality has ever survived.").

In the face of the Republican opposition, gay men and lesbians found little support from the Democratic party. Democratic Senator Byrd joined the Republicans in opposing marriage for same-sex couples on moral grounds and warning that the future of the country depended on enacting DOMA. *Id.* at 22,448–49 (traditional marriage must be defended against homosexual attack, and "America is being weighed in the balance"). Even among the Democrats who opposed DOMA, few expressed support for gay rights. *See* Klarman, FROM THE CLOSET TO THE ALTAR at 61. Instead, most "criticized the bill on federalism grounds, observing that in the past Congress had always left the definition of marriage up to the states." *Id.*

DOMA passed both houses easily. The House passed the bill by a vote of 342 to 67. *Id.* at 63. Nearly two-thirds of House Democrats voted in favor of the bill, and only one Republican, an openly gay congressman, voted against it. *Id.* The Senate passed the bill by a vote of 85 to 14. *Id.* Senator John Kerry was the only Senator up for reelection in 1996 who voted against the bill. *Id.* Moreover, "[d]ozens of lawmakers who usually supported gay rights voted for the measure." *Id.* President Clinton, who had run in 1992 as a candidate sympathetic to concerns of gay men and lesbians, signed DOMA on September 21, 1996. *Id.* at 62-63.

As one commentator explained, "Those who might be sympathetic to [marriage for same-sex couples] have no incentive to promote it—in the near term, at least, favorable legislation has no chance of being enacted, and the vast majority of politicians potentially face retribution at the ballot box if they speak on behalf of same-sex marriage." Rom, *Introduction*, in THE POLITICS OF SAME-SEX MARRIAGE at 18.

III. RECENT EVENTS AND STATISTICS DO NOT DEMONSTRATE THAT GAY MEN AND LESBIANS HAVE POLITICAL POWER.

Focusing on some, but not all, of the relevant events and statistics from the past few years, the Bipartisan Legal Advisory Group ("BLAG") asserts that gay men and lesbians are politically powerful.

BLAG Br. 51-54. BLAG overstates the importance of recent events to the political power inquiry. Moreover, such a limited focus is misplaced because it ignores the many existing laws that distort the political process and deprive the group of power.

A. The Importance of Recent Events to the Political Power Inquiry Is Overstated.

Gay men and lesbians lack political power. That was true when DOMA was passed and remains true today. *See supra* Part II. Gay men and lesbians are underrepresented in political office; they are viewed negatively by a majority of Americans; their interests are opposed by powerful, well-funded interest groups that use ballot initiatives to try to undo the limited political successes that gay men and lesbians have achieved; and they have limited influence over their political allies. *Id.* Despite this evidence, BLAG asserts that recent events demonstrate that gay men and lesbians have political power. That is incorrect.

1. BLAG argues that the political power of gay men and lesbians is apparent from the fact that many senior government officials, including the President, support marriage for same-sex couples. BLAG Br. 51. Indeed, BLAG goes so far as to argue that "the decision of the President and Attorney General to stop defending and start attacking DOMA itself demonstrates the remarkable political clout of the same-sex marriage movement." *Id.* at 53.

This argument fails because a group's political power cannot be determined based solely on whether it has some allies who are willing to support its position on discrete issues. *See supra* Part I. That support may have nothing to do with political power, but rather simply be a result of policy agreement. Moreover, the government's decision not to defend DOMA was based in part on a determination that the group lacks political power. *See* Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, House of Representatives (Feb. 23, 2011).

By focusing only on the actions of the President and Attorney General, BLAG ignores the actions of the many politicians who openly support discrimination against gay men and lesbians. Indeed, politicians often find it beneficial to speak negatively about gay men and lesbians in ways that would not be tolerated if the comments were made about other minority groups. For example, in recent years, elected officials have called gay men and lesbians "the greatest threat to our freedom that we face today,"[8] have referred to the group's lifestyle as "part of Satan,"[9] and have warned that the legal recognition of marriage for same-sex couples will result in the end of civilization.[10]

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[8] *See, e.g.*, Robert Schlesinger, *Medicine Man*, Salon (Sept. 13, 2004), *available at* http://www.salon.com/2004/09/13/coburn_2/ (quoting Senator Tom Coburn: "The gay community has infiltrated the very centers of power in every area across this country, and they wield extreme power. . . . That agenda is the greatest threat to our freedom that we face today. Why do you think we see the rationalization for abortion and multiple sexual partners? That's a gay agenda.").

[9] *See* Elspeth Reeve, *The Depth of Michelle Bachmann's Fear of Gays*, (July 13, 2011), *available at* http://www.nationaljournal.com/dailyfray/the-depth-of-michele-bachmann-39-s-fear-of-gays-20110713.

2. BLAG notes that "[t]he November 2012 elections witnessed a record number of openly gay candidates for Congress, and the election of the first openly gay U.S. Senator." BLAG Br. 51. But the most recent election did not change the fact that gay men and lesbians remain vastly underrepresented in political office. *See supra* Part II.A. Even counting the six openly gay men or lesbians currently in office, only about 0.1 percent of the more than 12,000 Senators and Representatives elected to Congress in U.S. history have been openly gay or lesbian.[11] Indeed, BLAG's evidence of political power—that, after more than two centuries of having no representation, openly gay men and lesbians account for 1 percent of the U.S. Congress—highlights the group's lack of power.

3. BLAG also notes that, in 2012, "voters in Maine, Maryland, and Washington state passed measures allowing same-sex marriage, and Minnesota voters defeated a proposed traditional marriage amendment to the state constitution." BLAG Br. 52 (internal quotation marks and citation omitted). These victories are not enough to show that gay men and lesbians have political power

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[10] *See* 152 Cong. Rec. 14,799 (2006).

[11] *See* Jennifer E. Manning, Congressional Research Service, Membership of the 112th Congress: A Profile, at 1; Jeremy W. Peters, *Openly Gay, and Openly Welcomed in Congress*, N.Y. TIMES , Jan. 26, 2013, at A1.

because a determination that the group lacks political power "does not rest on the extreme assumption that in no place, at no time, under any circumstances, have gay men and lesbians won any outcome." J.A. 401; *see also supra* Part I. Indeed, even accounting for the occasional victory, gay men and lesbians have less political power than women and racial minorities had when this Court held that laws classifying based on gender or race are subject to heightened scrutiny. J.A. 433.

BLAG's focus on these recent votes is particularly misplaced because it fails to place the votes in the broader context of all ballot initiatives regarding marriage for same-sex couples. Overall, opponents of same-sex marriage have been successful in the vast majority of ballot initiatives, including as recently as last year. J.A. 410-11; *see* Campbell Robertson, *Ban on Gay Marriage Passes in North Carolina*, N.Y. TIMES, May 9, 2012, at A15.

BLAG also ignores the remedial nature of these successes. A successful outcome for gay men and lesbians typically is limited to amelioration of prior discrimination. Put another way, these successes often result in nothing more than removing existing discriminatory laws. That gay men and lesbians need positive legislative outcomes to put themselves in the same position as other minority groups is powerful evidence that they lack political power.

4. BLAG also points to the repeal of the military's "Don't Ask, Don't Tell" policy as evidence that gay men and lesbians are politically powerful. BLAG Br. 52. But this su[illegible] is hardly evidence of political

power, given that it did nothing more than repeal a discriminatory law that forced gay men and lesbians to conceal their sexual orientation. That is especially true given the fierce opposition to the repeal of the policy. Of the votes cast, more than 90 percent of House Republicans and nearly 80 percent of Senate Republicans voted against repealing the law. J.A. 407-08.

Although BLAG discusses the repeal of "Don't Ask, Don't Tell," it ignores the fact that this repeal did not remove the issue from the political agenda. To the contrary, reinstating the policy was part of the Republican Party platform during the 2012 elections.[12] As a result, gay men and lesbians must continue to devote their time, energy, and other resources to protect this political success.

5. BLAG contends that "the Human Rights Campaign, one of the nation's leading gay-rights organizations, has been ranked the second most successful political organization in the entire country by National Journal." BLAG Br. 52 (internal quotation marks and citations omitted). But regardless of whether a particular political organization is considered successful, the relevant issue is whether gay men and lesbians have political power—an issue that requires considering the relative strength of organizations supporting same-sex marriage as compared to those that oppose it.

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[12] *See* Republican Platform 2012, at 42, *available at* http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf (opposing "'social experimentation" in the military).

The evidence shows that, "[c]ompared to the groups that oppose same-sex marriage, [groups advocating for same-sex marriage] are much smaller, poorer, and more politically divided." Rom, *Introduction*, in THE POLITICS OF SAME SEX MARRIAGE at 15; *see also supra* Part II.C.

In sum, BLAG's account of the recent successes of gay men and lesbians overstates that degree to which the group's political power has increased since DOMA was enacted. Both when DOMA was enacted and still today, gay men and lesbians lack the political power to protect their interests in the political process.

B. Existing Laws Have Distorted the Political Process, Making Political Change Harder for Gay Men and Lesbians.

BLAG is incorrect to focus on recent events because this limited focus ignores the burdens imposed by the many existing laws that disadvantage gay men and lesbians. Existing laws that disfavor gay men and lesbians impose a significant obstacle to the group's ability to participate in the political process. Rather than operating on a level playing field, gay men and lesbians must first undo the harmful effects of existing laws before they can even attempt to pass laws benefiting the group.

When existing laws disadvantage gay men and lesbians, the group cannot protect their interests simply by blocking future unfavorable legislation. Instead, they must repeal the existing laws, which is substantially more difficult than blocking a law from being enacted in the first place. For example, a group needs to gain support from only the president or a majority of one house of Congress to block a federal law from being enacted, whereas repealing a law requires agreement of the president and a majority of both the House and Senate. *See* U.S. Const. Art. I, §7.

Gay men and lesbians face an even greater hurdle in a majority of states. Thirty-one states have removed the issue of marriage for same-sex couples from the normal political process by amending their state constitutions to define marriage as limited to opposite-sex couples.[13] In these states, gay men and lesbians must amend the state constitution—which typically requires a super-majority vote or a ballot initiative—before they could attempt to achieve their goals through the normal legislative process.

This Court has long recognized that the Equal Protection Clause prohibits laws that "distort[] governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982). For example, this Court struck down a city ordinance that created a different—and more demanding—process for adopting housing antidiscrimination ordinances. *See Hunter v. Erickson*, 393 U.S. 385, 392-93 (1969). The Court explained that a state "may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* (citation omitted).

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[13] *See* Nat'l Conf. of State Legislatures, *Same-Sex Marriage and Domestic Partnerships on the Ballot*, *available at* http://www.ncsl.org/legislatures-elections/elections/same-sex-marriage-on-the-ballot.aspx.

In *Washington*, the Court considered a state law that permitted school districts to bus students to schools outside of their neighborhoods for almost any reason other than to promote school desegregation. 458 U.S. at 462-63. The Court held that the law violated the Equal Protection Clause because it "worked a major reordering of the State's educational decisionmaking process." *Id.* at 479. The Court explained that, "when the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice, the governmental action seriously 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.'" *Id.* at 486 (quoting *Carolene Products*, 304 U.S. at 153 n.4). As a result, the law at issue "implicate[d] the judiciary's special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" 458 U.S. at 486 (quoting *Rodriguez*, 411 U.S. at 28).

In *Romer*, this Court considered a challenge to an amendment to the Colorado Constitution prohibiting any government action to protect persons based on their sexual orientation. 517 U.S. at 631-33. The

Court noted that, because gay men and lesbians can "obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution," they were "forbidden the safeguards that others enjoy or may seek without constraint." *Id.* at 631. In holding that the law violated the Equal Protection Clause, the Court explained that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633.[14]

As these cases demonstrate, the Court should consider the way in which existing laws have distorted the political process. In 31 states, gay men and lesbians must first seek to amend the state constitution before they can resort to the normal legislative process to seek the ability to obtain a government marriage licenses. In light of these constitutional limitations, the Court should not ignore existing law by addressing the political power of gay men and lesbians based solely on recent events.

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[14] Because Colorado's attempt to "deem a class of persons a stranger to its laws" could not satisfy even rational basis review, the Court did not decide whether classifications based on sexual orientation are subject to heightened scrutiny. 517 U.S. at 635.

CONCLUSION

The Court should apply heightened scrutiny to DOMA because gay men and lesbians lack political power.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
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No. 12-307

In The
Supreme Court of the United States

◆

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR,
in her capacity as executor of the
estate of THEA CLARA SPYER, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

◆

BRIEF FOR AMICI CURIAE SCHOLARS OF THE CONSTITUTIONAL RIGHTS OF CHILDREN IN SUPPORT OF RESPONDENT EDITH WINDSOR ADDRESSING THE MERITS AND SUPPORTING AFFIRMANCE

◆

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

- I. DOMA AFFIRMATIVELY HARMS CHILDREN 6
  - A. The Children of Gay and Lesbian Parents Are an Important and Sizable Segment of Society 7
  - B. DOMA Deprives Children of Important Federal Benefits 9
  - C. DOMA Inflicts Psychological Harm on All Children with Gay or Lesbian Parents 13
- II. DOMA FAILS UNDER ANY LEVEL OF SCRUTINY BECAUSE IT PUNISHES CHILDREN BASED ON THE CONDUCT OF THEIR PARENTS 17
  - A. The Court's Treatment of Discrimination Against Non-Marital Children 18
  - B. The Court's Broader Concern with Discrimination Against Children 25
  - C. Moral Disapproval of the Parents' Relationship is Not a Permissible Basis for Punishing Children 27

CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES

Brown v. Board of Education, 347 U.S. 483 (1954) ... *passim*

Caban v. Mohammed, 441 U.S. 380 (1979) ... 31, 32, 33

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) ... 2, 27

Clark v. Jeter, 486 U.S. 456 (1988) ... 24

Heller v. Doe, 509 U.S. 312 (1993) ... 5

Lawrence v. Texas, 539 U.S. 558 (2003) ... 6, 34

Levy v. Louisiana, 391 U.S. 68 (1968) ... *passim*

Levy v. Louisiana, 250 La. 25 (1967) ... 20

Levy v. Louisiana, 192 So. 2d 193 (La. Ct. App. 1967) ... 20

Orr v. Orr, 440 U.S. 268 (1979) ... 31, 32

Nevada Dept. of Human Res. v. Hibbs, 538 U.S. 721 (2003) ... 31, 33

Palmore v. Sidoti, 466 U.S. 429 (1984) ... 3, 5, 28, 29

Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294 (D. Conn. 2012) ... 7, 11, 12

Pickett v. Brown, 462 U.S. 1 (1983) ... 17

Plyler v. Doe, 457 U.S. 202 (1982) ... *passim*

San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973) ... 17

U.S. v. Virginia, 518 U.S. 515 (1996) ... 31, 32

TABLE OF AUTHORITIES – Continued

Page

U.S. Dept. of Agric. v. Moreno, 413 U.S. 528 (1973) 6

Weber v. Aetna Cas. & Surety, 406 U.S. 164 (1972) .... *passim*

STATUTES

29 U.S.C. § 2601(b)(1) & (2) 10

29 U.S.C. § 2612(a)(1) 10

OTHER AUTHORITIES

1 WILLIAM BLACKSTONE, COMMENTARIES 19

Aff. of Gregory M. Herek, Ph.D., Mass. v. U.S. Dept. of Health and Human Services, 682 F.3d 1 (1st Cir. 2012) (No. 1:09-cv-11126-JLT), 2010 WL 604593 13

ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: *RHINELANDER V. RHINELANDER* AND THE LAW OF THE MULTIRACIAL FAMILY (forthcoming June 2013) 10

Brief of Appellee, Levy v. Louisiana, 391 U.S. 68 (1968) No. 508, 1968 WL 112826 20

Brief on the Merits for Respondent The Bipartisan Legal Advisory Group of the U.S. House of Representatives, United States v. Windsor, No. 12-307 (U.S. Jan. 22, 2013) .... *passim*

TABLE OF AUTHORITIES – Continued

Page

Brief for Intervener-Defendant-Appellant, Golinski v. U.S. Office of Pers. Mgmt., Nos. 12-15388, 12-15409 (9th Cir. June 4, 2012), 2012 WL 2132484 30

Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691 (2003) 31

Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 FORDHAM L. REV. 2733 (2008) 31

Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion – Legitimacy, Dual-Gender Parenting, and Biology*, 28 LAW & INEQ. 307 (2010) 30

Catherine Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2037519 .... 4, 20

Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C. L. L. REV. 81 (2011) 4

Gareth W. Cook, *Bastards*, 47 TEX. L. REV. 326 (1969) 19

GARY J. GATES AND JASON OST, THE GAY AND LESBIAN ATLAS (2004) 7

INTEREST OF AMICI CURIAE[1]

Amici, scholars and professors primarily of family law and the law of equal protection, submit this brief to respond directly to arguments advanced by the Bipartisan Legal Advisory Group (BLAG) that the Defense of Marriage Act (DOMA) is justified because it advances child welfare. Specifically, BLAG asserts that DOMA advances child welfare by: (1) providing a stable structure to raise unintended and unplanned offspring; (2) encouraging the rearing of children by their biological parents; and (3) promoting childrearing by both a mother and a father.[2] Each of these purported justifications expresses and enforces a bare preference for the children of opposite-sex couples as the only children entitled to the type of permanency, stability and so-called "ideal" parenting arrangements that DOMA allegedly confers. These articulated justifications reveal that DOMA's real function is to draw invidious distinctions between families headed by opposite-sex parents and families headed by same-sex parents, and, by implication, between the children in these families.

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person other than *amici* and their academic institutions contributed monetarily to the preparation or submission of this brief. This amicus brief is filed pursuant to the blanket consent executed by the parties and with the consent of Windsor.

[2] Brief on the Merits for Respondent The Bipartisan Legal Advisory Group of the U.S. House of Representatives at 44-49, *United States v. Windsor*, No. 12-307 (U.S. Jan. 22, 2013) (hereinafter Brief for Respondent).

Amici's scholarship refutes the validity of BLAG's child welfare justifications by delineating the legal, economic and psychological injuries that DOMA inflicts on children with same-sex parents. Amici's scholarship further demonstrates that DOMA is categorically impermissible under this Court's equal protection jurisprudence because it punishes children for the conduct of their parents.

◆

SUMMARY OF ARGUMENT

BLAG acknowledges that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike,"[3] and yet DOMA patently violates this most fundamental understanding of the equal protection guarantee. The children of same-sex married couples are *identically situated* to the children of opposite-sex married couples, in terms of their need for and entitlement to the types of family-supporting governmental rights and benefits regulated by DOMA. Yet DOMA imposes permanent class distinctions between these two groups of children by penalizing the children of same-sex couples merely because their parents are of the same sex.

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[3] Brief for Respondent at 46-47 (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985)).

Further, this Court has made clear that the government may not punish children (by, for example, denying them government-conferred benefits[4]) based on moral disapproval of the parents' relationship, or in an effort to regulate the parents' conduct.[5] DOMA punishes children for conduct over which they have no control, which bespeaks invidious discrimination rather than an effort to attain legitimate governmental objectives.[6]

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[4] *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding state law that denied recovery to illegitimate child for the wrongful death of the child's mother violated equal protection).

[5] *Plyler v. Doe*, 457 U.S. 202, 219-20 (1982) (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)) (holding that arguments in support of withholding state benefits to illegal entrants do not apply to children of illegal entrants because they cannot affect their parents' conduct or their own status).

[6] *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding that private biases and the possible injury they might inflict are not permissible considerations for removal of an infant child from the custody of his mother); *Weber v. Aetna Cas. & Surety*, 406 U.S. 164, 175 (1972) (striking down state law denying workers' compensation proceeds to non-marital children, explaining "[t]he status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illegal and unjust."); *Plyler*, 457 U.S. at 219-20 (striking down Texas law that withheld state education funds from school districts that enrolled children of Mexican descent not legally admitted to the United States, in part, because "children can neither affect their parents' conduct nor their own status."); *Levy*, 391 U.S. at 72 ("We conclude that it is invidious to discriminate against [non-marital children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.").

Amici advance two main points. First, DOMA affirmatively harms children. Although advocates and commentators have thoroughly documented the ways in which DOMA disadvantages same-sex couples, less attention has been paid to the class of children adversely affected by DOMA's discriminatory framework.[7] As demonstrated below, a significant number of children in the United States are being raised by same-sex couples, as well as by single gay and lesbian parents. DOMA inflicts immediate, concrete injuries on a subset of these children, namely: those whose families would otherwise benefit from federal family-supporting programs, but whose parents' marriages, while recognized on the state level, are rejected at the federal level. Throughout this brief, this subset of children will be referenced as "the excluded class of children."[8] In addition to exacting an impermissible legal and economic toll on the excluded class of children, DOMA also stigmatizes and psychologically harms all children of same-sex couples by declaring their families inferior to those headed by opposite-sex couples.[9] Far from promoting the welfare of children, DOMA does nothing to help the children of opposite-sex couples, while actively harming the children of same-sex couples. Thus, this purported state interest cannot provide even a rational basis for the law, as it finds no "footing in the realities of the subject addressed by the legislation."[10]

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[7] For discussions of same-sex marriage from the perspective of children, *see* Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of the Child*, 102 W. VA. L. REV. 411, 412 (1999) ("[t]he preponderance of the dialogue about same-sex marriage concentrates on the adult partners and their derivative benefits from the relationship; precious little focus is given to the rights of a child who may be a product of a same-sex relationship"); Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 586 (2005); Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C. L. L. REV. 81, 85-89 (2011); Ruth Butterfield Isaacson, *"Teachable Moments": The Use of Child-Centered Arguments in the Same-Sex Marriage Debate*, 98 CAL. L. REV. 121, 131-51 (2010); Catherine Smith, *Equal Protection for Children of Same-Sex Parents*, 90 Wash. U. L. Rev. (*forthcoming* 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2037519.

Second, DOMA fails in its entirety because it serves an impermissible function: it punishes the excluded class of children based on nothing more than moral disapproval of their parents' conduct.[11] This Court has repeatedly struck down classifications that are based in the majority's bare moral disapproval of a disfavored social group as a violation of the Equal Protection Clause.[12] Further, laws are simply not permitted to permanently place a disfavored group of children into a disadvantaged class.[13]

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[8] Specifically, this class of children includes children of same-sex couples who are lawfully married in one of the nine marriage-equality states or the District of Columbia.

[9] *Cf. Brown v. Board of Education*, 347 U.S. 483, 494 (1954) ("The impact [of racial segregation on children] is greater when it has the sanction of law; for the policy of separating the races is usually seen as denoting the inferiority of the negro group.") (quoting the lower court).

[10] *Heller v. Doe*, 509 U.S. 312, 321 (1993).

[11] *Weber*, 406 U.S. at 171; *Palmore*, 466 U.S. at 433.

ARGUMENT

I. DOMA AFFIRMATIVELY HARMS CHILDREN

The children of same-sex couples are an important and increasingly sizable segment of our society, in particular in those states that permit same-sex couples to marry, where one-third of same-sex married couples are raising children.[14]

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[12] *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("the fact that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.") (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). *See also* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 921-24 (2012) (discussing *Lawrence* and moral disapproval).

[13] *See Plyler*, 457 U.S. at 208 (striking law that "permanently locked" a disfavored group of children "into the lowest socio-economic class.").

[14] Sara Wildman, Children Speak for Same-Sex Marriage, N.Y. Times (Jan. 20, 2010), http:// www.nytimes.com/2010/01/21/fashion/21kids.html; Williams Institute, United States Census Snapshot: 2010, at 3, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapsho-US-v2.pdf.

BLAG asserts that DOMA advances child welfare by: (1) providing a stable structure to raise unintended and unplanned offspring; (2) encouraging the rearing of children by their biological parents; and (3) promoting childrearing by both a mother and a father.[15] In fact, the real effect of DOMA is to place the excluded class of children in a legal, economic and social underclass[16] and to stigmatize all children with gay or lesbian parents.

A. The Children of Gay and Lesbian Parents Are an Important and Sizable Segment of Society

An October 2011 study, "All Children Matter," estimated that "roughly two million children are being raised by LGBT parents."[17] According to the United States Census, twenty-eight percent of cohabitating same-sex couples are raising at least one child under the age of eighteen.[18] Of these, it is estimated that between 300,000 to one million children are being raised by same-sex couples; the remainder are children being raised by single gays and lesbians.[19] "Contrary to stereotypes, children being raised by same-sex couples are twice as likely to live in poverty as children being raised by married heterosexual households."[20] Further, same-sex couples of color are raising children at a much higher rate than white same-sex couples.[21]

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[15] Brief for Respondent at 44-49.

[16] *See Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 338 (D. Conn. 2012) (noting DOMA's effect of "limiting the resources, protections, and benefits available to children of same-sex parents.").

[17] *See* MOVEMENT ADVANCEMENT PROJECT ET AL., ALL CHILDREN MATTER: HOW LEGAL AND SOCIAL INEQUALITIES HURT LGBT FAMILIES ("ALL CHILDREN MATTER"), 1 (2011), *available at*: http://www.americanprogress.org/issues/2011/10/pdf/all_children_matter.pdf.

[18] GARY J. GATES AND JASON OST, THE GAY AND LESBIAN ATLAS 45 (2004).

As for the children of families excluded by Section 3 of DOMA, while there is no consensus as to exact numbers, it is estimated that one-third of same-sex couples in marriage states are raising children.[22] These numbers are likely to increase as more states extend the institution of marriage to include their gay and lesbian residents.

As discussed below, DOMA categorically excludes these children from enjoying the family-supporting rights, benefits and protections provided by the federal government to other families. Given the substantial and adverse impact of DOMA on the children of same-sex couples, BLAG's contention that excluding these families promotes the interests of children is patently irrational.

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[19] Todd Brower, *It's Not Just Shopping, Urban Lofts and the Lesbian Gay-by Boom: How Sexual Orientation Demographics Can Inform Family Courts*, 17 AM. U. J. GENDER SOC. POL'Y & L. 1, 27 (2009).

[20] ALL CHILDREN MATTER at 1.

[21] *Id.*

[22] Sara Wildman, Children Speak for Same-Sex Marriage, N.Y. Times (Jan. 20, 2010), http://www.nytimes.com/2010/01/21/fashion/21kids.html; Williams Institute, United States Census Snapshot: 2010, at 3, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapsho-US-v2.pdf.

B. DOMA Deprives Children of Important Federal Benefits

BLAG concedes – as it must – that inclusion in the safety net of federal family-supporting rights and benefits is important to the stability of children.[23] Indeed, it largely defends DOMA on the basis of the benefits it creates for children – although BLAG fails to explain how excluding some families and not others advances this goal.[24]

BLAG's argument is premised on the notion that only *some* children are entitled to these benefits – children of opposite-sex couples. Yet children in the excluded class are deserving of these protections as well. These children face the entire range of experiences that define family life, including family medical crises, divorce, parental lay-offs, and parental death.[25]

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[23] Brief for Respondent at 3-4.

[24] *Id.* at 44-49 (listing as the reasons for supporting DOMA that it supports providing a stable structure in which to raise children).

[25] *See Weber*, 406 U.S. at 171 ("Both the statute in *Levy* and the statute in the present case involved state created compensation schemes, designed to provide close relatives and dependents

(Continued on following page)

Tragically, when these events take place, DOMA denies these children access to resources designed to serve as safety nets to protect children within family units – benefits that children with opposite-sex married parents obtain as a matter of course.[26]

The exclusion of same-sex married couples from over 1,100 federal marital rights and benefits has a direct and harmful economic impact on their children. For example, their families are denied the protections of the Family Medical Leave Act, which was enacted to help "balance the demands of the workplace with the needs of families, to promote the stability and economic security of families."[27] The FMLA permits eligible employees to take up to twelve weeks of unpaid leave to care for a child, spouse, or parent with a serious health condition.[28] It is beyond argument that the children of married same-sex couples have the same interest in family security and stability as the children of married opposite-sex couples. Excluding same-sex married couples from the FMLA subjects the child and the entire household to

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of a deceased a means of recovery for his often abrupt and accidental death").

[26] For a list of privileges that benefit heterosexual couples and opposite-sex parents, *see* Angela Onwuachi-Willig, According to Our Hearts: *Rhinelander v. Rhinelander* and the Law of the Multiracial Family 159-61 (Yale University Press 2013).

[27] 29 U.S.C. § 2601(b)(1) & (2).

[28] 29 U.S.C. § 2612(a)(1).

"greater stress in attempting to cope with the serious illness of a parent."[29]

The excluded children also are prevented from obtaining federal health insurance under the Federal Employees Health Benefits Program (FEHB), which offers coverage to federal civilian employees and their family members. DOMA prohibits same-sex married spouses from obtaining coverage, once again, exacting an economic toll on the same-sex married household, diverting economic resources from child-rearing, and creating a burden that opposite-sex married couples and their children do not carry.[30]

In addition, DOMA precludes same-sex married couples from filing joint tax returns. These couples pay more in taxes than their opposite-sex counterparts, "depleting the resources available to provide for their children."[31]

Finally, DOMA denies same-sex married couples Social Security payments if a spouse dies or becomes disabled, reducing and/or diverting funds that would be used to raise and support the couples' children.[32]

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[29] *Pedersen*, 881 F. Supp. 2d at 339.

[30] *Id.* at 299-300 (Plaintiffs Damon Savoy and John Weiss, married under Connecticut law, were denied FEHB, diverting funds from their three adopted children to cover health insurance for Weiss, their full-time stay-at-home dad).

[31] *Id.* at 339. Plaintiffs Suzanne Artis and Geraldine Artis, raising three children together, were denied the marital benefit of filing their taxes jointly. *Id.* at 304.

These are merely a few examples of countless scenarios revealing DOMA's adverse effect on the children of same-sex married couples. As the district court in *Pedersen v. OPM* found:

> DOMA is inimical to its stated purpose of protecting children . . DOMA does not alter or restrict the ability of same-sex couples to adopt children, a right conferred by state law, and therefore, DOMA's denial of federal marital benefits to same-sex married couples in fact leads to significant unintended and untoward consequences by limiting the resources, protections and benefits available to children of same-sex parents.[33]

Denial of these protections is not a one-time injury; rather, this denial over the course of a child's lifetime is cumulative and disrupts one of the primary functions of family units – to provide stability (financial and otherwise) for future generations.

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[32] *See Id.* at 303 (surviving spouse of same-sex couple denied Social Security lump-sum death benefit); Brief for Respondent at 9 (quoting Senator Gramm as stating that without DOMA, state recognition of same-sex marriage will create new survivor benefits under Social Security).

[33] *Id.* at 338. Amici do not necessarily agree that DOMA's consequences for children of same-sex parents were "unintended," but, regardless of the original intent behind DOMA, BLAG's justifications for the law explicitly state a preference for the welfare of children of opposite-sex parents over the welfare of children of same-sex parents.

C. DOMA Inflicts Psychological Harm on All Children with Gay or Lesbian Parents

In addition to the direct legal and economic harm DOMA inflicts on children with same-sex married parents, DOMA also inflicts psychological harm by symbolically expressing the inferiority of families headed by same-sex parents and the children in those families.

BLAG's characterization of DOMA as a child-protective measure that promotes "responsible procreation and child-rearing" is at odds with the adverse impact of the legislation on all children with gay or lesbian parents. The effect and purpose of DOMA is to stigmatize the families of which these children are a part, and, by extension, to stigmatize these children.[34] As Dr. Gregory Herek (Professor of Psychology at U.C. Davis, who is known for his extensive empirical work investigating the impact of structural prejudice in the context of sexual orientation) has observed:

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[34] Aff. of Gregory M. Herek, Ph.D. at ¶ 29, *Mass. v. U.S. Dept. of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012) (No. 1:09-cv-11126-JLT), 2010 WL 604593 ("*Stigma* refers to an enduring condition, status, or attribute that is negatively valued by society . . . and that consequently disadvantages and disempowers those who have it.").

> Denying federal recognition to married same-sex couples devalues and delegitimizes their relationships. It conveys the government's judgment that committed intimate relationships between people of the same sex . . . are inferior to heterosexual relationships, and that the participants in a same-sex relationship are less deserving of society's recognition than heterosexual couples. . . . To the extent that laws differentiate majority and minority groups and accord them differing statuses, they highlight the perceived "differentness" of the minority and thereby promote and perpetuate stigma.[35]

DOMA communicates to the children of same-sex parents that their families, and the relationships within their families, are morally objectionable and functionally deficient.

This Court has previously considered state action that stigmatizes children relevant to assessing the constitutionality of such state action. Highlighting the adverse psychological effects of de jure segregation on black children, for example, a unanimous Court announced in *Brown v. Board of Education*:[36]

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their

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[35] Aff. of Gregory M. Herek, Ph.D. at ¶¶ 28, 30.

[36] 347 U.S. 483 (1954).

> status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.[37]

Children of same-sex parents, like the victims of racial segregation, suffer the harmful psychological effects of the condemnation of their families, which, as the Court noted in *Brown*, is compounded by the law's sanction of this discrimination, and denotes the inferiority of their families.

Courts have acknowledged psychic harm to children as a constitutionally relevant consideration in other contexts. For example, in *Plyler v. Doe*,[38] the Court examined the constitutionality of a Texas statute authorizing local school districts to deny enrollment to undocumented immigrant children. The Court described the effect of the law as levying an "inestimable toll . . . on the social, economic, intellectual, and psychological wellbeing of the individual."[39] The Court went on to emphasize the relevance of the law's harmful impact on children to its constitutionality, stating:

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[37] *Id.* at 494 (quoting the lower court).

[38] 457 U.S. 202 (1982).

[39] *Id.* at 222

> Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. . . . In determining the rationality of § 21. 031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.[40]

This Court need not find that discrimination against children of same-sex parents is identical to the discrimination against black children in *Brown* or immigrant children in *Plyler* in every respect. What is clear from these cases, however, is that the stigma a discriminatory law imposes – particularly on children – is a worthy consideration when analyzing the constitutionality of that law.

By categorically refusing to recognize the legally sanctioned relationships of same-sex couples, DOMA deprives children in these families of important, family-supporting benefits that they would otherwise enjoy. Further, by declaring that the children of same-sex couples are somehow less worthy than the children of opposite-sex couples, DOMA stigmatizes all children with gay or lesbian parents.

DOMA treats families headed by same-sex couples as second-class families, and thereby relegates children in these families to second-class status relative to their peers. The assertion that DOMA is justified by a legitimate or important governmental interest in protecting children is thoroughly undermined by the reality that DOMA stigmatizes same-sex families and inflicts psychological harm on the children of such families, while purporting to protect children generally.

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[40] *Id.* at 223-24

II. DOMA FAILS UNDER ANY LEVEL OF SCRUTINY BECAUSE IT PUNISHES CHILDREN BASED ON THE CONDUCT OF THEIR PARENTS

The Court's equal protection jurisprudence has expressed a consistent, special concern for discrimination against children.[41] Why? Because discrimination against children always necessarily implicates two of the Equal Protection Clause's core values: promoting a society in which one's success or failure is the result of individual merit,[42] and discouraging the creation of permanent class or caste distinctions.[43]

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[41] *See Pickett v. Brown*, 462 U.S. 1, 7 (1983) (noting explicitly a "special concern" for illegitimate children); *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 111 (1973) (Marshall, J., dissenting) (stating that the Court has a "special interest" in education because it is the "principal instrument in awakening the child" to cultural values, preparing children for professional training, and helping children adjust to the environment. (quoting *Brown*, 347 U.S. at 493)).

[42] *See Plyler*, 457 U.S. at 222. *See also* Pollvogt at 926 (identifying meritocracy as core equal protection value).

[43] *See Plyler*, 457 U.S. at 234 (Blackmun, J., concurring). *See also* Pollvogt at 926 (discussing goal of Equal Protection Clause to eliminate laws that tend to create social castes).

Where laws function to place children in a distinct, disadvantaged class based on the conduct of their parents, these principles are violated.[44]

DOMA directly controverts these important prohibitions. Through its own proffered justifications for the law (that is, the notion that DOMA promotes child welfare), BLAG makes clear that DOMA not only expresses and enforces a preference for opposite-sex couples over same-sex couples, but also expresses and enforces a preference for the *children* of opposite-sex couples over the *children* of same-sex couples. Thus, BLAG's justifications directly implicate this Court's lengthy history of protecting children against such unfair (and inherently invidious) discrimination.

A. The Court's Treatment of Discrimination Against Non-Marital Children

This Court has consistently expressed special concern with discrimination against children – in particular protecting their right to self-determination and to flourish fully in society, without being hampered by legal, economic and social barriers imposed by virtue of the circumstances of their birth.[45] This concern is perhaps most strongly expressed in the Court's treatment of non-marital children.

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[44] *Plyler*, 452 U.S. at 219-20.

[45] *See Weber*, 406 U.S. at 175 (stating that condemning a child for the actions of his parents is "illogical and unjust."); *Levy*, 391 U.S. at 72 (holding that it is invidious to discriminate against illegitimate children for the actions by people over which they have no control).

The United States has a long history of discrimination against children born to unmarried parents.[46] Because of society's moral condemnation of their parents' conduct, they were denied legal and social benefits to which marital children were entitled. They could not inherit property; further, they were not entitled to financial parental support, wrongful death recovery, workers' compensation, social security, and other government benefits.[47]

In the early 1940s, criticism of the treatment of non-marital children began to take root and became a part of the political and legal debates of the civil rights movement.[48] In 1968, Professor Harry Krause and civil rights lawyer Norman Dorsen advanced child-centered arguments in *Levy v. Louisiana*, the first equal protection challenge on behalf of nonmarital children.[49]

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[46] 1 WILLIAM BLACKSTONE, COMMENTARIES *447 ("rights [of a non-marital child] are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody."); Gareth W. Cook, *Bastards*, 47 TEX. L. REV. 326, 327 n.11 (1969). *But see Levy*, 391 U.S. at 70 ("We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment.).

[47] *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma and Discrimination Against Non-marital Children*, 63 FLA. L. REV. 345, 346-47 (2011).

[48] Martha Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 90 (2003)

Louise Levy, an unmarried African American mother with five young children, died from the medical malpractice of a state hospital.[50] Thelma Levy, Louise's sister, sued Louisiana on behalf of the Levy children, who were prohibited from a "right to recover" because they were born outside of marriage.[51] The Louisiana Court of Appeals affirmed the trial court's dismissal of the children's claim on the grounds that they were not "legitimate," insofar as "morals and general welfare . . . discourage[ ] bringing children into the world out of wedlock."[52]

In a groundbreaking legal victory for children, this Court reversed. The Court, citing *Brown*, explained its departure from its normal practice of deferring to legislative decisions: "we have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side."[53] The Court determined Louisiana's actions were driven by invidious discrimination because the child's status as "illegitimate" was unrelated to the injury to the mother.[54]

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[49] Brief of Appellee, *Levy v. Louisiana*, 391 U.S. 68 (1968) No. 508, 1968 WL 112826; *see also*, Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. (*forthcoming* 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2037519.

[50] John C. Gray and David Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1, 2-3 (1969).

[51] *Id.* at 3.

[52] *Id.* (quoting *Levy v. Louisiana*, 192 So. 2d 193, 195 (La. Ct. App. 1967)). The Louisiana Supreme Court denied certiorari because it found the Court of Appeals made no error of law. *Levy v. Louisiana*, 250 La. 25 (1967).

Four years after Levy, in *Weber v. Aetna Casualty & Surety Co.*,[55] this Court struck another blow to government conduct that penalized children based on moral disdain for the parents' conduct. Henry Clyde Stokes had died of work-related injuries. At the time of his death, he lived with Willie Mae Weber.[56] Stokes and Weber were not married, but had five children.[57] One of the children was born to Stokes and Weber, while four others had been born to Stokes and his lawful wife, Adlay Jones, who had previously been committed to a mental hospital.[58] Weber and Stokes' second child was born shortly after Stokes' death.[59]

The four marital children filed a workers' compensation claim for their father's death, while Willie Mae Weber sought compensation benefits on behalf of the non-marital children.[60] Louisiana law awarded workers' compensation proceeds to a deceased worker's children born of his marriage, while the children born outside the marriage were denied those same proceeds.[61]

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[53] *Levy*, 391 U.S. at 71.

[54] *Id.* at 72; *see also* Plyler, 457 U.S. at 216.

[55] 406 U.S. 164 (1972).

[56] *Id.* at 165.

[57] *Id.*

[58] *Id.*

[59] *Id.*

Once again, this Court reversed the Louisiana Supreme Court's decision, which had allowed laws to penalize non-marital children based on their parents' conduct. The Court articulated a principle that is now well-established: treating children born outside of marriage differently than those born inside it is impermissible discrimination.[62] The Court explained that marital and non-marital children were identically situated with respect to their interest in these benefits: "An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged."[63]

Weber, the most well-known and cited non-marital status case, reiterated that a state may not express its moral objection of parental conduct by withholding government benefits from the child. To do so places the child at an economic disadvantage for conduct over which the child has no control. In *Weber*, the Court conceded that the state's interest "in protecting 'legitimate family relationships'" was weighty.[64] The Court acknowledged that "the regulation and protection of the family unit have indeed been a venerable state concern."[65] Importantly, the Court did not "question the importance of that interest" but did question "how the challenged statute will promote it."[66] The Court ultimately concluded that "[t]he state interest in family relationships is not served by the statute"[67] explaining, "[t]he inferior classification of unacknowledged illegitimates bears, in this instance, no relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve."[68]

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[60] *Id.* at 165-66.

[61] *Id.* at 175-76.

[62] *Id.* at 169.

[63] *Id.*

In other words, while promoting marriage and childbirth within marriage may be a valid state interest in the abstract, the Court rejected the contention that this interest is advanced by excluding a group of children who have an identical interest in the benefits at issue, simply because that group of children is disfavored.

Similarly, although it is unusual for the federal government to be in the business of regulating marriage at all, BLAG's purported concern for promoting childbirth in marriage may appear to be a superficially legitimate governmental interest. But it is unclear how excluding families headed by *married* same-sex couples advances this interest. Protecting the family unit is one matter; expressing a bare preference for one type of family is another.

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[64] *Id.* at 173.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 175.

[68] *Id.*

In light of this history and legal precedent,[69] it is apparent that BLAG's argument that DOMA somehow protects children suffers from the same, fatally flawed reasoning that had been used to justify discrimination against non-marital children. BLAG seeks to permanently exclude an entire class of children from access to family-supporting federal benefits because it finds their parents' conduct to be objectionable. This is not a sufficient basis for such profound discrimination.

The rationales articulated in *Levy* and *Weber* formed early equal protection jurisprudence and spoke to the importance of the social and economic rights unique to children.[70] That the history of discrimination at issue in *Levy* and *Weber* turned on the distinction between marital and non–marital children (as compared to the distinction drawn by DOMA between children of same-sex married parents and children of opposite-sex married parents) does not insulate BLAG's justifications from a determination that DOMA violates the values that animate the Equal Protection Clause. The fact that DOMA purports to promote "legitimate family relationships" by preferring some children over others is an insufficient justification for the discrimination it enacts and the harms it inflicts.

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[69] Between 1968 to 1986, this Court heard more than a dozen cases challenging laws that disadvantaged non-marital children, ultimately holding that this classification was of such concern that differential treatment of non-marital children warranted intermediate scrutiny. *See Clark v. Jeter*, 486 U.S. 456, 465 (1988).

[70] *See* Laurence C. Nolan, *"Unwed Children" and Their Parents Before the United States Supreme Court from Levy to Michael H.: Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1, 28 (1999).

B. The Court's Broader Concern with Discrimination Against Children

The Court has additionally expressed special concern about unfair discrimination against children in other contexts. Specifically, *Weber*'s moral and jurisprudential clarity about discrimination against children was echoed years later in *Plyler v. Doe*.[71] At issue in *Plyler* was a state law that sought to deny public education to the children of undocumented immigrants. In deciding the case, the Court relied heavily on the factual findings of the district court to the effect that (1) the law did nothing to improve the quality of education in the state and (2) it instead tended to "permanently lock[] the children of undocumented immigrants into the lowest socio-economic class."[72]

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[71] 457 U.S. 202 (1982).

The Court highlighted the foundational mission of the Equal Protection Clause: "to work nothing less than the abolition of all caste-based and invidious class-based legislation."[73] To be sure, not all laws that distinguish between groups fall under this prohibition. But laws that determine the legal, economic and social status of children, based on the circumstances of their birth, surely do. As the Court explained in Plyler, "[l]egislation imposing special disabilities upon groups disfavored *by virtue of circumstances beyond their control* suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."[74]

The Court went on to emphasize that, even though it was arguably permissible to disapprove of the presence of undocumented immigrants in the United States, this concern did not justify "imposing disabilities on the minor *children* of illegal immigrants."[75] In support of its holding, the Court announced, "Even if the state found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[76] Thus, discrimination against children is unjust in part because it contravenes "one of the goals of the Equal Protection Clause . . . [which is] the abolition of governmental barriers to advancement on the basis of individual merit."[77]

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[72] *Id.* at 208.

[73] *Id.* at 213.

[74] *Id.* at 216 n.14 (emphasis added).

[75] *Id.* at 219-20.

The Equal Protection Clause mandates that those who are similarly situated be treated alike.[78] The *Plyler* Court implemented this mandate by determining whether the children of undocumented immigrants were different *in a way that was relevant to children's interest* in receiving an education. Similarly, the relevant inquiry with respect to DOMA is whether the children of married same-sex couples are different *in a way that is relevant to their interest* in benefitting from the myriad family-supporting programs the government provides to promote stability and opportunity in our society. The answer is unequivocally "no."

C. Moral Disapproval of the Parents' Relationship is Not a Permissible Basis for Punishing Children

Finally, the Court has gone so far as to categorically reject moral disapproval of parental conduct and choices, even when enforcing such disapproval may, at the time, be viewed by government decision makers as serving the best interests of the child. In *Palmore v. Sidoti*,[79] the Court took the unusual step of reviewing a state family court's custody award. Following the divorce, the mother in the case was awarded custody of the couple's infant child. Both the father and the mother were white. Subsequent to the divorce, the mother entered into a relationship with and married a black man. The father sought custody of the child based on these "changed circumstances."

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[76] *Id.*

[77] *Id.* at 222.

[78] *Cleburne*, 473 U.S. at 439 (citing *Plyler*, 457 U.S. at 202).

The family court explicitly found that there was no concern about either the mother's or the stepfather's parental fitness. Nonetheless, the court took to heart the recommendation of a counselor, who expressed concern about the "social consequences" for a child being raised in "an interracial marriage." Specifically, the counselor opined:

> "The wife [petitioner] has chosen for herself and for her a child, a life-style unacceptable to the father *and to society* . . . The child is, or at school age will be, subject to environmental pressures not of choice."[80]

On this basis, "the [family] court concluded that the best interest of the child would be served by awarding custody to the father."[81] While acknowledging that the father's disapproval of the relationship was not a sufficient basis for awarding him custody, the family court determined that because society did not yet fully accept interracial relationships, the child would inevitably "suffer from . . . social stigmatization."[82] On this basis, the family court awarded custody to the father.

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[79] 466 U.S. 429 (1984).

[80] *Id.* at 431.

[81] *Id.*

This Court applied strict scrutiny to the family court's decision, and concluded that the stated interest in serving the best interests of the child was "a duty of the highest order."[83] However, the Court's chief concern was in regard to the actual *function* of the ruling, which was to give legal effect to private bias.[84] The Court held that the family court's decision, which determined the rights of the child based on societal disapproval of the parents, violated equal protection, famously stating: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[85]

Here, DOMA denies children benefits by giving effect to private bias in two different ways. First, as detailed above, it gives effect to private bias against same-sex couples. Second, as discussed below, it gives effect to private bias regarding impermissible gender-role stereotypes in parenting.

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[82] *Id.*

[83] *Id.* at 433.

[84] *See id.* at 433.

[85] *Id.*

BLAG baldly asserts that one of the justifications for DOMA is that DOMA serves to promote "childrearing by both a mother and a father,"[86] which it considers an optimal parenting situation. BLAG grounds the claim that opposite-sex parenting is superior in "common sense" and "the experience of countless parents."[87] This, according to BLAG, represents a legitimate state interest, because "it is rational for the federal government to encourage childrearing in situations in which children have a mother and a father," because there are "biological differentiation[s] in the roles of mothers and fathers" and "typical differences between men and women in parenting style, size and voice tone."[88]

The insistence that "opposite-sex parenting" necessarily leads to differentiation in parental roles is inescapably grounded in impermissible gender-role stereotyping. "The gender-based assumptions that women and men bring inherent differences to child-rearing and parental responsibilities – differences which render same-sex couples incapable of successful child-rearing by comparison – rest on gender stereotyping, as scholars have explained."[89]

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[86] Brief for Respondent at 48.

[87] Brief for Respondent at 50.

[88] *See* Brief for Intervenor-Defendant-Appellant at 56, *Golinski v. U.S. Office of Pers. Mgmt.*, Nos. 12-15388, 12-15409 (9th Cir. June 4, 2012), 2012 WL 2132484.

[89] Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion*

(Continued on following page)

It is well established that laws may not rely on overbroad generalizations about different talents, capacities, or preferences of males and females.[90] Assumptions about expected parenting roles that men and women must or should perform based on gender alone falls squarely within the gender stereotyping that has been deemed impermissible in equal protection law, including in decisions about parents and parenting.

For example, in *Caban v. Mohammed*,[91] the Court struck down a New York law that permitted unwed mothers to block the adoption of their children by

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– *Legitimacy, Dual-Gender Parenting*, 28 LAW & INEQ. 307, 326 (2010). *See also* Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 FORDHAM L. REV. 2733, 2768 ("The normative notion[] that optimal child care depends on something unique about mothers as women conflates social expectations and roles imposed on parents according to their sex/gender with seemingly natural and intrinsic characteristics that distinguish women from men (and vice versa)."); Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 725-48 (2003); Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL'Y 397, 413 (2000).

[90] *See U.S. v. Virginia*, 518 U.S. 515, 533; *see also Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 731 (2003) (recognizing "pervasive sex-role stereotype that caring for family members is women's work" an insufficient justification under Equal Protection Clause); *Orr v. Orr*, 440 U.S. 268, 279-80 (1979) (holding invalid justification based on state's preference for allocation of family responsibilities under which wife plays a dependent role).

[91] 441 U.S. 380 (1979).

denying consent to potential adoptees. The law did not, however, extend this consent-based objection to unwed fathers. The father in the case challenged the gender-based distinction as an equal protection violation after his parental rights were terminated. The mother argued that the distinction between unmarried mothers and unmarried fathers was based on a fundamental difference between the sexes, because "a natural mother, absent special circumstances, bears a closer relationship with her child" than a father.[92] This Court disagreed, finding that "maternal and paternal roles are not invariably different in importance," and, even if unwed mothers were closer to their newborn children, "this generalization concerning parent-child relations would become less acceptable . . . as the age of the child increased."[93] The court "reject[ed] . . . the claim that the broad gender-based distinction of [the statute] is required by any universal difference between maternal and paternal relations at every phase of a child's development."[94]

As the state did in *Caban*, BLAG here relies on impermissible, overbroad generalizations about different talents, capacities, or preferences of males and females.[95] This not only fails to provide a rational

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[92] *Id.* at 387-89.

[93] *Id.* at 389.

[94] *Id.*

[95] *See Virginia*, 518 U.S. at 533; *see also Orr v. Orr*, 440 U.S. 268, 279-80 (1979) (holding invalid justification based on state's

(Continued on following page)

basis for a law; it embodies a form of categorically impermissible discrimination.

In conclusion, the parallels between the states' arguments in support of discriminatory legislation in *Levy*, *Weber*, *Plyler*, *Palmore*, and *Caban* and BLAG's argument in support of DOMA are impossible to ignore. The reasoning and holdings in these cases instruct that it is impermissible for laws to disadvantage children for matters outside of their control, in an effort to control the conduct of their parents, or as an expression of moral disapproval of their parents' relationships and conduct.

◆

CONCLUSION

The child-welfare justifications advanced by BLAG in support of DOMA embody the very essence of invidious discrimination: BLAG contends, in essence, that families headed by married, opposite-sex couples are benefitted because families headed by married, same-sex couples are excluded from important rights and benefits – rights and benefits that serve the general social good of promoting family stability. Multiple courts have found that DOMA does

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preference for allocation of family responsibilities under which wife plays a dependent role); *and Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 731 (2003) (recognizing "pervasive sex-role stereotype that caring for family members is women's work" an insufficient justification under Equal Protection Clause).

nothing to advance the interests that BLAG invokes to justify the law. But it is beyond argument that DOMA serves to harm – both concretely and symbolically – the families it excludes, including the children in those families.

As this Court has thoughtfully observed,

> [T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[36]

Although BLAG may morally disapprove of same-sex marriage, DOMA's harmful impact on generations of children of same-sex couples renders it ineffective, unjust, and patently impermissible.

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[36] *Lawrence*, 539 U.S. at 579.

The judgment of the Second Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER AND BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF DOVID Z. SCHWARTZ AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* AND SUMMARY 1

ARGUMENT 1

- I. DOMA WITHSTANDS BOTH RATIONAL BASIS AND INTERMEDIATE SCRUTINY REVIEW 1
  - A. DOMA Section Three Is Rationally Related To The Legitimate Government Interest Of Upholding A Sound Public Policy Based On The Widely-Held Morality Of Its Citizens 3
  - B. DOMA Section Three Is Tailored To Uphold The Public Policy Rooted In Strong Foundations Of The Torah That Traditional Marriage Protects The Health And Well-Being Of The Country 4
    - 1. The Sources Of The Public Policy Of Traditional Marriage In The Torah 4
    - 2. This Court's Determination Of The National Policy For Marriage Will Define The Nation's Vision Of The Human Soul 8
- II. NEW YORK STATE DID NOT RECOGNIZE SAME-SEX MARRIAGES IN 2009, THE DATE DETERMINATIVE FOR PLAINTIFF'S STANDING 11

TABLE OF CONTENTS—Continued

Page

A. The Marriage Recognition Rule of New York Furthers a Policy of Avoiding the Repercussions of Bastardizing Children 14

B. Public Policy of New York Disfavored Same-Sex Marriage in 2009 15

III. THE COURT OF APPEALS IMPROPERLY APPLIED HEIGHTENED SCRUTINY TO THIS CASE 22

A. The Court Of Appeals Erred In Categorizing Gay Men And Lesbians As A "Suspect Class" Warranting Heightened Scrutiny Because The Group Lacks A Coherent, Objectively Verifiable "Immutable" Feature 23

B. The Court Of Appeals Erred In Categorizing Gay Men And Lesbians As A "Suspect Class" Warranting Heightened Scrutiny Because The Group Does Lack The Ability To Contribute A Certain Quality To Society 24

IV. THE ACT OF ENTERING INTO AND MAINTAINING A MARRIAGE INVOLVES A PUBLIC DECLARATION WITH SPECIFIC MEANING AND IS THUS TRADITIONAL MARRIAGE IS PROTECTED AS FREE SPEECH UNDER THE FIRST AMENDMENT 25

TABLE OF CONTENTS—Continued

Page

V. OVERTURNING DOMA WOULD IMPLY AN OVERRULING OF ALL STATE STATUTES DEFINING MARRIAGE AS A MAN AND A WOMAN....... 33

CONCLUSION 34

TABLE OF AUTHORITIES

CASES Page(s)

Bowen v. Gilliard, 483 US 587 (1987)............. 22

Boy Scouts of America v. Dale, 530 US 640 (2000) 27, 28, 29, 30, 31

Christian Legal Society v. Martinez, 130 S.Ct. 2971 (2010) 28, 29

City of Cleburne v. Cleburne Living Center, 473 US 432, 105 S.Ct. 3249.......................... 22

Davidson v. Ream, 97 Misc. 89, 161 N.Y.S. 73 (Sup.Ct. Saratoga County 1916), *affirmed*, 178 App. Div. 362, 164 NYS 1037, 178 AD 362 (1917) 16

Dougherty v. Equitable Life Assurance Society of U.S., 266 N.Y. 71, 193 N.E. 897 (1934) 16

Ehrlich-Bober & Co., Inc. v. University of Houston, 49 NY2d 574 (1980) 16

Elias W. Van Voorhis, Executors v. Sarah A. Brintnall, Ella Thiers, 86 N.Y. 18, 1881 WL 12957 (N.Y.) (1881)................................ 14

Godfrey v. Spano, 2009 NY Slip Op 08474 (New York 2009) 13 N.Y.3d 358 (2009) 13

Haag v. Barnes, 9 N.Y.2d 554, 216 N.Y.S.2d 65 (1961) 16

Hernandez v. Robles, 7 N.Y.3d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006) 18, 19, 20, 21

TABLE OF AUTHORITIES—Continued

Page(s)

Hollingsworth v. Perry, Case No. 12-144 27

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 US 557 (1995) 27, 30, 31, 32

In re May's Estate, Greenberg v. May, 280 A.D. 647, 117 N.Y.S.2d 345 (3rd Dept. 1952) 14, 17

J. Zeevi and Sons, Ltd. v. Grindlays Bank (Uganda) Ltd., 27 N.Y.2d 220, 371 N.Y.S.2d 892, 334 N.E.2d 168 (1975) 15

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CONSTITUTIONS Page(s)

N.Y. Const., Preamble 18

N.Y. Const. art. I, § 6 19

N.Y. Const. art. I, § 11 19

U.S. Const. amend. I .... *passim*

U.S. Const. amend. XIV, § 1 8

STATUTES

26 U.S.C. § 2056(A) 1

The Defense of Marriage Act, § 3, 1 U.S.C. § 7 .... *passim*

The Fugitive Slave Act of 1850, 9 Stat. 462.... 20

Marriage Equality Act, 2011 N.Y. Sess. Laws ch. 95 (A.8354) (McKinney) (N.Y. Dom. Rel. Law § 10-a (McKinney Supp. 2012)).... 32

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Page(s)

Supplemental Declaration of Lisa M. Diamond, Sept. 12, 2011, *Windsor v. United States*, 833 F.Supp.2d 394 (S.D.N.Y. 2012), *aff'd*, 699 F.3d 169 (2d Cir. 2012) 23

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INTEREST OF *AMICUS CURIAE* AND SUMMARY

This brief is submitted to the Court to present new information not raised by the parties related to an additional legitimate interest of the government rationally related to the enactment of the Defense of Marriage Act, and new information that provides an important interest of the government in upholding the Defense of Marriage Act. As an officer of the Court, the author of this brief is troubled by what may appear to be a less-than-robust development of the record and argument in this case, and the neglect of compelling bases of support for this law.[1]

This brief is submitted with consent of the parties.

ARGUMENT

I. DOMA WITHSTANDS BOTH RATIONAL BASIS AND INTERMEDIATE SCRUTINY REVIEW

This matter comes to the Court on review of the decision of the Second Circuit Court of Appeals, that Respondent Windsor was improperly denied a spousal deduction for federal estate taxes under 26 U.S.C. § 2056(A) due to the enforcement of the Section 3 of the Defense of Marriage Act 8 ("DOMA"), 1 U.S.C. § 7, that defined marriage, for Federal purposes, as the union of a man and a woman. The text of § 3 is as follows:

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[1] No counsel for a party authored this brief in whole or in part. No counsel or a party made any monetary contribution intended to fund the preparation or submission of the brief. Written consent to the filing of this brief has been received from all parties and filed with the Clerk of the Court.

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7. As a part of its analysis, the Court of Appeals found that Section 3 of DOMA is subject to intermediate scrutiny, ruling that homosexuals as a group qualify as a quasi-suspect class.

The Court's charter to defend the liberty of its citizens does not empower it to act as the final arbiter of existential truth. As the Court observed in *Lawrence v. Texas*, 539 U.S. 558 (2003) at 588, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." Nevertheless, with the Federal definition of marriage, this Court is not asked simply to decline to endorse a certain worldview that represents the traditional view of marriage. Striking down the Defense of Marriage Act will actively affirm and elevate another, competing value system in its place.

This brief is submitted to call attention to the Court additional information not raised by the parties. The decision of the Court of Appeals should be reversed based on the Defense of Marriage Act's rational relationship of its limitation of marriage to a man and a woman to the legitimate government interest of embodying the moral standard that defines the human species, and the important state interest of preserving the health and safety of the American people.

I respectfully submit that the laws of the majority voters in the majority of states that define marriage as a man and a woman are undergirded by the foundation of the Abrahamic religions, and can never be legitimately characterized as untenable bias. Furthermore, the health and well-being of the U.S. population is intimately connected to its intellectual and emotional integrity measured in part by its adherence to certain baseline of sexual conduct.

A. DOMA Section Three Is Rationally Related To The Legitimate Government Interest Of Upholding A Sound Public Policy Based On The Widely-Held Morality Of Its Citizens

This is not a mere appeal to history or tradition for its own sake, or a preference for continuity in the face of an uncertain future. Rather the moral laws recorded in the Torah are the headwaters from which flow a deep and abiding faith for countless millions of Americans. This knowledge may have taken on a variety of expressions based on the particular circumstances of the various peoples who adopted it. But the central moral values of the Torah form a vast uniting understanding of the true purpose and mission of mankind, and it continues to be an animating force to a large number of the body of the nation today.

No other institution greater embodies the idea of purpose, destiny and the future of the nation than marriage. Thus the Court's responsibility to act as stewards of this nation, upholding the public policy enacted by Congress is monumental.

I urge the Court to look outside the framework of the constitutional analysis as a closed system, and see the context of marriage in society. The definition of marriage currently held by major world religions with vast representation in the United States is based on Torah law which holds the conduct of homosexual relations to be antithetical to the well-being of individuals and society.

B. DOMA Section Three Is Tailored To Uphold The Public Policy Rooted In Strong Foundations Of The Torah That Traditional Marriage Protects The Health And Well-Being Of The Country

Many people see a moral responsibility to stand up, protect and vindicate the rights of any group of people who have been marginalized by society.

The compassion displayed by advocates for gay men and lesbians is commendable. But the position of supporters of traditional marriage have often been rejected as unenlightened bigotry. To supplement the record, I submit that the bases of the conception of traditional marriage, rooted in the Torah, reflect the ideal form of human relationships, and the promotion of that ideal is in keeping with the natural strengths and potentials of the human being. Section Three of DOMA, then, is precisely tailored to meet the important government interest of preserving the intellectual, emotional and physical health of the American people.

1. The Sources Of The Public Policy Of Traditional Marriage In The Torah

The human being is composed of two conflicting natures. Each person has a physical body that drives him or her to seek satisfaction of material needs. In this respect, the human being is similar to the animals. A human being also has a spiritual component, known as the soul, which allows her or him to rationally examine and understand the depths of the world. See Rabbi Moses Chaim Luzzato (Ramchal), *Derech Hashem* (*"The Way of G-d"*), Rabbi Aryeh Kaplan, trans., Part I, chapter 3, para. 2. (Feldheim Publishers)

> When an individual is born, he is almost completely physical, with the mind having only a very small influence. As he matures, his mind continues to gain influence, depending on the individual's nature. However, the physical does not automatically relinquish its influence and stop inclining the individual toward its way. The only means by which one can overcome the physical is by growing in wisdom, becoming versed in it and living by it. *Derech Hashem,* Part I, chapter 4, para. 2.

Every person has been created with the challenge to overcome the compulsion of the physical nature and conform his or her behavior to the spiritual standards by which the human race is judged. Implicit in the ethos of the Torah is the conviction that each and every person is created with a unique mission, purpose and challenges to face in this world.

There is a universal set of principles that define the nature of a human being. These laws outline the ideal conditions to develop the upper reaches of human potential, as well as the baseline standards by which people's lives are judged. These laws explain a code of conduct that preserves the intellectual and emotional fitness of human beings, just as anatomy and physiology define the physical blueprint of the entire human race.

The Seven Laws of the Children of Noah are a distinct body of legislation apart from the 613 commandments that are incumbent on the Jewish people. To that extent, the Torah is distinguished from other religious systems in that it does not expect the gentile world to become Jews. G-d Almighty taught these laws to the first human beings, and again instructed the prophet Noah who set out to rebuild the world after the Great Flood. The patriarchs of the Jewish people, Abraham, Isaac and Jacob attended the ancient academies of learning in the land of Canaan, and were personally taught this knowledge by Noah, Noah's son, Shem, and Shem's great-grandson Eyver (the progenitor of the "Hebrew" people). During the Egyptian bondage, the tribe of Levi safeguarded this knowledge of the mysteries of the world. Moses received the authority over Torah law on behalf of the Jewish people from G-d Almighty, Who formed them as a nation at Mount Sinai. The Code known as the Seven Laws of the Children of Noah, which represent the bedrock of civilization, were included in the canon of Torah law given over to the safekeeping of the Jewish people.

While there might appear to be logically sound ideas for these principles, observance of its guidelines is premised on a person's desire to serve the Creator, through the authority of the Torah given to Moses. Included among these guidelines are prohibitions against murder, theft and cruelty to animals. See *Babylonian Talmud, Tractate Sanhedrin* trans. by Rabbi Michael Weiner p. 56a5, Schottenstein Edition Artscroll/Mesorah Publications, (Brooklyn 1994).

In the narration of the life of the first people, the Torah records the prohibition of certain intimate relationships for all mankind. "Therefore a man should leave his mother and father and cling to his wife, and become one flesh." Torah, ***Braishis*** (book of ***Genesis***), translated by Rabbi Nosson Scherman, ***The Chumash: The Stone Edition***, page 15, chapter 2, verse 24 (Mesorah Publications, Brooklyn 1994). The Talmud explains each phrase of this statement to refer to a class of prohibited unions. See ***Babylonian Talmud, Tractate Sanhedrin***, page 58a3. The expression, "and cling," the Talmud explains, implies that a man should not lie with a man. Rabbi Shlomo ben Yitzchok, the medieval scholar whose explanations are universally accepted as definitive, published within the pages of Talmud itself, explains the connection, "and not with a man, for there's no clinging. On account of the fact that the one who is lying doesn't benefit, he doesn't become attached to him." ***Id.*** See also Rabbi Moshe ben Maimon (the Rambam, also known as Maimonides) in his codification of Torah law, ***Mishneh Torah***, Sefer Shoftim (Book of Judges), "Chapter 9: Hilchos Melachim U'Milchomotehem (Laws of Kings and Their Wars)", Rabbi Eliyhau Touger, p. 180-183 trans., (Moznaim Publishers, New York 1987) halacha (law) 5.

From these brief words, the Torah reveals the essence of the human personality. The underlying logic tells us that only that relationships where intercourse can involve both parties benefiting from the same act forms a "clinging" between them. This is not the case with homosexual acts, which cannot be experienced as mutual benefit, but rather only the partners servicing each other through turn-taking.

Based upon the natural affinity for male-female unions to result in stable, devoted relationships, marriage is rationally related to the legitimate state interest of fostering stable relationships to ensure the continuity of society. Conversely, an important state interest (meriting the ability to withstand heightened scrutiny) arises from the avoidance or minimization of those things that result from unstable relationships, including the increase of venereal disease (see below), to protect the physical, emotional and intellectual well-being of the American people.

Discussing the obligations incumbent upon all mankind, the Talmud (*Babylonian Talmud, Tractate Chullin*, vol. II p. 92a4-92b trans., Rabbi Mendy Wachsman, Mesorah Publications (Brooklyn, 2003)) indicates that one of the few remaining merits of the gentile world is that they don't recognize same-sex marriage (called *kesuba l'zecharim*, a "marriage contract for males"), as well as they don't weigh out human meat in the marketplaces. Rabbi Shlomo ben Yitzchok (Rashi) explains the meaning of the text, that although people may be suspected of engaging in homosexual relations, and acquire men for themselves for this purpose, they don't conduct themselves with such reckless disregard of this prohibition to write them a marriage contract. *Id.*

2. This Court's Determination Of The National Policy For Marriage Will Define The Nation's Vision Of The Human Soul

The Court in *Loving v. Virginia*, 388 U.S. 1 (1967) struck down anti-miscegenation laws on the grounds of Due Process and Equal Protection. But it is a farce to compare this racially-based law invoking dubious religious authority, to the natural and intrinsic differences between men and women reflected in the traditional marriage definition rooted in the Torah.

The essential differences between men and women make their marriage a union of opposite, a combination that allows startling novelty in the form of new life to emerge from their differing perspectives, this cannot be said of homosexual relationships.

"Over the years, this Court has consistently repudiated distinctions between citizens solely because of their ancestry as being odious to a free people whose institutions are founded upon the doctrine of equality." *Loving*, 388 U.S. at 11. Laws that draw distinctions based on race are, for the most part, superficial, while the differences between men and women go far beyond external features.

This Court decided *Lawrence v. Texas* there is no legal basis in this country for the government to intrude with criminal penalties over two adults choosing how they wish to express their affection for each other. But the official recognition, by the apparatus of national recognition of same-sex marriages, is quite a different matter.

Justice O'Connor wrote in her concurrence to *Lawrence v. Texas*, 539 U.S. at 582, that moral disapproval of a group alone is never a legitimate state interest. But extolling one particular relationship, the monogamous union of a man and a woman, as the preferred ideal relationship, does more than simply foster disapproval of homosexuals. The positive message of traditional marriage also excludes countless other arrangements, most notably promiscuous relationships with third parties of either sex. It is a fallacious caricature to portray the proponents of traditional marriage of being singularly focused on demonizing gay men and lesbians.

Gay men and lesbians claim that their desires identify who they really are; supporters of traditional marriage say there is a standard to which everyone needs to aspire. This court is not charged with adjudicating theology, but the consequences of the determination of this case can have very real practical effects on defining this country's vision of the human soul.

For instance, a report published in England recently commended the work of kindergarten programs that encouraged "gender free" environments. Boys were encouraged to act, speak and dress like girls, and vice versa. The putative goal of this type of program was to remove any social stigma for "transgender children," that is, a person who is "intrinsically" one sex but whose soul (for lack of a better term) was born in the body of the opposite sex. See "Primary Schools Praised for Labelling Four-Year-Olds 'Transgender'", Hannah Furness, *The Telegraph*, January 19, 2012, http://www.telegraph.co.uk/education/primaryeducation/9340632/Primary-schools-praised-for-labelling-four-year-olds-transgender.html.

The Court might also note the reports of children being encouraged by their parents to undertake "gender reassignment" (sex-change) surgery. A recent news item may demonstrate how the unqualified acceptance of homosexuality eerily transforms into a sort of mysticism defining the human soul. At the age of three, Thomas Lobel told his parents that he was a girl. In an effort to be supportive of the child's "true nature" the parents enrolled the boy in a battery of medications that would halt the onset of puberty, making it easier for his body to adjust to gender-reassignment surgery. "The little boy who started a sex change aged eight because he (and his lesbian parents) knew he always wanted to be a girl," *The Daily Mail*, September 30, 2011, http://www.dailymail.co.uk/news/article-2043345/The-California-boy-11-undergoing-hormone-blocking-treatment.html#ixzz1Za9Z49LQ

I will leave to the Court to evaluate the prudence of the parents' choice to "support" their child in this way. But overturning the Defense of Marriage Act will not merely undermine the moral foundations of this country that are shared by millions of people of a diverse range of communities. The elevation of gay men and lesbians to protected class status, or the striking down of DOMA as being not rationally related to legitimate government interest, would act to uproot widely held common principles of morality, grounded in the foundations of the Torah, to establish a new theology in its place.

As discussed more fully below, the spread of disease and the proliferation of unstable relationships should not be encouraged by government recognition. The important government interest of protecting the intellectual, emotional and physical well-being of the nation warrants the exclusion of gay men and lesbians from the definition of marriage.

II. NEW YORK STATE DID NOT RECOGNIZE SAME-SEX MARRIAGES IN 2009, THE DATE DETERMINATIVE FOR PLAINTIFF'S STANDING

Windsor brought her claim based on an IRS assessment that she pay taxes on the transfer of assets that she would have been exempt from, under the marital estate tax exemption, if the Federal Government recognized her marriage to Ms. Spyer. No one contends that New York was not the correct jurisdiction for the probate of Ms. Spyer's estate. However, Ms. Spyer died in 2009, two years before the state of New York recognized marriages between two women.

The Second Circuit Court of Appeals predicted that the New York Court of Appeals would have recognized out-of-state same-sex marriages in 2009, but this ruling warrants this Court's review. Ms. Windsor cites a consensus of Appellate Division rulings that superficially suggest that New York recognized out-of-state same-sex marriages in 2009 short of the actual legalization of same sex marriage in 2011. But the legislative history of same-sex marriage in New York is far from clear as to what an authoritative ruling on the out-of-state recognition would have been in 2009. Further, a closer examination of the policies underlying comity to out-of-state marriages is crucial to evaluating the merit and impact of Ms. Windsor's case on a national policy level as well.

In 2008, Governor David Paterson directed his counsel, David Nocenti, to issue an executive order to all state agencies, ordering them to revise all protocols and procedures to make the language gender-neutral, and to accordingly give legal force to all same-sex marriages performed out-of-state. He based this order on the Fourth Department Appellate Division ruling in *Martinez v. County of Monroe*, 2008 NY Slip Op 909 50 A.D.3d 189, 850 N.Y.S.2d 740 (4th Dep't 2008), which held that an employer was required to extend spousal health care benefits to the same-sex married spouse that an employee had married in Canada. The stated rationale of the order was to avoid lawsuits.

As a procedural matter in this case, I will demonstrate, the Second Circuit Court of Appeals erred in predicting that the state of New York would have recognized the Canadian same-sex marriage of Ms. Windsor and Ms. Spyer in 2009. As BLAG points out in its brief to the Second Circuit, the New York State Court of Appeals had the issue of whether to extend recognition to out-of-state same sex marriages squarely before it in *Godfrey v. Spano*, 13 N.Y.3d 358 (2009) but the court explicitly chose to issue a narrow ruling in that case, deferring to the legislature.

> Because we can decide the cases before us on narrower grounds, we find it unnecessary to reach defendants' argument that New York's common-law marriage recognition rule is a proper basis for the challenged recognition of out-of-state same-sex marriages. We end by repeating what we said in *Hernandez v. Robles*, expressing our hope that the Legislature will address this controversy; that it 'will listen and decide as wisely as it can; and that those unhappy with the result – as many undoubtedly will be – will respect it as people in a democratic state should respect choices democratically made.'" *Godfrey v. Spano*, 13 N.Y.3d 358 (2009).

This exercise of judicial restraint by the New York Court of Appeals in *Godfrey v. Spano* proved prescient, as in December of that same year, 2009, the New York Senate voted on a bill to legalize same-sex marriage in New York, and rejected it by a lopsided 38-24 margin.

A. The Marriage Recognition Rule of New York Furthers a Policy of Avoiding the Repercussions of Bastardizing Children

The public policy behind comity recognizing out-of-state marriages that would have been prohibited under New York law is to prevent branding the children of such out-of-state marriages with the social stigma and harsh legal consequences of having their births deemed illegitimate. This public policy is plainly stated in the case law. Discussing a case where a couple was married in a foreign state, the court held "the doctrine in favor of marriage so contracted is founded on principles of policy to prevent the great inconvenience and cruelty of bastardizing the issue of such marriages." [citation and parentheses omitted]. *Elias W. Van Voorhis, Executors v. Sarah A. Brintnall, Ella Thiers*, 86 N.Y. 18, 1881 WL 12957 (N.Y.) (1881).

In addition, for many years New York law imposed criminal charges for violations of the state's marriage laws. Thus the court in the *Van Voorhis* case went further, explaining that absent an explicit grant of authority from the Legislature, the Court lacked authority to refuse enforcement to any out-of-state marriage, even if it could not be legally consummated in New York, because refusal to recognize a foreign marriage could result in "a man [being] punished by fine and imprisonment, or by the disgrace of himself and the woman he married—the bastardy of his children... the severer punishment is in the last alternative." *In re May's Estate, Greenberg v. May*, 280 A.D. 647, 117 N.Y.S.2d 345, (3rd Dept. 1952), *quoting Van Voorhis*.

The rationale of preventing bastardization of children is emphatically not present in any case involving same-sex marriages, even where the care of children is concerned. There is virtually none of the original criminal penalties, legal barriers and social stigma in New York today for a child being born from two parents who are not married to each other. Can someone today credibly claim that in any area, legally or socially, children who are not biologically related to their parents are somehow less "legitimate" than their neighbors?

Further, with respect to same-sex marriage in particular, it is a virtual certainty that any child raised by two men or two women could not possibly be the offspring of both same-sex spouses together at the time of their being married. The partners would unquestionably have required a third party to have contributed to the conception of any children they might raise. Therefore extending recognition to out-of-state same-sex marriages of same-sex partners does nothing to advance New York's public policy of protecting children from the brand of illegitimacy.

B. Public Policy of New York Disfavored Same-Sex Marriage in 2009

Whatever a sister state memorializes as a marriage is not automatically granted deference by New York state. The principle of comity is not a rule of law. *Johnston v. Compagnie Generale Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926), *rehearing denied*, 243 NY 541, 154 N.E. 597 (1926). "Forum states need not give effect to foreign laws which are contrary to their public policy." *J. Zeevi and Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 27 N.Y.2d 220, 371 N.Y.S.2d 892, 334 N.E.2d 168 (1975); *Perutz v.*

Bohemian Discount Bank in Liquidation, 304 N.Y. 533, 110 N.E.2d 6 (1953); *Dougherty v. Equitable Life Assurance Society of U.S.*, 266 N.Y. 71, 193 N.E. 897 (1934). In evaluating whether to enforce a foreign determination, on public policy grounds, the issue is whether the enforcement of the arrangement would represent an affront to the public policy of the forum. *Haag v. Barnes*, 9 N.Y.2d 554, 216 N.Y.S.2d 65 (1961).

As the Court of Appeals stated regarding comity in *Ehrlich-Bober & Co., Inc. v. University of Houston*, 49 N.Y.2d 574 (1980)

> [I]n New York the determination of whether effect is to be given foreign legislation is made by comparing it to our own public policy; and our policy prevails in case of conflict. In search of the public policy of the State, courts of course are not free to indulge in mere individual notions of expediency and fairness but must look to the law as expressed in statute and judicial decision and to the prevailing attitudes of the community. [citations omitted].

Generally, out-of-state marriages are given legal recognition in New York even if they could not be legally entered there, based on the principle that "a contract entered into in another State or country, if valid according to the law of that place, is valid everywhere." *Van Voorhis*, 86 N.Y at 24. Exceptions were made for marriages that the state had a public policy not to recognize, based on two considerations. Either the relationship itself is the subject of positive legislation (e.g., if the legislature had passed a law specifically denying recognition of the marriage in question), or 2) the relationship is contrary to the prohibitions of natural law. *Davidson v. Ream*, 97 Misc. 89, 161 N.Y.S. 73 (Sup.Ct. Saratoga County

1916), *affirmed*, 178 App. Div. 362, 164 NYS 1037, 178 AD 362 (1917).

While the exact boundaries of such "natural law" are not elucidated, it is definitional that natural law encompasses a body of moral legislation independent of the vagaries of shifting social mores. The term "natural law" was employed to invoke the collective understanding of Western civilization for millennia which often appeared to be self-evident. Natural law cannot be synonymous with social mores.

But the Appellate Division did go further on at least one occasion to identify some of the bases of recognizing "natural law," with reasoning upheld by the Court of Appeals. Evaluating a marriage formed in Rhode Island that could not be entered in New York law (a man and his niece) the Third Department determined that such a relationship "was not interdicted by Levitical or Talmudical law and is presently sanctioned by the Jewish faith and doctrine." On that basis, the Appellate Division found that this case did not come "within the inhibitions of natural law as it is recognized by countries adhering to the concepts of Christian culture and its antecedents." *In re: May's Estate, Greenberg v. May*, 280 A.D. 647, 117 N.Y.S.2d 345, 347 (1952).

If New York courts gave express recognition to Torah law, as codified in the Pentateuch and explained in the Talmud, as a system comporting with the demands of "natural law," then there is no way that such a "natural law" system could also include the recognition of same-sex marriages. The black-letter Torah law, and the received traditions of other religious communities that incorporate Torah law by reference, specifically prohibits homosexual conduct. Therefore a marriage of a homosexual couple could not be considered within the inhibitions of natural law.

Recognition of the authority of moral values rooted in religious traditions is not foreign to New York law. To give an example, the New York State Constitution opens with a Preamble that states in no uncertain terms that the legislative intent is to conform with the will of G-d Almighty. "We the people of New York," the Preamble declares, "grateful to Almighty G-d for the gift of Liberty and in order to secure its blessings, do establish this Constitution."

This general statement invoking the will of G-d does not raise problems with the Establishment Clause because no single religious system has been granted authority to be the official "Church of the state of New York." The Preamble does, however, invoke a collective base, and counsel deference to those shared moral principles rooted in the authority of religious laws, values and understandings. While there may be a large number of New Yorkers today who might disagree with the idea that the purpose of the laws of the state is to conform to the will of G-d Almighty, New Yorkers are free to democratically elect legislators to amend the constitution and its Preamble. Until that time, this preamble may be read as a canon of construction directing interpretation of the laws of the state in the light of the values consistent with received religious traditions.

Conversely, in its seminal decision finding no constitutional right to same-sex marriage, the Court of Appeals in *Hernandez v. Robles*, 7 N.Y.3d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006) plainly stated that there was an extremely high evidentiary burden to challenge the presumptions underpinning the public policy that prohibits same-sex marriages. The level of proof based on "social-science literature reporting studies of same-sex parents and their children" similar to the type submitted by Plaintiffs in that case, would need "to establish beyond a doubt that children fare equally well in same-sex and opposite-sex households." *Hernandez* at 360. Simply stated, the authority of religious values rooted in the Torah should be given no less weight than Ms. Windsor's expert testimony of psychologists, sociologists and academics.

More specifically to this case, however, the Court of Appeals stated in *Hernandez*, "Articles 2 and 3 of the Domestic Relations Law, which govern marriage, nowhere say in so many words that only peoples of different sexes may marry each other, but that was the universal understanding when Articles 2 and 3 were adopted in 1909...New York's statutory law clearly limits marriage to opposite-sex couples." *Hernandez* at 357.

With *Hernandez* the Court of Appeals ruled that not only did the constitution not grant a right to same-sex marriage, but more importantly that the state was not barred, and, in fact, the current state of the law at that time was, to prohibit same-sex marriage in its borders altogether. Multiple times in the *Hernandez* opinion the Court stressed that what the Legislature had in fact done was to limit marriage to opposite-sex couples. *See Hernandez* at 359 ("We conclude... that there are at least two grounds that rationally support the limitation on marriage that the Legislature has enacted."); at 361 ("Our conclusion that there is a rational basis for limiting marriage to opposite-sex couples leads us to hold that that limitation is valid under the New York Due Process and Equal Protection clauses") and 363 ("In *Lawrence*, by contrast, the court found the distinction between homosexual sodomy and intimate relations generally to be essentially arbitrary. Here, there are, as we have explained, rational grounds for limiting the definition of marriage to opposite-sex couples.")

It is indisputable from the words, "New York's statutory law clearly limits marriage to opposite-sex couples" (*Hernandez*) *Id.* that the Court of Appeals fully contemplated the impact of their determination that the Legislature had rationally chosen to prohibit same-sex marriage from any recognition in New York.

To analogize, insisting that comity compels New York to accept a moral standard of her sister states that was not recognized under the New York state laws is tantamount to restating the rationale of The Fugitive Slave Act of 1850, 9 Stat. 462 that forced residents of free-state New York to collaborate and assist their slave-state neighbors to return slaves who had escaped back to slavery.

The Second Circuit Court of Appeals erred by predicting that the New York State Court of Appeals would have recognized foreign same-sex marriages in 2009. It is not a foregone conclusion that same-sex marriage was definitely not against the public policy of New York in 2009. Governor Paterson's abysmal public approval ratings forced him to chose to not seek re-election. Following the 2011 passage of same-sex marriage legislation, by a vote of 33-29, at least five Senators who had been elected on their promise to uphold traditional marriage, but changed their votes (Sen. James Alesi, Sen. Shirley Huntley, Sen. Carl Kruger, Sen. Roy McDonald and Sen. Steven Saland) lost their seats in the 2012 election.

As citizens of a diverse state with a bustling exchange of ideas, our social instincts might counsel us to employ a more gracious terminology, but whether expressed as such or not, the view of same-sex marriage to many, if not the majority, of New Yorkers may very well be called abhorrent. As explained above, the source of this belief is many times not simply ignorance or xenophobia, but on a principled perspective reflecting a moral code rooted in the Torah which holds that homosexual relations are destructive to its participants and destructive to society. As the Court of Appeals stated in *Hernandez*, "It is true that there has been serious injustice in the treatment of homosexuals... But the traditional definition of marriage is not merely a by-product of historical injustice... A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted." *Hernandez* at 361.

BLAG's rational basis for DOMA of "steering naturally procreative relationships into stable commitments" does not paint the full picture of this government's responsibility to buttress traditional marriage by special recognition in the law. There is a government interest, legitimate, and also important, to defer to the moral judgment of its citizens, when those views are traceable not just to irrational bias and xenophobia, but the well-established and clearly defined code of conduct, technically known as the Seven Laws of the Children of Noah, incorporated and shared currently by at least three major world religions with multiple denominations in the United States.

III. THE COURT OF APPEALS IMPROPERLY APPLIED HEIGHTENED SCRUTINY TO THIS CASE

The Court of Appeals found that DOMA is subject to heightened scrutiny under the factors enumerated in *City of Cleburne v. Cleburne Living Center*, 473 US 432, 105 S.Ct. 3249. Alternatively, the Court noted that the District Court had employed a "more careful assessment" under a rational basis analysis that varies by context, following 833 F.Supp.2d at 402, citing the 1st Circuit 682 F.3d 10-11, but acknowledged that the Supreme Court "has not expressly sanctioned such modulation in the level of rational basis review... (Ct App. 2d Cir at 180). Therefore the Court of Appeals held that "no permutation of rational basis review is needed if heightened scrutiny is available... We conclude that the review of Section 3 of DOMA requires heightened scrutiny." Ct. App. 2d Cir at 181.

The factors that the Court of Appeals found were present in this case which triggered a heightened standard of review included: A) whether the class has been historically 'subjected to discrimination' [*Bowen v. Gilliard*, 483 US 587 (1987); B) whether the class has a defining characteristic that 'frequently bears [a] relation to ability to perform or contribute to society' [*Cleburne*, 473 US at 440-41]; C) whether the class exhibits 'obvious, immutable or distinguishing characteristics that define them as a discrete group' [*Bowen*, 483 US at 602]; and D) whether the class is 'a minority or politically powerless.' *Id.*

A. The Court Of Appeals Erred In Categorizing Gay Men And Lesbians As A "Suspect Class" Warranting Heightened Scrutiny Because The Group Lacks A Coherent, Objectively Verifiable "Immutable" Feature

The Second District Court of Appeals erred in applying "heightened scrutiny" to this case because the class that Ms. Windsor purports to represent, is not only not "immutable," but it is virtually impossible to define in any objective fashion. According to Ms. Windsor's expert, Ms. Lisa M. Diamond, associate professor of developmental psychology, the single defining and uniting characteristic of gay men and lesbians as a group is "the capacity for same-sex attractions." (see *Supplemental Declaration of Lisa M. Diamond*, Sept. 12, 2011, para. 8) There appears to be no way to verify that a party is indeed a member of this class. Ms. Windsor has argued that colloquially, "everybody knows what it means to be gay" but this statement is conclusory.

Unlike sex, illegitimacy or national origin, which arose out of a historical fact completely outside a person's control, and forever unalterable, the status of "gay man" or "lesbian" is vague in that it includes whoever wishes to declare him or herself a member at whatever time. The only method of determining whether a person is in the class of gay men or lesbians, from an outside, objective perspective, aside from observing him or her engaging in homosexual conduct, would be based on a verbal or social declaration of the person him or herself, the "coming out" event much celebrated by journalists.

The unfairness inherent in the former "suspect classes" comes from the fact that a person has no or little ability to remove the historical fact giving rise to the classification. The decision to "merely keep the status private" does not eliminate the category itself which stands on a historical fact. But identification as a gay man or lesbian effectively ceases, for public purposes, with one's discontinuing to identify that way.

B. The Court Of Appeals Erred In Categorizing Gay Men And Lesbians As A "Suspect Class" Warranting Heightened Scrutiny Because The Group Does Lack The Ability To Contribute A Certain Quality To Society

The Court of Appeals erred in dismissing out of hand the fact that there qualification for "suspect class" intermediate scrutiny requires that the class not have any feature that makes them unable to contribute to society. Viewed solely through the lens of material output, the Court noted that gay men and lesbians are routinely found amongst professionals such as doctors, attorneys and other professions.

But "contribution to society" does not only mean "the ability to earn a professional degree." Not only are there also moral standards for judging "contribution" to society, in general, but an analysis of the terms and meaning of marriage itself demands considering those standards. For the countless Americans in 41 states who view marriage as a declaration of a personal morality regarding the proper ordering of intimate relationships, any union of two men or two women is fundamentally incapable in contributing to society in terms of upholding the moral declaration that traditional marriage implicates.

IV. THE ACT OF ENTERING INTO AND MAINTAINING A MARRIAGE INVOLVES A PUBLIC DECLARATION WITH SPECIFIC MEANING AND IS THUS TRADITIONAL MARRIAGE IS PROTECTED AS FREE SPEECH UNDER THE FIRST AMENDMENT

There can be no question that marriage implicates free speech. Married couples enjoy far more than a basket of rights and benefits that accrue to them by virtue of state and Federal law. A married couple enjoys the unique status of sending a message to the world that they are now one unit.

The passion which is displayed on both sides of the controversy surrounding marriage turns on the role of marriage as speech, that is, what is the "message" of getting married. Gay men and lesbians insist that they're just the same as their heterosexual neighbors, and stress that marriage is really about two people in a loving relationship who make a life-long commitment to each other. Traditional marriage supporters say, "that's not all that marriage is about."

This positive declaration of marriage often entails an exclusion of its opposite. That is, marriage itself suggests a disavowal of cohabitation with other parties outside the marriage, the concept known as fidelity. The Hebrew term for marriage is "*kiddushin*", which signifies setting apart one's spouse from the rest of the world and implies designation for a special purpose. In English, as well, marriages are referred to as "sanctification," a term which also implies a "setting aside." The speech aspects of marriage are reinforced by the customs associated with it, including verbal declaration of oaths, a public reception memorializing the event, and the wearing of "wedding rings" to broadcast unmistakably to the world: this person is married and therefore not available.

While people may often fail to uphold a commitment of fidelity with their spouses, the ideal of fidelity as a cornerstone of marriage is not eroded by the practical incidence of failures in individual cases. While they might not all be able to achieve it, many married people will tell you that they recognize that fidelity is the ideal form of marriage.

This assumption about the public declaration of fidelity through marriage between a man and a woman, cannot likewise be assumed with couples of two men or two women. Despite continuous attempts to portray the idea through news media, literature and entertainment that gay men and lesbians are no different whatsoever from married heterosexual couples, social science surveys have documented that the actual relationships between two men in a "committed, long-term relationship" very often do not include an expectation of fidelity. Nearly half of long-term relationships between two men admit to staying open, with lovers on the side. This has been documented by the rise of new HIV infections among homosexual men in steady relationships. "Many Gay Couples Negotiate Open Relationships," by Meredith May, *San Francisco Chronicle*, sfgate.com, July 16, 2010, reporting on a study by Colleen Hoff of The Center for Research on Gender & Sexuality at San Francisco State University. See also a study of the rise of HIV in male couples in Amsterdam, by Maria Xiridoua, Ronald Geskusa, John deWita, Roel Coutinhoa, and Mirjam Kretzschmard, in the journal AIDS, 2003 May 2;17(7):1029-38 The status of a "long-term commitment", these studies suggest, reflects more of a preference of a "partner of choice." Thus, with the recognition of same-sex marriages, the very terms of the premises behind marriage, like fidelity, is altered as well.

Marriage, then, is an act of speech, a continual broadcasting to the world of the intimate and exclusive relationship between man and wife. Through marriage, which is a private contract given public force, a man and wife form an association that engages in expressive activity entitled to protection of the First Amendment. See *Boy Scouts of America v. Dale*, 530 US 640 (2000) at 654. The use of state power to force inclusion of same-sex couples alongside traditional married couples, under the single term of marriage, "violates the fundamental protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 US 557 (1995).

Marriage is essentially an act of association, if not the paragon of association itself. The role of government to act as the dispensary of rights and benefits and the enforcer of obligations between married couples does not empower the state to fundamentally alter the terms of that association. Even in the public mind, the inability of government to impart moral legitimacy in its own right is vividly demonstrated by the fact that many gay men and lesbians (including the parties before this Court in *Hollingsworth v. Perry*) insist that even if they were granted all the attendant rights, benefits and responsibilities of marriage from the state through use of a different term, like "civil unions," they still lack the credibility that comes with the title "marriage." Precisely to the point, "marriage" is special because of the linguistic associations and meanings of the term, which owes its potency as a cultural symbol precisely from its derivation and continuing link to the institutions of religious authority.

The most troubling aspect of this controversy as it relates to First Amendment protection is the fact that many states require all married couples, regardless of their chosen officiant, to obtain civil marriage licenses. This requirement essentially leaves no viable alternative to traditional married couples to avoid being associated with all other married couples. "Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, it intends to express. Thus, freedom of association... plainly presupposes a freedom not to associate." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) [quotation marks omitted].

This case differs from *Christian Legal Society v. Martinez*, 130 S.Ct. 2971 (2010). The *Christian Legal* case involved a University enforcing a policy of non-discrimination that applied to all student affairs and campus activity. A student club that wished to be recognized as an official University organization invoked their religious beliefs to request an exemption from the viewpoint-neutral school policy that requires all official clubs to be open to anyone who wishes to join. There, the Court held that the University was permitted to make official recognition contingent on an "all-comers" policy. But no one compelled the students to participate in the club, and the club may have convened without receiving official school recognition.

In this case, the states that enacted same-sex marriage compel association, by the very fact that the government regulates the process of marriage by requiring marriage licenses and other procedures.

Every married couple – and a marriage is an association par excellence – is being compelled by the order of the state to have the meaning of their association shaped by the presence of others who share vastly different views about the defining terms of an institution founded as a moral commitment.

In fact, Justice Kennedy notes in his concurrence, the student group in *Christian Legal* "would have a substantial case on the merits if it were shown that the all-comers policy was either designed or used to infiltrate the group or challenge its leadership in order to stifle its views." *Christian Legal Society* at 3000. The use of same-sex marriage recognition as a means to stifle the views of traditional marriage couples is precisely what has taken place in at least three major U.S. cities recently. The Court may be aware of that a fast food restaurant chain, Chick-Fil-A, that is owned and operated by religious Christians, found itself the target of a coordinated effort by the leaders of three major U.S. cities to intimidate the company simply because it supported traditional marriage causes. The mayors of the cities of Boston and Chicago, and the City Council Speaker of New York, threatened to erect barriers to entry for Chik-Fil-A in their cities, branding the company out-of-step with their cities' tolerant and non-discriminatory public attitudes.

The message of marriage, as speech, according to many couples holding beliefs grounded in Torah values, turns precisely on excluding all other types of sexual conduct like homosexuality, that are antithetical to the established meaning of marriage. This Court has held that an association that seeks to transmit a set of values engages in expressive activity. *Boy Scouts of America v. Dale*, 530 U.S. 640, 650 (2000). In order to be entitled to First Amendment protection, an association must merely engage in expressive activity that could be impaired. *Boy Scouts of America v. Dale*, 530 U.S. 640, 655 (2000).

If marriage is an institution with an avowedly moral purpose or dimension, "transmitting a set of values," the Court may well be advised to review what has been, and currently is the substance of that morality. Civil marriage was created to provide a legal registry to memorialize the rights and obligations of its citizenry. But the institution of marriage predates possibly every secular state government in operation to this day, and the character of marriage has remained for the most part largely the same. The jurisdictions that enacted same-sex marriage, however, have done more than just include an additional class of people for benefits and protections. By changing the very terms of marriage, jurisdictions that enacted same-sex marriage changed the message of what it means to be married.

"Since all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say. [T]he state... may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995). [W]hatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control. *Id.* at 575.

Whatever the ultimate level of scrutiny, a review under the Speech Clause requires that a challenged restriction on speech serve a compelling, or at least an important, governmental object. *Hurley* at 577. Infringements on the right to associate "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Boy Scouts of America v. Dale*, 530 U.S. 640, 680 (2000) [*Justice Stevens dissenting*]. The real question that is raised by DOMA, and the decision of the Second Circuit Court of Appeals in this case, may in fact be to review that handful of states which enacted same-sex marriage, and ask, "is there a compelling state interest to infringe on the freedom of association of traditionally married couples in those states?" That is, does the inclusion of gay men and lesbians serve an important government interest to justify the burden on the free speech of married couples who wish to send the message that a monogamous relationship between a man and a woman is the ideal form of human relationships?

It has been speciously argued by proponents of same-sex marriage that the governing test is whether the granting of same-sex marriages will result in discouraging heterosexual marriages. But that simplification entirely misses the declarative, and hence, the free speech aspects of marriage. To that end, inclusion of gay men and lesbians under the single term "marriage" will very likely adversely impact the ability of traditionally married couples to use their own homes as a model for fostering belief in a certain ethos of personal morality. The dilution of the term "marriage," in fact, serves to recast the relationship as one simply focused on the personal love shared between the spouses.

As a case in point, BLAG has noted in the record the skyrocketing incidence of cohabitation without marriage in countries that enacted same-sex marriage. Simply put, with the voiding of the moral dimension of marriage in the public sphere, the institution becomes virtually meaningless. Thus the state action of imposing same-sex marriages to be equated with traditional marriages seriously undermines the ability of traditionally married couples to effectively broadcast their message about the ideal form of personal relationships.

As the Court stated in *Hurley*, "the law is free to promote all sorts of conduct in place of harmful behavior, [but] it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley* at 579.

At the very least, it was clearly in the intent of the New York State Legislature to contemplate the invalidation of all same-sex marriages performed in the state under the Marriage Equality Act of 2011 (Marriage Equality Act, ch. 95, 2011 N.Y. Sess. Laws ch. 95 (A.8354) (McKinney) (N.Y. Dom. Rel. Law § 10-a (McKinney Supp. 2012)). The law contains an inseverability provision which holds that if any aspect of the law is held to be unconstitutional, then the entire law will become null and void. The Court is urged to overturn the Marriage Equality Act of New York, as a violation of the First Amendment Rights of traditionally married couples.

Therefore the Court is urged, in the interest of protecting the First Amendment freedom of speech and association of married couples in traditional marriages, to strike down the marriage laws of the states that have enacted same-sex marriage.

V. OVERTURNING DOMA WOULD IMPLY AN OVERRULING OF ALL STATE STATUTES DEFINING MARRIAGE AS A MAN AND A WOMAN

Lastly, the Court of Appeals noted that "the Constitution delegated no authority of the United States on the subject of marriage and divorce." DOMA was therefore an unprecedented intrusion "into an area of traditional state regulation."

The Court of Appeals has proved too much by this limitation of Federal power. If this Court were to strike down DOMA as discrimination against the suspect class of same-sex couples, what prevents the very next logical inference that would cause all the state constitutional amendments and statutes defining marriage as the union of a man and woman to be invalidated as well? After all, if DOMA is found discriminatory, every single one of those state laws would appear to be discrimination per se.

Further, even if the Court were to overturn DOMA based on the "rational basis" review, the failure of this Court to find a legitimate government interest in the traditional definition of marriage would strongly imply a corresponding lack in state interest over that definition. Therefore invalidating DOMA, in the name of "limiting the Federal power over divorce and marriage" would result in perhaps the greatest upheavals of State authority over marriage in this nation's history.

CONCLUSION

Therefore, for the legitimate government interest of reflecting the moral policy of its citizens, grounded in the ethos of Torah law, and further, to uphold the important government interest of preserving the intellectual and emotional health and well being of the nation, and based on Petitioner's lack of standing due to New York's public policy of limiting marriage to opposite-sex couples in 2009, I respectfully request the Court to overturn the decision of the Second District Court of Appeals in this case. I further implore the Court to take plenary review of the state statutes that enacted same-sex marriage, as a violation of the First Amendment freedom of speech and association of traditionally-married couples, and strike down those state statutes as well.

Respectfully submitted,

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January 29, 2013

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BRIEF

No. 12-307

RECORD
AND
BRIEFS

Supreme Court, U.S.
MAR 1 - 2013
OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, in Her Capacity as Executor of the Estate of Thea Clara Spyer, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF SERVICES AND ADVOCACY FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER ELDERS (SAGE), THE NATIONAL SENIOR CITIZENS LAW CENTER, THE AMERICAN SOCIETY ON AGING, THE NATIONAL HISPANIC COUNCIL ON AGING, THE SOUTHEAST ASIA RESOURCE ACTION CENTER, AND THE NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES IN SUPPORT OF RESPONDENTS (MERITS BRIEF)

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their state by defining marriage as "only a legal union between one man and one woman" and spouse as "a person of the opposite sex."

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS. ii

TABLE OF CITED AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT. 5

ARGUMENT. 7

I. The Advancement of Age Presents Challenges for All Americans, Whether LGBT, Straight, Married or Single – Including the Threat of Financial Insecurity 7

II. LGBT Elders Face Unique Challenges That Are Not Shared By Their Heterosexual Peers – Including a Greater Risk of Financial Insecurity 10

III. Legally Married Same-Sex Elders are Denied Equal Access to Important Federal Benefits Otherwise Available to Married Couples That Are Intended to Mitigate the Threat of Financial Insecurity 12

  1. Social Security. 14

    a. Disability Benefits 15

Page

b. Retirement Benefits 16

c. Death Benefits 21

2. Family and Medical Leave Act 21

3. Retiree Health and Survivorship Benefits 22

a. Retiree Health Benefits 23

b. Medicare Part B 26

c. Retiree Survivorship Benefits 28

4. Tax Qualified Retirement Plans 29

a. Contributions to a Spouse's IRA 29

b. Withdrawals from a Deceased Spouse's IRA 31

5. Estate Taxes 32

IV. The Denial of Marital Benefits and Protections Heightens the Threat of Financial Insecurity for Legally Married Same-Sex Elders 34

CONCLUSION 35

TABLE OF CITED AUTHORITIES

Page

CASES

Gill v. Office of Pers. Mgmt.,
699 F. Supp. 2d 374 (D. Mass. 2010) 18, 19, 24, 30

Massachusetts v. U.S. Dep't Health & Human Servs.,
682 F.3d 1 (1st Cir. 2012) 27

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881 F. Supp. 2d 294 (D. Conn. 2012) 22, 25

Strauss v. Horton,
207 P.3d 48 (Cal. 2009) 13, 18

Windsor v. United States,
699 F.3d 169 (2d Cir. 2012) 33

STATUTES

1 U.S.C. § 7 . . . . .1, 5

26 U.S.C. § 106 25

26 U.S.C. § 219(c) 30

26 U.S.C. § 401(a)(11) 28

26 U.S.C. § 2001(c) 33

Page

29 U.S.C. § 1055 28

29 U.S.C. § 2612(a)(1) 21

42 U.S.C. § 402 14

42 U.S.C. § 402(b) 15, 16

42 U.S.C. § 402(c) 15, 16

42 U.S.C. § 402(e) 16, 19

42 U.S.C. § 402(f) 16, 19

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42 U.S.C. § 402(i) 21

42 U.S.C. § 416(c)(1)(E) 16

42 U.S.C. § 416(d)(2) 16, 19

42 U.S.C. § 426 26

42 U.S.C. § 426(*l*) 26

42 U.S.C. § 1395k 26

42 U.S.C. § 1395o 26

Page

FEDERAL REGULATIONS

Sup. Ct. R. 37.6 1

5 C.F.R. § 890.302 23

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Page

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Page

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Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders ("SAGE"), the National Senior Citizens Law Center ("NSCLC"), the American Society on Aging ("ASA"), the National Hispanic Council on Aging ("NHCOA"), the Southeast Asia Resource Action Center ("SEARAC"), and the National Organization of Social Security Claimants' Representatives ("NOSSCR") respectfully submit this brief as *amici curiae* in support of the affirmance of the Court of Appeals for the Second Circuit's ruling that Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, is unconstitutional.

INTEREST OF *AMICI CURIAE*[1]

SAGE is a national organization that offers supportive services and consumer resources to lesbian, gay, bisexual and transgender ("LGBT") older adults and their caregivers, advocates for public policy changes that address the needs of LGBT older people, and provides training for aging providers and LGBT organizations. In partnership with constituents and allies, SAGE works to achieve a high quality of life for LGBT older adults, supports and advocates for their rights, fosters a greater understanding of aging in all communities, and promotes positive images of LGBT life in later years. SAGE is a non-profit organization; it does not offer stock and has no parent organization.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no party's counsel has authored any portion of this brief and that no party or their counsel has contributed any money toward the preparation or filing of this brief. Other than SAGE, NSCLC, ASA, NHCOA, SEARAC and NOSSCR, no person has contributed any money that was intended to fund the preparation or submission of this brief.

As the country's largest and oldest organization dedicated to improving the lives of LGBT older adults, SAGE has a vested interest in challenging the constitutionality of DOMA because it prevents legally married same-sex couples from accessing federal safety net programs and benefits that are intended to assist Americans as they age. As an organization representing LGBT elders from offices in New York City, Chicago, and Washington D.C., and working in connection with 23 local SAGE affiliate organizations in 16 different states and the District of Columbia, SAGE is well-positioned to provide the Court with unique insight on how DOMA detrimentally impacts the health and economic well-being of LGBT elders, one of the country's most underserved populations.

The National Senior Citizens Law Center is an organization dedicated to protecting the rights of low-income older adults. NSCLC is a non-profit organization; it does not offer stock and has no parent organization. For the past 40 years, NSCLC has sought to ensure the health and economic security of older adults with limited income and resources. Through advocacy, litigation, and the education and counseling of local advocates, NSCLC works to promote the independence and well-being of low-income elderly and persons with disabilities, especially disadvantaged minorities, including the elderly LGBT community. Because of its commitment to ensuring the economic security of older adults by protecting their access to the federal benefits programs that allow low-income older adults to live with dignity and independence, NSCLC has a vested interest in challenging the constitutionality of DOMA because it deprives legally married same-sex older adults of the benefits that help them to live free from the worry and pain that the threat of poverty can bring.

The American Society on Aging is an association of diverse individuals in aging and aging-related fields who promote the well-being of aging people and their families. ASA's membership is multidisciplinary and includes professionals who are concerned with the physical, emotional, social, economic and spiritual aspects of aging. ASA offers nationally recognized professional education programs, publications, and information on responding to the ever-growing needs of the aging population. ASA is a non-profit organization; it does not offer stock and has no parent organization. Because ASA's members wish to enhance the quality of life of all older adults and work to ensure that racial and other disparities are reduced, and because DOMA diminishes the quality of life for legally married LGBT elders and reinforces economic and other disparities, ASA has an interest in challenging the constitutionality of DOMA.

The National Hispanic Council on Aging is a national organization working to improve the lives of Hispanic older adults, their families and their caregivers. For more than 30 years, NHCOA has sought to ensure the health and economic security of older Hispanic adults by promoting and advocating for research, policy, and practical programming in the areas of economic security, health, and housing. NHCOA is a non-profit organization; it does not offer stock and has no parent organization. In addition to developing a Hispanic Aging Network of community-based organizations across the continental United States, the District of Columbia, and Puerto Rico that reaches millions of Latinos each year, NHCOA is one of the six founding members of the Diverse Elders Coalition – a coalition of diverse aging organizations that advocates for policies and programs to improve aging in our communities. Given this commitment to improving the lives of older adults, NHCOA has an interest in challenging the constitutionality of DOMA because of its discriminatory effects on legally married same-sex couples and spouses.

The Southeast Asian Resource Action Center is a national organization that advances the interests of Cambodian, Laotian, and Vietnamese Americans by empowering communities through advocacy, leadership development, and capacity building to create a socially just and equitable society. SEARAC is a non-profit organization; it does not offer stock and has no parent organization. For over fifteen years, SEARAC has been a leader in policy advocacy and community development initiatives on behalf of elder Southeast Asian American refugees who have resettled in the United States, as well as other vulnerable and isolated older adult populations. As one of the six founding members of the Diverse Elders Coalition – a coalition of diverse aging organizations that advocates for policies and programs to improve aging in our communities – SEARAC has an interest in challenging the constitutionality of DOMA because its discriminatory effects perpetuate economic and other disparities for legally married same-sex adults.

The National Organization of Social Security Claimants' Representatives is a voluntary membership association comprised of approximately 4,000 professionals, mostly attorneys, who represent individuals applying for Social Security and Supplemental Security Income ("SSI") benefits. NOSSCR members include employees of legal services organizations, educational institutions, and other non-profits; employees of for-profit law firms and other businesses; and individuals in private practice.

NOSSCR is a non-profit organization; it does not offer stock and has no parent organization. NOSSCR is committed to ensuring that Americans who have paid into the Social Security trust funds, as required by law, receive the benefits to which they and their families have contributed, in a non-discriminatory manner.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a). Copies of the requisite consent letters have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

There are an estimated 1,138 federal laws and regulations that look to Section 3 of DOMA for the definition of "spouse" or "marriage."[2] These laws and regulations confer multiple rights, benefits and protections on married heterosexual couples. But because DOMA restricts the definition of marriage to "only a legal union between one man and one woman" and spouse to "a person of the opposite sex,"[3] legally married gay and lesbian couples are denied every single one of them. This denial of marital benefits and protections has a substantial impact on married same-sex elders and their surviving spouses.

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[2] U.S. Gov't Accountability Office, GAO-04-353R, *Defense of Marriage Act: Update to Prior Report* 1 (2004), *available at* http://www.gao.gov/new.items/d04353r.pdf. *See also Married But Not Equal* (In the Life Media 2012), http://www.youtube.com/watch?v=a5KbrMbcCA0 (last visited Feb. 21, 2013).

[3] 1 U.S.C. § 7.

The threat of financial insecurity is an unfortunate reality for the majority of aging Americans. Loss of income following retirement and an increased need for medical and long-term care can leave elder Americans vulnerable. Federal income programs, housing subsidies, access to affordable, quality health care and long-term services all play a critical role in helping aging Americans address financial insecurity and avoid poverty. While many of these programs are available to individuals, there are valuable benefits that are only available on the basis of a legally recognized marital relationship – such as Social Security spousal and survivor benefits and the marital deduction under federal estate tax laws. But because of DOMA, more than 130,000 legally married same-sex couples[4] are denied these benefits for no valid or apparent reason other than the gender of their spouse.

The elder services and advocacy organizations SAGE, NSCLC, ASA, NHCOA, SEARAC and NOSSCR, submit this brief for the purpose of illustrating to the Court the tangible and disparate impact that DOMA has on the lives and financial well-being of LGBT elders as compared with their similarly situated heterosexual peers. This brief discusses certain federal benefits and protections afforded to heterosexual spouses – Social Security benefits, protected leave under the Family and Medical Leave Act, retiree health and survivorship benefits, qualified deferred tax retirement plans, and the marital deduction under the federal estate tax – to show how the denial of these benefits to married same-sex elders heightens the threat of financial insecurity in the growing LGBT elderly population. As these examples plainly show, DOMA impairs the financial security of married same-sex elders. Because there is no justification for this inequitable treatment, the Court of Appeals' holding that Section 3 of DOMA is unconstitutional should be affirmed.

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[4] U.S. Census Bureau, *Census Bureau Releases Estimates of Same-Sex Married Couples* (Sept. 27, 2011), http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn181.html ("According to revised estimates from the 2010 Census, there were 131,729 same-sex married couple households . . . in the United States.")

ARGUMENT

I. The Advancement of Age Presents Challenges for All Americans, Whether LGBT, Straight, Married or Single – Including the Threat of Financial Insecurity.

All individuals face considerable challenges as they age. Often there is the frustration of coping with an aging body, the growing dependency on others, increased frailty and the threat of chronic illness, departing the workforce, and the loss of networks and social opportunities as family members and friends who have also reached old age pass on. In addition to these physical and emotional challenges, aging brings with it the threat of financial insecurity, and for many older Americans, even the possibility of poverty.[5]

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[5] *See, e.g.*, Administration on Aging, U.S. Dep't of Health and Human Servs., *A Profile of Older Americans: 2011*, at 1, http://www.aoa.gov/aoaroot/aging_statistics/Profile/2011/docs/2011profile.pdf ("Almost 3.5 million elderly persons (9.0%) were below the poverty level in 2010. . . . The [Supplemental Poverty Measure released by the U.S. Census Bureau] shows a poverty level for older persons of 15.9%, an increase of over 75% over the official rate of 9.0% mainly due to medical out-of-pocket expenses.").

Most older Americans have minimal retirement savings. Fifty-nine percent of poor adults depend on Social Security for all or nearly all of their household income.[6] Even with important programs like Social Security, the median annual income for Americans 65 and over is below $45,000 for married couples and less than half that amount for non-married elders.[7] In addition, because of rising health care and prescription drug costs, older Americans spend a far higher percentage of their income on health care and prescription drugs than the general population. A recent study, which considered health care expenses as well as more traditional daily living expenses, found that 21.2% of older New Yorkers live in poverty.[8] In the District of Columbia, the number is even higher, with 31.5% of residents over 65 living in poverty.[9]

LGBT elders are confronted with the same challenges that all individuals face when they age. As the LGBT Baby Boomers – the first generation of LGBT individuals to have lived openly gay or transgender lives in large numbers – reach retirement age and more studies on this emerging population are conducted, we are learning more about the challenges faced by LGBT elders. These studies show that LGBT older adults make up a significant – and growing – share of not only the overall LGBT population, but also a significant share of the larger 65 and over population as well. Indeed, experts estimate that between 1.75 and 4 million Americans ages 60 and over are lesbian, gay, bisexual or transgender.[10] Over the coming decades, the percentage of Americans age 65 and older is expected to grow from about 12% to approximately 20% of the total population. LGBT elders are conservatively estimated to comprise at least 4% of that senior population.[11] By 2030, it is estimated that there will be close to 6 million LGBT elders living in the United States.[12]

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[6] Ellen O'Brien, Ke Bin Wu, and David Baer, AARP Public Policy Institute, *Older Americans in Poverty: A Snapshot* 2 (Apr. 2010), *available at* http://assets.aarp.org/rgcenter/ppi/econ-sec/2010-03-poverty.pdf.

[7] Soc. Sec. Admin., *Income of the Aged Chartbook, 2010*, at 5 (2012), *available at* http://www.ssa.gov/policy/docs/chartbooks/income_aged/2010/iac10.pdf. Data is for households headed by a person age 65 or older.

[8] NYC Center for Econ. Opportunity, *The CEO Poverty Measure, 2005 – 2010*, at ix (Apr. 2012), *available at* http://www.nyc.gov/html/ceo/downloads/pdf/CEO_Poverty_Measure_April_16.pdf.

[9] *Older Americans in Poverty: A Snapshot*, *supra* note 6, at 63 tbl. 3.

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[10] Administration on Aging, U.S. Dep't of Health and Human Servs., *Diversity: Lesbian, Gay, Bisexual and Transgender (LGBT)*, http://www.aoa.gov/AoA_programs/Tools_Resources/diversity.aspx#LGBT (last visited Feb. 21, 2012).

[11] Jim Zians, *LGBT San Diego's Trailblazing Generation: Housing & Related Needs of LGBT Seniors* 4 (2011), *available at* http://www.thecentersd.org/pdf/programs/senior-needs-report.pdf.

[12] Nancy J. Knauer, *LGBT Elder Law: Toward Equity in Aging*, 32 HARV. J. L. & GENDER 1, 8 (2009). *See also* Karen I. Fredriksen-Goldsen, et al., *The Aging and Health Report: Disparities and Resilience among Lesbian, Gay, Bisexual, and Transgender Older Adults* 9 (2011), *available at* http://caringandaging.org/wordpress/wp-content/uploads/ 2011/05/Full-Report-FINAL-11-16-11.pdf (noting that the number of LGBT older adults will increase proportionally with the general population, more than doubling by 2030).

II. LGBT Elders Face Unique Challenges That Are Not Shared By Their Heterosexual Peers – Including a Greater Risk of Financial Insecurity.

In addition to the common challenges of aging, many LGBT elders confront challenges stemming from lingering stigma and prejudice that can impede full and equal access to important health and community services, programs and opportunities. These challenges make "successful aging"[13] more difficult for LGBT elders than for their heterosexual counterparts, who often take for granted the acceptance and support of their family and peers, as well as the benefits, services and protections they receive from the federal government. This puts LGBT elders at an increased risk of social isolation, loneliness and depression, all of which can exacerbate existing health conditions. In addition, LGBT elders are more likely to need to rely on informal families of choice for social connections, daily support and long-term care, rather than on blood relatives, who may be estranged, or spouses or children, which LGBT elders are less likely to have. Finally, many laws and safety net programs that are intended to support and protect older Americans fail to provide equal protection for LGBT elders.[14]

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[13] Access to appropriate housing, quality health care, and supportive services are some of the key components of successful aging. Other objectives include maximizing physical and emotional well-being, maintaining autonomy and independence for as long as possible and remaining socially involved in the community. Funders for Lesbian and Gay Issues, *Aging in Equity: LGBT Elders in America* 3 (2004), *available at* http://www.lgbtfunders.org/files/AgingInEquity.pdf. *See also* LGBT Movement Advancement Project (MAP) & Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders (SAGE), *Improving the Lives of LGBT Older Adults* 1 (March 2010), *available at* http://sageusa.org/files/Improving%20the%20Lives%20of%20LGBT%20Older%20Adults%20-%20full%20report.pdf.

Adding to these unique challenges, LGBT elders are generally less financially secure than American elders as a whole.[15] Indeed, contrary to a common stereotype, most LGBT elders are not affluent individuals or couples living comfortable urban lives. For many LGBT elders, a lifetime of employment discrimination translates into earning disparities, reduced lifelong earnings, smaller Social Security payments, and fewer opportunities to build pensions. As a result, older LGBT couples face higher poverty rates than married heterosexual couples,[16] and older lesbian couples are twice as likely to be poor as heterosexual couples.[17] In New York State, a recent needs assessment for the LGBT population found that 11.9% of the survey respondents reported being in poverty, with either no income or household income of less than $10,000 per year.[18]

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[14] For more in-depth discussions of the challenges facing the aging LGBT population, see generally, *Improving the Lives of LGBT Older Adults*, *supra* note 13, and *The Aging and Health Report*, *supra* note 12. *See also* Shaun Knittel, *National Study Finds Health Care Needs Lacking Among LGBT Elderly*, EDGE Boston, Nov. 21, 2011, http://www.edgeboston.com/index.php?ch=news&sc=family&sc3=&id=126983 (describing the unique needs of the aging LGBT population, including the fear of discrimination, the lack of children upon which they can depend for caregiving, and destabilizing social support and fear of financial insecurity).

[15] *Improving the Lives of LGBT Older Adults*, *supra* note 13, at ii.

[16] *Id.* at 11 (Figure 7).

[17] *Id.* at 11 (citing Naomi G. Goldberg, *The Impact of Inequality for Same-Sex Partners in Employer-Sponsored Retirement Plans* (2009)).

Unfortunately, "a lack of financial security is the fearful reality for a large percentage of LGBT older adults."[19] This lack of financial security among LGBT elders dramatically impacts not only their standard of living, but also their mental and physical health. Indeed, almost all of the challenges of old age are felt more acutely by those in lower income groups, when compared to their peers at the higher end of the income scale.[20]

III. Legally Married Same-Sex Elders are Denied Equal Access to Important Federal Benefits Otherwise Available to Married Couples That Are Intended to Mitigate the Threat of Financial Insecurity.

Many LGBT elders, like a large number of other older Americans, rely on federally provided benefits, programs and protections to help ease some of the financial challenges that often accompany aging. Federal income programs, housing subsidies, access to affordable health care and long-term care all play a critical role in helping American elders avoid poverty. However, many of the federal laws and programs designed to protect older Americans provide greater protections and benefits to married couples. The combination of this marriage-centered approach and the lack of marriage equality hurts LGBT elders, many of whom will never get an opportunity to marry.

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[18] Somjen Frazer, *LGBT Health and Human Services Needs in New York State* 5 (2009), *available at* http://www.prideagenda.org/Portals/0/pdfs/LGBT%20Health%20and%20Human%20Services%20Needs%20in%20New%20York%20State.pdf.

[19] Tom Nelson, *Foreword* to *Improving the Lives of LGBT Older Adults*, *supra* note 13.

[20] *Improving the Lives of LGBT Older Adults*, *supra* note 13, at 11 (Figure 8).

Nine states and the District of Columbia recognize marriage for same-sex couples,[21] but DOMA prevents legally married spouses of the same-sex from accessing benefits and protections that are afforded to their heterosexual counterparts. As a result, DOMA makes it more difficult for married same-sex elders to achieve financial security for themselves and their legal spouses, relative to the heterosexual population. Because of DOMA, legally married same-sex elders are, among other things, denied certain Social Security benefits, denied the spousal care protections afforded by the Family and Medical Leave Act, required to pay income tax on health insurance provided to a same-sex spouse, likely to pay higher premiums for Medicare Part B coverage, unable to make tax-deductible contributions to a spouse's IRA, required to begin drawing down inherited tax-qualified retirement plans within one year of inheritance, ineligible for certain survivor annuity benefits, and deprived of the federal estate tax's marital deduction.

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[21] Nine states, Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington, and the District of Columbia currently issue marriage licenses to same-sex couples. National Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws* (Nov. 2012), http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx. For a limited time, California issued marriage licenses to same-sex couples and the approximately 18,000 marriages that took place during that time are recognized by the state as valid marriages. *See Strauss v. Horton*, 207 P.3d 48, 74, 119, 122 (Cal. 2009) (discussing the history of same-sex marriage law in California and holding that Proposition 8 was a valid constitutional amendment but does not apply retroactively).

1. Social Security

Social Security is the most important financial safety net program for older and disabled Americans. Nearly 90% of all elder households receive Social Security.[22] A family's eligibility and benefit amounts are based on contributions to Social Security in the form of mandatory Federal Insurance Contributions Act ("FICA") payroll taxes from the individual, the individual's spouse, divorced spouse, or in some cases the individual's parent.[23] But as explained below, even when same-sex married couples have paid into Social Security trust funds at the same rate as opposite-sex couples, they do not derive equal benefits.

DOMA's definition of "spouse" bars same-sex spouses' eligibility for spousal benefits administered by the Social Security Administration, including various Old Age, Survivors, and Disability Insurance Benefits, plus a one-time death benefit. Because DOMA mandates that the federal government treat legally married same-sex couples as legal strangers, a same-sex spouse is often denied financial benefits – including the spousal disability benefit, the survivor disability benefit, the spousal retirement benefit, the survivor retirement benefit, and the lump sum death benefit, as well as all benefits in all categories to divorced spouses – that are afforded to legally married opposite-sex spouses. As a result, "gay male couples receive [on average] 18% less in Social Security benefits than straight couples, and lesbian couples receive 31% less (because women statistically earn less money)."[24]

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[22] *A Profile of Older Americans: 2011*, *supra* note 5, at 1.

[23] *See* 42 U.S.C. § 402. A parent can also receive benefits from his or her insured child under certain limited circumstances. *See id.* at § 402(g)(1)(D).

a. Disability Benefits

Social Security provides special benefits to married couples if one spouse should become disabled. For example, if a worker becomes disabled, the worker's spouse is often entitled to receive "auxiliary benefits up to the rate of 50% of the disabled worker's own benefits," subject to the family maximum.[25] Because of DOMA's definition of spouse, the Social Security Administration denies this auxiliary benefit to same-sex spouses when the working spouse becomes disabled.

If a dependent spouse becomes disabled, the "survivor disability benefit" can provide assistance after the working spouse's death. When a surviving spouse has reached the age of 50 and has a disability that began within seven years after the insured's death, the disabled survivor can qualify for auxiliary benefits on the deceased spouse's earnings record.[26] A disabled same-sex surviving spouse who otherwise qualifies for the auxiliary survivor disability benefit would nonetheless be denied the auxiliary benefit because of DOMA's definition of spouse. This denial of benefits may lead the disabled surviving same-sex spouse to suffer financial harm or forgo needed treatment or care.

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[24] Paul Canning, *How LGBT Inequality Means Economic Inequality*, care2.com (May 1, 2012, 12:30 PM), http://www.care2.com/causes/how-lgbt-inequality-means-economic-inequality.html.

[25] 42 U.S.C. § 402(b)(1)(D), (c)(1)(D). To qualify for such auxiliary benefits, a spouse must be 62 years of age or have a child entitled to child's insurance benefits in her care. *Id.* at § 402(b)(1)(B), (c)(1)(B). Similarly, a divorced spouse can qualify for auxiliary benefits under the same conditions as the spouse above as long as the marriage to the insured lasted for at least ten years. *Id.* at § 402(b)(1)(C), (b)(1)(G); *id.* at § 402(c)(1)(C), (c)(1)(G).

b. Retirement Benefits

The "spousal retirement benefit" allows a heterosexual spouse to receive the greater of an amount equal to 50% of the benefit that his or her past or current spouse has earned or the benefit due from his or her own earnings.[27] Spouses are entitled to the spousal retirement benefit when they meet the minimum age requirements.[28] For example, a wife who has never worked outside of the home may nonetheless claim a $500 monthly spousal benefit if her husband is eligible for a $1,000 monthly benefit; yet a same-sex spouse homemaker would not be entitled to any benefit, even if her spouse is eligible for a $1,000 monthly benefit. For high income wage earners, the denial of this benefit to a legally married same-sex spouse can amount to $15,078 per year in lost income, where one spouse begins claiming benefits at age 66 and receives the maximum monthly Social Security payout of $2,513.[29]

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[26] 42 U.S.C. § 402(e)(1)(B), (e)(4); *id.* at § 402(f)(1)(B), (f)(4). The surviving spouse must also meet the marriage requirement of nine months in order to qualify for survivor's benefits (subject to limited exceptions). *Id.* at § 416(c)(1)(E). A surviving divorced spouse can also receive "survivor's disability benefits." *Id.* at § 402(e)(1)(A), (f)(1)(A). To qualify for benefits as a surviving divorced spouse, the marriage must have been valid under state law and have lasted for at least ten years. *Id.* at § 416(d)(2).

[27] 42 U.S.C. § 402(b)(1)(D), (c)(1)(D).

[28] 42 U.S.C. § 402(b)(1)(B), (c)(1)(B). A divorced spouse can normally receive the retirement benefits so long as the marriage lasted for at least ten years. *Id.* at § 402(b)(1)(C), (G); *id.* at § 402(c)(1)(C), (G).

This inability to claim the spousal benefit impacts numerous same-sex spouses, including Jo Ann Whitehead and Mina Kay Meyer. Jo Ann has been in a committed relationship with her wife, Bette Jo Green, since 1980. In 2004, Bette Jo and Jo Ann were married in Massachusetts. Although both women receive primary insurance benefits from Social Security based on their individual work histories, Bette Jo's income from working for 35 years as a labor and delivery nurse substantially exceeded Jo Ann's, who worked part-time as a gardening educator. As a result, Jo Ann's monthly Social Security benefit is less than 50% of Bette Jo's monthly benefit. Under the spousal benefit program, Jo Ann should therefore be entitled to a monthly benefit amount equal to 50% of the benefit that her spouse, Bette Jo, has earned. But because of DOMA, Jo Ann has been denied the spousal benefit and the additional monthly income that she would be entitled to if Bette Jo were a man.[30] The denial of the spousal benefit means that as a couple, Jo Ann and Bette Jo receive a lower combined monthly benefit amount than a similarly situated heterosexual couple, and, if Bette Jo were to predecease her spouse, Jo Ann would be left even more vulnerable.

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[29] Soc. Sec. Admin., *Fact Sheet: 2012 Social Security Changes* (2012), http://www.ssa.gov/pressoffice/factsheets/colafacts2012.pdf. For each year that a retiree delays claiming benefits, his or her monthly benefit amount is increased by up to 8% until age 70. Soc. Sec. Admin., *Retirement Planner: Delayed Retirement Credits*, http://www.ssa.gov/retire2/delayret.htm (last modified Oct. 18, 2012).

Similarly, Mina Kay Meyer has been denied the spousal retirement benefit because she is not married to a man. Mina has known her wife Sharon Raphael since they were pre-schoolers growing up as neighbors and playmates in Ohio. Now in their seventies, Mina and Sharon have lived together as a couple for over 40 years and were married in California in 2008 during the period in which the state was issuing marriage licenses to same-sex couples.[31] Although they both receive individual Social Security retirement benefits, Mina's monthly benefit of $544.90 is less than half of Sharon's $2,312.30 monthly benefit. Under the spousal benefit program, Mina should therefore be entitled to a monthly benefit amount equal to 50% of Sharon's monthly benefit – or $1,156.15 per month. But because of DOMA, Mina's application for the spousal retirement benefit was denied.[32] As a result, Mina receives $611.25 less per month than a similarly situated heterosexual spouse. This amounts to a loss of $7,335.00

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[30] *See generally Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010).

[31] For a limited time in 2008, California issued marriage licenses to same-sex couples. The approximately 18,000 marriages that took place during that time are recognized by the state as valid marriages. *See Strauss v. Horton*, 207 P.3d 48, 74, 119, 122 (Cal. 2009).

[32] Matter of Mina Kay Meyer, Office of Disability Adjudication and Review, Soc. Sec. Admin. (filed Feb. 1, 2013).

per year that, if not for DOMA, Mina would otherwise be entitled.

The "survivor retirement benefit" allows a surviving opposite-sex spouse to receive up to 100% of a deceased spouse's benefit amount.[33] The surviving opposite-sex spouse can receive a portion of this benefit as early as age 60.[34] For example, the wife who has never worked outside the home could receive up to a $2,503 monthly benefit following her husband's death; yet a gay widower like Herb Burtis would be entitled only to his own benefit amount following the death of his higher earning husband, John.

Herbert "Herb" Burtis and John Ferris met in college in 1948 and were married in Massachusetts in 2004, after what they called their "55-year engagement." Herb and John both worked as musicians and music teachers, but over the course of their lives together, John earned more money than Herb. In 1992, John was diagnosed with Parkinson's disease. For the next 16 years, while John suffered and deteriorated from the disease, Herb cared for John and served as his principal advocate and caregiver. After John's death in 2008, Herb applied for the survivor benefit because John's monthly benefit amount was higher than Herb's; but because of DOMA, the Social Security Administration denied Herb's application, depriving him of the additional monthly income to which he would be entitled had John been a woman.[35]

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[33] 42 U.S.C. § 402(e)(1)(A), (f)(1)(A).

[34] 42 U.S.C. § 402(e)(1)(B), (f)(1)(B). A surviving divorced spouse can receive the same benefits if the marriage lasted for at least ten years. *Id.* at § 402(e)(1)(A), (f)(1)(A); *id.* at § 416(d)(2).

[35] *Gill*, 699 F. Supp. 2d at 397.

This lack of survivor benefits can cost a legally married same-sex widow or widower up to $30,156 per year in lost income, assuming benefits are claimed beginning at age 66 at the maximum monthly Social Security payout of $2,513 per month. The disparity can be the difference between whether or not a same-sex widow lives in poverty.[36]

Over time, the effects of the discriminatory denial of Social Security benefits compounds, potentially condemning the same-sex couple or the same-sex surviving spouse to poverty, while providing financial security for an opposite-sex couple, surviving spouse, or divorced spouse.[37] Jo Ann, Mina, and Herb's experiences are representative of same-sex couples and surviving spouses across the country, who, as a result of DOMA's discriminatory definition of marriage, are unable to access valuable Social Security benefits otherwise available to heterosexual couples, widows and widowers.

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[36] *See* Soc. Sec. Admin., *Income of the Population 55 or Older, 2010*, at 39 (2012), *available at* http://www.ssa.gov/policy/docs/statcomps/income_pop55/2010/incpop10.pdf (noting that the median income for households of single individuals over age 65, including widows and widowers, is $17,478).

[37] Data show the grim effects of this unequal treatment – lesbian couples receive an average of 31.5% less in Social Security, and gay couples receive 17.8% less, when compared to heterosexual couples. *Improving the Lives of LGBT Older Adults*, *supra* note 13, at 13 (Figure 10); Naomi G. Goldberg, *The Impact of Inequality for Same-Sex Partners in Employer-Sponsored Retirement Plans*, Executive Summary (2009), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Goldberg-Retirement-Plans-Report-Oct-2009.pdf.

c. Death Benefits

Finally, Social Security pays a one-time "death benefit" to the surviving heterosexual spouse, which often helps cover funeral and other burial related expenses.[38] But because of DOMA, legally married same-sex spouses are not entitled to collect even this modest benefit: Herb Burtis's application for the one-time death benefit following his husband John's death was denied.

2. Family and Medical Leave Act

The Family and Medical Leave Act ("FMLA") entitles eligible employees to take up to 12 weeks of unpaid leave for certain family and medical reasons without fear of the employee losing his or her job.[39] Among other things, FMLA leave permits an employee to care for the employee's spouse, child, or parent who has a serious health condition. However DOMA denies this protection to employees who need to care for an ailing same-sex spouse. An employee who is not guaranteed the protections of FMLA leave to provide care to his or her same-sex spouse may not be able to afford appropriate medical care and may be at risk of losing his or her job if the employee decides to care for the spouse. Alternatively, the ailing spouse may have to forgo appropriate medical care in order to protect the working spouse's employment. This is not a choice that heterosexual couples have to face if they need to care for an ailing spouse.

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[38] 42 U.S.C. § 402(i).

[39] 29 U.S.C. § 2612(a)(1) ("Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following: . . . (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition . . . .").

But this was the situation that Raquel Ardin and Lynda DeForge faced when Raquel required regular medical treatments because of a neck injury sustained while serving in the Navy. Raquel and Lynda met in 1977 when they were both serving in the Navy and were married 32 years later in 2009 in Vermont. Both had long careers with the U.S. Postal Service, but eventually Raquel had to take disability retirement because of her neck condition. Lynda applied for FMLA leave so that she could care for Raquel while she was receiving medical treatment. But because of DOMA, the Postal Service was unable to recognize Raquel as Lynda's spouse and her FMLA leave request was denied.[40] Lynda was required to use her vacation time to care for Raquel during her medical treatments and also following Raquel's two surgeries; time that Lynda would otherwise have taken as unpaid FMLA leave, had Raquel been a man or DOMA not deprived her of the FMLA protections and benefits afforded to heterosexual spouses.

3. Retiree Health and Survivorship Benefits

Retired married heterosexual couples receive tangible health and survivorship benefits that are unavailable to legally married same-sex couples because of DOMA. For example, where a retiree benefit plan provides that health or survivorship benefits are payable to an insured's "spouse," DOMA prevents same-sex spouses from accessing these valuable benefits that are otherwise available to similarly situated heterosexual spouses. Similarly, legally married same-sex couples can be required to pay higher Medicare Part B premiums than similarly situated heterosexual couples.

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[40] *See generally Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012).

a. Retiree Health Benefits

Spouses of retired federal employees are automatically eligible for health care coverage under the retired employee's Federal Employee Health Benefit ("FEHB") Program.[41] The same is true for spouses of state employees who receive pensions through state retirement systems. However, because FEHB and many state pension plans invoke DOMA's definition of marriage, same-sex spouses of federal and state employees, like Dean Hara, Jim Fitzgerald and Janet Geller, are excluded from the same health care benefits that are afforded to the heterosexual spouses of other retired federal and state employees. The lack of health insurance for the same-sex spouse of a retired federal or state employee can impose a substantial household cost if the couple must purchase alternative health care coverage for the same-sex spouse.

Dean Hara, the surviving spouse of former Massachusetts Congressman Gerry Studds, has been denied FEHB coverage and other protections available to a surviving spouse of a federal employee.[42] Numerous other couples, including Martin "Al" Koski and Jim Fitzgerald, are also impacted by the denial of FEHB coverage and related benefits to same-sex spouses. Al Koski, a retired Social Security Administration employee, has been in a committed relationship with Jim Fitzgerald, an aide at an addiction treatment center, since 1975. The couple was married in Massachusetts in 2007. Following their marriage, Al requested that Jim be added to his FEHB plan, as other federal employees do as a matter of course for their spouses. But because of DOMA, Al's application to add Jim to his FEHB plan was denied.[43] As a result, Al and Jim are forced to spend hundreds of dollars each month on insurance premiums, co-pays, and prescription medications for Jim, who has chronic and severe asthma. Between 2007, when the couple was married, and 2011, they have spent over $12,500 more in health care costs than a similarly situated heterosexual couple because Jim was not recognized as a spouse for the purposes of Al's FEHB plan.

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[41] 5 C.F.R. § 890.302.

[42] *See, e.g.*, Philip Shishkin, *The Battle Over Benefits for Same-Sex Spouses*, The Wall St. J., May 21, 2009; *No Death Benefits for Studds's Spouse*, The Wash. Post, Oct. 18, 2006.

DOMA has had a similar impact on Janet Geller and Joanne Marquis, both retired school teachers. Janet and Joanne have been together for 32 years and were married in 2010 in New Hampshire. Throughout their 30- and 43-year careers teaching at the high school, college, and middle school levels, both women paid in to the New Hampshire Retirement System ("NHRS") and now both receive a pension through NHRS. However, because of Joanne's additional years of service, her benefits include a medical cost supplement that helps her pay for Medicare Part B supplemental insurance. Although Janet has not earned this additional benefit as an individual, as Joanne's spouse she would be otherwise entitled to receive it.[44] But because the trust that funds the NHRS is qualified under federal tax laws, which incorporate DOMA, Janet has been denied the additional medical cost supplement, costing the couple $375.56 per month.

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[43] *Gill*, 699 F. Supp. 2d at 397.

Additionally, federal tax law currently allows a private employer to provide health insurance to the heterosexual spouse of an employee or retired employee as a tax-free benefit.[45] If an employer offers the same benefit to legally married same-sex couples, DOMA operates to require the value of the same-sex spouse's health insurance to be treated as taxable income.[46] Thus, because of DOMA, the employee's same-sex spouse must pay income taxes on the value of this benefit while the heterosexual spouse does not. This costs same-sex couples on average $1,069 more per year than their married heterosexual counterparts with the same coverage.[47] This high cost prevents many elderly same-sex spouses from accepting health insurance from their spouses' employers because the couples simply cannot afford to pay higher income taxes.

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[44] *Pedersen*, 881 F. Supp. 2d at 303-04.

[45] 26 U.S.C. § 106 ("Except as otherwise provided in this section, gross income of an employee does not include employer-provided coverage under an accident or health plan."); 26 C.F.R. § 1.106-1 ("The gross income of an employee does not include contributions which his employer makes to an accident or health plan for compensation (through insurance or otherwise) to the employee for personal injuries or sickness incurred by him, his spouse, or his dependents, as defined in section 152."); *but see* I.R.S. Priv. Ltr. Rul. 98-50-011 (Sept. 10, 1998) (because of DOMA, "[a]n employee's same-sex domestic partner does not qualify as the 'spouse' of the employee for purposes of the Code.").

[46] Regulation of employee benefits falls under the federal Employee Retirement Income Security Act, which incorporates DOMA's definition of marriage, and consequently views legally married same-sex couples as legal strangers.

b. Medicare Part B

For those who are eligible and enrolled, Medicare Part B generally covers the cost of medically necessary doctors' services, outpatient care, home health services, durable medical equipment, preventative services, and other services not covered under Medicare Part A.[48] Unlike Part A, which is free for those over age 65 who paid Medicare taxes while working,[49] Part B coverage requires the payment of a premium every month. Because of DOMA, however, Part B premiums can be higher for legally married same-sex couples than for similarly situated heterosexual couples.

An individual's Part B premium is based on the individual's yearly income from 2 years prior as reported on the individual's tax return. In 2013, Part B premiums are as follows:[50]

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[47] M. V. Lee Badget, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits* 7 (Dec. 2007), *available at* http://escholarship.org/uc/item/25c0n9rx.pdf.

[48] 42 U.S.C. § 1395k. Medicare Part B is available to individuals who are age 65 and older, disabled and receiving Social Security disability or Railroad Retirement benefits for at least 24 months, or have end stage renal disease. *See* 42 U.S.C. § 1395o; *id.* at §§ 426, 426(*1*).

[49] Centers for Medicare & Medicaid Services, U.S. Dep't of Health and Human Servs., *Medicare & You* 24 (2013), *available at* http://www.medicare.gov/Pubs/pdf/10050.pdf.

2011 Yearly Income		**Part B Premium in 2013**
Individual Tax Return	**Joint Tax Return**	
$85,000 or less	$170,000 or less	$104.90
above $85,000 up to $107,000	above $170,000 up to $214,000	$146.90
above $107,000 up to $160,000	above $214,000 up to $320,000	$209.80
above $160,000 up to $214,000	above $320,000 up to $428,000	$272.70
above $214,000	above $428,000	$335.70

Because DOMA "prevents same-sex married couples from filing joint federal tax returns,"[51] they are unable to combine their incomes and therefore must pay Part B premiums under the individual scale. Thus, if an individual made $110,000 in 2011, and his same-sex spouse made $50,000, the individual's Part B premium would be based on his individual tax return, resulting in a premium payment of $209.80 per month in 2013. If this same individual's spouse were of the opposite sex, however, the couple could file a joint tax return showing joint income of $160,000 in 2011. The individual's Part B premium would then only be $104.90 per month in 2013, which is half the amount that the similarly situated individual with a same-sex spouse is required to pay. Over the course of 2013, if both individuals continue to pay Part B premiums, the same-sex couple will pay $1,258.80 more for Part B coverage than the similarly situated heterosexual couple.

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[50] *Id.* at 25.

[51] *Massachusetts v. U.S. Dep't Health & Human Servs.*, 682 F.3d 1, 6 (1st Cir. 2012).

c. Retiree Survivorship Benefits

Benefits payable under a deceased spouse's defined benefit or pension plan can provide a significant source of income for a surviving spouse. The Employment Retirement Income Security Act ("ERISA")[52] regulates employer-sponsored retirement funds, including pension and defined benefit plans. These plans are typically offered by large public employers or employers with unionized workforces and guarantee workers a certain payment for life, after an individual works a certain number of years. Pension plans provide an important source of retirement income, with over 40% of older American households receiving income from pension plans.[53]

Under federal law, a married worker's pension is automatically designated as a Qualified Joint and Survivor Annuity, which makes the pension payable over the lifetimes of both the worker and his or her spouse.[54] Employers are also required to offer Qualified Pre-Retirement Survivor Annuities, which entitle the surviving spouse of an employee who dies before retirement to all accrued retirement funds over the remainder of the surviving spouse's life. However, because ERISA looks to DOMA for the definition of "spouse," same-sex spouses are not entitled to receive the annuity as a matter of right.[55] Although employers may choose to offer this benefit to same-sex spouses of their employees, many employers do not.[56] The inability of a surviving same-sex spouse to access these important benefits denies surviving same-sex spouses valuable retirement income which is guaranteed under federal law to similarly situated heterosexual surviving spouses.

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[52] 29 U.S.C. § 1055.

[53] Soc. Sec. Admin., *Fast Facts & Figures About Social Security, 2012*, at 6, *available at* http://www.ssa.gov/policy/docs/chartbooks/fast_facts/2012/fast_facts12.pdf.

[54] 26 U.S.C. § 401(a)(11).

4. Tax Qualified Retirement Plans

Tax qualified individual retirement accounts ("IRA") are one of the most common forms of retirement savings in the United States. Married couples receive distinct benefits with respect to both contribution to and withdrawal from IRAs that, because of DOMA, are unavailable to legally married same-sex couples.

a. Contributions to a Spouse's IRA

Unmarried individuals may contribute to an IRA up to an annual deductible limit as long as the individual has earned income in a given year. A married couple filing a joint tax return, however, can take advantage of "spousal IRA" contributions, which allow married couples to make contributions on behalf of each spouse up to his or her annual deductible limit, even if one spouse has not earned any income in the tax year.[57] But because DOMA prevents legally married same-sex couples from filing a joint income tax return, non-working same-sex spouses like Kathy Bush are not able to make tax-deductible contributions to their IRAs.

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[55] Pension and defined benefit plans often limit the class of permitted beneficiaries to certain enumerated family members and many do not include a same-sex spouse in the class of beneficiaries.

[56] Human Rights Campaign, *Corporate Equality Index 2013*, at 28, *available at* http://www.hrc.org/files/assets/resources/CorporateEqualityIndex_2013.pdf.

Married in 2004 in Massachusetts, Kathy Bush has been in a committed relationship with Mary Ritchie for nearly 23 years. For as long as they have been a couple, Mary has been a member of the Massachusetts State Police. After the birth of the couple's first son, Kathy stopped working outside of the home in order to care for the couple's son, and later other children, full-time. The couple wants to use Mary's income to make contributions to Kathy's IRA, to ensure that she has adequate retirement savings. But Kathy cannot make her own contributions because she has no taxable income, and because DOMA prevents Mary and Kathy from filing a joint income tax return, the couple cannot use Mary's income to make tax-deductible contributions to Kathy's IRA.[58] A similarly situated non-working heterosexual spouse would be able to use the working spouse's income to make tax-deductible IRA contributions and, unlike Kathy, would not be denied this opportunity to set aside tax-deferred retirement savings.

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[57] 26 U.S.C. § 219(c).

[58] *See generally Gill*, 699 F. Supp. 2d 374.

b. Withdrawals from a Deceased Spouse's IRA

DOMA also impacts the ability of a surviving spouse to inherit their deceased spouse's IRA investments. Current law places no restrictions on whom the owner of the qualified retirement plan may designate as a beneficiary; however beneficiaries are treated differently depending on their relationship to the plan's owner. A surviving heterosexual spouse can inherit his or her deceased spouse's retirement plan and leave the inherited amount to grow tax-free until the surviving spouse reaches age 70.5. A surviving spouse of the same-sex, however, is not permitted to do this. Because of DOMA, the same-sex surviving spouse is treated as a "non-spouse" and must start drawing down a minimum amount of funds each year beginning the year after the original accountholder dies.

Over time, this disparate treatment can have a significant impact on the retirement savings and income of the surviving same-sex spouse. For example, if a heterosexual widow inherits a $50,000 IRA at age 49.5 and invests this amount for a 5% return, she could withdraw $10,864 per year in after-tax income for 15 years once she turned 70.5. A similarly situated lesbian widow would be forced to start drawing down funds each year beginning the year after her spouse dies and could only withdraw $9,582 in after-tax income once she turned 70.5, which is a difference of $1,282 per year. If the inheritance age is reduced to 39.5, the heterosexual widow could withdraw $17,696 per year in after-tax income, compared to only $14,491 for the lesbian widow – a difference of $3,205 per year.[59]

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[59] *See Improving the Lives of LGBT Older Adults*, *supra* note 13, at 19 & n.97.

Like numerous others, Andrew Sorbo has been deprived of interest income because DOMA forced him to begin withdrawing money from his husband Colin Atterbury's IRA shortly after Colin died of pancreatic cancer. Andrew, a teacher and school principal, and Colin, a professor of medicine and employee of the Veteran's Administration, were married in Connecticut in 2009, having been in a committed relationship since 1979. Four months after they were married, Colin succumbed to pancreatic cancer. Among other things, Andrew inherited Colin's IRA. Had Andrew been a woman, he would have been able to transfer the IRA to his name and allow the principal to continue to grow tax-free; but because of DOMA, Andrew was viewed as a "non-spouse" and was required to begin withdrawing money from Colin's IRA almost immediately following Colin's death.[60] This imposed a significant long-term financial strain on Andrew, which would not have been experienced by a similarly situated surviving heterosexual spouse who would have been able to defer the income tax-free.[61]

5. Estate Taxes

While only a small fraction of all estates are affected by the estate tax, the inability of legally married same-sex couples to take advantage of the marital deduction impacts higher-net-worth same-sex couples whose estates are subject to federal estate tax. While a surviving heterosexual spouse is allowed to inherit all of the deceased spouse's assets without incurring any estate tax liability, a same-sex spouse must pay taxes on any inheritance over the federal exemption limit,[62] which is what Respondent Edie Windsor was required to do when she inherited the estate of her late wife, Thea Spyer, in 2009.

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[60] *Hearing on S.598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families Before the S. Comm. on the Judiciary*, 111th Cong. (2011) (statement of Andrew Sorbo).

[61] Andrew's financial hardships were compounded because DOMA prevented Colin's pension from the Veteran's Administration to be transferred to Andrew, as his same-sex spouse, after his death. *Id.*

Edie and Thea met in 1963 and soon thereafter began a committed relationship that would last for over 40 years. Both women had successful careers, Edie as a computer systems consultant for IBM and Thea as a respected clinical psychologist. But later in life, as a result of multiple sclerosis and a heart condition, Thea's health began to deteriorate. In 2007, the couple was married in Canada.[63] Two years later, Thea passed away. Under Thea's will, her entire estate passed to Edie. Prevented by DOMA from taking advantage of the unlimited marital deduction, Edie was required to pay over $363,000 in federal taxes on Thea's estate, an amount that no similarly situated heterosexual surviving spouse would have been required to pay.

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[62] Currently the federal estate tax rate is 35%. 26 U.S.C. § 2001(c). However, the estate tax rate changes frequently. When the federal estate tax was levied against the late Ms. Spyer's estate, the tax rate was 45%, which required Ms. Windsor to pay $363,053 in estate taxes. Brief for Plaintiff-Appellee Edith Windsor at 7, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (Nos. 12–2335, 12–2435).

[63] Edie and Thea were residents of New York, which although did not offer marriage licenses to same-sex couples in 2007, did recognize same-sex marriages from other jurisdictions at the time of Thea's death. *Windsor v. United States*, 699 F.3d 169, 177-78 (2d Cir. 2012).

A recent study estimated that in 2011, same-sex couples affected by the federal estate tax would lose an average of $1.1 million per couple due to the inequity caused by DOMA.[64] This is an unjust loss of a protection afforded to opposite-sex surviving spouses.

IV. The Denial of Marital Benefits and Protections Heightens the Threat of Financial Insecurity for Legally Married Same-Sex Elders.

The inequitable treatment precipitated by DOMA exacerbates LGBT elders' predisposition to financial insecurity. Although elderly same-sex couples and elderly heterosexual couples have equally paid into, and are in equal need of, the programs and benefits that are designed to assist older couples in their retirement years, DOMA stands as a roadblock to the elderly same-sex couples' equal access to these benefits based on nothing more than their spouses' gender. As the examples above make plain, the disparate impact of DOMA on legally married same-sex elders is tangible and pronounced. In direct contrast to Petitioner's irrational justification, time has shown that because of DOMA, married same-sex couples have experienced "significant problems of disuniformity and unfairness in the distribution of [marital] benefits."[65]

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[64] Michael D. Steinberger, *Federal Estate Tax Disadvantages for Same-Sex Couples* 10 (Nov. 2009), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Steinberger-Federal-Estate-Tax-Nov-2009.pdf.

[65] Brief for Defendant-Appellant Bipartisan Legal Advisory Group of the United States House of Representatives at 14, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (Nos. 12–2335, 12–2435).

CONCLUSION

Because of DOMA's undeniable and unjustifiable unequal treatment of legally married couples, *amici curiae* SAGE, NSCLC, ASA, NHCOA, SEARAC and NOSCCR respectfully submit that this Court should affirm the decision of the Court of Appeals for the Second Circuit that Section 3 of DOMA is unconstitutional.

Dated: New York, New York
March 1, 2013

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 12-307

IN THE
Supreme Court of the United States

THE UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR, in her capacity as
Executor of the estate of THEA CLARA SPYER,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. FEDERAL AGENCIES HAVE NEVER APPLIED A UNIFORM DEFINITION OF MARRIAGE. 3

A. Marriage is regulated and defined at the state level. 5

B. Federal agencies look to state marriage law when administering federal programs. 7

1. When federal law includes choice of law provisions, agencies apply the law of a particular state. 8

2. When federal law is silent, agencies still apply state law 10

II. FEDERAL AGENCIES HAVE EXPERIENCE NAVIGATING SUBSTANTIAL VARIATION IN STATE MARRIAGE LAW 13

A. Federal agencies have addressed significant differences regarding interracial marriage. 15

TABLE OF CONTENTS—Continued

Page

B. Federal agencies have addressed significant differences regarding divorce. 18

C. Federal agencies have addressed significant differences regarding common law marriage. 23

D. Federal agencies have addressed other significant differences among state marriage laws. 27

III. FEDERAL AGENCIES MAKE OTHER DETERMINATIONS THAT ARE FAR MORE BURDENSOME THAN APPLYING STATE MARRIAGE LAW.... 29

CONCLUSION 35

APPENDIX

AMICI CURIAE IN SUPPORT OF RESPONDENT.......... 1a

TABLE OF AUTHORITIES

FEDERAL CASES Page(s)

Astrue v. Capato ex rel. B.N.C.,
132 S. Ct. 2021 (2012) 9

Bd. of Trs. of Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 15, 22

Beebe v. Moormack Gulf Lines,
59 F.2d 319 (5th Cir. 1932) 12

Boyter v. Commissioner,
74 T.C. 989 (1980) 20

De Sylva v. Ballentine,
351 U.S. 570 (1956) 10, 11

Dunne v. Office of Pers. Mgmt.,
173 F. App'x 814 (Fed. Cir. 2005) 12

Estate of Goldwater,
539 F.2d 878 (2d Cir. 1976)........................... 12

Estate of Steffke,
538 F.2d 730 (7th Cir. 1976) 12

Ex parte Burrus,
136 U.S. 586 (1890) 5

Gartland v. Schweiker,
1982 WL 171060 (D. Ariz. Mar. 25, 1982)... 28

Haddock v. Haddock,
201 U.S. 562 (1906) 5

Heller v. Doe,
509 U.S. 312 (1993) 4

Helvering v. Fuller,
310 U.S. 69 (1940) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Huff v. Dir., Office of Pers. Mgmt.,
40 F.3d 35 (3d Cir. 1994) 21

Lembcke v. United States,
181 F.2d 703 (2d Cir. 1950) 19

Loving v. Virginia,
388 U.S. 1 (1967) 15

Madewell v. United States,
84 F. Supp. 329 (E.D. Tenn. 1949) 21

Massachusetts v. U.S. Dep't of Health & Human Servs.,
682 F.3d 1 (1st Cir. 2012) 6, 7

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457 U.S. 202 (1982) 34

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517 U.S. 620 (1996) 2

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419 U.S. 393 (1975) 5

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504 F. Supp. 653 (D. Mass. 1980) 21

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103 F. Supp. 619 (S.D. Iowa 1951) 28, 29

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177 F.2d 44 (D.C. Cir. 1949) 9

Page(s)

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317 U.S. 287 (1942) 5

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GSBCA No. 15382-RELO, 01-1 BCA
¶ 31,271 (2000) 24, 25

Matter of Balodis,
17 I. & N. Dec. 428 (BIA 1980) 27, 28

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2009 WL 3713201 (BIA Oct. 23, 2009) 12, 13

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No. 11-2588, 2012 U.S App. Vet. Claims
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U.S. Const. art. I, § 8 6

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§ 8101(6) 10
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§ 8341 20

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17 U.S.C. § 101 8

20 U.S.C. § 1087vv(d)(1) 10

26 U.S.C. § 4980B(f)(3)(C) 20

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§ 103(c) 8
§ 1310 30
§ 1311(a)(1) 30
§ 1311(a)(2) 31
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Page(s)

42 U.S.C.
  § 409(a) 30
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  § 416(d) 20
  § 416(h)(1)(A)(i) 8

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H.R. Rep. No. 104-664 (1996) 4, 33

FEDERAL REGULATIONS

5 C.F.R.
  § 831.613(e) 26
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  § 1651.5 26
  § 1651.5(a) 9

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  § 219.32 26
  § 222.13 26
  §§ 404.1041–1059 30
  § 404.1520(a)(4)(i)–(v) 32
  § 404.726 26
  § 725.204(a)(1) 9

28 C.F.R. § 32.3 26

29 C.F.R.
  § 825.122(a) 9
  § 825.800 9

Page(s)

38 C.F.R.
- § 3.10 30
- § 3.10(b) 30
- § 3.10(d) 30, 31
- § 3.10(e) 31
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557 N.W.2d 102 (Iowa Ct. App. 1996) 24

Estate of Love,
618 S.E.2d 97 (Ga. Ct. App. 2005) 24

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414 N.E.2d 657 (N.Y. 1980) 23, 24

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- Colo. Rev. Stat. § 14-10-106(1)(a)(I) 19
- Fla. Stat. § 741.21 27
- Ga. Code Ann. § 19-3-1.1 23
- 750 Ill. Comp. Stat. Ann. 5/212(a)(4) 27
- Kan. Stat. Ann. § 23-2502 23
- Ky. Rev. Stat.
  - § 391.100 (1966) 16
  - § 402.020 (1966) 16
  - § 402.040 (1966) 16
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- Mo. Rev. Stat.
  - § 451.020 27
  - § 451.020 (1966) 16
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- N.J. Stat. § 2A:34-10 19
- Or. Rev. Stat. § 11-106.010 27
- 23 Pa. Cons. Stat. § 1103 23
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INTEREST OF AMICI CURIAE[1]

Amici curiae are former Cabinet secretaries, commissioners, and other senior administrative agency officials with years of experience administering federal benefit programs and other federal laws. Amici have served a wide range of agencies in both Democratic and Republican administrations, including the Department of Health and Human Services, the Social Security Administration, the Department of Defense, the Department of Labor, the Office of Personnel Management, and the Internal Revenue Service. The federal programs that they administered regulate many aspects of American life and often require agencies to make determinations of marital status. Thus, amici are well positioned to discuss the impact of the Defense of Marriage Act (DOMA), which categorically bars federal agencies from treating marriages of same-sex couples like any other state-sanctioned marriages.

SUMMARY OF ARGUMENT

From the earliest days of our nation, when Congress authorized survivor benefits for widows of soldiers after the Revolutionary War, administrative agencies overseeing federal benefits and laws have determined marital status by turning to state marriage laws. Such laws have varied and evolved over time, reflecting different views about, for example, whether to permit mixed-race marriages, whether and how marital status could end by divorce, and whether to recognize the validity of non-ceremonial common law marriages. Despite the diversity and ongoing evolution of state laws, federal agencies have historically proven adept at applying choice of law rules to ascertain state marital status while administering the scores of federal programs that rely on marriage determinations.

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[1] A list of the amici filing this brief is set forth in the Appendix. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than amici or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this amicus brief have been filed with the Clerk of the Court.

Section 3 of DOMA, by prohibiting the federal government from recognizing the legal marriages of same-sex couples, represents a stark and unconstitutional departure from this practice. At a bare minimum, government action that discriminates against a group of citizens must "bear[] a rational relation to some legitimate end," *Romer v. Evans*, 517 U.S. 620, 631 (1996), thereby ensuring "that classifications are not drawn for the purpose of disadvantaging the group burdened by the law," *id.* at 633. The Bipartisan Legal Advisory Group (BLAG) contends that DOMA serves a legitimate end—the government's interest in national "uniformity"—because Section 3 establishes a categorical rule regarding the validity of marriages of same-sex couples under federal law. But Section 3 has no rational relationship to that end. It fails to foster uniformity because it does not alter the federal government's incorporation of other variations in state marriage law. Rather, it singles out the marriages of same-sex couples and wholly excludes these couples from access to federal benefits and obligations applicable to other married couples. In fact, Section 3 diminishes uniformity by creating two classes of married people.

Contrary to BLAG's further contention, Section 3 of DOMA does not ease administrative burdens or simplify the determinations made by federal agencies. Congress has never enacted a uniform definition of marriage—not prior to 1996, and not with the passage of Section 3. Under DOMA, federal agencies undertake a routine analysis of state law to determine marital status for all marriages between heterosexual couples. The effort that would be borne by agencies absent DOMA is no different. It is the product of how our federalist system has regulated marriage since the Founding, embracing diversity under state law rather than mandating uniformity across the nation. Indeed, the task of interpreting state marriage laws, particularly for a modest number of married same-sex couples, pales in magnitude, complexity, and fact intensity to many other benefit determinations made by federal agencies every day.

ARGUMENT

I. FEDERAL AGENCIES HAVE NEVER APPLIED A UNIFORM DEFINITION OF MARRIAGE.

The contention raised by BLAG to justify Section 3 of DOMA, that the law "ensures national uniformity in eligibility for federal benefits and programs based on marital status," BLAG Br. 33, utterly lacks merit. According to BLAG, it was reasonable for Congress to enact a uniform rule rejecting legal marriages of same-sex couples under federal law "rather than adopting a patchwork of disparate state-law rules," which would potentially recognize some but not all same-sex relationships under federal law. *Id.* BLAG also defends DOMA on the basis that Section 3 ensures that "similarly-situated [same-sex] couples will have the same federal benefits regardless of the state in which they happen to reside." *Id.*[3]

These arguments lack any "footing in the realities of the subject addressed" by DOMA. *Heller v. Doe*, 509 U.S. 312, 321 (1993). Federal agencies applying federal law have never administered a "uniform" definition of marriage. Marriage is regulated at the state level, and different states have crafted different requirements for marriage. When applying federal law and administering federal programs, administrative agencies manage this diversity by choosing and following the appropriate state marriage law.

Section 3 of DOMA does not displace the settled regime of deference to different state-by-state definitions of marriage—except for married same-sex couples, who are systematically excluded from federal benefits and obligations applicable to all other married couples. DOMA announces no uniform nationwide rule of divorce, consanguinity, or common law marriage. Apart from denying recognition to married same-sex couples, Section 3 entirely leaves in place the same "patchwork of disparate state-law rules" that administrative agencies have regularly used to determine marital status. *See, e.g.*, H.R. Rep. No. 104-664, at 30 (apart from denying recognition of marriages of same-sex couples, "the federal government will continue to determine marital status in the same manner as it does under current law"). Thus,

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[3] Notably, the legislative history of DOMA is largely devoid of any discussion of "uniformity" as a justification for the law. *See, e.g.*, H.R. Rep. No. 104-664, at 12–18 (1996) (discussing four governmental interests purportedly advanced by DOMA).

BLAG's characterization of Section 3—DOMA operates "not by singling out any category of relationships for specific exclusion, but rather by clarifying what marriage *means* for purposes of federal law," BLAG Br. 3—bears no relation to the language or effect of the law.

A. Marriage is regulated and defined at the state level.

Unlike the states, the federal government does not issue marriage licenses, grant divorce decrees, or otherwise regulate marital relationships (with very limited exceptions for territories and enclaves under its exclusive jurisdiction). Nor has it ever. As this Court has explained: "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce. . . . [T]he Constitution delegated no authority to the government of the United States on the subject of marriage and divorce." *Haddock v. Haddock*, 201 U.S. 562, 575 (1906), *overruled on other grounds by Williams v. North Carolina*, 317 U.S. 287 (1942); *see also Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (describing "domestic relations" as "an area that has long been regarded as a virtually exclusive province of the States"); *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States.").

A necessary consequence of federalism is that marriage law in America is characterized by diversity, not uniformity. As discussed in Part II below, state requirements for marriage and divorce have varied significantly, especially as the institution of marriage has changed over many years. This "patchwork of disparate state-law rules" is precisely what the Founders envisioned.

To be sure, state authority over marriage does not preclude all federal legislation that references marital relationships.[3] Congress has the power to levy taxes, provide for the common defense and general welfare, regulate commerce, raise and support armies, and enact uniform rules for naturalization and bankruptcy. *See* U.S. Const. art. I, § 8. All of these powers to some degree touch upon personal relationships, including marriage. But since the earliest days of the nation, Congress has enacted federal legislation that assumes, builds upon, and incorporates the status of marriage as defined by the states. *See, e.g.*, Act of June 7, 1794, ch. 52, § 1, 1 Stat. 390, 390 (providing pensions for "widow, or if no widow, such child or children" of "any commissioned officer in the troops of the United States [who] shall . . . die by reason of wounds received in actual service of the United States"); Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. 436, 436–37 (extending right to renew author's copyright, if author not living, to "a widow, or child, or children, either or all then living").

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[3] BLAG contends that, notwithstanding the clear pattern of federal law expressly relying on state law to determine marital status, "Congress also has a long history, when it sees fit, of supplying its own definitions of marriage for federal purposes." BLAG Br. 4 (citing examples). However, the few specialized provisions cited by BLAG have nothing in common with DOMA. *See generally* Amici Br. of Family Law Professors. They do not purport to define marriage for all federal purposes. They are tailored to specific programs, designed to advance the underlying legislative purposes and prevent documented abuses. As Judge Straub noted below: "It may be that prior to DOMA, any federal 'definition' of marriage was limited to advancing the targeted goal of a particular federal program, not a blanket, undifferentiated policy choice imposed on statuses created by states." *Windsor v. United States*, 699 F.3d 169, 203 (2d Cir. 2012) (Straub, J., dissenting in part and concurring in part); *see also Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 12 (1st Cir. 2012).

With the rise of the modern administrative state, and the vast expansion of federal benefits including Social Security, Medicare, and Medicaid, federal law now includes abundant references to marriage, spouses, and surviving spouses. The General Accounting Office has identified well over one thousand provisions of federal law in which benefits, rights, and privileges are expressly contingent upon marital status. U.S. General Accounting Office, *Defense of Marriage Act*, GAO/OGC-97-16 (Jan. 31, 1997) (1,049 provisions identified); U.S. General Accounting Office, *Defense of Marriage Act: Update to Prior Report*, GAO/OGC-04-353R (Jan. 23, 2004) (1,138 provisions).

Each of the amici once administered some of these laws and understands how they operate. As discussed below, federal agencies routinely turn to state marriage law to determine marital status.

B. Federal agencies look to state marriage law when administering federal programs.

With the sole exception of DOMA, Congress has never purported to define marriage for all federal law purposes. Rather, the U.S. Code is a mixture of many programs and regulatory regimes. *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 12 (1st Cir. 2012). Some federal programs and laws that depend on determinations of marital status include explicit statutory or regulatory choice of law provisions for applying state law, the source of domestic relations law in this country.

Although others are silent about how to determine marital status, agencies and courts have routinely filled the void by adopting their own choice of law rules for applying state law.

If there is one consistent rule, it is that federal law has incorporated state law definitions of marriage into federal law in one form or another. *See Windsor v. United States*, 699 F.3d 169, 186 (2d Cir. 2012). Section 3 of DOMA, "a blanket, undifferentiated policy choice," represents a stark departure from this approach. *See id.* at 203 (Straub, J., dissenting in part and concurring in part).

1. When federal law includes choice of law provisions, agencies apply the law of a particular state.

In some circumstances, federal statutes explicitly impose choice of law rules for applying state law regarding marital status. For example, the Social Security Act states that "[a]n applicant is the wife, husband, widow, or widower . . . if the courts of the State in which such insured individual is domiciled . . . would find that such applicant and such insured individual were validly married . . . ." 42 U.S.C. § 416(h)(1)(A)(i). Similarly, the Veterans' Benefits Act directs that "[i]n determining whether or not a person is or was the spouse of a veteran, their marriage shall be proven as valid . . . according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued." 38 U.S.C. § 103(c); *see also* 17 U.S.C. § 101 (definition of "widow" and "widower" under Copyright Act).

Federal agencies have adopted comparable choice of law provisions through administrative rulemaking.

See, e.g., 29 C.F.R. §§ 825.122(a), 825.800 (defining spouse under Family and Medical Leave Act as "a husband or wife as defined or recognized under state law for purposes of marriage in the State where the employee resides"); 20 C.F.R. § 725.204(a)(1) (defining spouse under Federal Coal Mine Health and Safety Act according to whether "[t]he courts of the State in which the miner is domiciled would find that such individual and the miner [are] validly married"); 5 C.F.R. § 1651.5(a) (defining spouse under Thrift Savings Plan according to "[t]he state law of the participant's domicile").

Under these provisions, federal agencies routinely discern and apply state marriage law to determine eligibility for federal programs tied to marital status. *See, e.g., United States v. Snyder*, 177 F.2d 44, 46 (D.C. Cir. 1949) ("The validity of marriages is no new problem in veterans' affairs."). Contrary to BLAG's argument, these choice of law rules are not "obscure" or "[un]settled," and they are no more "complex" than the rules federal agencies interpret and apply on a daily basis to make other eligibility and benefit determinations. BLAG Br. 34 (also discussing "vagaries and difficulties of undertaking a multitude of . . . complex choice-of-law determinations"). Indeed, just last term, this Court concluded that a parallel choice of law provision in the Social Security Act (applying the term "child" by looking to state intestacy law) "installed *a simple test*, one that ensured benefits for persons plainly within the legislators' contemplation, while avoiding congressional entanglement in the traditional state-law realm of family relations." *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2031 (2012) (emphasis added) (rejecting uniform rule of construction).

2. When federal law is silent, agencies still apply state law.

In many instances, federal statutes that reference marital relationships are silent about how those relationships are to be determined. For example, the Higher Education Act, which established the modern financial aid system, directs that the income of a student's parents should not factor in an aid determination if the applicant is an "independent student," defined in part as "a married individual." 20 U.S.C. § 1087vv(d)(1). But the Act and the accompanying regulations say nothing about who qualifies as a "married individual." In other instances, federal provisions that address marital status are basically tautological. The Federal Employees Benefits Act, which provides for compensation in the event of the death or disability of a federal employee, defines "widow" and "widower" as a surviving "wife" or "husband," without further defining those terms. 5 U.S.C. § 8101(6), (11); *see also* 10 U.S.C. § 1408(a)(6) (defining "spouse" in Military Pensions Act as "the husband or wife . . . of a member who, on or before the date of a court order, was married to that member").

Absent explicit statutory or regulatory guidance, courts and agency adjudicators have routinely turned to state law to determine marital relationships referenced in federal legislation.

This Court's ruling in *De Sylva v. Ballentine*, 351 U.S. 570 (1956), is instructive. *De Sylva* involved a dispute under the Copyright Act between an author's widow and the author's child born to another woman. The widow challenged whether the child born out of wedlock fell within the statutory provision that "'children of the author . . . shall be entitled to a renewal and extension of the copyright.'" *Id.* at 571 (quoting former provision of Copyright Act). The Court concluded it was appropriate to look to state law to determine how to define both "widow" and "children":

> The scope of a federal right is, of course, a federal question, but this does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.
>
> . . . . To decide who is the widow or widower of a deceased author, or who are his executors or next of kin, requires a reference to the law of the State which created those legal relationships. . . . We think it proper, therefore, to draw on the ready-made body of state law to define the word "children" in § 24.

Id. at 580–81 (citations omitted).

Notably, the Court did not adopt the position of two concurring justices, who supported a nationwide rule that "illegitimate children were 'children' within the meaning of § 24 of the Copyright Act, whether or not state law would allow them dependency benefits." *Id.* at 584 (Douglas, J., concurring). Instead, the Court embraced, in the words of the concurring justices, "the diversity which would flow from incorporating into the Act the laws of forty-eight States." *Id.* at 583 (Douglas, J., concurring).

Other court decisions have followed the same course, looking to state law to determine marital status for federal purposes. *See Helvering v. Fuller*, 310 U.S. 69, 74–75 (1940) ("[A]n inquiry into state law seems inescapable. For the provisions in the [tax code and regulations] . . . imply[] the necessity for an examination of local law to determine the marital status and the obligations which have survived a divorce."); *cf. Seaboard Air Line Ry. v. Kenney*, 240 U.S. 489, 493–94 (1916) (looking to state law to define "next of kin" entitled to collect judgment under Federal Employers' Liability Act). As the Federal Circuit summarized: "[A]lthough federal law controls the right to federal benefits resulting from familial relationships, state law applies to define such relationships." *Dunne v. Office of Pers. Mgmt.*, 173 F. App'x 814, 815 (Fed. Cir. 2005); *see also, e.g.*, *Estate of Goldwater*, 539 F.2d 878, 880 (2d Cir. 1976) (affirming agency ruling applying state law to define "surviving spouse" under estate tax provision); *Estate of Steffke*, 538 F.2d 730, 735 (7th Cir. 1976) (affirming agency ruling applying state law to determine validity of foreign divorce under estate tax); *Powell v. Rogers*, 496 F.2d 1248, 1250 (9th Cir. 1974) (affirming agency ruling applying state law to define "surviving wife" under Longshoremen's and Harbor Workers' Compensation Act); *Beebe v. Moormack Gulf Lines*, 59 F.2d 319, 319–20 (5th Cir. 1932) (applying state law to define "surviving widow" under federal statutes regarding death of seamen and railroad employees).

Agencies have followed the same rule in their adjudications. *See, e.g.*, Rev. Rul. 58-66, 1958-1 C.B. 60 ("The marital status of individuals as determined under state law is recognized in the administration of the Federal Income tax law."); *In re Barragan*, No. A098 323 725, 2009 WL 3713201, at *1 (BIA Oct. 23, 2009) (unpublished) (under immigration law, "[t]he issue of the validity of a marriage under State law is generally governed by the law of the place of celebration of the marriage"); *United States v. Poole*, 39 M.J. 819, 820–21 (A.C.M.R. 1994) (under Uniform Code of Military Justice, "[m]ilitary law recognizes the legitimacy of marriages by service personnel if valid in the state in which they are contracted").

In sum, the legal framework for determining marital status under federal law embraced and continues to embrace state law diversity, except for marriages of same-sex couples. As demonstrated in the next section, administrative agencies implementing federal programs have routinely applied choice of law rules to incorporate variable and sometimes contentious state law definitions. DOMA unconstitutionally interferes with a long-standing and well-functioning system by singling out and excluding from federal benefits one class of married couples.

II. FEDERAL AGENCIES HAVE EXPERIENCE NAVIGATING SUBSTANTIAL VARIATION IN STATE MARRIAGE LAW.

States have taken sometimes very different approaches to regulating marriage. For example, the states were long divided over whether to recognize marriages between members of different races and whether to permit divorces without finding evidence of fault. To the present day, states have different rules for divorce, common law marriage, consanguinity, and age of consent. In fact, neither state nor federal law has ever treated "similarly-situated couples" the same across the nation—a purported justification for DOMA Section 3. *See* BLAG Br. 33.

BLAG contends that in 1996 the prospect of same-sex couples marrying was an "unprecedented situation"—the first time in the history of the nation that the states engaged in a "reconsideration of the traditional definition of marriage." *Id.* at 32, 35. But, as demonstrated below, the idea that state marriage laws were static and uniform before DOMA is a fallacy. Instead, states have continually amended and modernized their laws, and as they have done so, agencies have expertly navigated these differences while administering federal law.

Supporters of DOMA dismiss these substantial variations in state law as "particulars" and "minor variations." BLAG Br. 4; Amici Br. of Senators Hatch *et al.*, at 20. But the differences among state marriage laws have been anything but "minor," especially compared to the clear positions that the states have taken on the marriage of same-sex couples.[4]

While BLAG argues that DOMA "avoids a confusing situation in which same-sex couples could gain (or lose) federal marital status simply by moving between states with different policies on recognition of same-sex marriages," BLAG Br. 33, Congress has never seen fit to address this problem for any class of heterosexual couples, whose marital status could just as easily ebb and flow as they moved across the country. A law must fail even rational basis review where the "purported justifications" make "no sense" in light of how the government has "treated other groups similarly situated in relevant respects." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001).

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[4] There is no basis for confusion about where states stand on the subject of marriage between same-sex couples. Nine states and the District of Columbia sanction these marriages. Thirty-nine states prohibit them, most typically in their state constitutions. In the two remaining states—Rhode Island and New Mexico—marriages between same-sex couples are not performed although they are not expressly prohibited by law. Their state attorneys general have opined that their states would recognize marriages of same-sex couples from other jurisdictions. *See* Letter from R.I. Att'y Gen. Patrick C. Lynch to Jack R. Warner, at 5 (Feb. 20, 2007); N.M. Op. Att'y Gen. 11-01, at 4 (Jan. 4, 2011).

Despite significant differences among the states over the validity of marriages, Congress never imposed a single federal benchmark before 1996 and then did so only with respect to one particular aspect of marital eligibility. Since 1996, federal agencies have continued to accommodate the differences among state marriage laws on a regular basis, each agency determining how best to apply state law. Marriages of same-sex couples pose no issue for agencies already adept at applying diverse state marriage laws.

A. Federal agencies have addressed significant differences regarding interracial marriage.

From colonial times until well past the middle of the twentieth century, the states did not agree whether white persons and persons of color could legally wed. So called "anti-miscegenation" laws prohibiting interracial marriage were common, but not universal, prior to this Court's decision declaring them unconstitutional. *Loving v. Virginia*, 388 U.S. 1, 6, 11–12 (1967) (invalidating laws in 16 states); Charles S. Mangum Jr., *The Legal Status of the Negro* 238 n.6 (Lawbook Exchange 2000) (1940) (30 of 48 states prohibited interracial marriages or relationships in 1940); Rachel F. Moran, *Interracial Intimacy: The Regulation of Race and Romance* 4 (2001). These laws differed considerably among states.

They varied, for example, in how they determined an individual's race and which racial groups were restricted from marrying. Mangum, *supra*, at 245–47, 253–54. Missouri restricted marriages between a white person and one "having one-eighth part or more Negro blood," Mo. Rev. Stat. §§ 451.020, 563.240 (1966), whereas in Kentucky, the definition was based on one-quarter, *see* Ky. Rev. Stat. §§ 391.100, 402.020, 040, 090 (1966). Arizona's statute voided marriages of "persons of Caucasian blood, or their descendants, with Negroes, Hindus, Mongolians, members of the Malay race, or Indians, and their descendants," Ariz. Code Ann. §§ 63-107, 63-108 (1939), while Maryland prohibited whites from marrying "a person of negro descent to the third generation inclusive," Md. Code art. 27, § 398 (1957). States also differed in whether they recognized an interracial marriage performed by another state. *See* Mangum, *supra*, at 249 n.81.

In the face of this diversity, federal agencies administered the range of programs that turn on marital status by applying choice of law rules and adroitly incorporating state law differences.

The Board of Immigration Appeals, for example, addressed whether an interracial couple seeking immigration benefits was married under the laws of their state of residence when they had traveled elsewhere to get married. *See Matter of D–*, 3 I. & N. Dec. 480 (BIA 1949). The claim at issue involved a marriage between a white Norwegian man and a black woman. The man admitted that the couple had traveled to Canada and married there "for the purpose of circumventing the laws of North Dakota, where both reside." *Id*. at 481. The Board determined that under North Dakota law—which invalidated marriages performed elsewhere if they would violate North Dakota law—the marriage was void, and therefore void for purposes of federal immigration law as well. *Id.* at 482–83. *Cf. Matter of C–*, 7 I. & N. Dec. 108, 110–13 (BIA 1956) (comparing Maryland and North Dakota laws banning interracial marriage, and finding that a Filipino immigrant's first marriage to a white woman in District of Columbia was valid in the couple's home state of Maryland, even though they could not have celebrated it there; second marriage was bigamous and claimant was deportable because of adultery).

The Department of the Interior addressed questions of state law and interracial marriage in determining pension claims. *See, e.g.*, *Mary A. Miller*, 9 P.D. 209, 209–10 (Bd. Pens. App. 1898) (denying pension claim of a "colored woman, and former slave" as the widow of a "white man and ex-soldier" in Texas because under state law, the marriage was "null and void"); *Emily Rincke*, 17 P.D. 257, 261 (Bd. Pens. App. 1907) (recognizing validity of a Canadian marriage between a white woman and a black man—which was not recognized in original home state of Maine—because the couple moved to California, which also outlawed interracial marriages but recognized such marriages performed elsewhere).

The Bureau of Indian Affairs and the U.S. Armed Forces considered similar disputes. *See Estate of James Franklin Macer Crow Allottee No. 377*, 69 Interior Dec. 35, 41–42, 1962 WL 9765, at *1–2 (DOI Apr. 24, 1962) (concluding that a man was not "white" under Montana law so his marriage to a black decedent was legal under Montana law); *Ida N. Waters*, B-155582, 1965 WL 3236, at *1–2 (Comp. Gen. Jan. 6, 1965) (withholding benefits to the black widow of a white man because Texas statute prohibited interracial marriage).

As these examples show, in the face of substantial differences among state marriage laws, federal agencies deferred to state law and applied choice of law rules to determine marital status. Federal law did not prioritize uniformity or treat all mixed-race couples the same nationwide. Instead, couples who were married under relevant state law were considered married by the federal government. Any lack of uniformity among the states with respect to the marriage of same-sex couples is plainly no more challenging for federal agencies than the historic lack of uniformity among state laws regarding interracial marriage.

B. Federal agencies have addressed significant differences regarding divorce.

At the Founding, divorce was extremely rare and southern colonies did not even permit it. Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 Wm. & Mary Bill Rts. J. 381, 383–84 (2007); *see also* Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 Va. L. Rev. 1497, 1501 (2000). By the early twentieth century, however, a few states (most notably Nevada) had enacted lenient divorce laws with short residency requirements. Estin, *supra*, at 384; Friedman, *supra*, at 1502–05. Married individuals increasingly crossed state lines to take advantage of these variations and secure so-called "migratory divorces." Estin, *supra*, at 384. This led to a vehement public outcry, including several unsuccessful proposals to amend the Constitution to empower Congress to enact uniform divorce legislation. *Id.* at 390–92. Instead, state residency requirements and statutory grounds for divorce continued to vary dramatically for many years. *Id.* at 394–95.

Some states prohibited a person "at fault" in the dissolution of a marriage, such as an adulterous party, from remarrying. *See, e.g.*, *Lembcke v. United States*, 181 F.2d 703, 704–07 (2d Cir. 1950) (Under New York law, person divorced on basis of adultery could not remarry anyone during lifetime of former spouse without court permission, whereas Pennsylvania law prohibited adulterer from marrying only the person with whom he or she had committed adultery). To this day, states have differing residency requirements to obtain a divorce. *Compare, e.g.*, Colo. Rev. Stat. § 14-10-106(1)(a)(I) (must live in the state 91 days) *with* N.J. Stat. § 2A:34-10 (one-year residency requirement). "No fault" divorce provisions, which are now the norm, are still not uniform. *Compare, e.g.*, Ariz. Rev. Stat. Ann. § 25-312 ("no fault" divorce requires showing that "marriage is irretrievably broken"; no separation required), *with* Va. Code Ann. § 20-91 (no showing of marriage being "irretrievably broken" required; "no fault" divorce generally requires continuous separation without cohabitation for one year). Although most states historically recognized other states' divorce decrees, some states refused. *See* Estin, *supra*, at 387 (New York, Pennsylvania, North Carolina, and South Carolina did not recognize ex parte divorce decrees from other states in 1900).

Divorce and remarriage affect the administration of many federal programs. Divorce can, for example, constitute a "qualifying event" triggering COBRA insurance availability. *See* 26 U.S.C. § 4980B(f)(3)(C). Divorced spouses are eligible for certain Social Security benefits based on their prior spouses' earnings. *See* 42 U.S.C. § 416(d). Remarriage can terminate benefits received from federal agencies. *See* 5 U.S.C. § 8341 (terminating survivor annuity upon remarriage before age 55).

When administering federal programs, agencies have frequently turned to differing state laws to determine the validity of divorces and subsequent marriages by claimants. In *Boyter v. Commissioner*, 74 T.C. 989 (1980), for example, both the IRS and the Tax Court rejected a married couple's attempt to avoid the "marriage penalty" by obtaining divorces in foreign countries in December in two consecutive years, only to remarry each January, because the divorces were not valid under applicable state law. *Id.* at 993, 994 ("We . . . agree with the [agency's] assertion . . . that 'the Tax Court is bound by state law rather than federal law when attempting to construe marital status.'"); *see also* SSR 67-4, 1967 WL 2988, at *2 (1967) (Social Security Administration analyzing timing of divorce under Nebraska law where divorce reinstated widow's entitlement to her mother's insurance benefits); *Louise P. Pettey*, 34 Comp. Gen. 629, 631, 1955 WL 1040, at *2 (May 25, 1955) (denying claim for spousal quarters allowance where marine's alleged wife could not prove dissolution of previous marriage before 1945, the year she married the marine because New York law would not recognize retroactive divorce decree).

Federal agencies have handled these issues as adeptly when the place of celebration of the marriage differs from the couple's state of residence. In SSR 66-4, 1966 WL 3045 (1966), the Social Security Administration applied "the law of the place where the marriage was contracted to determine the validity of such marriage." *Id.* at *1. Although the couple lived in Wisconsin, the agency found that the post-divorce marriage celebrated in Iowa was valid under Iowa law even though it would have been invalid under the law of Wisconsin, and awarded benefits. *Id.*

When disputes over the validity of a divorce and choice of law have led to court litigation, the federal courts, too, have referred to, and deferred to, state law. *See Madewell v. United States*, 84 F. Supp. 329 (E.D. Tenn. 1949) (Veterans Administration case determining, under Tennessee law, validity of marriage putatively entered in Georgia during divorce proceedings in California); *see also Huff v. Dir., Office of Pers. Mgmt.*, 40 F.3d 35, 36–37 (3d Cir. 1994) (for purposes of federal employee survivors' benefits, validity of remarriage after disputed divorce was determined according to Pennsylvania law, the state with most "significant interest" in marriage); *Thompson v. Harris*, 504 F. Supp. 653, 654–55 (D. Mass. 1980) (where husband divorced first wife in Mexico, married plaintiff in New Hampshire and then divorced her in Mexico, the court, applying Massachusetts law, found that the first divorce was invalid, the second marriage was, therefore, invalid, and plaintiff was accordingly unmarried under Social Security Act).[5]

Variable state laws regarding divorce treat couples in different states differently. More than a century ago, in authorizing funds for a county-by-county survey regarding marriage and divorce in the United States, Congress observed that "'a marriage is often treated at the same time in one state as dissolved and in another state or county as subsisting, and a man may be convicted of bigamy or adultery in one jurisdiction upon what would be a lawful second marriage in another.'" Carroll D. Wright, *A Report on Marriage and Divorce in the United States, 1867–1886*, at 11 (1889) (quoting House of Representatives Judiciary Committee report). But even this lack of uniformity—triggering possible culpability under criminal law—did not prompt Congress to supplant the diversity of state laws with a national rule.

In light of this long history, the argument that Section 3 of DOMA was necessary to solve an administrative problem caused by the marriage of same-sex couples, *see, e.g.*, BLAG Br. 43, is irrational. Federal agencies have a history of deference to state law, and this deference is the legacy of a longstanding and well-functioning federal agency structure. As with laws prohibiting interracial marriage, agencies have applied choice of law rules and analyzed state law without the need to resort to or impose a uniform federal definition of marriage or divorce. This reservoir of experience demonstrates that federal agencies have the ability to interpret and apply diverse state marriage laws regarding same-sex couples.

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[5] Amici in support of BLAG contend that Section 3 of DOMA was a rational way of avoiding "state by state and statute by statute litigation seeking federal benefits." Amici Br. of Senators Hatch *et al.*, at 9. But lawsuits challenging adverse agency rulings are an established part of administrative law practice. There is no rational reason to supplant the federal government's deference to states in this area only for married same-sex couples. *See Garrett*, 531 U.S. at 366 n.4 (measure fails "basic principles of rationality review" where "purported justifications" make "no sense in light of how" defendant treats "other groups similarly situated in relevant respects").

C. Federal agencies have addressed significant differences regarding common law marriage.

Common law marriage is another area of significant diversity among the states. At one time, most states recognized common law (or non-ceremonial) marriage, but today only ten states and the District of Columbia do so. *See, e.g.*, *Coates v. Watts*, 622 A.2d 25, 27 (D.C. 1993). Even among these states, there are differences. Kansas recognizes common law marriage provided that neither party is under 18 years of age. *See* Kan. Stat. Ann. § 23-2502. Other states recognize common law marriages that were entered into only before a certain date. *See, e.g.*, Ga. Code Ann. § 19-3-1.1 (prohibiting common law marriages entered into after 1996); 23 Pa. Cons. Stat. § 1103 (prohibiting common law marriages entered into after 2004). Some states that no longer (or never did) recognize the creation of common law marriages within their borders may still recognize those marriages for some or all purposes if they were validly created somewhere else. *See, e.g.*, *People v. Badgett*, 895 P.2d 877, 897 (Cal. 1995) (noting that California recognizes common law marriages "contracted in another state that would be valid by the laws of that state"); *Mott v. Duncan Petroleum Transp.*, 414 N.E.2d 657, 658–59 (N.Y. 1980) (New York will recognize a common law marriage as valid "if it is valid where contracted").

The law of common law marriage often requires detailed factual findings to determine marital status, and requirements vary by state. For example, Georgia requires proof of consummation, *Estate of Love*, 618 S.E.2d 97, 100–01 (Ga. Ct. App. 2005); Iowa requires "continuous cohabitation," *Conklin ex rel. Johnson-Conklin v. MacMillan Oil Co.*, 557 N.W.2d 102, 105 (Iowa Ct. App. 1996); and Pennsylvania requires "an exchange of words in the present tense, spoken with the specific purpose that the legal relationship of husband and wife is created by that," *Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 1020–21 (Pa. 1998).

As with other issues surrounding marriage that vary by state, federal agencies have long been able to administer benefit programs by making determinations whether common law marriages exist. *See, e.g., Erickson v. Shinseki*, No. 11-2588, 2012 U.S. App. Vet. Claims LEXIS 1892, at *9–15 (Vet. App. Aug. 31, 2012) (assessing under Iowa law whether veteran was a party to a legally recognized common law marriage); SSR 72-26, 1972 WL 12314, at *2 (1972) (applying Florida law and concluding that claimant for Social Security benefits was not validly married because her purported husband was still married to another person at time of claimant's ceremonial marriage in Missouri and was not divorced until after Florida stopped recognizing common law marriage in 1968).

In *Balasubramanian*, GSBCA No. 15382-RELO, 01-1 BCA ¶ 31,271 (2000), the Department of Veterans

Affairs looked to Georgia law to find that there was a valid common law marriage for purposes of relocation benefits. The agency considered that the claimant and his ex-wife had renewed their vows in a religious ceremony, the ex-wife had redrafted her will to leave her estate to him, and the couple had held themselves out as husband and wife.

In *Perdue*, GSBCA No. 14122-RELO, 98-1 BCA ¶ 29,674 (1998), the General Services Board of Contract Appeals analyzed Alabama, Louisiana, and North Carolina law and concluded that a federal employee was married for purposes of federal law because the employee established the elements of common law marriage under Alabama law before moving to Louisiana and then North Carolina. Neither Louisiana nor North Carolina recognizes in-state common law marriage, but, as the agency determined, both recognize common law marriages established out of state.

The Board of Veterans' Appeals and the Railroad Retirement Board have issued numerous decisions analyzing common law marriage under state law in determining entitlement to benefits. *See, e.g.*, No. 10-27 646, 2012 WL 6558182 (Bd. Vet. App. Oct. 23, 2012) (applying South Carolina law and concluding that veteran was not validly married to purported wife because, at the time of ceremonial marriage, veteran was still married to another person under South Carolina's common law marriage rules); No. 03-02 677, 2006 WL 4438322 (Bd. Vet. App. Sept. 8, 2006) (applying Illinois law and finding that claimant's ceremonial marriage with veteran was valid because claimant's admitted prior common law marriages were not valid in Illinois); No. L-99-5

(R.R. Ret. Bd. Mar. 11, 1999) (analyzing common law marriage laws of Wisconsin, Minnesota, Florida, and Georgia in determining whether appellant was entitled to lump-sum death benefit as common law widow of a federal employee).

Given the challenges posed by common law marriage, some agencies have developed their own internal guidance for applying state law. The Department of Labor has issued a 52-page handbook describing variances in state law and explaining how to address common law marriage under the agency's benefits programs. *See* U.S. Dep't of Labor, *Common-Law Marriage Handbook* (Apr. 2010), http://www.dol.gov/owcp/energy/regs/compliance/PolicyandProcedures/CommonLaw_Marriage.pdf (instructing claims examiners to conduct choice of law analysis and apply the appropriate state law to determine validity of common law marriage). The IRS provides that a person is married if living in a common law marriage recognized by the state in which the person lives or in the state where the common law marriage began. *See* IRS Publ'n 17: Tax Guide for 2012, at 20 (2013). *See also* 5 C.F.R. §§ 831.613(e), 842.605, 1651.5 (Office of Personnel Management guidance for civil service benefits programs); 20 C.F.R. § 404.726 (Social Security Administration guidance); 28 C.F.R. § 32.3 (Department of Justice guidance for administering public safety officers' benefits); 20 C.F.R. §§ 219.32, 222.13 (Railroad Retirement Board guidance for Railroad Retirement Act).

Federal agencies have developed, through decades of experience, a remarkable degree of sophistication and competence in applying the diverse laws of the states to determine whether to recognize common law marriages. That competence is equally applicable when assessing the validity of a post-divorce marriage, an interracial marriage, or the marriage of a same-sex couple.

D. Federal agencies have addressed other significant differences among state marriage laws.

State marriage laws have other variations that factor into the administration of federal benefits. These include variations in minimum age requirements and the permissible degree of relation between the parties.

Some states allow persons under the age of 18 to marry with parental consent, although the minimum age varies. *Compare, e.g.*, Or. Rev. Stat. § 11-106.010 (parties must be at least 17 years old), *with* Utah Code Ann. § 30-1-9 (parties must be at least 15 years old). There is also variation in state law as to whether first cousins can marry. *Compare, e.g.*, Mo. Rev. Stat. § 451.020 (prohibiting marriages between first cousins), *with* Fla. Stat. § 741.21 (not prohibiting first cousin marriages), *and with* 750 Ill. Comp. Stat. 5/212(a)(4) (permitted if both persons are at least 50 or with proof one party is "permanently and irreversibly sterile").

As in every other area in which states have different marital requirements, the federal government navigates these differences and incorporates them into eligibility determinations. In *Matter of Balodis*, 17 I. & N. Dec. 428 (BIA 1980), the Regional Commissioner of the Board of Immigration Appeals addressed a petition to classify a beneficiary as a "fiancée" where the petitioner and the beneficiary were first cousins. Michigan, the state in which the couple intended to reside, does not allow marriages between first cousins, although, as the opinion notes, "[o]ver one-fourth of the states do." *Id.* at 429. Analyzing Michigan law and state court decisions, the BIA determined that, under Michigan law, "a marriage which is valid where contracted is recognized as valid in Michigan despite the fact that it would be invalid if contracted in Michigan." *Id.* And, based on an Opinion of the Michigan Attorney General, the Board noted that Michigan permits first cousins to leave the state solely to contract a lawful marriage in a state that allows such marriages. Accordingly, the petition was approved. *Id.*; *see also Matter of Da Silva*, 15 I. & N. Dec. 778, 779–80 (BIA 1976) (determining marriage between uncle and niece, conducted in Georgia to evade New York's consanguinity law, would nonetheless be recognized under New York law).

In *Gartland v. Schweiker*, 1982 WL 171060 (D. Ariz. Mar. 25, 1982), the court addressed the validity of a marriage entered into with parental consent to determine eligibility for Social Security benefits. The applicant married at age 14 in Texas, and the couple then quickly separated. The marriage was annulled seven years later in Arizona. Looking to Arizona's choice of law provisions, the court applied Texas law and found that the applicant was married. *Id.* at *2, *5; *see also United States v. Mason*, 103 F. Supp. 619 (S.D. Iowa 1951) (applying Iowa law to analyze whether applicant was widow of first husband under National Service Life Insurance Act when first marriage occurred in Iowa without parental consent when the applicant was 14 and husband was 16). These cases examine just the sorts of questions that arise under our longstanding and well-established system of federal agency deference to state marriage law. DOMA's abrupt departure from this system cannot rationally be grounded in a claim of uniformity, a claim that applies only to marriages between same-sex couples.

In sum, while every variation of state marriage law is incorporated in federal law for heterosexual couples, only same-sex couples are categorically excluded from federal marital benefits under DOMA.

III. FEDERAL AGENCIES MAKE OTHER DETERMINATIONS THAT ARE FAR MORE BURDENSOME THAN APPLYING STATE MARRIAGE LAW.

As demonstrated above, federal administrative agencies have been applying choice of law rules for determining marital status under state law for as long as there has been an administrative state. Although BLAG attempts to justify Section 3 of DOMA based on a need to "eas[e] administrative burdens," BLAG Br. 34, federal agencies routinely make determinations that are far more burdensome than deciding whether state law would recognize a particular marriage. Federal administrative programs are riddled with complexities, and eligibility and benefit determinations often require extensive legal and factual judgments.

Under the Social Security Act, for example, the statutory definition of "wages" used to calculate the total retirement benefits awarded to a beneficiary includes twenty different exceptions. *See, e.g.*, 42 U.S.C. § 409(a). The accompanying administrative regulations to interpret and apply this statutory definition span twelve pages in the Code of Federal Regulations. *See* 20 C.F.R. §§ 404.1041–1059. Just one of the statutory exceptions to "wages," excluding payments from various trusts, annuities, and pensions, includes eleven subparts and cross-references twenty-two different provisions of the Internal Revenue Code (and one provision of ERISA). 42 U.S.C. § 409(a)(4)(A)–(K).

Likewise, the Veterans' Benefits Act and the accompanying regulations impose a complex set of rules for certain survivor benefits. Under the Act, the surviving spouse of a veteran who dies after 1956 from a service-connected or compensable disability is entitled to dependency and indemnity compensation. 38 U.S.C. § 1310. Wholly apart from the determination of who qualifies as a spouse, the Department of Veterans Affairs (VA) has a complex, sophisticated methodology for determining appropriate compensation rates in order to administer this program. 38 C.F.R. § 3.10.

The VA begins by employing one of two options for calculating the "basic monthly rate" owed to the spouse. Typically, this rate is established by cross-referencing dollar amounts prescribed in a subsection of a different federal statute, 38 U.S.C. § 1311(a)(1), which Congress updates to account for cost of living increases. 38 C.F.R. § 3.10(b). However, when the deceased veteran died prior to 1993, an "[a]lternative basic monthly rate" can be calculated based on the amount in 38 U.S.C. § 1311(a)(3) corresponding to the veteran's pay grade in service—but only if that amount is greater than the sum of the "basic monthly rate" and any applicable increases. 38 C.F.R. § 3.10(d). Under this latter approach, the Secretary of the concerned service department must certify the deceased veteran's pay grade. *Id.*

The VA also increases compensation levels under a variety of factual scenarios. *See* 38 U.S.C. § 1311(a)(2) (increasing basic monthly rate if veteran, at time of death, was receiving, or was entitled to receive, compensation for service-connected disability that was rated by VA as totally disabling for continuous period of at least eight years immediately preceding death).[8] In addition to the "basic monthly rate" and the first increase, the VA pays increases for various situations such as if the surviving spouse has one or more children under the age of 18 of the deceased veteran, or if the surviving spouse is in a nursing home or is housebound. 38 C.F.R. § 3.10(e).

In short, the VA must navigate an extensive flowchart of statutory and regulatory steps before reaching a benefits calculation under the Veterans' Benefits Act. In the face of such complexity, the VA's determination whether a would-be beneficiary even qualifies as a "spouse" under applicable state marriage law imposes a marginal administrative burden.

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[8] Determinations of entitlement to such an increase are subject to conditions described in 38 C.F.R. § 3.10(f). These conditions include a continuous marriage requirement during the minimum eight years of disability, a determination by the VA of "total disability," and an additional three-part test confirming that the veteran was "entitled to receive."

These are just two examples of the challenges that confront federal agencies on a regular basis when administering benefit programs with vast and complex legal requirements. Even when the legal determinations are straightforward, agencies face extensive administrative burdens in making factual determinations for large numbers of beneficiaries.

The Social Security Administration, for example, distributed disability benefits to 9.8 million people in 2011. *See* Social Security Administration, *Annual Statistical Report on the Social Security Disability Insurance Program, 2011*, at 21 tbl.3 (July 2012). The agency has a fact-intensive process for considering every disability claim, evaluating work activity, the medical severity of the impairment (its length and how it compares to impairments that are recognized as sufficient to obtain benefits), "residual functional capacity" and past work, and age, education, and work experience to determine whether one could find other work. 20 C.F.R. § 404.1520(a)(4)(i)–(v). Administrative hearings are handled by the Office of Disability Adjudication and Review (ODAR), one of the largest administrative judicial systems in the world. Social Security Administration, *Information About Social Security's Hearings and Appeals Process*, http://ssa.gov/appeals/ (last accessed Feb. 25, 2013). Hearings usually involve testimony from the claimant and other witnesses, as well as medical or vocational experts. Social Security Administration, *The Appeals Process*, SSA Publ'n No. 05-10041 (Jan. 2008), http://www.socialsecurity.gov/ pubs/10041.pdf. Each year, "more than 1,300 ALJs render over 700,000 decisions . . . ." *Information About Social Security's Office of Disability Adjudication and Review*, http://www.ssa.gov/appeals/about_ odar.html (last modified Nov. 13, 2012). At the appellate level, ODAR's Appeals Counsel "consists of about 100 administrative appeals judges and appeals officers and renders the agency's final decision in over 89,000 cases per year." *Id.*

DOMA was enacted at a time when marriages between same-sex couples were not legal in any states or foreign countries, based on the fear that one jurisdiction (Hawaii) might one day begin recognizing them. *See* H.R. Rep. No. 104-664, at 2–3 (1996). But even now that marriages between same-sex couples are legal in certain states, the number of married same-sex couples represents a small sliver of the total number of beneficiaries under many federal programs, including Social Security (62 million), Medicaid (52.6 million), and Medicare (49.4 million). *See* Social Security Administration, *Monthly Statistical Snapshot* (Jan. 2013), http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/2013-01.pdf; Kaiser Family Foundation, *Medicaid Enrollment: June 2011 Data Snapshot* (June 2012), http://www.kff.org/medicaid/upload/8050-05.pdf; StateHealthFacts.org, *Total Number of Medicare Beneficiaries, 2012*, http://www.statehealthfacts.org/comparemaptable.jsp?ind=290&cat=6&sort=a (last accessed Feb. 25, 2013).

Simply put, administrative agencies process a staggering number of claims for federal benefits—claims that often involve complex legal judgments and/or detailed factual determinations. The notion that DOMA served to reduce administrative burdens in any appreciable way, by eliminating the need to determine marital status for one small class of people who might wed, is impossible to credit.[7]

In this "Nation that prides itself on adherence to principles of equality under law," *Plyler v. Doe*, 457 U.S. 202, 219 (1982), Section 3 of DOMA cannot stand. BLAG cannot justify the law's unequal treatment of marriages of same-sex couples by claiming that Section 3 furthers a federal interest in uniformity. Federal agencies have never adopted uniform rules for making marital determinations, and they have always been able to develop choice of law rules in the face of substantial diversity among state marriage laws. Applying these same principles and practices to marriages of same-sex couples would pose no administrative challenges.

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[7] Section 3 of DOMA—which sweeps broadly across federal law without consideration of its particularized effects—can actually heighten burdens on agencies. For example, the IRS spent several years creating a special tax form and updating guidance for same-sex couples whose marriages are recognized in community property states like California and Washington, because the IRS interprets Section 3 to prohibit individuals in same-sex marriages from filing joint tax returns. *See* IRS Form 8958; *compare* IRS Publ'n 555 (rev. May 2007), *with* IRS Publ'n 555 (rev. Dec. 2010), *and with* IRS Publ'n 555 (rev. Jan 2013).

CONCLUSION

The judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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March 1, 2013

APPENDIX

APPENDIX

AMICI CURIAE IN SUPPORT OF RESPONDENT

Dr. Donna E. Shalala served as Secretary of Health and Human Services (HHS) from 1993 to 2001, becoming the nation's longest serving HHS Secretary. HHS manages a wide variety of federal benefits programs, including Medicare, Medicaid, Child Care and Head Start, Welfare, and the Public Health Service. At the start of Dr. Shalala's tenure, HHS also included the Social Security Administration. Dr. Shalala also served as Assistant Secretary for Policy Development and Research at the Department of Housing and Urban Development during the Carter administration. She is currently President of the University of Miami, where she is also Professor of Political Science.

Dr. Louis W. Sullivan was Secretary of Health and Human Services from 1989 to 1993. During his tenure, HHS included the Health Care Financing Administration, which then managed Medicare, Medicaid, and the Social Security Administration and served the needs of 50 million aged and disabled beneficiaries. Both before and after his tenure at HHS, Dr. Sullivan served as President of the Morehouse School of Medicine. He currently holds the title of President Emeritus there.

Togo D. West Jr. served as Secretary of Veterans Affairs (VA) from 1998 to 2000. As head of the VA, he was responsible for administering several significant benefits programs for veterans, their survivors, and their families. The Veterans Benefits Administration, one of three main branches of the VA, manages initial veteran registration, eligibility determination, and five key lines of benefits and entitlements: Home Loan Guaranty, Insurance, Vocational Rehabilitation and Employment, Education, and Compensation & Pension. Mr. West also served in a number of positions with the Department of Defense during the Carter and Clinton administrations, most notably General Counsel from 1980 to 1981 and Secretary of the Army from 1993 to 1997.

Kenneth S. Apfel served as the Commissioner of the Social Security Administration (SSA) from 1997 to 2001. SSA administers many important benefit programs for over 60 million people, including the Old-Age (Retirement), Survivors, and Disability Insurance programs and the Supplemental Security Income program. Professor Apfel also served as Associate Director for Human Resources at the Office of Management and Budget and Assistant Secretary for Management and Budget at HHS. At HHS, he was the agency's chief financial officer, overseeing a $700 billion budget. He is currently Professor of the Practice at the University of Maryland's School of Public Policy.

Sheldon S. Cohen served from 1965 to 1969 as Commissioner of the Internal Revenue Service (IRS). In the year prior, he served as Chief Counsel for the IRS. The IRS administers numerous federal tax programs, including the collection of individual income tax, employment tax, estate tax, and the gift tax. Mr. Cohen is currently a Director at the investment firm Farr Miller & Washington, LLC.

Rudy F. deLeon served as Deputy Secretary of Defense from 2000 to 2001. In earlier posts at the Pentagon, he served as Under Secretary of Defense for Personnel and Readiness from 1997 to 2000, and as Under Secretary of the Air Force from 1994 to

1997. Currently, Mr. deLeon is the Senior Vice President of National Security and International Policy at the Center for American Progress.

Jamie S. Gorelick served as General Counsel of the Department of Defense from 1993 to 1994. Among other responsibilities, the General Counsel offers legal advice regarding the Department's many federal benefit programs, including military survivor benefits and TRICARE, which provides health care to active and retired military personnel and their families. From 1994 to 1997, Ms. Gorelick was Deputy Attorney General of the United States, the second highest position in the Department of Justice. In that role, she had oversight responsibility for the Immigration and Naturalization Service, which at the time administered the nation's immigration laws. She is currently a partner at the law firm WilmerHale LLP.

Michael J. Graetz served as Deputy Assistant Secretary for Tax Policy at the Department of the Treasury from 1990 to 1991. He then served as Assistant to the Secretary and Special Counsel for the Treasury Department in 1992. The Treasury Department oversees the IRS and is responsible for managing federal finances, collecting taxes, enforcing the federal tax laws, and advising on tax policy. Professor Graetz has been a law professor for more than 25 years and is currently the Columbia Alumni Professor of Tax Law and the Wilbur H. Friedman Professor of Tax Law at Columbia Law School.

Dr. John J. Hamre served as the Deputy Secretary of Defense from 1997 to 2000. In that post, he had responsibility for helping to oversee and manage the day-to-day operations of the Defense Department. From 1993 to 1997, he was the Under Secretary of

Defense (Comptroller), the principal assistant to the Secretary of Defense for the preparation, presentation, and execution of the defense budget and management improvement programs. Since 2000, Dr. Hamre has served as president and chief executive officer of the Center for International and Strategic Studies.

Benjamin W. Heineman Jr. served in the Department of Health, Education, and Welfare from 1977 to 1979, ending his tenure there as Assistant Secretary for Planning and Evaluation. At that time, the Department had responsibility for a diverse range of federal programs, including the Social Security Administration, Medicare, Medicaid, the Family Support Administration, and agencies constituting the Public Health Service. In 1987, Mr. Heineman became Senior Vice President, General Counsel and Secretary of the General Electric Company. He is currently senior fellow at the Belfer Center for Science and International Affairs at Harvard University's Kennedy School of Government and a distinguished senior fellow at Harvard Law School's Program on the Legal Profession.

Kathryn O. Higgins was Deputy Secretary of Labor from 1998 to 2000. She also served in many other positions within the Department of Labor during more than three decades of service there. In her role as Deputy Secretary, she helped direct initiatives to expand pension benefits for workers and assist workers affected by trade and other economic dislocations. The Department of Labor oversees the implementation of the Health Insurance Portability and Accountability Act, and the Department's Wage and Hour Division administers benefits provisions of the Family and Medical Leave Act. Ms. Higgins is currently Chair of the Board of Directors of the Fair Labor Association.

Constance Berry Newman was the Director of the Office of Personnel Management (OPM) from 1989 to 1992. OPM manages the civil service of the federal government, including the administration of health care and retirement benefits for most federal employees. From 1969 to 1971, Ms. Newman was Special Assistant to Elliot Richardson, Secretary of the Department of Health, Education, and Welfare.

Harriet S. Rabb served as General Counsel of the Department of Health and Human Services from 1993 to 2001. As chief legal officer of the Department, she was responsible for counseling and supporting the programs of eleven agencies including the Health Care Financing Administration, which at the time administered Medicare and Medicaid, and the Administration for Children and Families, which addresses family and children's services and assistance. Since 2001, Ms. Rabb has been Vice President and General Counsel of The Rockefeller University.

AMICUS
CURIAE
BRIEF

Nos. 12-144, 12-307

In The

Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL., *Petitioners*,

v.

KRISTIN M. PERRY, ET AL., *Respondents*.

UNITED STATES, *Petitioner*,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED
STATES HOUSE OF REPRESENTATIVES, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Ninth and Second Circuits

AMICI CURIAE BRIEF OF SOCIAL SCIENCE PROFESSORS IN SUPPORT OF HOLLINGSWORTH AND BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS AND SUPPORTING REVERSAL

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QUESTIONS PRESENTED

Hollingsworth, et al. v. Perry, et al.

1. Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.

United States v. Windsor, et al.

1. Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. Compelling Evidence Shows that Children Benefit from the Unique Parenting Contributions of Both Men and Women. 5

II. The Claim of "No Difference" In Outcomes of Children Raised By Gay and Lesbian Parents and Intact Biological Parents Is Empirically Undermined by Significant Methodological Limitations. 13

  A. The APA studies are based on small sample sizes. 15

  B. The APA's studies are largely based on homogeneous samples. 17

  C. Most of the samples in the APA-cited studies relied on non-random, convenience sampling. 19

III. The Largest Population-Based Studies Do Not Confirm the "No Differences" Conclusion About Child Outcomes Among Same-Sex Parents. 21

CONCLUSION 29

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483 U.S. 587 (1987) 5

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INTEREST OF *AMICI CURIAE*[1]

Amici have studied and published on parental and household distinctions and their association with child and young-adult developmental outcomes. *Amici's* expertise in these fields would assist the Court's consideration of the issues presented by these cases. *Amici* include (in alphabetical order):

Douglas W. Allen (Ph.D., Economics, University of Washington) is Burnaby Mountain Professor of Economics at Simon Fraser University, BC, Canada.

David J. Eggebeen (Ph.D., Sociology, University of North Carolina) is an Associate Professor of Human Development and Sociology at Penn State University.

Alan J. Hawkins (Ph.D., Human Development and Family Studies, Penn State University) is a Professor of Family Life at Brigham Young University.

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[1] In Case No. 12-144, all parties granted blanket consent to the filing of *amicus curiae* briefs in support of either party or neither party, and in Case No. 12-307, the petitioner, United States of America, and Respondent Bipartisan Legal Advisory Group of the United States House of Representatives granted same; these consent letters are on file with the Clerk of the Court. Respondent Edith Windsor's written consent to the filing of this brief in Case No. 12-307 is filed contemporaneously. In accordance with Rule 37.6, *amici curiae* states that no counsel for any party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or entity, other than *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

Byron R. Johnson (Ph.D., Criminology, Florida State University) is a Distinguished Professor of Social Sciences at Baylor University.

Catherine Pakaluk (Ph.D., Economics, Harvard University) is an Assistant Professor of Economics at Ave Maria University.

Joseph Price (Ph.D., Economics, Cornell University) is an Assistant Professor of Economics at Brigham Young University.

Mark D. Regnerus (Ph.D., Sociology, University of North Carolina) is an Associate Professor of Sociology at the University of Texas at Austin, and a Faculty Research Associate at the Population Research Center of the University of Texas.

SUMMARY OF THE ARGUMENT

A persistent claim by those supporting same-sex marriage is that there is "no difference" in the outcomes of children raised by a biological mother and father and those who have been raised by two women or two men. That claim was made to the courts below, and will no doubt be made to this Court by associations like the American Psychological Association ("APA"). But as recent scholarship indicates, the claim is difficult to support because nearly all of the studies upon which the "no difference" assertion is based are rather limited, involving non-random, non-representative samples, often with relatively few participants. Specifically, the vast majority of the studies were based on samples of fewer than 100 parents (or children), and typically representative only of well-educated, white women (parents), often with elevated incomes. These are hardly representative samples of the lesbian and gay population raising children, and therefore not a sufficient basis to make broad claims about child outcomes of same-sex parenting structures.

These and other methodological limitations make the APA's confident "no difference" conclusion suspect. The claim also contradicts longstanding research asserting the view that the ideal environment for raising children is a stable biological mother and father. The science on comparative parenting structures is relatively new, especially that concerning same-sex households. Therefore, a claim that another parenting structure provides the same level of benefit should be rigorously tested and based on sound methodologies and representative samples.

Nearly all of the studies cited by the APA fail to meet those criteria.

Indeed, the only studies that were based on large, random, representative samples tended to reveal the opposite conclusion, finding significant differences in the outcomes of children raised by parents in a same-sex relationship and those raised by a married biological mother and father. What is clear is that much more study must be done on these questions. But there is no dispute that a biological mother and father provide, on average, an effective and proven environment for raising children. And it is reasonable to conclude that a mother and father function as a complementary parenting unit and that each tends to contribute something unique and beneficial to child development.

The State of California and the federal government thus have a rational interest in supporting that proven parenting structure by reserving the title and status of marriage to unions comprised of a man and a woman.

ARGUMENT

I. Compelling Evidence Shows that Children Benefit from the Unique Parenting Contributions of Both Men and Women.

It is a well-established and well-regarded sociological finding that "[c]hildren who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both of their biological parents . . regardless of whether the resident parent remarries." Sara McLanahan & Gary Sandefur, *Growing Up With a Single Parent: What Hurts, What Helps* 1 (1994); *see also* Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, & Single-Parent Families*, 65 J. Marriage & Fam. 876, 890 (2003) ("The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents."); Kristen Anderson Moore, et al, *Marriage from a Child's Perspective*, Child Trends Research Brief at 1-2 (2002) ("[I]t is not simply the presence of two parents . . . but the presence of two biological parents that seems to support children's development.").

Indeed, a few decades ago Justice William Brennan recognized what was likely considered a very unremarkable proposition when he stated that "the optimal situation for the child is to have both an involved mother and an involved father." *Bowen v. Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J. dissenting). Experts have long contended that both mothers and fathers make unique contributions to parenting. As sociologist David Popenoe explains, "[t]he burden of social science evidence supports the idea that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable." David Popenoe, *Life Without Father: Compelling New Evidence that Fatherhood & Marriage are Indispensable for the Good of Children & Society* 146 (1996). Indeed, even Respondents' expert, Professor Michael Lamb, advocated that same view prior to his advocacy for same-sex marriage, when he noted that "[b]oth mothers and fathers play crucial and qualitatively different roles in the socialization of the child." Michael E. Lamb, *Fathers: Forgotten Contributors to Child Development*, 18 Human Dev. 245, 246 (1975).

Current research on the psycho-social development of children continues to affirm that the complementarity of an intact family, with a mother and a father serving unique relational roles, is optimal for a child's healthy development. *See, e.g.*, Ruth Feldman, *Oxytocin and Social Affiliation In Humans*, 61 Hormones & Behav. 380-391 (2012) (noting the different roles that mothers and fathers play across species, the importance of those differences to human development, and suggesting that human oxytocin systems may account for the different yet complementary maternal and paternal functions). Indeed, in his testimony in the Proposition 8 trial below, Dr. Lamb admitted he had previously stated that men and women are not "completely interchangeable with respect to skills and abilities" and that "data suggests that the differences between maternal and paternal behavior are more strongly related to either the parents' biological gender or sex roles, than to either their degree of involvement in infant care or their attitudes regarding the desirability of paternal involvement in infant care." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), trial transcript at 1064 & 1068.

Dr. Lamb's statement is consistent with a great deal of scholarship on the distinct ways in which separate maternal and paternal contributions promote positive child development outcomes. For example, distinctive maternal contributions are numerous and significant. The natural biological responsiveness of a mother to her infant fosters critical aspects of neural development and capabilities for interactivity in the infant brain.[2] Mothers are also able to extract the maximum return on the temporal investments of both parents in a two-parent home because mothers provide critical direction for fathers on routine caretaking activities, particularly those involving infants and toddlers. *See* Sandra L. Hofferth et al., *The Demography of Fathers: What Fathers Do*, in Handbook of Father Involvement: Multidisciplinary Perspectives 81 (Catherine Tamis-Lamonda & Natasha Cabrera eds., 2002); Scott Coltrane, *Family Man* 54 (1996). This direction is needed in part because fathers do not share equally in the biological and hormonal interconnectedness that develops between a mother and a child during pregnancy, delivery, and lactation.

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[2] *See* C.A. Nelson & M. Bosquet, *Neurobiology of Fetal and Infant Development: Implications for Infant Mental Health*, in Handbook of Infant Mental Health 37-59, (C.H. Zeanah Jr. ed., 2d ed. 2000); M. DeWolff & M. van Izjendoorn, *Sensitivity and Attachment: A Meta-Analysis on Parental Antecedents of Infant Attachment*, 68 Child Dev. 571-91 (1997); M. Main & J. Solomon, *Discovery of an Insecure-Disorganized Disoriented Attachment Pattern*, in Affective Development in Infancy 95-124 (T.B. Brazelton & M.W. Yogman eds., 1986).

In comparison to fathers, mothers generally maintain more frequent and open communication and enjoy greater emotional closeness with their children, in turn fostering a sense of security in children with respect to the support offered by the family structure. Ross D. Parke, *Fatherhood* 7 (Developing Child Series, Jerome Bruner et al. eds., 1996). Mothers' typical mode of parent-child play is predictable, interactive, and geared toward joint problem-solving, which helps children to feel comfortable in the world they inhabit. Eleanor Maccoby, *The Two Sexes* 266-67 (1998)[3]; *see also* Parke, *supra* at 5. Mothers also impose more limits and tend to discipline more frequently, albeit with greater flexibility when compared with fathers. Maccoby, *supra* at 273.

Mothers also uniquely play a greater role in cultivating the language and communication skills of their children. Parke, *supra* at 6. Mothers help children to understand their own feelings and respond to the feelings of others, in part by encouraging open discussion of feelings and emotions within the family unit. *See* Suzanne A. Denham et al., *Prediction of Externalizing Behavior Problems*

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[3] Professor Maccoby, who is a distinguished feminist psychologist at Stanford University and who championed the idea that sex differences were caused only by socialization, is now acknowledging the importance of biology in explaining sex differences in parenting. Maccoby, *supra* at 314.

From Early to Middle Childhood: The Role of Parental Socialization and Emotion Expression, in Development and Psychopathology 23-45 (2000); Maccoby, *supra* at 272. Active maternal influence and input is vital to the breadth and depth of children's social ties, and mothers play a central role in connecting children to friends and extended family. Paul R. Amato, *More Than Money? Men's Contributions to Their Children's Lives?*, in Men in Families, When Do They Get Involved? What Difference Does It Make? 267 (Alan Booth & Ann C. Crouter eds., 1998).

Fathers also make distinctive contributions to the upbringing of their children, and positive paternal contributions play a key role in avoiding a variety of negative outcomes that arise with greater frequency in homes where a father is not present. Having a father is associated with an increase in positive outcomes for children in domains such as education, physical health, and the avoidance of juvenile delinquency. McLanahan & Sandefur, *supra* (1994); Greg Duncan & Jeanne Brooks-Gunn, *Consequences of Growing Up Poor* (1999). As Professor Norval Glenn explains, "there are strong theoretical reasons for believing that both fathers and mothers are important, and the huge amount of evidence of relatively poor average outcomes among fatherless children makes it seem unlikely that these outcomes are solely the result of the correlates of fatherlessness and not of fatherlessness itself." Norval D. Glenn, *The Struggle for Same-Sex Marriage*, 41 Soc'y 27 (2004).

Fathers engage proactively in spontaneous play with their children, and "children who roughhouse with their fathers . . . quickly learn that biting, kicking, and other forms of physical violence are not acceptable." Popenoe, *supra* at 144. A study conducted by developmental psychologist Daniel Paquette found that fathers are also more likely to supervise children at play while refraining from intervention in the child's activities, a pattern that stimulates "exploration, controlled risk-taking, and competition." Daniel Paquette & Mark Bigras, *The Risky Situation: A Procedure for Assessing the Father-Child Activation Relationship*, 180 Early Childhood Dev. & Care 33-50 (2010).[4] Boys who do not regularly experience the love, discipline, and modeling of a good father are more likely to engage in what is called "compensatory masculinity" where they reject and denigrate all that is feminine and instead seek to prove their masculinity by engaging in domineering and violent behavior. Popenoe, *supra* at 157.

Paternal modes of play activity are only one example of the ways in which fathers encourage their children to take risks. Compared to mothers, fathers are more likely to encourage children to try new things and to embrace novel situations and challenges. *See* Parke, *supra* at 6. One study summarized this aspect of paternal input and observed that "[f]athers, more than mothers, conveyed the feeling that they can rely on their adolescents, thus fathers might provide a 'facilitating environment' for adolescent attainment of differentiation from the family and consolidation of independence." Shmuel Shulman and Moshe M. Klein, *Distinctive Role of the Father in Adolescent Separation-Individuation*, 62 New Dir. Child & Adolesc. Dev. 41, 53 (1993).

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[4] *See* http://www.msnbc.msn.com/id/37741738 (last visited January 25, 2012).

Fathers also tend to utilize a different discipline style than mothers, in that they discipline with less frequency, but greater predictability and less flexibility in terms of deviating from pre-determined consequences for particular behavior. *See* Thomas G. Powers et al., *Compliance and Self-Assertion: Young Children's Responses to Mothers Versus Fathers*, 30 Dev. Psychol. 980-89 (1994). Children respond differently to paternal discipline, and are comparatively more likely to resist maternal commands and comply with paternal requests. Maccoby, *supra* at 274-75. This may be one reason why a number of studies have found that paternal influence and involvement plays an outsized role in preventing adolescent boys from breaking the law, and lowering the odds that a teenage girl will become pregnant. *See, e.g.*, Paul R. Amato & Fernando Rivera, *Paternal Involvement and Children's Behavior Problems*, 61 J. Marriage & Fam. 375-84 (1999) (finding that paternal involvement is linked to lower levels of delinquency and criminal activity, even after controlling for maternal involvement); Mark D. Regnerus & Laura B. Luchies, *The Parent-Child Relationship and Opportunities for Adolescents' First Sex*, 27 J. Fam. Issues 159-83 (2006) (study of 2000 adolescents noted that father-daughter relationship, rather than mother-daughter relationship, was an important predictor of whether and when adolescent girls transitioned to sexual activity); *see also* W. Brad Wilcox, et al., *Why Marriage Matters: Twenty-Six Conclusions from the Social Sciences*, 14, 22-23 (3d ed. 2011) (discussing evidence suggesting that female sexual development is slowed by early childhood exposure to pheromones of biological father, and accelerated by regular early childhood exposure to pheromones of adult male who is not child's biological father).

As President Obama has noted:

> We know the statistics—that children who grow up without a father are five times more likely to live in poverty and commit crime; nine times more likely to drop out of schools, and twenty times more likely to end up in prison. They are more likely to have behavioral problems, or run away from home or become teenage parents themselves. And the foundations of our community are weaker because of it.

Barack Obama, Statement at Apostolic Church of God (June 15, 2008)[5]; *see also* James Q. Wilson, *The Marriage Problem* 169 (2002) ("The weight of scientific evidence seems clearly to support the view that fathers matter.").

In sum, a substantial body of evidence exists documenting that both mothers and fathers make unique contributions to a child's development. Same-sex parenting structures, by definition, exclude either a mother or a father. Certainly same-sex couples, like other parenting structures, can make quality and successful efforts in raising children. That is not in question. But the social science evidence, especially evidence founded on conclusions from population-based samples, suggests that there remain unique advantages to a parenting structure consisting of both a mother and a father, political interests to the contrary notwithstanding. Therefore it remains rational for government to provide distinctive recognition and incentive to that proven parenting structure through the status of marriage.

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[5] *Available at* http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html (last visited January 25, 2013).

II. The Claim of "No Difference" In Outcomes of Children Raised By Gay and Lesbian Parents and Intact Biological Parents Is Empirically Undermined by Significant Methodological Limitations.

Decades of study on various other parenting structures yield the near uniform conclusion that a biological mother and father provide optimal child outcomes. Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 Soc. Sci. Research 752, 763 (2012) [hereinafter *How Different?*]. So the claim that another parenting relationship produces child outcomes just as good as (or even better than) intact biological parents is a surprising proposition, to say the least, and one that must be rigorously tested (and until then, viewed with healthy suspicion).[6]

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[6] Although outcomes of children raised by adoptive parents are often positive, outcomes for those children are not typically as positive as children raised by biological parents in an intact

A closer examination of the studies purporting to show no difference between same-sex parenting and parenting by biological parents suggests that they cannot bear the weight that advocates place on them. Most striking is that all but one failed to involve a large, random, representative sample of the population. While this can be attributed to the fact that such a sample is difficult to locate randomly, it nevertheless ought to raise concern when they are used to support broad public policy changes, like those at issue in this case. In short, it is faulty to credibly, much less confidently, claim "no difference" with such thin support.

The Eleventh Circuit has recognized these limitations in the research on gay and lesbian parenting, noting "significant flaws in the studies' methodologies and conclusions, such as the use of small, self-selected samples; reliance on self-report instruments; politically driven hypotheses; and the use of unrepresentative study populations consisting of disproportionately affluent, educated parents."

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marriage, despite the rigorous screening process that adoption entails. Regnerus, *How Different?*, *supra* at 754-55 ("[S]tudies of adoption—a common method by which many same-sex couples (but more heterosexual ones) become parents—have repeatedly and consistently revealed important and wide-ranging differences, on average, between adopted children and biological ones. In fact, these differences have been so pervasive and consistent that adoption experts now emphasize that 'acknowledgement of difference' is critical for both parents and clinicians when working with adopted children and teens." (citing Brent Miller et al., *Comparisons of Adopted and Non-Adopted Adolescents In A Large, Nationally Representative Sample*, 71 Child Dev. 1458 (2000)).

Lofton v. Sec'y of the Dep't of Children and Family Servs., 358 F.3d 804, 825 (11th Cir. 2004).

A. The APA studies are based on small sample sizes.

Most of the studies that the APA relies on to support its no-difference conclusion "are based on small, non-representative, convenience samples of fewer than 100 participants." Loren D. Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*, 41 Soc. Sci. Res. 735, 736-38 (2012); *see also* Douglas W. Allen et al., *Nontraditional Families and Childhood Progress Through School: A Comment on Rosenfeld*, Demography November 2012, http://link.springer.com/article/10.1007/s1352 4-012-0169-x/fulltext.html, ("Although there has been considerable research on the effect of family structure on child outcomes, almost none of the research using nationally representative samples has included same-sex parents as part of the analysis.").

The hallmark of a rigorous study is a large, representative pool of participants drawn from a population-based random sample. Regnerus, *How Different?*, *supra* at 754 (2012). Indeed, it is very difficult to draw reliable conclusions from the data used in small samples because the conclusions from such limited studies cannot be confidently extrapolated to the general population and the risk of erroneously attributing statistical insignificance to between-group comparisons (that is, mistakenly concluding there are no differences between groups) is high. Marks, *supra* at 736. "Even analyzing matched samples, as a variety of studies have done, fails to mitigate the challenge of locating statistically-significant differences when the sample size is small. This is a concern in all social science, but one that is doubly important when there may be motivation to confirm the null hypothesis (that is, that there are in fact no statistically-significant differences between groups)." Regnerus, *How Different?*, *supra* at 754.

Because of the small sample sizes in these studies, expected differences in children raised by biological and non-biological parents could not be measured in a meaningful way. For example, it is well established that having a stepfather in the home tends on average to result in less optimal child outcomes. Mark V. Flinn et al., *Fluctuating Asymmetry of Stepchildren*, 20 Evol. Hum. Behav. 465 (1999) ("In summary, the absence of a genetic relationship between stepchildren and stepparents may affect the quality and quantity of care—including specific behaviors that affect nutrition, sleep routines, hygiene, medical attention, work loads, instruction, comforting, protection and so forth—with consequent affect on growth."); Marilyn Coleman et al., *Reinvestigating Remarriage: Another Decade of Progress*, 62 J. Marriage & Fam. 1288, 1293 (2000) ("[M]ost researchers reported that stepchildren were similar to children living with single mothers on the preponderance of outcome measures and that step-children generally were at a greater risk for problems than were children living with both of their parents."). That is relevant for the matter at hand, since every child in a "planned" gay or lesbian family has at least one nonbiological "step" parent. But because of the small sample sizes of same-sex parents represented in the studies (and especially of gay fathers), these outcome differences have not often surfaced (or even been evaluated), raising additional questions about the reliability of the studies purporting to show no differences. Alternately, comparisons are most often made between children in heterosexual stepfamilies and those in gay unions, which overlook the general consensus about the importance of two biological connections to begin with.

Even one of the larger studies that the APA cites, but does not discuss, showed significant outcome differences between children raised by same-sex parents and those raised by biological parents in an intact relationship. "Overall, the study has shown that children of married couples are more likely to do well at school in academic and social terms, than children of cohabiting and homosexual couples." Marks, *supra* at 742-43 (quoting S. Sarantokas, *Children In Three Contexts: Family, Education, and Social Development*, 21 Children Australia 23 (1996), and describing the study's findings in detail, its comparative statistical strength, and the APA's puzzling de-emphasis of it).

B. The APA's studies are largely based on homogeneous samples.

Not only are most of the studies claiming no differences in same-sex parenting based on small sample sizes, they also tend to draw upon "homogeneous samples of privileged lesbian mothers to represent all same-sex parents." Marks, *supra* at 739. For example, many of the studies cited by the

APA include no minorities with samples predominantly composed of white, well-educated, middle- to upper-class women. *Id.* at 738. As one study candidly acknowledged, "the study sample was small and biased toward well-educated, white women with high incomes. These factors have plagued other [same-sex parenting] studies, and remain a concern of researchers in this field." *Id.* (quoting Laura Lott-Whitehead and Carol T. Tully, *The Family Lives of Lesbian Mothers*, 63 Smith Coll. Studies Soc. Work 275 (1993)); *see also* C.J. Patterson, *Children of Lesbian and Gay Parents*, 63 Child Dev. 1025, 1029 (1992) ("Despite the diversity of gay and lesbian communities, both in the United States and abroad, samples of children [and parents] have been relatively homogenous . . . . Samples for which demographic information was reported have been described as predominantly Caucasian, well-educated, and middle to upper class.").

And very few of the APA-cited studies on same-sex parenting analyzed the outcomes of children raised by gay fathers. Only eight of the fifty-nine cited studies included gay fathers, and only four of those included a heterosexual comparison group. Marks, *supra* at 739. "Systematic research has so far not considered developmental outcomes for children brought up from birth by single gay men or gay male couples (planned gay father families), possibly because of the difficulty of locating an adequate sample." Fiona Tasker, *Lesbian Mothers, Gay Fathers and Their Children: A Review*, 26 Dev. & Behav. Pediatr. 224, 225 (2005).

C. Most of the samples in the APA-cited studies relied on non-random, convenience sampling.

It is not surprising that the samples in these studies are so homogenous, given that most of the people in them were recruited by use of non-random, convenience (snowball) sampling. Regnerus, *How Different?*, *supra* at 753 (2012). For example, one data-collection effort that has been the subject of at least 19 different peer-reviewed publications to date "recruited entirely by self-selection from announcements posted 'at lesbian events, in women's bookstores, and in lesbian newspapers' in Boston, Washington, and San Francisco." *Id.* This method of recruitment was common among the APA-cited studies. *Id.* Such "snowball sampling is known to have some serious problems" because it is impossible to generalize the findings of such a specific subgroup to the general population. *Id.* (quoting Tom A. Snijders, *Estimation on the Basis of Snowball Samples*, 36 Bulletin de Methodologie Sociologique 59 (1992)).

In short, because such studies' samples are garnered from people who have a great deal in common with each other, how well their findings characterize a broader population of gay families remains unknown. "By their own reports, social researchers examining same-sex parenting have repeatedly selected small, non-representative, homogeneous samples of privileged lesbian mothers to represent all same-sex parents." Marks, *supra* at 739; *see also* Walter R. Schumm, *What Was Really Learned From Tasker & Golombok's (1995) Study of Lesbian & Single Parent Mothers?*, 95 Psych. Reports

422, 423 (2004) ("[O]ne has to be very careful in interpreting research on homosexual issues and be wary of outcomes when samples are very small and often nonrandom, so the null hypothesis is not rejected but is used for political purposes as if a meaningful result had been obtained"). Other research has likewise found that studies purporting to show no difference between children raised by same-sex couples and those raised by married mothers and fathers share these significant limitations.[7]

If these studies were being employed to shed light on the outcomes of children raised by highly educated and affluent middle to upper class white women, their conclusions would have merit. But the studies ought not be generalized to the childhood and adolescent experiences of the wide spectrum of gay and lesbian parents, since gay and lesbian parents are, in reality, economically, racially, and socially far more diverse than those studies imply.

The issue is further complicated by the political climate surrounding this issue. "Given the widespread support for same-sex marriage among social and behavioral scientists, it is becoming politically incorrect in academic circles even to suggest that arguments being used in support of same-sex marriage might be wrong." Glenn, *supra* at 25; *see also* Judith Stacey & Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 American Sociol. Rev. 159, 161 (2001) ("[T]oo many psychologists who are sympathetic to lesbigay parenting seem hesitant to theorize at all" and are apt to "downplay the significance of any findings of differences.").

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[7] One of the most extensive critiques of the research was offered by Professor Steven Lowell Nock of the University of Virginia. Nock Aff., *Halpern v. Attorney General of Canada*, Case No. 684/00 (Ontario Sup. Ct. Justice 2001), *available at* http://marriagelaw.cua.edu/Law/cases/Canada/ontario/halpern/aff_nock.pdf. *See also* Glenn, *supra* at 26-27; Schumm, *supra* at 423; Robert Lerner & Althea K. Nagai, *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting* (Marriage Law Project, 2001).

Given such limitations characteristic of a youthful domain of inquiry, the vast majority of the studies relied upon by the APA for its general claim that there is no difference in outcomes of children raised by gay and lesbian parents and those raised by heterosexual parents are poorly poised to address the broad propositions asserted in this case.

III. The Largest Population-Based Studies Do Not Confirm the "No Differences" Conclusion About Child Outcomes Among Same-Sex Parents.

Recent research using larger, randomly selected, nationally representative samples suggests that there are significant differences in the outcomes of children raised by parents who have had a same-sex relationship and children raised by intact biological parents. This research, called the New Family Structures Study (NFSS), was conducted on young adults with a very large sample size of nearly 3,000 participants, which comprised a racially, socioeconomically, and geographically diverse group that reflects the diversity noted in demographic mappings of the gay and lesbian population in

America. Regnerus, *How Different?*, *supra* at 755, 757. The study surveyed adults aged 18-39 who reflected on their parent(s)' past same-sex relationship behavior, which occurred as recently as a few years ago or as far back as 30 or more years.[8] Among that sample, 175 people reported living with a mother who was (and may still be) in a same-sex romantic relationship, and 73 who had reported living with a father who had been in a same-sex romantic relationship.

The study looked at "social behaviors, health behaviors, and relationships" comparing child outcomes (as reported by the adult children in the study rather than by those who raised them) among various groups, including married biological parents, stepparents, single parents, and parents who had been in a same-sex romantic relationship, among other types of families. "When compared with children who grew up in biologically (still) intact, mother-father families, the children of women who reported a same-sex relationship look markedly different on numerous outcomes, including many that are obviously suboptimal (such as education, depression, employment status, or marijuana use)." *Id.* at 764. Specifically, some of the statistically significant differences where adult children who reported living in a household with their mother and her partner for at least some period of time ("MLR" for mother in a lesbian relationship) fared worse than children raised by intact biological parents ("IBF" for intact biological family) included:

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[8] The NFSS may best capture what might be called an "earlier generation" of children of same-sex parents, and includes among them many who witnessed a failed heterosexual union.

- cohabitation (9% of the IBF and 27% of the MLR group),
- receiving welfare while growing up (17% of the IBF and 70% of the MLR group),
- currently receiving public assistance (10% of the IBNF and 49% of the MLR group),
- current full-time employment status (49% of the IBF and 17% of the MLR group),
- current unemployment (8% of the IBF and 40% of the MLR group),
- having an affair while married or cohabitating (13% of the IBF and 38% of the MLR group),
- having been touched sexually by a parent or other adult caregiver (2% of the IBF and 26% of the MLR group), and
- having been forced to have sex against their will (8% of the IBF and 27% of the MLR group).

Mark Regnerus, *Parental Same-Sex Relationships, Family Instability, and Subsequent Life Outcomes for Adult Children: Answering Critics of the New Family Structures Study with Additional Analysis*, 41 Soc. Sci. Res. 1367, 1372-74 (2012) [hereinafter *Parental Same-Sex Relationships*]; *see also* Douglas W. Allen, *High School Graduation Rates Among Children of Same-Sex Households* at 4 (2012) (unpublished manuscript, on file with Department of Economics, Simon Fraser University, Vancouver, Canada) (analyzing Canadian census data to find that children raised by gay and lesbian parents are much less likely to graduate from high school compared to children raised by a married mother and father).

Because of the smaller sample size for fathers who have had gay relationships, there were not as many significant findings as compared to mothers who have had lesbian relationships. However, adult children of fathers who are or have been in a same-sex relationship "are more apt than [adult children raised by intact biological parents] to smoke, have been arrested, pled guilty to non-minor offenses, and report more numerous sex partners." Regnerus, *How Different?*, *supra* at 764. The study's author asserts that the study is not poised to assess causation or definitively answer political questions. Indeed, the suboptimal outcomes may not be due to the sexual orientation or sexual behavior of the parent. Rather, the author simply asserts that the groups display numerous, notable distinctions, the exact sources of which would be difficult if not impossible to adequately sequester.

When the NFSS-based study was released in summer 2012, it initiated much heated discussion about same-sex parenting, and encountered widespread criticism and a level of scrutiny unusual for a published sociological study based on nationally-representative data. Regnerus, *Parental Same-Sex Relationships*, *supra* at 1367. One of the most frequent criticisms by supporters of same-sex marriage was that the study compared "apples to oranges," by comparing the numerous adult children of stably intact biological parents with both adult children whose mother or father left a heterosexual union for a same-sex one, and the rare scenarios in which children were raised consistently and stably in a same-sex household. *Id.*

But as the author's follow-up study noted, that criticism is unfair for at least two reasons. First, "if stability is a key asset for households with children, then it is sensible to use intact biological families in any comparative assessment." *Id.* at 1368. Indeed, part of the problem of nearly all previous studies is that they seldom included a married biological family control group. *Id.* at 1368-69. Second, the fact that most of the same-sex households were at some point unstable raises the question of whether stable same-sex households were genuinely undercounted in the study, or whether same-sex relationships were more short-lived. *Id.* The last scenario is possible, if not probable, given other research on the comparative volatility of lesbian relationships.

> A study of Norwegian and Swedish same-sex marriages notes that divorce risk is higher in same-sex marriages and that the 'risk of divorce for female partnerships actually is more than twice that for male unions'. Moreover, early same-sex marriages—those occurring shortly after a shift in marriage law—exhibited a similar risk of divorce as did more recent unions, suggesting no notable variation in instability over time as a function of new law or pent-up demand among more stable, longstanding relationships. **The study authors estimate that in Sweden, 30% of female marriages are likely to end in divorce within 6 years of formation,**

> **compared with 20% for male marriages and 13% for heterosexual ones.**

Id. at 1370 (emphasis added) (quoting Gunnar Anderson et al., *The Demographics of Same-Sex Marriages In Norway and Sweden*, 43 Demography 79, 89 (2006)). Other studies show similar instability, especially among lesbian couples. *Id.* While gay men's relationships appear more stable than lesbian relationships, they are less likely to be monogamous. *Id.* (citing Colleen Hoff & Sean Beougher, *Sexual Agreements Among Gay Male Couples*, 39 Arch. Sex. Beh. 774 (2010)).

An important, unanswered question then is whether the NFSS-based study randomly undercounted stable same-sex parenting relationships, or whether its small number of such stable relationships (a) was a product of an earlier era exhibiting a poorer social climate for same-sex households, or (b) reflects possible greater instability in same-sex parenting relationships, thus limiting their easy location via random sampling. Whatever the answer, and it is empirically unknown, what is clear is that there remains much to be studied in this domain, and hence confident assertions of "no difference" ought to be viewed with suspicion. As the study author indicated,

> Perhaps in social reality there are really two 'gold standards' of family stability and context for children's flourishing—a heterosexual stably-coupled household and the same among gay/lesbian households—but no population-based sample analysis is yet able to *consistently confirm wide*

> *evidence* of the latter. Moreover, a stronger burden of proof than has been employed to date ought to characterize studies which conclude 'no differences', especially in light of longstanding reliance on nonrandom samples of unknown bias and the high risk of making [significant] errors in small-sample studies. Simply put, the science here is young. Until much larger random samples can be drawn and evaluated, the probability-based evidence that exists suggests that the biologically-intact two-parent household remains an optimal setting for long-term flourishing of children.

Id. at 1377 (citations omitted); *see also* Walter R. Schumm, *Methodological Decisions and the Evaluation of Possible Effects of Different Family Structures on Children: The New Family Structures Survey*, 41 Soc. Sci. Research 1357-66 (2012) (validating methodological decisions made in New Family Structures Study, and noting similar decisions in other large-scale surveys).

Other population-based studies have similarly identified better outcomes for children raised by a biological mother and father than other parenting structures. In his assessment of group differences in academic progress through school, Rosenfeld noted no differences in school progress for children raised by same-sex parents. Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, 47 Demography 755 (2010). However, a reanalysis of his high-quality, Census-based sample—this time including the children of all couples, not just those who were residentially stable for at least five years—revealed that "children being raised by same-sex couples are 35% less likely to make normal progress through school." Douglas W. Allen et al., *supra* (noting findings that "are strikingly different from those of the original [Rosenfeld] study"). Thus the original "no differences" conclusion may be a result of dropping more unstable households from his analytic sample. While the Census is optimal for a comparison of same-sex and opposite-sex couples, it is not poised to assess the households of gay or lesbian single parents, since the Census does not ask questions about sexual orientation.

Indeed, no existing study yet bears the ability to randomly compare large numbers of children raised by gay couples with the same among heterosexual couples over a long period of time. The social science of same-sex parenting structures remains young, and subject to significant limitations about what can be known, given that the influence of household structures and experiences on child outcomes is not a topic for experimental research design. But those analyses that employ large, population-based samples continue to document differences, in contrast to contrary scholarly claims. With so many significant outstanding questions about whether children develop as well in same-sex households as in opposite-sex households, it remains prudent for government to continue to recognize marriage as a union of a man and a woman, thereby promoting what is known to be an ideal environment for raising children.

CONCLUSION

Marriage is the legal means by which children are stably united with their biological mothers and fathers and poised for optimal development. Opposite-sex parenting allows children to benefit from distinctive maternal and paternal contributions. Given these facts, safeguarding marriage is a liberty to be accorded to children at least as much as to their parents.

Thus, Amici respectfully request that the Court reverse the Ninth Circuit and the Second Circuit decisions.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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UNITED STATES OF AMERICA,
Petitioner,

—v.—

EDITH SCHLAIN WINDSOR and
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* SURVIVORS OF SEXUAL ORIENTATION CHANGE THERAPIES IN SUPPORT OF PETITIONER UNITED STATES OF AMERICA AND RESPONDENT EDITH SCHLAIN WINDSOR, URGING AFFIRMANCE

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. SEXUAL ORIENTATION IS A SUSPECT CLASSIFICATION UNDER THE EQUAL PROTECTION CLAUSE BECAUSE GAY MEN AND LESBIANS HAVE BEEN SUBJECTED TO A HISTORY OF DISCRIMINATION BASED ON AN IMMUTABLE CHARACTERISTIC THAT BEARS NO RELATIONSHIP TO THEIR ABILITY TO CONTRIBUTE TO SOCIETY 3

  A. Ryan Kendall 6

  B. Peter Drake 9

  C. John Metzidis 10

  D. Emily Kane 13

  E. James Guay 14

  F. Maris Ehlers 16

CONCLUSION 20

TABLE OF AUTHORITIES

Cases PAGE

Bowen v. Gilliard,
483 U.S. 587 (1987) 2

Brown v. Bd. of Educ.,
347 U.S. 483 (1954) 3

Lawrence v. Texas,
539 U.S. 538 (2003) 4

Perry v. Schwarzenegger,
704 F. Supp. 2d 921 (N.D. Cal. 2010) ... 6

Windsor v. United States,
699 F.3d 169 (2d Cir. 2012) 3

Statutes

1 U.S.C. § 7 2

Other Authorities:

AM. PSYCHIATRIC ASS'N, Position Statement, *Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)* (May 2000) ... 5

AM. PSYCHOLOGICAL ASS'N, REPORT OF THE TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION (2009) 4, 5

Gabriel Arana, *My So-Called Ex-Gay Life*, THE AMERICAN PROSPECT, Apr. 11, 2012 8

PAGE

Jim Burroway, *What Are Little Boys Made Of?: An Investigation of an Experimental Program to Train Boys to be Boys*, Box Turtle Bulletin, June 7, 2011 .... 18, 19

Richard Green, The "Sissy Boy Syndrome" and the Development of Homosexuality (Yale University Press, 1987) 18, 19

Joint Appendix, *Hollingsworth v. Perry*, No. 12-144 (Jan. 22, 2013) 6, 7, 8

Nat'l Comm. on Lesbian, Gay, & Bisexual Issues, Nat'l Ass'n of Social Workers, Position Statement, *"Reparative" and "Conversion" Therapies for Lesbians and Gay Men* (Jan. 21, 2000) 5

George A. Rekers & O. Ivar Lovaas, *Behavioral Treatment of Deviant Sex-Role Behaviors in a Male Child*, 7 J. Applied Behav. Analysis 173 (1974) 17, 18

Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 Pediatrics 346 (2009) 8

Robert L. Spitzer, Letter to the Editor, *Spitzer Reassesses his 2003 Study of Reparative Therapy of Homosexuality*, 41 Archives Sexual Behav. 757 (2012) 6

INTEREST OF AMICI CURIAE[1]

Amici Curiae are five survivors of the dangerous and discredited therapies and treatments, collectively known as "sexual orientation change efforts" ("SOCE"), that are still used by some mental health practitioners to try to change patients' sexual orientation. The sister of a man who was subjected to SOCE as a child and ultimately committed suicide is the sixth *Amicus*. They submit this brief to recount their stories, which illustrate that gay men and lesbians as a class are defined by an immutable trait that bears no relationship to their ability to contribute to society, and have historically experienced discrimination and prejudice that continues to this day. They urge that the Court recognize sexual orientation as a suspect classification for equal protection constitutional analysis purposes.

Ryan Kendall, Peter Drake, John Metzidis, Emily Kane, and James Guay recount their own stories, including the stigmatizing effect of their own families' and communities' hostility towards homosexuality, and the harms that they suffered as a result of the doomed efforts to change a fundamental part of themselves. Maris Ehlers recounts the story of her brother, Kirk Andrew Murphy, who was subjected to SOCE as a child and ultimately took his own life after despairing about his inability to change his sexual orientation.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to the preparation or submission of this brief. Consent of the parties to the filing of this brief has been obtained and filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Sexual orientation should be recognized as a suspect classification under the equal protection component of the Due Process Clause of the Fifth Amendment because homosexuals as a class have long been subjected to discrimination based on an immutable characteristic that should not be the basis for unequal treatment. While it would not be necessary for sexual orientation to be an immutable trait for heightened scrutiny to apply, *see Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (looking to whether a class "exhibit[s] obvious, immutable, *or* distinguishing characteristics that define them as a discrete group" (emphasis added)), where a community is singled out for discrimination based on an inherent characteristic that *is* immutable, as is the case here, the application of heightened scrutiny is particularly appropriate.

Amici's personal stories as survivors of SOCE, which are representative of the experiences of countless other lesbian, gay, bisexual and transgender ("LGBT") people, illustrate the immutability of sexual orientation and the history of discrimination and animosity faced by gay men and lesbians based solely on a trait that bears no relationship to their ability to contribute to society.

For these reasons, *Amici* urge the Court to subject the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, to a heightened level of scrutiny and affirm the decision of the United States Court of Appeals for the Second Circuit holding that the law violates the equal protection component of the Due Process Clause of the Fifth Amendment.

ARGUMENT

I. SEXUAL ORIENTATION IS A SUSPECT CLASSIFICATION UNDER THE EQUAL PROTECTION CLAUSE BECAUSE GAY MEN AND LESBIANS HAVE BEEN SUBJECTED TO A HISTORY OF DISCRIMINATION BASED ON AN IMMUTABLE CHARACTERISTIC THAT BEARS NO RELATIONSHIP TO THEIR ABILITY TO CONTRIBUTE TO SOCIETY

DOMA prohibits the federal government from recognizing the marriages of gay men and lesbian women, solely on the basis of their sexual orientation. The Second Circuit Court of Appeals correctly held that DOMA could not survive Respondent Edith Windsor's Equal Protection challenge under intermediate scrutiny, *Windsor v. United States*, 699 F.3d 169, 188 (2d Cir. 2012); it follows that DOMA cannot survive the heightened level of scrutiny triggered because it discriminates based on a suspect classification.

Amici's stories reveal the extent that gay men and lesbians have been and continue to be subjected to discrimination and prejudice, based solely on an inherent trait that bears no relationship to their ability to contribute to society. The harmful and lasting effect of this stigma, as recounted by these *Amici*, demonstrate that discrimination against gay men and lesbians "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

Amici's stories also illustrate that a person's sexual orientation, like his or her race, ethnicity or gender, is an immutable characteristic. Respondents Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") assert that sexual orientation is not immutable, describing it as merely "a propensity to engage in a certain kind of conduct." Resp't BLAG's Br. 55. Yet for nearly 40 years, the leading mental health professional associations have recognized that homosexuality is not an illness or disorder that can or should be changed. Homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders ("DSM") in 1973, and the American Psychological Association "rejected the stigma of mental illness that the medical and mental health professions had previously placed on sexual minorities." AM. PSYCHOLOGICAL ASS'N, REPORT OF THE TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 11 (2009). This scientific and medical consensus has become more widely accepted throughout society over the past decades, and it is past time that the immutability of sexual orientation is recognized by the courts as well. *See Lawrence v. Texas*, 539 U.S. 538, 578-79 (2003) ("Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

There is simply no reliable evidence that a person can change his or her sexual orientation, as recognized by the mental health community. For example, in 2000, the National Association of Social Workers concluded that "lesbians and gay men are often pressured to seek reparative or conversion therapies, which ***cannot and will not change sexual orientation***. . . . No data demonstrate that reparative or conversion therapies are effective . . . ." NAT'L COMM. ON LESBIAN, GAY, & BISEXUAL ISSUES, NAT'L ASS'N OF SOCIAL WORKERS, Position Statement, *"Reparative" and "Conversion" Therapies for Lesbians and Gay Men* (Jan. 21, 2000) (emphasis in original). In 2000, the American Psychiatric Association also opposed the practice of SOCE because it is "at odds with the scientific position . . . that homosexuality per se, is not a mental disorder," and explained that "there are no scientifically rigorous outcome studies . . . [and] sparse scientific data" to support the position that SOCE can change an individual's sexual orientation. AM. PSYCHIATRIC ASS'N, Position Statement, *Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)* (May 2000). In 2009, an American Psychological Association task force conducted a comprehensive review of scientific studies on the effectiveness of SOCE, and concluded that "the peer-refereed empirical research . . . provides little evidence of efficacy" in reducing or eliminating same-sex attraction. AM. PSYCHOLOGICAL ASS'N, REPORT OF THE TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 35 (2009).

The one prominent academic study that purported to show that SOCE could result in changes in sexual orientation has been renounced by its author, Dr. Robert Spitzer, who explained that his methodology was deeply flawed and apologized to the gay community for "making unproven claims of the efficacy of reparative therapy." Robert L. Spitzer, Letter to the Editor, *Spitzer Reassesses his 2003 Study of Reparative Therapy of Homosexuality*, 41 ARCHIVES SEXUAL BEHAV. 757 (2012). As the District Court in *Perry v. Schwarzenegger* found: "No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 966 (N.D. Cal. 2010).

A. Ryan Kendall

Ryan Kendall testified at trial in *Perry v. Schwarzenegger*, the challenge to California's Proposition 8, and elaborates on his testimony here.

Ryan was raised in a religiously conservative household in Colorado Springs by parents who believed that homosexuals were "essentially evil." When he was a young teenager, Ryan's parents discovered that he was gay by reading his journal and were outraged. As Ryan testified: "I remember my mother looking at me and telling me that I was going to burn in hell." Joint Appendix at 729, *Hollingsworth v. Perry*, No. 12-144 (Jan. 22, 2013).

Ryan's parents desperately sought to "fix" him by sending him to a series of SOCE practitioners. After several sessions of with a self-described

"Christian therapist." Ryan's parents were referred to the National Association for Research and Therapy of Homosexuality ("NARTH"), an organization that purported to practice a more secular form of SOCE. For the better part of a year, Dr. Joseph Nicolosi practiced SOCE on Ryan through weekly telephone sessions and in person at NARTH's California treatment center.

Ryan knew from the start that his sexual orientation was inherent and unchangeable, and that the SOCE sessions were useless: "I knew I was gay just like I knew I'm short and I'm half Hispanic. And I just never thought that those facts would change." *Id.* at 731. In fact, during a group therapy session, Dr. Nicolosi introduced a man named Kelly as a "perfect patient" who had been cured of his same-sex attractions, yet after Dr. Nicolosi left the room, Kelly told Ryan that he was going to a gay bar later that night, and was merely pretending to be cured for the sake of his family. *Id.* at 737. As Ryan testified: "I knew I was gay. I knew that could not be changed. And this just confirmed that this [program] wasn't going to be effective for me." *Id.* at 738.

However, Ryan's understanding of the immutability of his sexual orientation did not protect him from the harmful effects of SOCE on his psyche and on his family. During each session, Dr. Nicolosi emphasized that Ryan's "treatment" would help him suppress his sinful and defective same-sex desires. Ryan's exposure to SOCE validated his parents' beliefs about homosexuality, encouraging them to reject him and causing him great pain. After he began SOCE, Ryan's parents became verbally and emotionally abusive, telling him that he was abhorrent, disgusting, and evil. As Ryan testified: "[M]y mother would tell me that she hated me, or that I was disgusting, or that I was repulsive. Once she told me that she wished she had had an abortion instead of a gay son. She told me that she wished I had been born with Downs Syndrome or I had been mentally retarded." *Id.* at 733.

The experience virtually destroyed Ryan's place in the world, driving him to the brink of suicide. Ryan was not unique: LGBT youth who experience high levels of family rejection, as Ryan did, are 8.4 times more likely than peers from families with no or low levels of family rejection to report having attempted suicide. Caitlin Ryan et al., ***Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults***, 123 PEDIATRICS 346, 349-50 (2009). In fact, Gabriel Arana, another minor undergoing SOCE who Dr. Nicolosi paired with Ryan as part of their "treatment," came perilously close to taking his own life after years of exposure to SOCE because he saw himself as "a leper with no hope of a cure." *See* Gabriel Arana, *My So-Called Ex-Gay Life*, THE AMERICAN PROSPECT, Apr. 11, 2012, http://prospect.org/article/my-so-called-ex-gay-life.

When he was 16, Ryan stopped undergoing SOCE, ran away from home, and legally separated from his parents. For the next decade, Ryan suffered severe depression, including frequent thoughts of suicide. He was filled with self-hatred that derived from SOCE, which had reinforced the message that he was defective and immoral at a time when most adolescents are first discovering their sexual identity. Like many others experiencing total family rejection, Ryan succumbed to periods of drug abuse and homelessness, and his education was derailed for more than a decade. Ryan's exposure to SOCE tore apart his family, leading to a fifteen-year period of estrangement from his parents.

Although Ryan has been able to rebuild his life, returning to school and reconciling with his parents, he continues to struggle with the lasting psychological damage caused by SOCE. Nor will he be able to regain his lost decade—at the critical period in the transition from adolescence to adulthood—or the fifteen years taken from him and his family, including his father, whose health is failing.

B. Peter Drake

Peter Drake realized that he was attracted to men when he was 13, but because of the stigma associated with homosexuality, he could not accept that he was gay for much of his life. Peter lived in a straight marriage for 28 years, fathering two children. Although he was faithful to his wife, his attraction to men was always present. While Peter avoided same-sex relationships for decades, he was never able to change who he was, and eventually realized that he was fighting a losing battle.

When Peter was 46, he sought out a licensed SOCE therapist in an attempt to change his sexual orientation. For nearly three years, Peter subjected himself to weekly SOCE "therapy" sessions that deepened his depression until he came very close to attempting suicide. The therapist's change efforts ranged from having Peter imagine himself lusting for parts of the female body, to attempting to "father" Peter to correct the supposedly inadequate parenting that the therapist believed to be a cause of his homosexuality. After three years without progress, Peter became increasingly discouraged, ashamed, and humiliated, as he perceived his inability to change his sexual orientation as a personal failure. Peter's hopes that he could be "cured" were dashed, and his therapist offered no comfort, leaving him broken.

Through work with a different therapist, Peter was slowly able to accept himself as a gay man, coming out to his family and friends when he was 53. With support from his wife, Peter's marriage ended amicably. Peter now recognizes that his sexual orientation is an immutable trait and fundamental part of his identity: he was able to "pass" as straight for decades, but at the cost of burying his true self. Recently, a pastor said the words that Peter had needed to hear so long ago: "Peter, I am glad you are ready to be the man God made you to be."

C. John Metzidis

Around the age of 14, when John Metzidis realized that he was attracted to men, he felt immense shame, as he had been struggling with the fear that he was gay since early childhood. Raised in a politically conservative household in Orange County, California, John saw that his community viewed being gay as disgusting and shameful. As a child, he was often teased by other children and called derogatory names like "gay boy" and "faggot," and thus learned to be careful about the way he spoke, the way he carried himself, and the interests and hobbies he pursued, lest anything be perceived by the other children as too effeminate or "gay."

Due to the stigma associated with homosexuality, John was not prepared to accept his sexual orientation, which he saw as a "problem" or "defect" that needed to be "cured." After graduating high school, John began reading about the "ex-gay" movement, and was drawn to the purportedly more secular forms of SOCE practiced by NARTH and Dr. Nicolosi, which taught that it was possible to change one's sexual orientation. At the age of 20, John sought out a SOCE practitioner and began undergoing weekly sessions of "reparative therapy" with Scott Sutherland, a therapist at Dr. Nicolosi's clinic. Like many others who voluntarily seek out SOCE, John was initially hopeful at the prospect of changing his sexual orientation, and for a period believed that he was making progress.

After about nine months of subjecting himself to SOCE, John was frustrated with his inability to change his sexual orientation, and became fixated on the notion that he was broken or defective. He became withdrawn and exceedingly self-conscious, and his grades showed a sharp decline. John began suffering from deepening depression and anxiety, and thought about killing himself more than at any other time in his life. When, after 18 months of SOCE, John finally accepted that he could not change his sexual orientation, his therapist was unable to offer any support, and instead blamed John for not working hard enough to change.

Before ending his therapy, John met another SOCE therapist from Dr. Nicolosi's clinic, David Matheson, who told him that he was being too "perfectionistic" in his expectations about changing his sexual orientation, and that he needed to focus less on "changing" and more on "overcoming" his same-sex attractions. From this and other conversations, John got the sense that Matheson and other self-identified "ex-gays" he met had not actually succeeded in changing their sexual orientation, and that their "struggle" with their sexual identity continued, no matter how long ago they had begun SOCE treatment or how long they had been married to women.

John considers himself one of the luckier survivors of SOCE, but one of the most damaging aspects for him was the deep violation of trust and the abuse of the therapeutic relationship. John opened up to his therapist more than he had to any other person to that point in his life, sharing intimate details and exploring difficult emotions. Yet that relationship was based upon a fraud: that his sexual orientation was a disorder that could be changed if he tried hard enough, rather than an immutable characteristic.

John is now a happy and well-adjusted person, having embraced his sexual orientation as a fundamental part of his identity. He and his partner Jason are engaged to be married. As they live in California, they have had to wait due to California's Proposition 8. Being allowed to participate in the social institution of marriage is important to John and Jason because being officially married singularly conveys the values of family, love, commitment and fidelity—values that John and Jason deeply honor. To them, the federal government's refusal to grant equal treatment and dignity to same-sex unions send the message that there is something dysfunctional or disordered about gay people as individuals—a view that was the underlying premise of John's participation in SOCE, and a view that John has worked so hard to overcome.

D. Emily Kane

Emily Kane was raised in a religiously conservative household in Kentucky, in a community where homosexuality was seen as immoral and wrong. When she was 16, her parents discovered that she was a lesbian and tried to change her by forcing her to undergo weekly "conversion therapy" sessions at CrossOver Ministries, an "ex-gay" counseling organization. During each session, Emily's therapist, a self-proclaimed "former" lesbian with no formal therapeutic training, would emphasize that Emily's same-sex desires were sinful and that she should choose to reject them through the power of prayer. There were times during those months when Emily hated herself to the core. She tried in vain to eliminate her attraction to women, and was left with the constant feeling of failure because she was unable to change this fundamental part of herself.

Although by the end of her three months of "conversion therapy," Emily recognized that her sexual orientation was immutable, her exposure to SOCE had reinforced the stigmatizing effect of the animosity and hostility of her family and community towards homosexuality. Emily did not feel safe talking with anyone about her sexual orientation because it was clear to her that she would not be accepted, and was terrified that if she were honest with her parents, they would reject her completely. For about four years, she was not able to come out to anyone, and lived in a constant state of fear that someone would discover that she was gay. Being told by her "therapist" that her same-sex desires were a choice that she could pray away only made Emily feel worse, because she knew that it was impossible to change her sexual orientation.

Emily is now a college student who has mostly recovered from the psychological harms she suffered as a result of her exposure to SOCE, and has fully embraced her identity as a lesbian. Yet she still feels deeply scared and sick to her stomach each time she comes out to a new person, as there is a part of that deeply engrained stigma associated with homosexuality that has never left her.

E. James Guay

As the son of a preacher raised in a fundamentalist Christian household in Southern California, James Guay was plagued with guilt and shame when he realized at the age of 12 that he was gay. Brought up in a religiously conservative household, James was taught that homosexuals were inherently flawed and sinful, and was desperate to change his sexual orientation. He spent the next eight years of his life making every effort to eliminate his same-sex attractions before finally recognizing that he could never truly change this fundamental part of himself.

After four years of attempting to change on his own—through church involvement, Bible reading, and prayer—James had succeeded only in internalizing the Biblical message that he was an "abomination," increasing his feelings of self-hatred. At the age of 16, James disclosed his internal struggle to his parents, who helped him to find a self-described "ex-gay" licensed psychologist, Dr. James Wilder, who practiced a form of SOCE referred to as "conversion therapy." James was initially filled with a sense of relief and a newfound hope that he could change his sexual orientation through SOCE. Like many other LGBT minors, James voluntarily agreed to undergo SOCE and was fully dedicated to the weekly sessions for a year. As an impressionable teenager determined to rid himself of his "disease," James believed for a time that undergoing SOCE would help him to become heterosexual. Yet the promises of change never materialized, and his exposure to SOCE instead caused lasting psychological trauma.

As part of James's "conversion therapy," Dr. Wilder counseled that homosexuality can result from inadequate parenting, which wreaked havoc on James's relationship with his parents by transforming his self-hatred into anger at them. Dr. Wilder also required James to examine his past to search for an actual set of events that caused his same-sex desires, which put extraordinary pressure on him to create false memories, and obliterated his sense of self. His exposure to SOCE deepened his depression, shame, and feelings of isolation, rejection, and failure. For years, he suffered from fear of intimacy, severe anxiety, and from addictive behaviors.

When James realized that, despite his discipline and devotion, he could never truly change who he was, his worst fears were realized and he saw himself as intrinsically broken. He was left to pick up the pieces with the help of affirmative psychotherapy that did not demand that he change the unchangeable.

James now happily recognizes that his sexual orientation is an immutable trait that is a fundamental part of his identity. He has worked as a licensed therapist for more than a decade, helping LGBT clients overcome the harmful effects of SOCE. His clients who underwent SOCE are often distrustful, scared, and in a great deal of pain, exhibiting symptoms similar to those of people who suffered early childhood traumas. Through his work, James has learned that his experience was a common one: many of his clients voluntarily underwent SOCE because they, like he, desperately needed to conform their identities to the expectations of their families and communities.

F. Maris Ehlers

Maris Ehlers's older brother, Kirk Andrew Murphy, was the original poster child for the dangerous practices now known as SOCE. On December 21, 2003, at the age of 38, Kirk committed suicide. At the time, Maris did not understand why. After learning more about the SOCE "therapy" that Kirk was subjected to by the State of California, Maris wonders how Kirk was able to live as long as he did.

In 1970, when Kirk was almost five years old, his parents enrolled him in a federally funded experimental study at the University of

California, Los Angeles ("UCLA"), which used aversion therapy to discourage feminine behaviors in young boys, based on the now-discredited theory that this would prevent them from growing up to be gay. Under the pseudonym "Kraig," Kirk became a case study, and later a repeatedly cited "success story," of then-UCLA doctoral student George A. Rekers, who has since become one of the leading proponents of subjecting children to SOCE. *See* George A. Rekers & O. Ivar Lovaas, *Behavioral Treatment of Deviant Sex-Role Behaviors in a Male Child*, 7 J. APPLIED BEHAV. ANALYSIS 173-190 (1974).

At the UCLA Gender Identity Clinic, Kirk was placed in a playroom filled with stereotypical "boys' toys" and "girls' toys." *Id.* at 176. Kirk's mother was instructed to smile and compliment him when he played with the "boys' toys," and to shun him when he played with "girls' toys." *Id.* at 179. Kirk became so distraught by his mother's refusal to acknowledge him after he picked up a "girls' toy" that he would break down crying, and the researchers had to reassure her "empathetically that she was doing the right thing and was doing it well . . . ." *Id.* Maris does not fault her mother for following the directions of UCLA "therapists," whom she trusted not to ask her to do anything that would harm her son. However, Maris does not doubt that requiring her mother to repeatedly reject Kirk was cruel and damaging.

The UCLA researchers exported Kirk's SOCE "treatment" to the Murphy home, training Kirk's mother to award blue poker chips for masculine behavior and red poker chips for feminine behavior. *Id.* at 180-81. Blue chips were to be exchanged for rewards, like candy, and red chips for punishments, including "physical punishment by spanking." *Id.* at 180. At the end of each week, when the chips were tallied, Kirk's father would administer the spankings by whipping Kirk's bare bottom with a belt. While Maris was too young to remember the poker chip system imposed on the family as part of Kirk's SOCE "treatment," she does remember sneaking into Kirk's room to comfort him after the whippings.

After ten months, the UCLA researchers ended their experimental SOCE treatment on Kirk and declared victory, concluding that they had succeeded in their attempt "to extinguish feminine behavior and to develop masculine behavior." *Id.* at 179, 186. Contrary to the researchers' self-congratulation, their "therapy" had caused extraordinary damage to Kirk, without changing his sexual orientation. After undergoing SOCE, Kirk became withdrawn, isolated, and incredibly self-conscious. He obsessed over what others thought of him, revealing through questions to Maris that he was constantly over-analyzing the words and actions of others. Maris could never understand the visible pain that Kirk carried with him, and his belief that no one could ever love him as he was. She believes that SOCE left Kirk stricken with the feeling that he was broken.

At the age of 17, Kirk attempted suicide for the first time. The following year, Kirk explained to Dr. Richard Green, one of the leading advocates for removing homosexuality from the DSM in 1973, that he had a sexual encounter with a man weeks before his suicide attempt. Jim Burroway, *What Are Little Boys Made Of?: An Investigation* *of an Experimental Program to Train Boys to be Boys*, BOX TURTLE BULLETIN, June 7, 2011, http://www.boxturtlebulletin.com/what-are-little-boys-made-of5 (quoting Richard Green, THE "SISSY BOY SYNDROME" AND THE DEVELOPMENT OF HOMOSEXUALITY 313-15 (Yale University Press, 1987)).[2] Kirk told Dr. Green that he felt guilty that the SOCE "treatment" he underwent at UCLA had failed to "fix" him, and admitted that he had tried to kill himself because he did not want to be gay. *Id.*

Kirk eventually came out to Maris as a gay man; even the extreme form of SOCE that he was subjected to as a child was unable to change his sexual orientation. But Kirk was not able to recover from the severe harm that he suffered due to his exposure to SOCE, and ultimately took his own life. Through the painful process of losing her brother and then learning what was done to him under the auspices of government-sanctioned SOCE "treatment," Maris became committed to protecting others from being exposed to these dangerous and ineffective efforts to change this fundamental and inherent part of themselves.

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[2] Dr. Richard Green used Kirk as a prominent case study in his book, under the pseudonym "Kyle." He confirmed that "Kyle" is Kirk to Maris in 2010.

CONCLUSION

By illustrating the immutability of sexual orientation and the history of discrimination faced by gay men and lesbians based solely on a trait that bears no relationship to their ability to contribute to society, *Amici's* stories show that the Court should recognize sexual orientation as a suspect classification for equal protection constitutional analysis purposes, and thus should review DOMA under a heightened level of scrutiny.

For the foregoing reasons, and for the reasons stated in the Merits Briefs of Petitioner United States of America and Respondent Edith Schlain Windsor, *Amici Curiae* urge the Court to affirm the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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THE UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER
and
BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED
STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF 278 EMPLOYERS AND ORGANIZATIONS REPRESENTING EMPLOYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT EDITH SCHLAIN WINDSOR (MERITS BRIEF)

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 10

ARGUMENT 11

- A. DOMA Imposes Compliance Burdens upon Employers 13
  - 1. Workplace Benefits and a Workplace Ethos of Transparent Fairness are Critical to Amici's Success 13
  - 2. DOMA Burdens Amici and Their Employees, and Strains the Employer/Employee Relationship 14
  - 3. DOMA Forces Employers to Incur Administrative Burdens and Expense. 25
- B. DOMA Forces Amici to Affirm Discrimination They Regard as Injurious to Their Corporate Missions and Contrary to Non-Discrimination Laws and Policies 31

CONCLUSION 36

Appendix A: Identification of Amici .... App 1

TABLE OF AUTHORITIES

Page(s)

CASES

Bd. of the County Comm'rs of Bryan County v. Brown,
520 U.S. 397 (1997) 33

Bipartisan Legal Advisory Group of the U.S. House of Representatives v. Gill,
No. 12-13 15

Cozen O'Connor P.C. v. Tobits,
No. 2:11-cv-00045 (E.D. Pa.) 32

Department of Health and Human Services v. Massachusetts,
No. 12-15 15

Goodridge v. Department of Public Health,
798 N.E.2d 941 (Mass. 2003) 12

Grutter v. Bollinger,
539 U.S. 306 (2003) 36

Massachusetts v. Department of Health and Human Services,
No. 12-97 15

Office of Personnel Management v. Golinski,
No. 12-16 15

Office of Personnel Management v. Pedersen,
No. 12-302 15

Pedersen v. Office of Personnel Management,
No. 12-231 15

TABLE OF AUTHORITIES

Page(s)

Strauss v. Horton,
46 Cal. 4th 364, 207 P.3d 48 (Cal. 2009) 12

Varnum v. Brien,
763 N.W.2d 862 (Iowa 2009) 12

Windsor v. United States,
No. 12-2335-cv(L), 12-2435(Con), 2012 WL 4201895 (2d Cir. Sep. 7, 2012) 17

FEDERAL STATUTES

1 U.S.C. §7 1

5 U.S.C. §§ 6381-6387 20

8 U.S.C.
§ 1153(b)(1)(A)-(C) 23
§ 1153(d) 24, 25

26 U.S.C.
§ 21(b)(2) 17
§ 72(t) 20
§ 105 6
§ 105(b) 16
§ 106(a) 16

TABLE OF AUTHORITIES

Page(s)

§ 125(f) 17
§ 129(e) 17
§ 152 16
§ 152(a) 16
§ 152(b)(3)(A) 25
§ 213(a) 18
§ 401(a)(9) 23
§ 401(a)(11) 22
§ 401(k)(2)(B)(i)(IV) 20
§ 415(b) 23
§ 417 22
§ 417(b), (c) 23
§ 2056 22
§ 5000(b)(1) 15
§ 6013 18
§ 6110(k)(3) 27
§ 9801(f) 19

29 U.S.C.
§ 1055 22
§ 1055(d), (e) 23
§§ 1161-1169 18
§ 1161(b) 18
§ 1163(1)-(6) 19
§ 1167(1) 15
§ 1167(3) 19
§§ 1181-1183 19
§ 2601 *et seq.* 20

Consolidated Omnibus Budget Reconciliation Act of 1985(COBRA), Pub. L. No. 99-272, 100 Stat. 82 18

Defense of Marriage Act ("DOMA") .... *passim*

TABLE OF AUTHORITIES

Page(s)

Family and Medical Leave Act of 1993, Pub. L. 103-3, 107 Stat. 6 .... 20, 21

Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936 19

STATE AND D.C. STATUTES

CAL. FAM. CODE § 308(b) 12

CAL. GOV'T CODE § 12940(a) 31

CAL. HEALTH & SAFETY CODE § 1366.20 *et seq.* 19

CAL. INS. CODE § 10128.50 *et seq.* 19

CAL. LAB. CODE § 2808 34

COLO. REV. STAT. § 24-34-402 32

CONN. GEN. STAT.
  § 46b-20 12
  § 46a-60 31
  § 46a-81c 31

D.C. CODE
  § 2-1402.11 31
  § 46-401 12

DEL. CODE. tit. 19, § 711 31

HAW. REV. STAT. § 368-1 31

TABLE OF AUTHORITIES

Page(s)

Iowa Code
  § 509A.13A 19
  § 216.6 32
  § 216.6A 32

775 Ill. Comp. Stat. 5/1-103, 5/2-102. 31

Mass. Gen. Laws
  ch. 151B, § 4 32
  ch. 176J § 9 19

Md. Code Ann.
  Fam. Law § 2-201 12
  State Gov't § 20-606 31

Me. Rev. Stat.
  tit. 5, § 4572 32
  tit. 19-A, § 650A 12

Minn. Stat. § 363A.08 31

N.H. Rev. Stat. Ann.
  § 457:1-a 12
  § 21-I:26 19
  § 354-A:1 31

N.J. Rev. Stat.
  § 10:5-12 31
  § 10:5-33 31

N.M. Stat. Ann.
  § 40-1-4 12
  § 28-1-7 32

N.Y. Dom. Rel. Law § 10-a 12

TABLE OF AUTHORITIES

Page(s)

N.Y. EXEC. LAW. § 296(a) 31

NEV. REV. STAT. § 613.330 32

OR. REV. STAT. § 659A.003 31

R.I. GEN. LAWS § 28-5-7 32

VT. STAT. ANN.
  tit. 15, § 8 12
  tit. 21, § 495 32

WASH. REV. CODE
  § 26.04.010 12
  § 49.60.030 31
  § 49.60.180 31

WIS. STAT.
  § 111.321 31
  § 111.36 31

COUNTY ORDINANCES

County of Santa Clara Ordinance Code § A25-124 34

King County Code § 12.16.020 34

CITY CODES

Baltimore City Code, art. 4, § 3-1 34

Code of the City of Bangor § 195-3.. 34

TABLE OF AUTHORITIES

Page(s)

City of Cambridge Municipal Code
  § 2.76.030 34
  § 2.76.100 34
  § 2.76.120 34

City of Hartford Municipal Code § 2-696............... 34

New York City Administrative Code § 8-107 34

San Francisco Admin. Code § 12B.1(b) 34

City of Santa Monica Municipal Code
  § 4.40.030 34

City of Seattle Municipal Code § 14.04.040........... 34

City of West Hollywood Municipal Code §
  9.28.050 34

TRIBAL CODES AND ORDINANCES

Blackfeet Trib. Empl. Rights Ord. & Safety
  Enforcement Act of 2009 § 4-101 31

COQUILLE INDIAN TRIB. CODE § 740.010................. 12

LITTLE RIVER BAND OF OTTAWA INDIANS TRIB.
  CODE ch. 600, tit. 03, § 4.01 31

LITTLE TRAVERSE BAY BANDS OF ODAWA
  INDIANS TRIB. CODE § 14.108.............................. 31

Mandan Hidatsa and Arikara Nation Emp.
  Rights and Contracts Pref. Ord. § 206 31

TABLE OF AUTHORITIES

Page(s)

NOTTAWASEPPI HURON BAND OF THE POTAWATOMI TRIB. CODE, tit. V, ch. 2, § 301 31

Poarch Band of Creek Indians Trib. Emp. Rights Ord.
§ 33-4-3 32
§ 33-4-10 32

Shoshone-Bannock Tribes Worker Prot. Ord. § 401 32

SUQUAMISH TRIB. CODE, tit. 9, ch. 9.1 12

TULALIP TRIB. CODE § 4.20.030(1) 12

REGULATIONS

Treas. Reg.
§ 1.21-1(b) (2007) 17
§ 1.106-1 (1960) 16, 17
§ 1.125-4 (2001) 20
§ 1.401(k)-1(d)(3)(i) & (iii) (2009) 21
§ 1.401(k)-1(d)(3)(iii)(B)(1) (2009) 20
§ 54.4980B-1 (2001) 18
§ 54.9801-6 (2004) 19
§ 54.9801-6(b)(2)(iv)-(vi) (2004) 20

ADMINISTRATIVE RULINGS

City of Boston Equal Opportunity Statement 33

I.R.S. Info. Ltr. 2011-0066, 2011 WL 4626122 (Jul. 27, 2011) 16

I.R.S. Notice 2007-7, 2007-1 C.B. 395, Q&A 5

TABLE OF AUTHORITIES

Page(s)

I.R.S. Priv. Ltr. Rul.
  9717018, 1997 PLR LEXIS 85 (Jan. 22, 1997) 16
  9850011, 1998 PLR LEXIS 1650 (Sept. 10, 1998) 16
  200108101, 2000 PLR LEXIS 2092 (Nov. 17, 2000) 26
  200339001, 2003 PLR LEXIS 879 (June 13, 2003) 16
  200524016, 2005 PLR LEXIS 278 (Mar. 17, 2005) 16

I.R.S. Pub. 555, Community Property 25

I.R.S., Questions and Answers for Registered Domestic Partners and Same-Sex Spouses in Community Property States 25

N.M. Op. Att'y. Gen. 11-01, 2011 WL 111243 (Jan. 4, 2011) 12

N.Y. City Office of Labor Relations, Health Benefits Program, Notice of Rights: When Your Health Benefits Terminate 19

N.Y. City Dep't of Citywide Admin. Servs., Pers. Servs. Bulletin 440-8R, Guidelines on the Family and Medical Leave Act of 1993 21

N.Y. State Dep't of Tax'n and Fin, Technical Memorandum, The Marriage Equality Act 26

R.I. Exec. Order No. 12-02 (May 14, 2012) 12

TABLE OF AUTHORITIES

Page(s)

SUPREME COURT RULES

Rule 37.3(a) 1

Rule 37.6 1

INTERNATIONAL AUTHORITIES

Act of 27 June 2008 No. 53 (Nor.) 24

Äktenskapsbalk [Marriage Code] 1:1 (Swed.) 24

Burgerlijk Wetboek [Civil Code], Art. 30:1 (Neth.) 24

Civil Marriage Act, S.C. 2005, c. 33 (Can.) 24

Civil Union Act 17 of 2006 (S. Afr.) 24

Code Civil [Civil Code], art. 143 (Belg.) 24

Código Civil para el Distrito Federal [Civil Code of the Federal District], art. 146 (Mex. City) 24

Código Civil Para El Estado De Quintana Roo [Civil Code of the State of Quintana Roo], Art. 680 (Mex.) 24

Corregedor-Geral Da Justica da Bahia, Provimento Conjunto No. CGJ/CCI – 12/2012 (Braz.) 24

Corregedor-Geral De Justica Piaui, Provimento No. 04/2012 (Braz.) 24

TABLE OF AUTHORITIES

Page(s)

Corregedoria-Geral Da Justica de Alagoas, Provimento No. CG 40/2011 (Braz.) 24

Corregedoria-Geral Da Justica de Sao Paulo, Provimento CG No. 41/2012 (Braz.) 24

Law 13/2005 Código Civil [Civil Code] 2005, 157 (Spain)...24

Law 26.618, July 22, 2010, [CXVIII] B.O. 31.949 (Arg.) 24

Law No. 9/2010, May 31, 2010 (Port.) 24

Law No. 65/2010, June 27, 2012 (Ice.) 24

Law No. 532, June 12, 2012 (Den.) 24

OTHER AUTHORITIES

Eastern Bank: Embracing Diversity......................35

Human Rights Campaign,
Domestic Partner Benefits: Grossing Up to Offset Imputed Income Tax 15, 29
Employment Non-Discrimination Act..............35

James K. Harter, Frank L. Schmidt & Theodore L. Hayes, *Business-Unit-Level Relationship Between Employee Satisfaction, Employee Engagement, and Business Outcomes: A Meta-Analysis*..............14

U.S. Bureau of Labor Statistics, *Employee Benefits in the United States — March*

TABLE OF AUTHORITIES

Page(s)

M.V. Lee Badgett, Center for American Progress & UCLA Williams Institute, *Unequal Taxes on Equal Benefits* 18, 26, 27

MetLife, *10th Annual Study of Employee Benefit Trends* 13

Tara Siegel Bernard,
  A Progress Report on Gay Employee Health Benefits, N.Y. TIMES, Dec. 5, 2012 30
  For Gay Employers, an Equalizer, N.Y. TIMES, May 20, 2011 29
  Yale Payroll Error Gives Gay Employees a New Year Surprise, N.Y. TIMES, Jan. 11, 2011 ....27, 33

WENDY R. GINSBERG, CONG. RESEARCH SERV., R41030, FEDERAL EMPLOYEE BENEFITS AND SAME-SEX PARTNERSHIPS (2011) 15

INTEREST OF THE *AMICI CURIAE*[1]

This brief is submitted with the written consent of all parties pursuant to Rule 37.3(a).

Amici are financial institutions, medical centers, providers of health care and of health-care coverage, airlines, builders, energy and high technology businesses, manufacturers, media companies, insurers, pharmaceutical companies, law and professional firms, retailers, marketers, restaurants, non-profit organizations, the cities of Baltimore, Bangor, Boston, Cambridge, Hartford, Healdsburg, Los Angeles, New York, Northampton, Portsmouth, Providence, San Francisco, Santa Monica, Seattle, and West Hollywood, King and Santa Clara counties, and trade and professional associations. *Amici* are employers or associations of employers, and we share a desire to attract, retain, and secure a talented workforce. We are located in or operate in states that recognize marriages of certain of our employees and colleagues to spouses of the same sex. At the same time, we are subject to section 3 of the federal Defense of Marriage Act ("DOMA"),[2] which precludes federal recognition of these marriages. This dual regime uniquely burdens *amici*. It puts us, as employers, to unnecessary cost and administrative complexity, and regardless of our business or professional judgment forces us to treat one class of our lawfully married employees differently than another, when our success depends upon the welfare and morale of all employees. *Amici* write to advise the Court concerning the impact on the employer of these conflicting legal regimes.

---

[1] Pursuant to Rule 37.6, counsel for *amici* certify that no counsel for any party had any role in authoring this brief in whole or in part, and that no person other than *amici curiae*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

[2] Codified at 1 U.S.C. §7.

Amici curiae are the following businesses:

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The City of Bangor, Maine
The City of Boston, Massachusetts
The City of Cambridge, Massachusetts
The City of Hartford, Connecticut
The City of Healdsburg, California
The City of Los Angeles, California
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The City of Portsmouth, New Hampshire
The City of Providence, Rhode Island
The City and County of San Francisco, California
The City of Santa Monica, California
The City of Seattle, Washington
The City of West Hollywood, California
The County of King, Washington
The County of Santa Clara, California
The United States Conference of Mayors[3]

SUMMARY OF THE ARGUMENT

Although marriages are celebrated and recognized under state law, DOMA, a federal law withholding marital benefits from some lawful marriages but not others, requires that employers treat one employee differently from another, when each is married, and each marriage is equally lawful. DOMA thus impairs employer/employee relations and other business interests. In this brief, *amici* show how the burden of DOMA's dual regime is keenly felt by organizations that conduct operations or do business in jurisdictions that authorize or recognize marriage between two people of the same sex.

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[3] The *amici* are identified more fully in Appendix A.

ARGUMENT

The House of Representatives argues that Congress, through DOMA, sought to impose a uniform rule of eligibility for federal marital benefits.[4]

The perspective of the American employer who must implement DOMA is very different. Far from creating uniformity, DOMA obliges employers to treat an employee married to someone of the same sex and an employee married to someone of a different sex unequally.[5]

Twelve states, the District of Columbia, and three federally recognized Indian tribes now either authorize the marriages of same-sex couples, or recognize

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[4] *See* Brief on the Merits for Respondent Bipartisan Legal Advisory Group of the United States House of Representatives, at 33-37.

[5] The fact that marriage laws vary from state to state does not create the practical problems we discuss below. Absent DOMA, employers could treat all employees married under the law of any state in a consistent way. Our burden arises because federal law intrudes to conflict with state law, forcing the employer to create two groups of married employees, and to treat one group differently from another.

(to varying degrees) such marriages when performed in other states, while DOMA, operating in each state, territory, and upon each tribe, precludes federal recognition of these marriages.[6] The burden of a dual regime arises for employers that conduct operations or do business in any of these jurisdictions.[7]

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[6] Marriages between same-sex couples are licensed in Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, the District of Columbia, and the Coquille and Suquamish Tribes. *See* CONN. GEN. STAT. § 46b-20; *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); ME. REV. STAT. tit. 19-A, § 650A; MD. CODE ANN., FAM. LAW § 2-201; *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003); N.H. REV. STAT. ANN. § 457:1-a; N.Y. DOM. REL. LAW § 10-A; VT. STAT. ANN. tit. 15, § 8; WASH. REV. CODE § 26.04.010; D.C. CODE § 46-401; COQUILLE INDIAN TRIB. CODE § 740.010; SUQUAMISH TRIB. CODE, tit. 9, ch. 9.1.

Rhode Island, New Mexico, and the Tulalip Tribes recognize marriages between same-sex couples lawfully performed in other states. Recognition of Out of State Same-Sex Marriages, R.I. Exec. Order No. 12-02 (May 14, 2012), http://www.governor.ri.gov/documents/executiveorders/2012/Executive_Order_12-02.pdf (last visited Jan. 28, 2013); N.M. STAT. ANN. § 40-1-4; Are same-sex marriages performed in other jurisdictions valid in New Mexico?, N.M. Op. Att'y. Gen. 11-01, 2011 WL 111243 (Jan. 4, 2011); TULALIP TRIB. CODE § 4.20.030(1).

California recognizes marriages between same-sex couples as valid under state law if those marriages were performed in California between June 16, 2008 and November 4, 2008, or were performed outside of California prior to November 5, 2008. *See Strauss v. Horton*, 46 Cal. 4th 364, 397, 470, 207 P.3d 48, 68, 119 (Cal. 2009); CAL. FAM. CODE § 308(b).

[7] *Amici* acknowledge that further complexity arises from additional categories of committed relationships, such as domestic partnerships and civil unions that are recognized by various states; however, because Ms. Windsor was married to her spouse, these other relationships are not presently before the Court in this matter.

A. DOMA Imposes Compliance Burdens upon Employers

1. Workplace Benefits and a Workplace Ethos of Transparent Fairness are Critical to *Amici*'s Success

The capital of modern enterprises is in many ways a human capital. Success depends on the talent, morale and motivation of the workforce for private and public employers alike. To attract the best employees and colleagues, *amici* must offer robust workplace benefits and a workplace ethos of transparent fairness. In 2012, 86% of full-time U.S. workers in private industry had access to medical benefits through the employer, and 74% to an employer-provided retirement plan.[8] Benefits packages—especially health-care and retirement benefits—are a direct contributor to employee loyalty.[9] Satisfied and engaged workers are more productive and perform better across a variety of metrics than less-satisfied colleagues.[10] Workplace benefits enhance the employer/employee relationship, which in turn is a key to institutional success. To compete effectively in the modern employment market, *amici* strive to offer workplace benefits to their employees on an equitable basis.

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[8] U.S. Bureau of Labor Statistics, *Employee Benefits in the United States — March 2012* (July 11, 2012), http://www.bls.gov/news.release/ebs2.nr0.htm (last visited Jan. 28, 2013).

[9] MetLife, *10th Annual Study of Employee Benefit Trends*, 20 (2012), http://www.metlife.com/assets/institutional/services/insights-and-tools/ebts/ml-10-Annual-EBTS.pdf (last visited Jan. 28, 2013). Sixty-six percent of polled employees agreed that health-care benefits were "very important for feelings of loyalty to the company," 59 percent agreed regarding retirement benefits, and 51 percent agreed regarding dental, disability, vision, and life insurance benefits. *Id.* at 26.

2. DOMA Burdens *Amici* and Their Employees, and Strains the Employer/Employee Relationship

Federal law provides to the working family many benefits and protections relating to health care, protected leave, and retirement. These protections provide security and support to an employee grappling with sickness, disability, childcare, family crisis, or retirement, allowing the employee to devote more focus and attention to his work.

DOMA thwarts these employee expectations, to the direct detriment of some married employees of *amici*, and, by extension, of *amici* ourselves. As set forth below, DOMA forces *amici* to consider the gender of the spouses of our lawfully married employees when determining the scope and manner of benefits that may be extended to those spouses (and the children of those spouses).[11] DOMA enforces discriminatory tax treatment of spousal retirement and healthcare benefits. In many other benefit-related matters, *amici* may incur the cost and administrative burden of "workarounds" (employer-created benefit structures attempting to compensate for the discriminatory effects of DOMA), or leave the married workforce in separate castes.[12]

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[10] James K. Harter, Frank L. Schmidt & Theodore L. Hayes, *Business-Unit-Level Relationship Between Employee Satisfaction, Employee Engagement, and Business Outcomes: A Meta-Analysis*, 87 J. Applied Psychol. 268 (2002).

[11] *Amici* do not intend to suggest that every *amicus* has encountered each of the burdens identified in this section, though most *amici* have encountered at least some of them.

Health Insurance and Related Benefits. While DOMA does not prevent a non-federal employer from offering health-care benefits[13] to the same-sex spouse of an employee,[14] it does impose discriminatory tax treatment. Under the Internal Revenue Code, the fair market value of health-care benefits for a qualified employee's spouse who is not otherwise a dependent of the qualified employee is not subject to federal income tax,[15] but DOMA forces both employer and employee to treat that value as taxable income when the qualified employee and his spouse are of the same sex.[16] Even where an employer provides coverage under a "family plan," in which the addition of a discrete beneficiary may not add a discrete premium cost, an employee who elects such coverage for her same-sex spouse or for the children of her same-sex spouse is taxed on the imputed fair market value of that coverage, unless the individuals covered qualify as tax dependents through independent means.[17]

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[12] *See, e.g.*, Human Rights Campaign, *Domestic Partner Benefits: Grossing Up to Offset Imputed Income Tax*, http://www.hrc.org/resources/entry/domestic-partner-benefits-grossing-up-to-offset-imputed-income-tax ("Human Rights Campaign: Grossing Up") (last visited Jan. 28, 2013).

[13] Such benefits typically are offered through a "group health plan." *See* 29 U.S.C. § 1167(1); 26 U.S.C. § 5000(b)(1).

[14] Multiple petitions concerning the limitations that DOMA places on extension of such benefits by federal employers are pending before this Court. *See Bipartisan Legal Advisory Group of the U.S. House of Representatives v. Gill*, No. 12-13; *Department of Health and Human Services v. Massachusetts*, No. 12-15; *Office of Personnel Management v. Golinski*, No. 12-16; *Massachusetts v. Department of Health and Human Services*, No. 12-97; *Pedersen v. Office of Personnel Management*, No. 12-231; *Office of Personnel Management v. Pedersen*, No. 12-302; *see also* WENDY R. GINSBERG, CONG. RESEARCH SERV., R41030, FEDERAL EMPLOYEE BENEFITS AND SAME-SEX PARTNERSHIPS (2011) (analyzing benefits unavailable to employees whose spouse or partner is of the same sex), http://assets.opencrs.com/rpts/R41030_20100121.pdf.

DOMA creates other tax distinctions with respect to workplace health-care and other benefits. An employer may allow a married employee to reduce her taxable income by paying, on a pre-tax basis, the cost of coverage for a different-sex spouse, but not for a same-sex spouse.[18] A married employee may reduce her tax burden through pre-tax contributions to a

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[15] *See, e.g.*, 26 U.S.C. §§ 105, 106(a), 152; Treas. Reg. § 1.106-1 (1960) (excluding from gross income "contributions which his employer makes to an accident or health plan for compensation . . . to the employee for personal injuries or sickness incurred by him, [or] his spouse").

[16] *See, e.g.*, I.R.S. Info. Ltr. 2011-0066, 2011 WL 4626122 (Jul. 27, 2011); I.R.S. Priv. Ltr. Rul. 200524016, 2005 PLR LEXIS 278 at *23-24 (Mar. 17, 2005); I.R.S. Priv. Ltr. Rul. 200339001, 2003 PLR LEXIS 879 at *9-11 (June 13, 2003); I.R.S. Priv. Ltr. Rul. 9850011, 1998 PLR LEXIS 1650 at*10-12 (Sept. 10, 1998); I.R.S. Priv. Ltr. Rul. 9717018, 1997 PLR LEXIS 85 at *11-12 (Jan 22, 1997).

[17] *See* 26 [illegible] 152(a) (defining "dependent").

[18] 26 U.S.C. §§ 105(b), 106(a) (limiting pre-tax treatment of medical expenses to employees, [opposite-sex] spouses and certain dependents).

"cafeteria" plan on behalf of a spouse, or be reimbursed on a pre-tax basis for spousal medical expenses from a health savings account or flexible savings account—but only for a different-sex spouse.[19] While an employer may allow an employee to reduce his salary on a pre-tax basis to cover certain day-care or elder-care expenses through a dependent care assistance plan, such plans may not extend to care of children or adults who are tax dependents of a same-sex spouse.[20]

Because of DOMA, the typical paycheck and Form W-2 for a married employee with a same-sex spouse looks quite different from that of her colleague married to a different-sex spouse. The Form W-2 for the first will show higher taxable wages, due to the addition of the imputed value of the spouse's health-care coverage, and reduced take-home pay, reflecting the increased withholding on that imputed income. In New York City, for example, taxable income to city employees in 2011 imputed from the city's cost of providing health-care benefits for a same-sex spouse ranged from $5,148.39 to $5,795.92.[21] One study shows that, on average, the Form W-2 of the employee married to a same-sex spouse will show $1,069 more in federal taxes paid than that of her colleague married to a different-sex spouse.[22] The former, unlike the latter, cannot reduce her tax obligation by pooling her same-sex spouse's uncompensated medical expenses to meet the threshold required for a federal tax deduction.[23]

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[19] *See* 26 U.S.C. § 125(f) (limiting "qualified benefits" under a cafeteria plan to benefits that are "not includible in the gross income of the employee"); Treas. Reg. § 1.106-1 (1960) (excluding from gross income "contributions which his employer makes to an accident or health plan for compensation... to the employee for personal injuries or sickness incurred by him, his spouse" or certain dependents).

[20] 26 U.S.C. § 129(e) (defining "dependent care assistance" by reference to 26 U.S.C. § 21(b)(2)); 26 U.S.C. § 21(b)(2) (defining "qualifying individual" in terms of an employee's dependents or spouse); Treas. Reg. § 1.21-1(b) (2007) (same).

[21] *See* Brief for the City of New York, et al., as *Amici Curiae* Supporting Plaintiff-Appellee, Dkt. 300, *Windsor v. United*

Continuing Health-Care Coverage and Open Enrollment Periods. Under COBRA,[24] most private employers must continue to offer existing group health-care coverage to employees, their spouses, and their dependent children upon certain qualifying events,

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States, No. 12-2335-cv(L), 12-2435(Con), 2012 WL 4201895, at *17 (2d Cir. Sep. 7, 2012).

[22] M.V. Lee Badgett, Center for American Progress & UCLA Williams Institute, Unequal Taxes on Equal Benefits, at 7 (Dec. 2007), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-UnequalTaxesOnEqualBenefits-Dec-2007.pdf (last visited Jan. 28, 2013).

[23] *See* 26 U.S.C. § 213(a) (uncompensated medical expenses of the taxpayer, his or her spouse, or his or her dependents deductible to the extent exceeding 7.5 percent of adjusted gross income). DOMA bars the married, same-sex couple from filing federal income tax returns under "married, filed jointly" status—a prerequisite for pooling deductions like uncompensated medical expenses. *See generally* 26 U.S.C. § 6013 (joint tax returns).

[24] Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, 100 Stat. 82 (codified in scattered titles, including at 29 U.S.C. §§ 1161-1169; *see also* Treas. Reg. § 54.4980B-1 (2001). COBRA applies to businesses with 20 or more employees. 29 U.S.C. § 1161(b).

such as death, job termination, and divorce.[25] DOMA excludes same-sex spouses from this default protection. Unless an employer voluntarily extends coverage (which may be difficult as a practical matter in markets where such coverage is limited or unavailable),[26] the same-sex spouse of a terminated employee will be without the equivalent of federal COBRA protection.[27]

Under HIPAA,[28] an employee who marries may immediately add a new spouse to his health-care plan that allows for spousal coverage.[29] HIPAA also allows an employee to change his coverage status to cover a spouse under his own plan in special circumstances, including where the spouse loses coverage due to job termination.[30] Because of DOMA, lawfully married same-sex couples lack this federal protection.[31] An employer must voluntarily secure a special plan accommodation, or else treat groups of its lawfully married employees differently.[32]

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[25] *See, e.g.*, 29 U.S.C. § 1163(1)-(6) (defining qualifying events for COBRA coverage); *id.* § 1167(3) (defining "qualified beneficiary," in relevant part, in terms of the covered employee's "spouse").

[26] *See, e.g.*, City of New York Office of Labor Relations, Health Benefits Program, *Notice of Rights: When Your Health Benefits Terminate* at pages 2-3, http://nyc.gov/html/olr/downloads/pdf/healthb/cobra.pdf (last visited Jan. 28, 2013).

[27] Because COBRA does not extend to small businesses, DOMA does not impair the operation of state statutes that provide comparable benefits to businesses with fewer than 20 employees. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1366.20 *et seq.*; CAL. INS. CODE § 10128.50 *et seq.*; IOWA CODE § 509A.13A; MASS. GEN. LAWS ch. 176J § 9; N.H. REV. STAT. ANN. § 21-I:26.

[28] Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936 (codified in scattered sections, including at 29 U.S.C. §§ 1181-1183).

[29] *See* 26 U.S.C. § 9801(f) (discussing "special enrollment"); Treas. Reg. § 54.9801-6 (2004) (regulating coverage in special enrollment periods).

Protections in Times of Family Crisis and Illness. If an employee's different-sex spouse becomes seriously sick or injured, federal law permits her up to 12 work weeks of unpaid, protected leave to care for her spouse.[33] In emergencies, she may use a pre-retirement "hardship distribution" from her 401(k) plan to pay his medical expenses.[34] While the distribution is taxable, the employee may be exempted from certain penalties that would otherwise apply.[35]

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[30] *Id.* Employees under cafeteria plans may also change their health-care coverage following triggering qualifying events. *See* Treas. Reg. § 1.125-4 (2001).

[31] Similarly, when an employee's same-sex spouse gives birth to or adopts a child, the employee may not be able to immediately enroll the child unless the child otherwise qualifies as the employee's dependent. *See, e.g.*, Treas. Reg. § 54.9801-6(b)(2)(iv)-(vi) (2004).

[32] An employer providing such an accommodation may also need to secure the cooperation of any relevant carrier or service provider.

[33] Family and Medical Leave Act of 1993, Pub. L. 103-3, 107 Stat. 6 (codified in scattered sections of 5 U.S.C. and 29 U.S.C., including at 5 U.S.C. §§ 6381-6387 and 29 U.S.C. § 2601 *et seq.*).

[34] 26 U.S.C. § 401(k)(2)(B)(i)(IV); Treas. Reg. § 1.401(k)-1(d)(3)(iii)(B)(1) (2009).

[35] Under 26 U.S.C. § 72(t), an enrollee may avoid imposition of additional tax on early retirement fund distributions if certain criteria are met, including distributions for spousal medical expenses and qualified domestic relations orders.

An employee with a same-sex spouse has no such assurances. Federal law secures her no leave. Under DOMA, the medical expenses of an employee's same-sex spouse who is not a tax dependent are not a recognizable ground for hardship distribution.[36] If the employee's 401(k) plan does not permit pre-retirement distribution for reasons other than hardship, she may not be eligible for a distribution, at all. In the absence of such protection under the Family and Medical Leave Act of 1993 ("FMLA"), some employers extend "FMLA-like" rights to employees with same-sex spouses, allowing them to take protected leave to care for a same-sex spouse.[37] In addition, employers may devise 401(k) plans to permit pre-retirement hardship distributions for a "primary beneficiary" designated by the participant.[38] Absent employer-funded programs, the employee will lack the flexibility—enjoyed by her colleague with a different-sex spouse—to care for a same-sex spouse in times of crisis or illness.

Retirement Protections. DOMA also strikes at retirement protections. An employee who designates her different-sex spouse as the beneficiary of her employee pension plan benefits or her employer-sponsored life insurance can expect those proceeds to pass to her spouse free of federal estate tax, because the proceeds will qualify for the estate tax marital deduction.[39] Because of DOMA, no such estate tax marital deduction would apply to the benefits received by a surviving same-sex spouse, leaving her with less financial support than an equivalent different-sex spouse if the decedent's estate is subject to estate tax.

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[36] *See* Treas. Reg. § 1.401(k)-1(d)(3)(i) & (iii) (2009).

[37] *See, e.g.* New York City Dep't of Citywide Admin. Servs., Pers. Servs. Bulletin 440-8R, Guidelines on the Family and Medical Leave Act of 1993, at 2, http://www.nyc.gov/html/dcas/downloads/pdf/psb/440_8R.pdf (last visited January 28, 2013).

[38] *See* I.R.S. Notice 2007-7, 2007-1 C.B. 395, Q&A 5 (Jan. 27, 2007).

Most employee pension plans are controlled by ERISA, which provides substantive rights to spouses—but under DOMA, only to spouses of a different sex. For example, most defined-benefit pension plans and certain defined-contribution retirement plans are required to distribute benefits in a form, such as a qualified joint and survivor annuity or qualified preretirement survivor annuity, that ensures that a participant's different-sex spouse may receive a portion of the participant's benefit absent express waiver by the participant (with spousal consent), and most retirement plans must provide different-sex spouses with special rights to the participant spouse's benefit if the participant dies while still employed.[40] The same-sex spouses of *amici*'s employees lack these ERISA safeguards. Employers can provide equivalent protections across the workforce only by building workarounds into retirement plans. Even then, the same-sex spouse will not be afforded the full range of federal tax benefits associated with qualified joint and survivor annuities or qualified preretirement survivor annuities that a different-sex spouse enjoys.[41]

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[39] *See* 26 U.S.C. § 2056.

[40] *See* 29 U.S.C. § 1055; 26 U.S.C. §§ 401(a)(11), 417.

Visa Rights. Under federal immigration law, employers may recruit certain highly qualified scientists, business executives and scholars.[42] This is of great benefit to those *amici* that actively recruit foreign nationals, or transfer international employees domestically. DOMA burdens an organization's ability to do so by precluding it from offering a foreign national's same-sex spouse the shared visa status that a different-sex spouse would receive. A recruited or transferred foreign national married to a same-sex spouse must either leave his spouse behind, or secure an independent visa status for the spouse (at personal expense and effort), and thereafter live with the risk of the expiration or rescission of that visa. For obvious reasons, this is a considerable impediment to attracting foreign nationals. Many may decline to come to a country that will not recognize a marriage that is lawful at home;[43] others may require assurances from the prospective employer that their relationship and marital estate can be adequately protected despite DOMA—assurances that the employer cannot provide. The preclusion of recognition of the foreign, same-sex spouse under immigration law also subjects the foreign national, and accordingly the employer, to special taxation problems.[44]

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[41] *See, e.g.*, 29 U.S.C. § 1055(d), (e) (defining qualified joint and survivor annuities and qualified pre-retirement survivor annuities as covering the "surviving spouse" of the plan participant); 26 U.S.C. § 417(b), (c) (same). Benefits under a qualified joint and survivor annuity are excluded for purposes of calculating annual limits on retirement benefits an individual may receive on a tax-deferred basis. 26 U.S.C. § 415(b). A surviving same-sex spouse receives benefits as a straight life annuity, which counts towards these limits without exclusion. A surviving employee is also unable, because of DOMA, to defer the payment of death benefits (and associated taxes) from his spouse's plan. *See* 26 U.S.C. § 401(a)(9). An opposite-sex surviving spouse, by contrast, may defer to age 70.5. *Id.*

[42] 8 U.S.C. § 1153(b)(1)(A)-(C).

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[43] *See* 8 U.S.C. § 1153(d) (providing that a "spouse" shall share the same visa status of an immigrant granted a visa). Currently, *amici* understand that individuals may lawfully marry a same-sex spouse in eleven countries: Argentina, Belgium, Canada, Denmark, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain, and Sweden. *See* Law 26.618, July 22, 2010 [CXVIII] B.O. 31.949 (Arg.); Code Civil [Civil Code], art. 143 (Belg.); Civil Marriage Act, S.C. 2005, c. 33 (Can.); Law No. 532, June 12, 2012 (Den.); Law No. 65/2010, June 27, 2012 (Ice.); Burgerlijk Wetboek [Civil Code], Art. 30:1 (Neth.); Act of 27 June 2008 No. 53 (Nor.); Law No. 9/2010, May 31, 2010 (Port.); Civil Union Act 17 of 2006 (S. Afr.); Law 13/2005 Código Civil [Civil Code] 2005, 157 (Spain); Äktenskapsbalk [Marriage Code] 1:1 (Swed.). The Brazilian states of Alagoas, Bahia, Piaui , and Sao Paulo and the Mexican state of Quintana Roo permit individuals to marry a same-sex spouse. *See* Corregedoria-Geral Da Justica de Alagoas, Provimento No. CG 40/2011 (Braz.); Corregedor-Geral Da Justica da Bahia, Provimento Conjunto No. CGJ/CCI – 12/2012 (Braz.); Corregedor-Geral De Justica Piaui, Provimento No. 04/2012 (Braz.); Corregedoria-Geral Da Justica de Sao Paulo, Provimento CG No. 41/2012 (Braz.); Código Civil Para el Estado De Quintana Roo [Civil Code of the State of Quintana Roo], Art. 680 (Mex.). Mexico City licenses marriages of same-sex couples that are recognized in all Mexican states. *See* Código Civil para el Distrito Federal [Civil Code of the Federal District], art. 146 (Mex. City).

[44] Whereas the same-sex spouse of a foreign national might be considered the tax dependent of the foreign national in the home country, DOMA precludes this treatment for the purposes of federal income taxes (even if the foreign national is the cou-

3. DOMA Forces Employers to Incur Administrative Burdens and Expense.

DOMA forces *amici* to administer dual systems of benefits and payroll, and imposes on them the cost of the workarounds necessary to protect married colleagues.

The burden of compliance. In states recognizing marriage between two people of the same sex, DOMA requires *amici* simultaneously to treat employees with same-sex spouses as (1) single for the purposes of federal tax withholding, payroll taxes, and workplace benefits that turn, as most do, on marital status, and (2) married for all other purposes under state law, including state community property laws.[45] This requires *amici* in effect to maintain two sets of books—one for married employees with same-sex

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ple's sole income source). *See* 26 U.S.C. § 152(b)(3)(A) (foreign national cannot qualify as dependent of taxpayer). Absent DOMA, the same-sex spouse of the foreign national would be eligible for a US resident visa, *see* 8 U.S.C. § 1153(d), would receive a social security number, and could be claimed as a tax dependent by the foreign national.

[45] Because of DOMA, federal self-employment tax may require a third treatment of employees married to persons of the same sex in community property states. *See* Questions and Answers for Registered Domestic Partners and Same-Sex Spouses in Community Property States (advising that same-sex spouses and domestic partners in California, Nevada and Washington should split income subject to federal self-employment tax, even though opposite-sex spouses are prohibited from doing so by statute), http://www.irs.gov/uac/Questions-and-Answers-for-Registered-Domestic-Partners-and-Same-Sex-Spouses-in-Community-Property-States; I.R.S. Pub. 555, Community Property, 6 (same), http://www.irs.gov/pub/irs-pdf/p555.pdf (each website last visited January 28, 2013)

spouses, and another for married employees with different-sex spouses.[46] The double entries ripple through human resources, payroll, and benefits administration.

Tax treatment of employer-provided health-care benefits for married, same-sex couples is an illustrative (and important) example. When an employee resident in a state such as New York adds a same-sex spouse to his health-care plan, the employer must impute the value of that coverage as taxable income under federal law. Because the employer pays a portion of federal Social Security (FICA) and unemployment insurance taxes based on employees' wages, this imputed income increases the employer's overall tax burden as well.[47] How should the imputation be calculated? The I.R.S. declines to provide official guidance, and instead puts the burden (and risk of error) on the employer.[48]

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[46] *See, e.g.*, N.Y. State Dep't of Tax'n and Fin, Technical Memorandum, The Marriage Equality Act, TSB-M-11(8)C, TSB-M-11(8)I, TSB-M-11(7)M, TSB-M-11(1)MCTMT, TSB-M-11(1)R, TSB-M-11(12)S, July 29, 2011, http://www.tax.ny.gov/pdf/memos/multitax/m11_8c_8i_7m_1mctmt_1r_12s.pdf (last visited Jan. 28, 2013).

[47] *See* Badgett, *supra* n. 22 at 5-7.

[48] *See* I.R.S. Priv. Ltr. Rul. 200108101, 2000 PLR LEXIS 2092 at *22, *24 (Nov. 17, 2000) (ruling that the fair market value of health-care benefits provided to domestic partners is taxable and declining "to issue a ruling that approves [a given] method of determining the value of the domestic partner health coverage"). While the I.R.S. has since issued various private letter rulings in response to written requests from individual taxpayers regarding specific valuation methods, other taxpayers cannot rely on those private letter rulings as precedent, as they

An employer with an employee married to someone of the same sex may then have to reverse course, and for purposes of calculating the employee's state income taxes, treat benefits for a same-sex spouse exactly as it does for a different-sex spouse.[49] Because marriages of same-sex couples are not recognized federally, but are recognized by many jurisdictions, DOMA's regime obliges an employer to maintain systems capable of tracking married employees by spousal gender—even when the employer has no current employee with a same-sex spouse.[50] Confusion abounds, and even sophisticated employers struggle. Employees of Yale University, for example, learned in January 2011 that the university had failed to withhold taxes for the imputed value of spousal health-care coverage in 2010, and that these amounts would be deducted from their paychecks in 2011.[51] Such incidents unnecessarily strain the employer-employee relationship and attract unwanted attention from the I.R.S.

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neither constitute official I.R.S. guidance on a topic nor have the force or effect of law. *See* 26 U.S.C. § 6110(k)(3).

[49] See Badgett, *supra* n. 22 at 5-7.

[50] Because changes to payroll/benefits administration require preparation, long lead time, and substantial expenditures, employers in states that recognize marriages between people of the same sex must prepare systems that can address married employees with same-sex spouses well in advance of their hiring.

[51] Tara Siegel Bernard, *Yale Payroll Error Gives Gay Employees a New Year Surprise*, N.Y. TIMES, Jan. 11, 2011 ("Yale Payroll Error"), http://bucks.blogs.nytimes.com/2011/01/11/yale-payroll-error-costs-gay-employees-thousands (last visited Jan. 28, 2013).

These dual regimes have spawned an industry of costly compliance specialists. Some *amici* have had to pay vendors to reprogram benefits and payroll systems, to add coding to reconcile different tax and benefit treatments, to reconfigure at every benefit and coverage level, and to revisit all of these modifications with every change in tax or ERISA laws for potential DOMA impact. Attorneys and ERISA advisors must be consulted. Human resources, benefits, and payroll personnel must be trained and retrained as tax or ERISA laws change. Plan documents, enrollment forms, and administrative procedures must be scoured for the word "spouse," and amendments and disclosures drafted to try to explain the numerous implications and consequences of a given benefits decision on the personal tax situation of an employee with a same-sex spouse. Enrollment systems must be reprogrammed to account for different spousal circumstances, and linked to provider records to ensure the providers extend appropriate coverage. Benefits and human resources departments, facing questions from employees with same-sex spouses regarding workplace benefit selections and coverage, must be adequately trained and prepared to explain the disparate treatment to employees who may later realize (perhaps too late) that their benefits choices and decisions carried unanticipated and significant financial implications. The complexity and uncertainty saps critical time, focus, and energy from the human resources and benefits administration function.

The burden on the small employer is especially onerous. Regular retention of outside consultants is generally not an option, and many may not be capable of devoting limited resources to understanding and administering the conflicting regimes. Administration of benefits for an employee married to a same-sex spouse is more likely to occur in an ad hoc, piecemeal fashion, and may require that employee to divulge personal information that she would not otherwise be required to make, enhancing a sense of marginalization. Such burdens, standing alone, might chill some employers from employing an otherwise qualified employee because she happens to be married to a same-sex spouse.

The dual regime especially burdens certain providers of workplace benefits, who must counsel their customers struggling with administration of inconsistent regimes. They must keep a roster of attorneys and ERISA consultants on retainer to grapple with the multi-faceted impact of DOMA on benefits packages. Call center employees and the sales force must be appropriately trained and prepared to respond to questions from both employers and employees about DOMA's impact on health insurance, tax, medical leave benefits, and retirement benefits. The complexities that arise from the variety of individual cases increase the risk that incorrect information may be given.

Workarounds. Many employers seek to rectify the invidious treatment of a class of their married employees by creating and funding parallel systems of benefits for employees lawfully married to same-sex spouses. These may include stipends representing the amount of imputed health-care benefits,[52] leave policies modeled to duplicate FMLA-related rights, and retirement plans that safeguard the same-sex spouse. These policies impose a direct cost on the employer. They carry administrative burden, requiring *amici* to retain experts to craft the policies and structure systems that can record gross-up amounts, educate human resources, benefits, and payroll administrators, and manage the dual systems. Workarounds may attract attention from regulators or cause tension with shareholders or investors, all of which consumes time, resources and goodwill. However enlightened and necessary, such voluntary policies perpetuate a caste system among married employees. Unhelpful distinctions are inimical to teamwork and, by extension, to the success of the entire organization.

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[52] *See* Human Rights Campaign: Grossing Up, *supra* n. 12; *see generally* Tara Siegel Bernard, *For Gay Employers, an Equalizer*, N.Y. TIMES, May 20, 2011, http://www.nytimes.com/2011/05/21/your-money/health-insurance/21money.html (report-

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ing that "a growing number of companies have taken it upon themselves to make life a little more equal for their gay employees" by "pay[ing] for an extra tax that their gay employees owe on their partners' health insurance—something that their married heterosexual co-workers don't have to worry about because the federal government recognizes them as an economic unit."). For a list of companies currently "grossing up" the pay of employees who must pay federal taxes on the imputed value of health-care benefits for their same-sex spouses, *see* Tara Siegel Bernard, *A Progress Report on Gay Employee Health Benefits*, N.Y. TIMES, Dec. 5, 2012, http://bucks.blogs.nytimes.com/2010/12/14/a-progress-report-on-gay-employee-health-benefits/ (each website last visited January 28, 2013).

B. DOMA Forces *Amici* to Affirm Discrimination They Regard as Injurious to Their Corporate Missions and Contrary to Non-Discrimination Laws and Policies

DOMA imposes on *amici* not simply the considerable burden of compliance and cost. DOMA conscripts *amici* to become the face of its mandate that two separate castes of married persons be identified and separately treated. As employers, we must administer employment-related health-care plans, retirement plans, family leave, and COBRA. We must impute the value of spousal health-care benefits to our employees' detriment. We must treat one employee less favorably, or at minimum differently, when each is as lawfully married as the other. We must do all of this in states, counties, and cities that prohibit workplace discrimination on the basis of sexual orientation and demand equal treatment of all married individuals.[53] This conscription has harmful consequences.

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[53] Some United States jurisdictions prohibit discrimination in employment or hiring on the basis of either marital status or sexual orientation. *See, e.g.*, CAL. GOV'T CODE § 12940(a); CONN. GEN. STAT. §§ 46a-60, 46a-81c; DEL. CODE. tit. 19, § 711; HAW. REV. STAT. § 368-1; 775 ILL. COMP. STAT. 5/1-103, 5/2-102; MD. CODE ANN., STATE GOV'T § 20-606; MINN. STAT. § 363A.08; N.H. REV. STAT. ANN. § 354-A:1; N.J. REV. STAT. §§ 10:5-12, 10:5-33; N.Y. EXEC. LAW. § 296(a); OR. REV. STAT. § 659A.003; WASH. REV. CODE §§ 49.60.030, 49.60.180; WIS. STAT. §§ 111.321, 111.36; D.C. CODE § 2-1402.11; Blackfeet Trib. Empl. Rights Ord. & Safety Enforcement Act of 2009 § 4-101; LITTLE RIVER BAND OF OTTAWA INDIANS TRIB. CODE ch. 600, tit. 03, § 4.01; LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS TRIB. CODE § 14.108; Mandan Hidatsa and Arikara Nation Emp. Rights and Contracts Pref. Ord. § 206; NOTTAWASEPPI HURON BAND OF THE

Litigation Risk. American employers are accustomed to statutory regimes that are either silent as to, or prohibit workplace discrimination. But a regimen that forces employers to differentiate imposes subtle but real risk. For example, DOMA forces upon *amici* conduct (*e.g.*, withholding on wages attributable to the imputed value of the cost of group healthcare plan benefits) that, but for the Supremacy Clause, would be unlawful under state law. More broadly, DOMA forces the employer to determine, at its own risk, where DOMA supersedes state law and where state law continues to protect the employee. Future litigation risk may take other forms, even harder to predict. Litigation may arise from disputes over a same-sex spouse's entitlement to employer-provided benefits.[54] Although constitutional litigation claims typically require state action, and most of the *amici* are not state actors, several *amici* are cities or counties. Municipal and county actors often are

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Potawatomi Trib. Code, tit. V, ch. 2, § 301; Poarch Band of Creek Indians Trib. Emp. Rights Ord. §§ 33-4-3, 33-4-10; Shoshone-Bannock Tribes Worker Prot. Ord. § 401. Other United States jurisdictions prohibit discrimination in employment or hiring on the basis of sexual orientation but not on the basis of marital status. *See, e.g.*, Colo. Rev. Stat. § 24-34-402; Iowa Code §§ 216.6, 216.6A; Mass. Gen. Laws ch. 151B, § 4; Me. Rev. Stat. tit. 5, § 4572 ; N.M. Stat. Ann. § 28-1-7 ; Nev. Rev. Stat. § 613.330; R.I. Gen. Laws § 28-5-7; Vt. Stat. Ann. tit. 21, § 495; ; *see also infra* n. 57 (listing municipal antidiscrimination laws and ordinances).

[54] *See, e.g.*, First Amended Complaint for Interpleader, Jan. 24, 2011, Dkt. 3, *Cozen O'Connor P.C. v. Tobits*, No. 2:11-cv-00045 (E.D. Pa.) (interpleader action arising, in part, from dispute over effect of DOMA on distribution of benefits from ERISA-covered pension plan).

required, in costly litigation, to respond to allegations that they are "state actors."[55] The practical fact is that DOMA makes the employer the unwilling agent of federally-required disparate treatment of lawfully married employees. Whatever the lack of merit of a formal legal challenge, disparate treatment in the workplace imposed by DOMA fosters workplace distress, and practical experience teaches that workplace distress increases the risk of the employer's having to respond, at its own expense, to claims of the aggrieved.

Morale. In the modern workplace, the employer becomes the face of DOMA's discriminatory treatment, and is placed in the role of intrusive inquisitor, imputer of taxable income, and withholder of benefits. The employer is thus forced by DOMA to participate in the injury of its own workforce morale. Yale University's error in administering DOMA, and its implementation of unexpected tax withholding against employees married to same-sex spouses in 2011,[56] cast the university as the antagonist to its own employees. Many *amici*, as employers, provide certain workarounds that attempt to address some of the disparate treatment of same-sex couples that DOMA requires. Many *amici* that are cities and counties have gone even farther, making substantial efforts to prevent discrimination against same-sex couples, up to and including passing anti-discrimination ordinances and amending city charters to outlaw discrimination against same-sex couples.[57] Administering and implementing DOMA subverts efforts to eliminate obstacles to full legal recognition for employees who have lawfully entered into committed relationships with persons of the same sex.

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[55] *See Bd. of the County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 400 (1997) (municipal actors may be liable under section 1983 where plaintiff identifies an official policy or "custom" of the municipality that caused injury).

[56] *See* Yale Payroll Error, supra n. 51.

The enforced compliance with DOMA's discriminatory regime has another dimension. The employee confused about the conflicting legal rules typically puts his first question to the human resources department. Every benefits administrator must become a constitutional scholar, or give uncertain advice.[58] Even the best-informed can provide only a general answer. The wrong answer may lead to harsh tax and financial consequences, and further erosion of workplace morale.

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[57] *See, e.g.*, Baltimore City Code, art. 4, § 3-1 (prohibiting workplace discrimination based on sexual orientation); Code of the City of Bangor § 195-3 (same); City of Cambridge Municipal Code § 2.76.120 (same); New York City Administrative Code § 8-107 (same); City of Santa Monica Municipal Code § 4.40.030 (same); City of Seattle Municipal Code § 14.04.040 (same); City of Hartford Municipal Code § 2-696 (prohibiting discrimination based on sexual orientation with respect to municipal employees and applicants); City of Boston Equal Opportunity Statement (prohibiting discrimination based on sexual orientation with respect to applicants for municipal employment); County of Santa Clara Ordinance Code § A25-124 (same); City of Cambridge Municipal Code §§ 2.76.100, 2.76.030, and 2.76.120 (requiring that city contractors and subcontractors comply with City employment non-discrimination provisions); City of West Hollywood Municipal Code § 9.28.050 (same); King County Code § 12.16.020 (same); San Francisco Admin. Code § 12B.1(b) (same).

[58] In some states, employers may be required by law to provide information about all of the benefits and coverage options to their employees. *See, e.g.*, Cal. Lab. Code § 2808.

Our Mission. The injury runs far deeper than mere litigation risk; deeper even than the morale of the work force. For many employers, DOMA does violence to the morale of the institution itself. Like other persons, legal and natural, *amici* are motivated by core principles. As of December 2012, 88% of Fortune 500 companies provided nondiscrimination protection for their gay and lesbian employees.[59] To take one example of many, *amicus* Eastern Bank "embrace[s] diversity in our workplace because it makes us a better employer and a better provider of service to our customers."[60] The business judgment of other *amici* has been to the same effect. These principles spring from hard experience. Our organizations are engaged in national and international competition—for talent, customers, and business. That competition demands teamwork, and teamwork thrives when the organization minimizes distracting differences, and focuses on a common mission. DOMA's core mandate—that we single out some of our married colleagues and treat them as a lesser class—upsets this imperative.

Our principles are not platitudes. Our mission statements are not simply plaques in the lobby. Statements of principle are our agenda for success:

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[59] *See* Human Rights Campaign, *Employment Non-Discrimination Act*, http://www.hrc.org/laws-and-legislation/federal-legislation/employment-non-discrimination-act (last visited Jan. 28, 2013).

[60] See Eastern Bank: Embracing Diversity, https://www.easternbank.com/site/about_us/Pages/diversity.aspx (last visited Jan. 28, 2013).

born of experience, tested in laboratory, factory, and office, attuned to competition. Our principles reflect, in the truest sense, our business judgment.[61] By force of law, DOMA rescinds that judgment and directs that we renounce these principles or, worse yet, betray them.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

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[61] "[T]he skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

Respectfully submitted,

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February 27, 2013

APPENDIX

APPENDIX A: IDENTIFICATION OF *AMICI*

Addis Creson is a brand consulting firm based in Berkeley, California

Adobe Systems Inc. is one of the world's largest and most diversified software companies. Founded in 1982, Adobe employees more than 11,000 employees worldwide.

Aetna Inc. is one of the nation's leading diversified health care benefits companies offering a broad range of traditional, voluntary and consumer-directed health insurance products and related services to approximately 37.3 million people. Aetna is a publicly traded corporation based in Hartford, Connecticut with over 35,000 employees across the U.S. and worldwide.

Aggregate Supply is a partnership operating a Valencia Street store in San Francisco, which features three lines of products: Heliotrope San Francisco, a local, all-natural skin care line, Turk + Taylor, a local clothing line, and Acacia, a curator of furniture and home decor.

Akamai Technologies, Inc. is an Internet content delivery network headquartered in Cambridge, Massachusetts. Akamai employees 3000 people worldwide with U.S. offices in California, Illinois, Washington, New York, and Virginia.

Alaska Air Group, Inc. is an airline holding company based in Washington State.

Alaska Airlines together with its partner regional airlines, serves 95 cities through an expansive network in Alaska, the Lower 48, Hawaii, Canada and Mexico.

Alcoa Inc. is the world's third largest producer of aluminum. With operational headquarters in Pittsburgh, Pennsylvania, Alcoa employs 61,000 people across the U.S. and worldwide.

Alere Inc. By developing new capabilities in near-patient diagnosis, monitoring and health information technology, Alere enables individuals to take charge of improving their health and quality of life at home. Alere's global leading products and services, as well as its new product development efforts, focus on cardiology, infectious disease, toxicology and diabetes. Alere is headquartered in Waltham, Massachusetts, has locations in 28 states and employs 8,000 employees in the US.

Amazon.com, Inc., based in Seattle, Washington, is one of the world's largest and best known online retailers. Amazon seeks to be the Earth's most customer-centric company, where customers can discover anything they might want to buy online at the lowest possible prices.

A. L. Nella & Company, LLP, CPAs is an accounting firm based in San Francisco, California.

American Benefits Council is an employee benefits policy advocacy organization based in Washington, D.C. whose member companies and organizations either sponsor directly or administer health and retirement plans covering more than 100 million Americans.

American International Group, Inc. (AIG) is a leading international insurance organization headquartered in New York City serving customers in more than 130 countries and jurisdictions. AIG companies serve commercial, institutional, and individual customers with property-casualty, life insurance and retirement services.

Ameristar Casinos, Inc. is a casino operator based in Las Vegas, Nevada. Ameristar operates eight properties and employs approximately 7,100 people across the U.S.

Apple Inc. is a multinational consumer electronics and software company based in Cupertino, California. Apple employs over 72,000 people across the U.S. and worldwide.

AppNexus Inc. provides an industry-leading online advertising technology platform. AppNexus has offices around the world and is headquartered in New York City.

ARC Design is a family-owned business based in Healdsburg, California specializing in unique homes and destination environments, custom cabinetry and furnishings.

Artify, Inc. an innovative San Francisco, California, based consumer internet startup in the art market. Artify Inc.'s subscription model allows affordable, unlimited access to a catalog of original, curated contemporary art that each subscriber can check out, keep at their home or business for an unlimited amount of time, swap out, or exhibit for sale.

Avanade, Inc. provides business technology solutions and managed services that connect insight, innovation and expertise in Microsoft technologies to help customers realize results. Avanade, which is majority owned by Accenture, was founded in 2000 by Accenture LLP and Microsoft Corporation and has 17,000 professionals in more than 20 countries.

A|X Armani Exchange, LLC, launched in 1991, is the youthful label created by Italian designer and entrepreneur Giorgio Armani. Today A|X Armani Exchange has an exclusive direct controlled retail network that currently comprises 264 freestanding stores in 32 countries.

Axcel Law Partners is a San Francisco, California based litigation boutique representing businesses and select individuals in commercial and intellectual property disputes.

Bain & Company, Inc. is a leading global strategy consulting firm, headquartered in Boston, Massachusetts, with over 5,500 staff based in 50 offices around the world.

Baker & McKenzie LLP is a global law firm of 4,000 locally qualified lawyers in 72 offices around the world, including offices in New York and California.

The Bank of New York Mellon Corporation (BNY Mellon), headquartered in New York, is a leading provider of investment management and investment services.

Bankers Trust Company. With operations in multiple states, Bankers Trust is the largest locally-owned bank in Iowa, and the 4th largest overall, with assets exceeding three billion dollars. Bankers Trust does not discriminate on the basis of age, race, color, religion, sex, national origin, disability, sexual orientation, or gender identity. Bankers Trust takes affirmative steps to employ women, minorities, individuals with disabilities, and veterans. In 2011 alone Bankers Trust hired personnel to fill 83 open positions.

Big Duck Studio, Inc. (doing business as Big Duck) is a New York communications firm that works exclusively with nonprofits to help reach supporters, build awareness, and raise money.

Bigelow Villa LLC dba The Lobby Bar is located on Capitol Hill in Seattle, Washington. We are a cocktail lounge that caters to the diverse Seattle community.

Biogen Idec, Inc. is a biotechnology company that discovers, develops and delivers to patients worldwide innovative therapies for the treatment of neurodegenerative diseases, hemophilia and autoimmune disorders. Biogen Idec is headquartered in Weston, Massachusetts and employs over 6,000 people in Massachusetts, North Carolina, and internationally.

BlackRock, Inc. is a leader in investment management, risk management and advisory services for institutional and retail clients worldwide. Headquartered in New York City, BlackRock's AUM was $3.792 trillion at 12/31/12. BlackRock has approximately 10,500 employees in 30 countries and offers products that span the risk spectrum to meet clients' needs across markets and asset classes.

Blu Homes, Inc. is a leading provider of green precision-built prefab homes in North America. Headquartered in Waltham, Massachusetts, Blu uses proprietary steel framing and building technology to ship and construct homes on site.

Blue Cross Blue Shield of Massachusetts, Inc. is a private health insurance company headquartered in Boston, Massachusetts and employing over 3,000 people.

Boehringer Ingelheim USA Corporation is the U.S. arm of pharmaceutical company Boehringer Ingelheim GmbH, which employs over 44,000 people worldwide.

Borrego Solar Systems Inc. designs and installs commercial solar power systems. Headquartered in San Diego, California, Borrego Solar employs 100 people and has offices in Oakland, Boston, Austin, and Washington D.C.

Boston Community Capital, Inc. is a Boston, Massachusetts based community development financial institution that invests in affordable housing projects, and job creation in low-income communities.

The Boston Foundation is a corporation located in Boston, Massachusetts that is one of the oldest and largest community foundations in the nation, with net assets of more than $800 million. The Foundation is a partner in philanthropy with some 900 separate charitable funds established by donors, either for the general benefit of the community or for special purposes.

Boston Medical Center Corporation is a private, not-for-profit, 496-bed academic medical center located in Boston, Massachusetts, and is the largest provider of trauma and emergency services in New England.

Boston Scientific Corporation transforms lives through innovative medical solutions that improve the health of patients worldwide. The company, which has approximately 24,000 employees, is headquartered in Massachusetts and has operations in multiple locations around the world.

The Bridgespan Group is a nonprofit advisor and resource for mission-driven organizations and philanthropists. The Bridgespan Group employs 200 people across three different offices in Boston, New York and San Francisco.

Broadcom Corporation is a global leader and innovator in semiconductor solutions for wired and wireless communications. Broadcom is headquartered in Irvine, California with over 11,000 employees across the U.S. and worldwide.

Burns & Levinson LLP is a Boston, Massachusetts-based law firm with over 125 attorneys and offices in Providence, Rhode Island and New York.

Caesars Entertainment Corporation is a public gaming corporation that owns and operates over 50 casinos, hotels, and seven golf courses across the United States and employing approximately 70,000 people.

Car Toys, Inc. is a chain of stores selling automotive and wireless consumer electronics, founded and headquartered in Seattle, Washington and distributing throughout Washington, Oregon, Colorado, and Texas.

CBS Corporation's operations span the media and entertainment industries and include a major television network (CBS), cable program services (including Showtime), television content production and distribution, motion pictures, radio stations, television stations, interactive businesses, outdoor advertising, and publishing (Simon & Schuster). CBS Corporation is headquartered in New York City with over 20,000 employees across the United States and worldwide.

Central Physical Therapy and Fitness, Inc. is an outpatient physical therapy clinic in Seattle, Washington, providing individualized physical therapy care and personal fitness training.

Chang Consulting is a sole proprietorship with offices in San Francisco, California. Chang Consulting has been doing business since 2005 with clients ranging from Fortune 20 companies to start-ups.

Choate, Hall & Stewart LLP, one of the nation's leading law firms, focuses on a core group of areas where it represents clients across the United States and internationally. Choate's areas of focus include private equity and mergers and acquisitions, finance and restructuring, technology companies, intellectual property and intellectual property litigation, government enforcement and compliance, insurance and reinsurance and wealth management.

Cisco Systems, Inc. is a multinational networking equipment and technology company headquartered in San Jose, California. Cisco has over 72,000 employees across the United States and worldwide.

Citigroup Inc., a leading global bank, provides consumers, corporations, governments and institutions with a broad range of financial products and services. Headquartered in New York, Citi has 259,000 employees worldwide and does business in more than 160 countries and jurisdictions.

City Catering Company is a full-service Seattle, Washington caterer providing innovative food, beverage, decor and service.

City Lites Neon, Inc. is an electrical sign company in Seattle, Washington, servicing, fabricating and installing all types of electrical signs.

The City of Baltimore, Maryland is the largest city in Maryland and has 14,278 employees and 14,940 retirees and beneficiaries currently receiving benefits. In addition, there are over 1,100 past employees, who will be eligible to receive retirement benefits in the future.

The City of Bangor, Maine is the third largest city in Maine employing approximately 500 full-time employees.

The City of Boston, Massachusetts is the capital and largest city of Massachusetts and a municipal employer.

The City of Cambridge, Massachusetts is a municipal employer. Over the past quarter century, the city has adopted policies and laws to prohibit discrimination based on sexual orientation and to extend to same-sex couples the rights and benefits afforded to opposite-sex couples to the maximum extent allowed by law.

The City of Hartford, Connecticut, the capitol city of Connecticut, employing approximately 1800 persons, was an early leader in adopting laws and policies to ensure equal treatment of same-sex couples to the maximum extent allowed by law.

The City of Healdsburg, California is a municipal employer and full service city of 11,500 citizens, nestled in the heart of the wine country, and a major tourist destination 65 miles north of San Francisco.

The City of Los Angeles, California is a municipal employer in California, with over 30,000 active employees, who receive health and other employment benefits through the City. Over the last several decades, the City of Los Angeles has adopted laws and policies to prohibit discrimination based on sexual orientation and to extend the same benefits to same-sex couples as are afforded to opposite-sex couples.

The City of New York, New York is the largest municipal employer in the United States with more than 300,000 employees, and more than 200,000 retirees receiving health insurance through the City. Over the past quarter century, the City of New York and its City Council have adopted policies and laws to prohibit discrimination based on sexual orientation and to extend to same-sex couples the same rights and benefits afforded to opposite-sex couples.

The City of Northampton, Massachusetts is a municipal employer in Massachusetts.

The City of Portsmouth, New Hampshire, founded in 1623, employs over 550 people. Unfortunately, with the existence of DOMA, the 173 same-gender marriage licenses issued by Portsmouth City Hall and the more than 2,235 same-gender marriages celebrated thus far throughout New Hampshire are not fully legally equal to all others.

The City of Providence, Rhode Island, the capitol city of Rhode Island, employs approximately 2000 persons. The City of Providence has adopted laws and policies to ensure equal treatment of same-sex couples to the maximum extent allowed by law. Since 2012, the State of Rhode Island has recognized marriages between persons of the same sex from other states.

The City and County of San Francisco, California employs roughly 26,000 employees and provides health and other benefits to almost all those employees. Hundreds of San Francisco's employees are members of same-sex unions.

The City of Santa Monica, California is a municipal employer in California.

The City of Seattle, Washington, employs over 10,000 employees and provides benefits to those employees and their families, including same sex spouses and domestic partners. Washington State recognizes same-sex marriage and the City wants to assure its employees are not discriminated against under Federal law.

The City of West Hollywood, California is a municipal employer in California.

Clean Yield Asset Management is an SEC-registered investment advisor serving social investors.

Connecticut Alliance for Business Opportunities is the LGBT chamber of commerce for the State of Connecticut.

The County of King, Washington . Located on Puget Sound in Washington State, and covering 2,134 square miles, and home to more than 1.9 million people, King County is the 14th most populous county in the nation.

The County of Santa Clara, California is a municipal employer in California.

Commune Hotels & Resorts is a multi-brand boutique and lifestyle platform, uniting Thompson Hotels, based in New York and Joie de Vivre Hotels based in San Francisco.

Conlin Properties, Inc. Conlin Properties manages over 8,000 retail units in the Greater Des Moines, Iowa area, along with 250,000 square feet of commercial retain and industrial space. It employs approximately 75 people and offers a wide range of real estate related services. Conlin Properties does not discriminate on the basis of age, race, color, religion, sex, national origin, disability, sexual orientation, or gender identity.

The Corcoran Group, a residential real estate brokerage company in New York City, operates 40 offices with 3,000 sales associates and employees serving the Manhattan, Brooklyn, East End of Long Island and South Florida markets.

Coupons.com Inc., is a leader in digital coupons, including online printable, pure digital and mobile promotions. The company is based in Mountain View, California.

Crazy Misfits Pet Services is a pet service company based in Kent, Washington, and providing services in 8 cities.

Credit Suisse Securities (USA) LLC is one of the world's leading financial services providers and part of the Credit Suisse group of companies, offering clients its expertise in private banking, investment banking and asset management. With offices nationwide, the largest U.S. office is located in New York City and has 47,400 employees.

Dana-Farber Cancer Institute, Inc. is a not-for-profit hospital and research institute located in Boston, Massachusetts that provides care to children and adults with cancer while advancing the understanding, diagnosis, treatment, cure and prevention of cancer and related diseases. Dana-Farber employs more than 4,000 people.

David Kosar Insurance Agency is a full-service agency offering property, auto, life, specialty personal lines, commercial and health insurance products in Everett, Washington.

Davis, Brown, Koehn, Shors & Roberts, P.C. The Davis Brown Law Firm employs 185 attorneys and support personnel. It is a significant participant in the legal profession, with multiple offices around the state of Iowa. The firm does not discriminate on the basis of age, race, color, religion, sex, national origin, disability, sexual orientation, or gender identity.

Depository Trust & Clearing Corporation (DTCC), through its subsidiaries, provides clearing, settlement and information services. In addition, DTCC is a leading processor of mutual funds and insurance transactions. DTCC is headquartered in New York.

Design Worlds for Learning, Inc. is a San Jose, California college admission counseling corporation that serves students world-wide.

Deutsche Bank AG is a leading global investment bank headquartered in Frankfurt, Germany, with major hubs in London, New York, Sao Paulo, Dubai, Hong Kong and Tokyo. With 10,000 of its 100,000 employees in the United States, Deutsche Bank offers unparalleled financial services throughout the world.

Diageo North America, Inc., an indirect subsidiary of Diageo plc, a public limited company in England and Wales, has employees in the States of California, Connecticut, Massachusetts, Maryland, and New York, and the District of Columbia, and owns and operates production, technical and warehouse facilities in Illinois, Kentucky, and Tennessee.

Distinguished Gay Men is a professional matchmaking service based in San Jose, California.

DLK Law Group, P.C., is a San Francisco, California-based law firm that provides comprehensive estate planning, trust and probate administration, elder law services, and prenuptial agreements.

DML Insurance Services, Inc., located in Seattle, Washington, is a property casualty insurance brokerage.

Dry Creek Vineyard is a vineyard located in Healdsburg, California.

DRY Soda Co. is Seattle, Washington-based manufacturer of all-natural soda.

Eastern Bank Corporation is the oldest and largest mutual banking company in the nation. Founded in 1818 in Salem Massachusetts, it is headquartered in Boston, Massachusetts, and has over 1650 employees.

eBay Inc., headquartered in San Jose, California, and employing more than 30,000 people, is a global commerce platform and payments leader, connecting millions of buyers and sellers through online platforms including eBay, PayPal, and GSI.

Edwards Wildman Palmer LLP is a law firm with 625 lawyers and 14 offices across three continents, including offices in California, Massachusetts, and Illinois.

Eldercare Consulting, is a sole proprietorship based in Seattle, Washington, and provides project management services for seniors and their families.

Electronic Arts Inc. is a multinational interactive entertainment software company headquartered in Redwood City, California. Electronic Arts has over 9,000 employees across the U.S. and worldwide.

EMC Corporation offers data storage, information security, virtualization, and cloud computing products and services which enable businesses to store, manage, protect, and analyze massive volumes of data.

EnduringHydro, LLC is a clean energy company headquartered in Chevy Chase, Maryland that develops hydroelectric power plants at existing dams, seeking to increase the electricity production from non-fossil fuel sources.

Ernst & Young LLP is a member firm of the global Ernst & Young organization, providing assurance, tax, transaction and advisory services in offices throughout the U.S. Ernst & Young member firms have 167,000 people worldwide who are united by our shared values and an unwavering commitment to quality.

Exelon Corporation is one of the nation's leading competitive energy providers, with 2012 revenues of approximately $23.5 billion. Headquartered in Chicago, Illinois, Exelon employs approximately 30,000 people and has operations and business activities in 47 states, the District of Columbia and Canada. Its utilities serve more than 6.6 million customers in Illinois, Pennsylvania and Maryland.

Facebook, Inc., based in Menlo Park, California, is a social media service with more than one billion users.

Farella Braun + Martel, LLP is a 130-lawyer San Francisco, California firm that represents clients in sophisticated business transactions and high-stakes commercial, civil and criminal litigation. Farella's unwavering service ethic and interdisciplinary team approach advances our clients' objectives in the most effective, coordinated and efficient manner.

Fenwick & West LLP is a law firm with more than 700 partners and employees in California and Washington, providing comprehensive legal services to technology and life sciences companies.

Firefly Creative Co., located in Sonoma County, California specializes in advertising and marketing communications for print, web, TV and radio.

500 BC, Inc., is a California-based company behind a new educational media application.

Flanery CPA is a CPA firm located in the greater Seattle, Washington area.

The Forward Motion Group, LLC is an independent consulting agency based in Minneapolis, advising corporations, associations and non-profit organizations in travel and tourism, philanthropy and LGBT outreach.

Full Court Press Communications is a public affairs, public relations, crisis communications and social media company based in Oakland, California.

Gammelgården LLC is a Pownal, Vermont, Jersey farm and creamery that sells skyr and other products prepared from fresh Jersey milk.

Gardenworks Inc. is a landscape contracting company located in Healdsburg, California, offering innovative and creative solutions for commercial and residential spaces.

Geolo Capital, Inc., is an investment group based in San Francisco, California, that invests in products and services that improve and enrich people's lives, with a focus on hospitality, entertainment, health and wellness, and consumer products.

Gilt Groupe Holdings, Inc., based in New York City and employing more than 1,100 people, is an innovative online shopping destination, offering members special access to leading fashion, home décor, hotel and travel experiences, and unique local activities in select cities.

Go Factory, LLC is a software startup located in San Francisco and Silicon Valley, California that helps enterprises and businesses to create mobile collaboration solutions that integrate data and content with people and systems.

The Golden Gate Restaurant Association is a non-profit trade association that promotes the interests of the San Francisco, California Bay Area restaurant industry, with over 1,000 member locations.

The Goldman Sachs Group, Inc. is a leading global investment banking, securities and investment management firm that provides a wide range of financial services to a substantial and diversified client base that includes corporations, financial institutions, governments and high-net-worth individuals. The firm is headquartered in New York City.

Google, Inc. is a global technology leader focused on improving the ways people connect with information, with headquarters in California.

Goulston & Storrs, P.C. is an international law firm practicing real estate, environmental, retail, tax and other practices in Boston, New York, and Washington, D.C.

Greater Boston Chamber of Commerce is a non-profit corporation with a principal place of business in Massachusetts.

Greater San Diego Business Association was founded in 1979 and is the LGBT chamber of commerce in San Diego County, California, with over 800 members.

Greater Seattle Business Association is the LGBT chamber of commerce in Seattle, Washington.

Greensulate provides sustainable building consulting in New York City, Long Island, the San Francisco Bay Area, and Los Angeles.

Grippo & Elden LLC is a Chicago, Illinois-based litigation boutique that litigates in courts throughout the country.

Grossman Marketing Group is a marketing firm with offices in Atlanta, Boston, Chicago, Hartford, New York, Providence, and Washington, D.C.

Group Health Cooperative is a nonprofit health care system that coordinates care and coverage for more than 600,000 residents of Washington state and Idaho.

Hafner Vineyard is a small family winery in Sonoma County, California's Alexander Valley.

Harrell Remodeling is a full-service residential design and building company based in Mountain View, California and operating in the Silicon Valley with 40 employees.

Heath-Newton LLP is a San Francisco, California-based law firm focused on family law and asset protection issues, including premarital agreements, divorce, and child custody.

Holdredge Wines, is a winery located in Healdsburg, California, bottling Pinot Noir grown in Sonoma County.

Homeward Pet Adoption Center is one of the leading non-profit, no-kill animal shelters serving the Greater Seattle, Washington area. Our mission is to give homeless animals a second chance through our rescue, shelter, and adoption programs.

Horizon Air Industries, Inc. is an airline serving cities throughout Arizona, California, Oregon, Washington, Idaho, Montana, and Nevada; Baja California

Sur (Mexico); and British Columbia and Alberta (Canada).

Hughes Hubbard & Reed LLP is an international law firm practicing business and financial law, litigation and arbitration with U.S. offices in New York, Washington D.C., Los Angeles, Miami, Jersey City, and Kansas City.

ID Financial, LLC, based in Seattle, Washington and New Mexico, is a financial planning firm offering comprehensive financial advisory services.

Inspirato, LLC, is a world leading private luxury travel club for discerning travelers, headquartered in Denver, Colorado.

Integrated Archive Systems, Inc. is a corporation based in Palo Alto, California, that provides data management solution and services.

Integrity Law Group is a law firm based in Seattle, Washington that focuses on immigration, family law, bankruptcy, estate planning, escrow, personal injury, short sales, and loan modifications.

Intel Corporation is the world's largest semiconductor manufacturer and is also a leading manufacturer of computer, networking, and communications hardware and software products. Intel is headquartered located in Santa Clara, California.

Intuit Inc. is a leading provider of innovative business and financial management solutions for small businesses, consumers, accounting professionals and financial institutions. With 8,500 employees in offices around the world, the company has been recognized for its commitment to diversity for eight consecutive years by the Human Rights Campaign.

INUS Group, LLC offers business consulting services in the Northwest United States and across the country.

iStrategyLabs is a brand consulting agency with offices in New York and Washington D.C.

The Jackson Hole Group LLC is a consulting firm headquartered in in San Francisco, California that advises client Boards, CEO's and C-Suite executives on key business, organizational and executive issues.

James D. Wood, D.D.S. Family Dental Care provides dental care to residents of Cloverdale, California and the Alexander Valley.

Jazz Pharmaceuticals, Inc. Jazz Pharmaceuticals is a specialty biopharmaceutical company that identifies, develops and commercializes innovative products. It has offices in California and Pennsylvania.

Jennifer Brown Consulting is a consulting firm based in New York City founded to guide executives and HR leadership in their efforts to build more inclusive, innovative workplaces.

JetBlue Airways Corporation is a U.S. passenger airline headquartered in New York and operating throughout the United States and internationally throughout the Caribbean and in Latin America. JetBlue employs 15,000 people throughout North America.

The Jim Henson Company, headquartered in Los Angeles, California. is recognized worldwide as an innovator in puppetry, animatronics and digital animation.

Johnson & Johnson embraces research and science - bringing innovative ideas, products and services to advance the health and well-being of people. Our nearly 129,000 employees at more than 275 Johnson & Johnson operating companies in 150 countries (including all 50 states) work with partners in health care to touch the lives of over a billion people every day, throughout the world.

Jo-Lynn Otto Photography is an independent, freelance photography firm based in San Jose, California.

Jonathan L. Bowman, Attorney at Law, PS, is a law firm in Seattle, WA, focusing upon estate planning, corporate and business law, trademark and copyright protection, real estate law, and domestic partnership and same-sex marriage legal matters.

JTracz Designs LLC, headquartered in Hartford County, Connecticut, focuses on educating businesses on how to do business with and market to the lesbian, gay, bisexual and transgender community.

Kazan, McClain, Satterley, Lyons, Greenwood & Oberman, PLC, is an 80-employee law firm with offices in Oakland, California and a national practice focused on the representation of asbestos cancer victims from all over the United States.

Keker & Van Nest LLP is a San Francisco, California law firm that tries and litigates high-stakes civil and criminal cases throughout the country.

Kemp Goldberg Partners is an advertising, public relations, and public affairs agency with offices in Portland, Maine and Washington D.C.

Kimpton Hotel & Restaurant Group, LLC operates hotels and restaurants in 24 major cities throughout the United States and has approximately 8,100 employees. Kimpton is a privately held Delaware limited liability company with its principal place of business in California.

Kinzer Real Estate provides real estate services in Seattle, Washington.

Kollmar Sheet Metal Works, Inc. is a metal fabrication and installation contractor doing residential and commercial work, located in Seattle, Washington.

Kotzan Chiropractic, a sole proprietorship located in San Carlos, California, is a provider of chiropractic care.

Lafayette & Kumagai LLP is a law firm based in San Francisco, California.

Laparoscopic Institute for Gynecologic Oncology, based in Portola Valley, California, produces comprehensive courses on minimally invasive gynecologic surgery.

Larson Marketing & Communications LLC is a marketing and communications consulting firm serving the healthcare, professional services, and nonprofit sectors in the greater Seattle, Washington area.

Law Office of Lisa E. Schuchman is a law firm in Seattle, Washington.

The Law Office of Susan K. Fuller, PLLC is a full-service law firm for small businesses that represents clients in federal and state courts in all sorts of disputes.

Law Offices of Cynthia F. Buhr PLLC is a family law firm in Seattle, Washington.

Lieff Cabraser Heimann & Bernstein, LLP is a law firm specializing in complex individual and class actions on behalf of consumers, investors, employees, patients, and small business owners, with over 50 attorneys across offices in San Francisco, New York, and Nashville.

Levi Strauss & Co. is one of the world's largest brand-name apparel marketers, with products sold under the Levi's®, Dockers®, Signature by Levi Strauss & Co.™ and Denizen™ brands. Based in San Francisco, California, it has roughly 16,000 employees worldwide.

Liberty Mutual Group, Inc. is a diversified global insurer and property and casualty insurer in the U.S. Based in Boston, Massachusetts, Liberty Mutual Group employs more than 45,000 people in more than 900 offices throughout the world.

Littler Mendelson, P.C. is a labor and employment law firm with more than 900 lawyers in 55 offices across the U.S. and globally.

Long Beach Community Business Network is the LGBT chamber of commerce of Long Beach, California.

Loring, Wolcott & Coolidge Trust, LLC is a non-depository trust company and limited liability company organized under the laws of New Hampshire with a principal place of business in Massachusetts.

M. Arthur Gensler Jr. & Associates, Inc. (Gensler) is a global architecture, design, planning and consulting firm based in San Francisco, California with more than 3,500 professionals in more than 40 locations.

Marriott International, Inc. is a leading lodging company based in Bethesda, Maryland with more than 3,700 properties in 74 countries and territories. The company operates and franchises hotels and resorts under 18 brands, including Ritz-Carlton, Renaissance and Courtyard by Marriott, and has approximately 300,000 associates.

Mars, Incorporated is a global petcare, chocolate, gum and confections, food, and drinks business headquartered in McLean, Virginia with 70,000 associates across the U.S. and worldwide.

Marsh & McLennan Companies is a global professional services firm providing advice and solutions in the areas of risk, strategy, and human capital. It includes Marsh (insurance brokering and risk management), Guy Carpenter (risk and reinsurance intermediary services), Mercer (talent, health, retirement, and investment consulting), and Oliver Wyman (management consulting).

Massachusetts Association of Health Plans is a non-profit corporation with a principal place of business in Massachusetts.

Massachusetts Mutual Life Insurance Company is a life insurance company with its principal place of business in Massachusetts.

Massachusetts Teachers Association (MTA) is a non-profit labor and professional organization representing approximately 110,000 members employed at all levels of the Massachusetts public educational system. The MTA has 220 employees, including employees married to same sex spouses, and joins this brief in its capacity as an employer.

Mattson, based in Foster City, California, develops new products for the food and beverage industry.

The McGraw-Hill Companies, Inc. provides financial, publishing and business services and is headquartered in New York City with over 20,000 employees across the U.S. and worldwide.

McKinstry Co. is a national leader in the integrated delivery of construction, energy and facility services with offices in Washington, Minnesota, Montana, Missouri, Idaho, Oregon, Texas, California, Kansas, Missouri and Wisconsin.

Microsoft Corporation prides itself on its products and services, its brand, and its global reach. But our employees are unquestionably our greatest asset. Inclusiveness is a fundamental part of our values, and integral to our company's business success. It's critical that we have a workforce as diverse as our customers, are able to treat all of our employees equally, and that we can attract top talent in our highly competitive industry. In addition to corporate policies supporting diversity and equality, we strive to engage in a thoughtful manner in public discussions on issues that have a significant impact on our employees and our business.

Mona Smith PLLC is a law firm in Seattle, Washington, focusing on the transactional and litigation needs of clients in the areas of business law, real estate, estate planning and LGBT families.

Moody's Corporation provides credit ratings, research, tools and analysis that contribute to transparent and integrated financial markets. It is the parent company of Moody's Investors Service, which provides credit ratings and research, and Moody's Analytics, which offers software, advisory services, credit research, economic analysis and financial risk management. Headquartered in New York, Moody's employs approximately 6,800 people and has a presence in 28 countries.

Morgan Stanley is a global financial services firm that provides products and services to corporations, governments, financial institutions and individuals. Morgan Stanley is headquartered in New York City, with regional offices throughout the U.S. and principal offices in London, Tokyo, and Hong Kong.

Mosaic Financial Partners, Inc. is a financial planning firm based in the San Francisco, California Bay area, providing services in estate and retirement planning, business and compensation planning, and mutual and index fund management.

MultiPlan, Inc. offers a wide range of healthcare cost management solutions for the commercial, government, and property and casualty markets. It is headquartered in New York City.

The National Fire Protection Association, Inc. is a non-profit corporation with a principal place of business in Massachusetts.

National Gay and Lesbian Chamber of Commerce is a not-for-profit advocacy organization headquartered in Washington, D.C. They are the national certification body for LGBT-owned businesses.

Neumann Capital Management, LLC is a wealth management firm based in Foster City, California providing comprehensive investment management and financial planning services.

New York Life Insurance Company is one of the largest mutual life-insurance companies in the U.S. and is headquartered in New York City with over 12,000 employees across the U.S.

NewZoom, Inc., doing business as ZoomSystems, is a leading global provider of automated retail solutions to top brands and retailers. ZoomSystems is based in downtown San Francisco, California and has operations in Japan, Canada and Western Europe.

NIKE, Inc., based near Beaverton, Oregon, is a world-leading designer, marketer and distributor of authentic athletic footwear, apparel, equipment and accessories for a wide variety of sports and fitness activities.

Nixon Peabody LLP is a law firm of approximately 700 attorneys across the U.S., Europe and Asia. Nixon Peabody is headquartered in Boston, Massachusetts.

The Ogilvy Group, Inc. is a corporation engaged in advertising and other businesses and based in New York.

The Olivia Companies, LLC, based in San Francisco, California, is a travel company that provides cruise and resort vacations for lesbians worldwide.

1 Source Consulting Solutions, based in San Jose, California, is a sole proprietorship providing executive coaching and leadership development programs and services to corporations and non-profits.

Onyx Pharmaceuticals, Inc. is a biopharmaceutical company dedicated to developing innovative therapies that target the molecular mechanisms that cause cancer. Onyx is headquartered in South San Francisco, California.

Oracle America, Inc. is a leading global technology company, delivering hardware, middleware, application software, database software, and operating systems that work together in the cloud and in the data center. Based in Redwood City, California, Oracle has over 115,000 employees worldwide.

Orbitz Worldwide is a leading global online travel company, with a portfolio of consumer brands, including Orbitz, CheapTickets, ebookers and HotelClub. Orbitz Worldwide is headquartered in Chicago.

Out & Equal Workplace Advocates is a non-profit, national organization headquartered in San Francisco, California that addresses LGBT issues in the workplace.

Partners HealthCare System, Inc. is a not-for-profit, integrated health care system in Boston, Massachusetts, including community and specialty hospitals, a managed care organization, a physician network, community health centers, home care and other services. Partners is the largest private employer in Massachusetts, with approximately 60,000 employees.

Paul's Draperies, Inc. is a custom window covering retailer in Silicon Valley.

Peabody & Arnold LLP is a law firm in Boston, Massachusetts. Its practice focuses on employment, professional liability, and insurance law.

Pfizer Inc. is headquartered in New York and has 30,000 colleagues across the U.S. Pfizer is engaged in the discovery, development, manufacture and sale of many of the world's best-known prescription medicines and consumer healthcare products. We are committed to applying science and our global resources to improve health and well-being at every stage of life. We are also committed to maintaining a diverse and inclusive workplace for all colleagues, including LGBT colleagues.

Pierson Labs is an engineering firm working on neural net algorithmic innovation based in San Francisco, California.

Planet Fitness is a franchise of fitness centers based in Newington, New Hampshire.

Portland Area Business Association is the LGBT Chamber of Commerce for the great Portland, Oregon and Vancouver, Washington metro area. Many of our members either live, work, or own businesses in the State of Washington.

Precision Door Service provides installation, service and sales for garage doors and openers, and has locations in Washington, Utah, and California.

Prince Lobel Tye LLP is a midsized, full-service law firm located in downtown Boston, Massachusetts with approximately 60 lawyers and 115 total employees.

The PrintingWorks is a commercial printer and print broker located in Sunnyvale, California.

Prior Construction is a construction company in Sonoma County, California.

Pro-Tec Data, Inc. is a national intellectual asset protection consulting, publishing, and licensing firm based in Los Altos, California, serving high-tech, biotech, pharmaceutical, financial, and manufacturing industries.

ProTrials Research, Inc. is a clinical research organization that supports pharmaceutical, biotechnology and medical device companies initiate, manage and complete clinical trials on a global basis. ProTrials corporate headquarters is located in Sunnyvale, California, and employs 125 professionals. We have offices both in North America and the United Kingdom.

Public Interest Law Group, PLLC is a Seattle, Washington-based law firm that emphasizes public interest litigation and serving clients who might otherwise be unable to hire an attorney.

Puma Springs Vineyards is an organic and biodynamic farming company in Healdsburg, California, that grows and sells luxury wine grapes to Sonoma County wineries.

Qualcomm Incorporated, based in San Diego, California, is a world leader in 3G, 4G and next-generation wireless and digital communications technologies, products, and services.

Rainbow Chamber of Commerce Silicon Valley is the LGBT chamber of commerce of Silicon Valley.

Ray Holley Communications is a sole proprietorship that provides writing and editing services in Healdsburg, California.

Recreational Equipment, Inc. (REI) is a retail corporation organized as a consumers' cooperative that sells outdoor recreation gear, sporting goods, and clothing. REI is headquartered in Kent, Washington and employs over 11,000 people across the U.S.

Regroup is a San Francisco, California-based corporation offering an all-in-one communications platform that enables group emails, text messages, voice broadcasts, and social media messaging.

Reproductive Science Center of New England, P.C. is a reproductive services provider with locations in Massachusetts, Rhode Island, and New Hampshire.

Resource Systems Group, Inc. RSG is a 100% employee-owned consulting firm that creatively applies state-of-the-art modeling and analytics to transportation planning, market strategy, environmental management, and custom software design. RSG is headquartered in Vermont, with additional offices in Illinois, New Hampshire, Washington, D.C., and Utah.

Rising Tide Brewing Company is a brewery based in Portland, Maine.

RLL Consulting & Advocacy, LLC is a Seattle, Washington-based consulting firm providing advice and consultation on health care policy and health insurance reform implementation to businesses and other employers.

Rocket Science Associates is a consulting firm based in San Francisco, California.

Ropes & Gray LLP is a global law firm headquartered in Boston, Massachusetts with over 1,000 lawyers in offices across the U.S., Asia, and Europe.

Rural Communications Service Corporation is a small employer providing broadband and telecommunications services to rural communities of Oregon, Idaho, and Nevada.

Russell & Olson, LLP is a law firm that specializes in campaign, election, lobby and public ethics compliance, as well as establishing and administering nonprofit organizations. The firm represents candidate and ballot measure committees, corporations, labor unions, individuals and foundations. The firm has offices in Burlingame and Sacramento, California.

Salera Consulting is a consulting firm based in Ipswich, Massachusetts.

salesforce.com, Inc. is a leading provider of enterprise cloud computing services headquartered in San Francisco, California. salesforce.com employs people across the United States and throughout the world.

The San Francisco Chamber of Commerce, representing over 1500 local businesses, attracts, develops and retains business in San Francisco, California.

Seabold International Services LLC (doing business as Seabold Group) is an investigative consulting firm in Seattle, Washington.

Seattle Hospitality Group LLC is a Seattle, Washington-based company that invests in corporate hospitality properties and services.

The Seattle Lesbian, LLC publishes a daily online news magazine operating from offices in the Pacific Northwest, and reaching communities spanning continents around the world.

Seattle Metropolitan Chamber of Commerce represents 2,200 small, medium and large businesses in the four-county Puget Sound region.

Seyfarth Shaw LLP is an international law firm with more than 800 attorneys that offers a national platform and an international gateway to serve clients' changing business and legal needs in litigation, employment, corporate, real estate and employee benefits.

Shawmut Design and Construction is a leading national construction management firm with offices in Massachusetts, New York, Rhode Island, Connecticut, Nevada and California. Shawmut serves clients in academic, commercial, corporate, cultural, gaming, healthcare and life sciences, retail, sports and other venues.

Shearman & Sterling LLP is a global law firm with approximately 900 lawyers in 20 offices in 12 countries. The firm is a leader in mergers and acquisitions, capital markets, project development and finance, complex business litigation and international arbitration, asset management and tax.

Silicon Valley Progressive Faith Community is a nonprofit in the Silicon Valley, California, affiliated with the Silicon Valley United Church of Christ.

Sing Out Louise! Productions is a Tony-Nominated Broadway production company based in New York City, with credits that include *Catch Me If You Can*, *American Idiot*, *Elling*, and the upcoming *ALLEGIANCE*.

Skadden, Arps, Slate, Meagher & Flom LLP is law firm headquartered in New York City with nearly 4,200 employees in 23 offices.

Skellenger Bender, P.S. is a Seattle, Washington-based law firm that serves individuals, families, businesses, and governmental entities.

Smith & Quinn LLC (doing business as Orange Crush Studios) is located in the heart of Japan Town in San Jose, California. The staff at Orange Crush Studios is committed to providing hair salon services of the highest caliber that reflect the latest trends in fashion and style.

Solutions Wealth Management is a 30-year-old financial planning firm in Campbell, California serving a diverse client base.

Sōw is a fresh juice company showcasing organic and heirloom produce sourced from California farmers and juiced to order at its San Francisco retail location.

Spectra Law PS is a law firm in Seattle, Washington that provides estate planning, probate, and small business services to the LGBT community.

Starbucks Corporation. Since 1971, Starbucks Coffee Company has been committed to ethically sourcing and roasting the high-quality *arabica* coffee. Today, with stores around the globe, the company is the premier roaster and retailer of specialty coffee in the world. Through our unwavering commitment to excellence and our guiding principles, we bring the unique

Starbucks Experience to life for every customer through every cup.

StartOut is a national not-for-profit organization with active chapters in New York, San Francisco, Los Angeles and Austin, dedicated to helping and fostering entrepreneurship and business leadership within the LGBT community through education, networking, mentorship, and connection to capital.

State Street Corporation is a global leader in providing financial services to institutional investors, delivering solutions across investment management, research and trading, and investment servicing. Headquartered in Boston, State Street operates in 29 countries and serves clients in more than 100 markets.

Stone Way Eateries, LLC (doing business as Tutta Bella Neapolitan Pizzeria) is an award-winning pizzeria company operating in Seattle, Washington.

Stonyfield Farm, Inc., with locations in New Hampshire and California, is a world-leading organic yogurt company, selling certified organic yogurt, smoothies, frozen yogurt, and other products.

Stuffed Cakes, LLC, located in West Seattle, Washington creates and sells custom cakes.

Sun Life Financial (U.S.) Services Company, Inc. has approximately 2,000 employees in 35 states supporting the U.S. insurance operations of Sun Life Financial Inc., a leading international provider of protection and wealth accumulation products and services to individual and corporate customers.

Support.com is a publicly traded company that provides cloud-based technology services and software. Headquartered in Redwood City, California, and with offices in Washington and Oregon, Support.com employs approximately 900 people.

Sweet is a travel company that designs vacations for lesbians while partnering with the communities it visits to do projects that enrich the places we visit. Sweet is based in San Francisco, California.

Taber Food Services, Inc. owns and operates seven Hobee's California Restaurants, serving up fresh, healthful California fare.

Thomson Reuters is a world-leading source of intelligent information for businesses and professionals in the financial and risk, legal, tax and accounting, intellectual property and science and media markets, powered by the world's most trusted news organization. With headquarters in New York and major operations in London and Eagan, Minnesota, Thomson Reuters employs approximately 60,000 people and operates in over 100 countries.

Total Awareness Accounting Services provides individual and small business tax preparation and accounting consulting services in Kirkland, Washington.

Total Home Improvement Inc. is a residential remodeling firm located in Seattle, Washington.

Transparent Language, Inc. is a New Hampshire-based provider of language learning software for consumers, government agencies, educational institutions, and businesses.

Twitter, Inc., founded in 2006, provides a real-time information service on which people around the world can post ideas, comments and news, plus photos and videos, in 140 characters or fewer. Twitter is based in San Francisco, California.

206 Inc. is a non-traditional marketing agency based in Seattle, Washington that builds authentic, multi-dimensional campaigns for globally recognized brands.

UBS AG is a global leader in providing wealth management, investment banking and asset management services. Headquartered in Switzerland, UBS is present in all major financial centers and has offices in over 50 countries and employs more than 63,000 people around the world.

U.S. Balloon Co. is the largest nationwide wholesale balloon distributor. Based in Brooklyn, New York, the company offers balloon designs and related party products.

The Ultimate Software Group, Inc., headquartered in Weston, Florida, with 1,600 employees nationwide, is a leading cloud provider of people management solutions for businesses.

Unigo LLC is one of the web's largest resources helping college students, with more than 15 million visitors per year.

The United States Conference of Mayors is the official non-partisan organization of all United States cities with populations of 30,000 or more. The conference supports the legal protection of gay and lesbian rights at all levels of government, and marriage equality for same-sex couples, and the recognition and extension of full equal rights to such unions, including family and medical leave, tax equity, and insurance and retirement benefits.

Valdez Noor Todd & Doyle LLP is a law firm based in San Francisco, California.

VCB Consulting & Accounting Services is a Seattle, Washington-based company that provides CPA services including taxation, write-up work, financial planning, and assistance to start-up companies.

Velsch Unlimited LLC is a consulting firm in Seattle, Washington.

Venable LLP is a law firm serving corporate, institutional, governmental, nonprofit and individual clients throughout the U.S. and around the world. Headquartered in Washington, D.C., with offices in California, Maryland, New York and Virginia, Venable LLP employs over 500 attorneys.

Verity Credit Union, with 6 branches and 115 employees, provides quality financial services. Founded in 1934 as a credit union for Federal employees, it now serves all residents in the greater Seattle, Washington area.

Viacom Inc., headquartered in New York City, is home to premier entertainment brands that connect with content across television, motion picture, online and mobile platforms in over 160 countries and territories. With media networks reaching approximately 700 million global subscribers, Viacom's leading brands include MTV, VH1, CMT, Logo, BET, CENTRIC, Nickelodeon, Nick Jr., TeenNick, Nicktoons, Nick at Nite, COMEDY CENTRAL, TV Land, SPIKE, Tr3s, Paramount Channel and VIVA. As of September 30, 2012, Viacom employed approximately 9,880 full-time and part-time employees worldwide, and had approximately 740 additional project-based staff on payroll.

VitalSource Staffing, LLC, located in downtown Seattle, Washington is a staffing firm, focused on technology, human resources, operations, sales & marketing, and accounting.

Vulcan Inc., based in Seattle, Washington, creates and implements groundbreaking projects in technology, business, and the arts.

W/S Development Associates LLC is a leading shopping center developer and owner based in Chestnut Hill, Massachusetts.

Walt Disney Company, together with its subsidiaries, is a diversified worldwide entertainment enterprise with operations in five business segments: Media Networks, Parks and Resorts, Studio Entertainment, Consumer Products and Interactive, employing more than 135,000 people.

Wasserman Media Group is a sports marketing and entertainment company headquartered in Los Angeles, California with global expertise in Media Rights, Consulting, Athlete Management, gold, Soccer/Football and Action Sports and Olympics.

Willkie Farr & Gallagher LLP is a leading international law firm with approximately 600 lawyers based in key financial centers: New York, Washington, D.C., Paris, London, Milan, Rome, Frankfurt, and Brussels.

Windows Management Experts, Inc. is an information technology consulting company based in Edmonds, Washington.

Witeck Communications, Inc., based in Washington, D.C., provides media, marketing and strategic communications counsel to U.S. corporations and nonprofits to build successful, trusted bridges with the LGBT community.

Xerox Corporation, with 140,000 employees in 160 countries, is a world-leading enterprise for business process and document management. Xerox provides true end-to-end solutions, from back-office support to the printed page, to help customers operate their businesses and manage information.

Zynga Inc., headquartered in San Francisco, California, is the world's largest social gaming company. Zynga's popular games like FarmVille, CityVille, Zynga Poker, and Words with Friends are played by over 300-million players monthly.

AMICUS
CURIAE
BRIEF

No. 12-307

In the Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

EDITH S. WINDSOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS IN SUPPORT OF RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP, ADDRESSING THE MERITS, AND SUPPORTING REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. The Defense of Marriage Act Is Subject to Rational Basis Review. 4

  A. There Is No Fundamental Right to Marry a Person of the Same Sex. 6

  B. As Defined by Courts to Date, "Sexual Orientation" Is Not a Classification That Should Trigger Heightened Scrutiny 10

II. Application of Stricter-Than-Rational Scrutiny to Classifications Based on Sexual Orientation Would Have Adverse Consequences in Other Areas of Law 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Baehr v. *Lewin*, 852 P.2d 44 (Haw. 1993) 7

Baker v. *Nelson*, 409 U.S. 810 (1972).................... 4,6,7

Baker v. *Nelson*, 191 N.W.2d 185 (Minn. 1971) 7

Ben-Shalom v. *Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) 14

Blodgett v. *Holden*, 275 U.S. 142 (1927) 4

Christian Legal Soc'y v. *Martinez*, 139 S. Ct. 2971 (2010) 12

Citizens for Equal Prot. v. *Bruning*, 455 F.3d 859 (8th Cir. 2006) 5

City of Cleburne v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985) 11,14,15,17

Commonwealth of Massachusetts v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012)...5,6,16,19

Conaway v. *Deane*, 932 A.2d 571 (Md. 2007) 10

Cook v. *Gates*, 528 F.3d 42 (1st Cir. 2008), *cert. denied sub nom.*, *Pietrangelo* v. *Gates*, 129 S. Ct. 2763 (2009). 5

Davis v. *Prison Health Servs.*, 679 F.3d 433 (6th Cir. 2012)... 5

Frontiero v. *Richardson*, 411 U.S. 677 (1973) 11

Goodridge v. *Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003) 8

Graham v. *Richardson*, 403 U.S. 365 (1971) 11

Heller v. *Doe*, 509 U.S. 312 (1993) 4

Hernandez v. *Robles*, 855 N.E.2d 1 (N.Y. 2006) 6

High Tech Gays v. *Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) 12,14

Hunt v. *Ake*, No. 8:04-cv-01852-JSM-TBM (M.D. Fla. Jan. 20, 2005) 6

Jackson v. *Abercrombie*, No. 11-00734 ACK-KSC, 2012 WL 3255201 (D. Haw. Aug. 8, 2012) 6,8,10,17

Johnson v. *Johnson*, 385 F.3d 503 (5th Cir. 2004) 5

In re Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004) 6,7

Kerrigan v. *Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) 8

Korematsu v. *United States*, 323 U.S. 214 (1944) 11

Lalli v. *Lalli*, 439 U.S. 259 (1978) 11

Lawrence v. *Texas*, 539 U.S. 558 (2003) 4,9

Lewis v. *Harris*, 908 A.2d 196 (N.J. 2006) 10

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Loving v. *Virginia*, 388 U.S. 1 (1967).............. 9,10,11

Lui v. *Holder*, No. 2:11-cv-01267 (C.D. Cal. Sept. 28, 2011) 6

Lyng v. *Castillo*, 477 U.S. 635 (1986) 11

Maynard v. *Hill*, 125 U.S. 190 (1888) 9

Miss. Univ. for Women v. *Hogan*, 458 U.S. 718 (1982) 11

Murphy v. *Ramsey*, 114 U.S. 15 (1885) 9

Perry v. *Brown*, 671 F.3d 1052 (9th Cir. 2012).......... 5

Peterson v. *Bodlovich*, No. 99-3150, 2000 WL 702126 (7th Cir. May 26, 2000) 5

Plyler v. *Doe*, 457 U.S. 202 (1982) 12,16

Price-Cornelison v. *Brooks*, 524 F.3d 1103 (10th Cir. 2008) 5

Romer v. *Evans*, 517 U.S. 620 (1996) 4,17

Rostker v. *Goldberg*, 453 U.S. 57 (1981) 4

San Antonio Sch. Dist. v. *Rodriguez*, 411 U.S. 1 (1973) 11

Seegmiller v. *LaVerkin City*, 528 F.3d 762 (10th Cir. 2008) 10

Sevcik v. *Sandoval*, No. 2:12-cv-00578-RCJ-PAL, 2012 WL 5989662 (D. Nev. Nov. 26, 2012) ... 15,20

Skinner v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) 9

Smelt v. *County of Orange*, 374 F.Supp.2d 861 (C.D. Cal. 2005), *aff'd in part and vacated in part*, 447 F.3d 673 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006) 6

Standhardt v. *Superior Court*, 77 P.3d 451 (Ariz. App. 2003) 7

Steffan v. *Perry*, 41 F.3d 677 (D.C. Cir. 1994) 5

Thomasson v. *Perry*, 80 F.3d 915 (4th Cir.), *cert. denied*, 519 U.S. 948 (1996) 5

Tigner v. *Texas*, 310 U.S. 141 (1940) 16

Torres-Barragan v. *Holder*, No. 2:09-cv-08564 (C.D. Cal. Apr. 30, 2010) 6

U.S. Dep't of Agric. v. *Moreno*, 413 U.S. 528 (1973) 17

Varnum v. *Brien*, 763 N.W.2d 862 (Iowa 2009) 8

Walters v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 4

Washington v. *Glucksberg*, 521 U.S. 702 (1997) 2,6,10

Wilson v. *Ake*, 354 F.Supp.2d 1298 (M.D. Fla. 2005) 6

Windsor v. *United States*, 699 F.3d 169 (2d Cir. 2012) 4,5,6,13

Witt v. *Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008) 5

Woodward v. *United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) 5,12

Zablocki v. *Redhail*, 434 U.S. 374 (1978) 9

State Constitutions

Ala. Const. amend. 774(b) 7

Alaska Const. art. I, § 25 7

Ariz. Const. art. XXX, § 1 7

Ark. Const. amend. 83, § 1 7

Cal. Const. art. I, § 7.5 7

Colo. Const. art. II, § 31 7

Fla. Const. art. I, § 27 7

Ga. Const. art. I, § IV, ¶ I(a) 7

Haw. Const. art. I, § 23 7

Idaho Const. art. III, § 28 7

Kan. Const. art. XV, § 16 7

Ky. Const. § 233A 7

La. Const. art. XII, § 15 7

Mich. Const. art. I, § 25 7

Miss. Const. art. XIV, § 263A 7

Mo. Const. art. I, § 33 7

Mont. Const. art. XIII, § 7 7

Neb. Const. art. I, § 29 7

Nev. Const. art. I, § 21 7

N.C. Const. art. XIV, § 6 7

N.D. Const. art. XI, § 28 7

Ohio Const. art. XV, § 11 7

Okla. Const. art. II, § 35(A) 7

Or. Const. art. XV, § 5a 7

S.C. Const. art. XVII, § 15 7

S.D. Const. art. XXI, § 9 7

Tenn. Const. art. XI, § 18 7

Tex. Const. art. I, § 32 7

Utah Const. art. I, § 29(1) 7

Va. Const. art. I, § 15-A 7

Wis. Const. art. XIII, § 13 7

State Statutes and Referenda

D.C. Code § 46-401 (2010) 8

Del. Code Ann. tit. 13, § 101(a) (2011) 7

HAW. REV. STAT. § 572-1 (2012) 7,8

750 ILL. COMP. STAT. 5/212(a)(5) (2011) 8

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MD. CODE ANN., FAM. LAW, § 2-201 (approved by voters Nov. 2012) 8

ME. REV. STAT. ANN. tit. 19-A, § 650-A (approved by voters Nov. 2012) 8

MINN. STAT. § 517.03 (2012) 8

NEV. REV. STAT. ANN. § 122A.210(1) (2011) 20

N.H. REV. STAT. ANN. § 457:1-a (2010) 8

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23 PA. CONS. STAT. § 1704 (2011) 8

VT. STAT. ANN. tit. 15, § 8 (2009) 8

W. VA. CODE § 48-2-104(c) (2012) 8

W. VA. CODE § 48-2-603 (2012) 8

WASH. REV. CODE § 26.04.010 (approved by voters Nov. 2012) 8

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142 Cong. Rec. 17093-94 (1996) (House) 8

142 Cong. Rec. 22467 (1996) (Senate) 8

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INTEREST OF *AMICUS*

The United States Conference of Catholic Bishops ("USCCB" or "Conference") is a nonprofit corporation, the members of which are the Catholic Bishops in the United States.[1] The USCCB advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the nature of marriage. Values of particular importance to the Conference include the promotion and defense of marriage, the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of the nation's jurisprudence on these issues.

We submit this brief on the merits in support of the Bipartisan Legal Advisory Group, and urge this Court to reverse the judgment of the Court of Appeals below and to uphold the Defense of Marriage Act.

SUMMARY OF ARGUMENT

Legislation challenged on equal protection grounds is subject to rational basis review as long as it does not infringe upon a fundamental right or involve a suspect or quasi-suspect classification. The

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* state that they authored this brief, in whole, and that no person or entity other than *amicus* made a monetary contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court.

Defense of Marriage Act ("DOMA") does not infringe upon a fundamental right, and involves neither a suspect nor quasi-suspect classification. It is therefore subject to rational basis review.

There is no fundamental right to marry a person of the same sex. Such a claim must be rejected because it does not satisfy the test to which this Court adheres in determining whether an asserted right is fundamental. Specifically, civil recognition of same-sex relationships is not deeply rooted in the Nation's history and tradition—quite the opposite is true. Nor can the treatment of such relationships as marriages be said to be implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Windsor's claim also cannot fairly be characterized as part of a generalized "right to marry." This Court's decisions describing marriage as a fundamental right plainly contemplate the union of one man and one woman. In addition, a generalized claim of a right to marry in this case does not satisfy the requirement, articulated in *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997), of a "careful" or particularized description of the asserted interest.

This case involves no suspect or quasi-suspect classification. This Court has accorded heightened scrutiny to only a small and discrete set of classifications, to which persons in same-sex relationships bear no relation and whose qualifying characteristics they do not share. None of the suspect or quasi-suspect classifications is defined by conduct; Windsor's involvement in a past homosexual relationship, by contrast, is the product of her own voluntary choice. Likewise, she is not a member of a politically powerless group needing protection against majoritarian impulses. To the contrary, the last two decades have witnessed far-reaching changes in how the law treats persons in same-sex relationships, changes that belie any claim of political powerlessness.

Application of heightened scrutiny in this case would not only have a distorting effect on this Court's equal protection jurisprudence as a whole, but would undermine the defense of state laws that define marriage as the union of one man and one woman, or that otherwise involve a classification based on "sexual orientation." Such a ruling would compromise the ability of states to accommodate religious and moral objections to homosexual conduct on the part of employers and individuals. In the end, a decision applying heightened scrutiny would seriously impede democratic solutions to questions about the legal treatment of persons in same-sex relationships.

ARGUMENT

I. The Defense of Marriage Act Is Subject to Rational Basis Review.[2]

"Judging the constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty that this Court is called upon to perform.'" *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927))). This Court has therefore applied rational basis review to laws unless they infringe a fundamental right or employ a suspect classification. *See Heller* v. *Doe*, 509 U.S. 312, 320 (1993).

Although this Court has never squarely addressed whether a classification based on "sexual orientation" is suspect or trenches on a fundamental right, the Court has nonetheless used the rational basis test when reviewing laws that classify on that basis. *Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003); *Romer* v. *Evans*, 517 U.S. 620, 631-32 (1996).

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[2] We agree with the dissent in the Court of Appeals below that invalidation of DOMA is precluded by *Baker* v. *Nelson*, 409 U.S. 810 (1972). *See Windsor* v. *United States*, 699 F.3d 169, 192-95 (2d Cir. 2012) (Straub, J., dissenting). Briefly, if states do not run afoul of the Equal Protection Clause when they define marriage as the union of one man and one woman, as *Baker* holds, then neither does the federal government run afoul of equal protection guarantees when it so defines marriage for purposes of federal programs. Rejection of *Baker* would also upset the reliance interests of an overwhelming majority of states that, subsequent to *Baker*, have defined marriage as the union of one man and one woman. *See* note 5, *infra*, and accompanying text.

The lower courts have addressed the question directly, and every federal court of appeals to do so—with only two exceptions, including in the present case[3]—has concluded that rational basis is the appropriate standard for reviewing such laws. *Perry* v. *Brown*, 671 F.3d 1052, 1082, 1086-90 (9th Cir. 2012); *id.* at 1100-01 (Smith, J., concurring in part and dissenting in part); *Davis* v. *Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Witt* v. *Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Price-Cornelison* v. *Brooks*, 524 F.3d 1103, 1113-14 & n.9 (10th Cir. 2008); *Citizens for Equal Prot.* v. *Bruning*, 455 F.3d 859, 866-867 (8th Cir. 2006); *Johnson* v. *Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Lofton* v. *Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005); *Peterson* v. *Bodlovich*, No. 99-3150, 2000 WL 702126, at *2 (7th Cir. May 26, 2000); *Thomasson* v. *Perry*, 80 F.3d 915, 927-928 (4th Cir.), *cert. denied*, 519 U.S. 948 (1996); *Steffan* v. *Perry*, 41 F.3d 677, 684-685 (D.C. Cir. 1994); *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990).

Consistent with this case law, and as a number of courts have held, DOMA too is subject to rational basis review. *Smelt* v. *County of Orange*, 374 F.Supp.2d 861, 879 (C.D. Cal. 2005), *aff'd in part and vacated in part for lack of standing*, 447 F.3d 673 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006); *Wilson* v. *Ake*, 354 F.Supp.2d 1298, 1308 (M.D. Fla. 2005); *Hunt* v. *Ake*, No. 8:04-cv-01852-JSM-TBM (M.D. Fla. Jan. 20, 2005); *In re Kandu*, 315 B.R. 123, 144 (Bankr. W.D. Wash. 2004); *Lui* v. *Holder*, No. 2:11-cv-01267 (C.D. Cal. Sept. 28, 2011); *Torres-Barragan* v. *Holder*, No. 2:09-cv-08564 (C.D. Cal. Apr. 30, 2010). An analysis of the relevant factors reveals that this conclusion is sound.

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[3] The Second Circuit applied intermediate scrutiny to strike down DOMA. *Windsor* v. *United States*, 699 F.3d at 176, 185. Months earlier, the First Circuit had applied "intensified scrutiny"—a level of review more rigorous than rational basis review but less rigorous than intermediate scrutiny—to strike down DOMA. *Commonwealth of Massachusetts* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 10 (1st Cir. 2012); *but see Cook* v. *Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (applying rational basis review to the military's "don't ask, don't tell" policy), *cert. denied sub nom.*, *Pietrangelo* v. *Gates*, 129 S. Ct. 2763 (2009).

A. There Is No Fundamental Right to Marry a Person of the Same Sex.[4]

A claimed right is fundamental for constitutional purposes only if two conditions are met: the asserted right is (a) "deeply rooted in this Nation's history and tradition" and (b) "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist" if it were sacrificed. *Glucksberg*, 521 U.S. at 720-21. The law's historic treatment of marriage as the union of one man and one woman belies any conclusion that there is a fundamental right to marry a person of the same sex. *Jackson* v. *Abercrombie*, No. 11-00734 ACK-KSC, slip op. at 63-66, 2012 WL 3255201 at *23-26 (D. Haw. Aug. 8, 2012); *Hernandez* v. *Robles*, 855 N.E.2d 1, 9 (N.Y. 2006); *In re Kandu*,

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[4] The argument that the present claim is foreclosed by *Baker*, *see* note 2, *supra*, is particularly strong with respect to any claim that there is a "fundamental right" to marry a person of the same sex. *See Commonwealth of Massachusetts*, 682 F.3d at 8 (finding that *Baker* precludes any arguments that "rest on a constitutional right to same-sex marriage"), quoted in *Windsor*, 699 F.3d at 178 n.1.

315 B.R. at 140; *Standhardt* v. *Superior Court*, 77 P.3d 451, 460 & n.14 (Ariz. App. 2003), and cases cited therein; *Baker* v. *Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), *dismissed for want of a substantial federal question*, 409 U.S. 810 (1972). Far from it, the legal definition of marriage as the union of one man and one woman has been the ubiquitous norm in Western cultures for millennia. Questions about that definition in relation to persons in same-sex relationships began to emerge in this country only in the last two decades, beginning with *Baehr* v. *Lewin*, 852 P.2d 44 (Haw. 1993). Faced with those emerging questions, and to uphold the definition of marriage as the union of one man and one woman, 37 states, the vast majority by state constitutional amendment, explicitly *reaffirmed* the legal definition of marriage as the union of one man and one woman.[5] These

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[5] From 1998 on, thirty States adopted such amendments. ALA. CONST. amend. 774(b); ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83, § 1; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § IV, ¶ I(a); IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.C. CONST. art. XIV, § 6; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35(A); OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29(1); VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13. Another state, Hawaii, adopted a constitutional amendment in 1998 giving the legislature "the power to reserve marriage to opposite-sex couples." HAW. CONST. art I, § 23. Between 1996 and 2004, Hawaii and six States having no state constitutional amendment on the precise question adopted statutes, currently in effect, defining marriage as the union of one man and one woman. DEL. CODE ANN. tit. 13, § 101(a) (2011); HAW. REV.

developments were foreshadowed by DOMA, which was passed in 1996 by overwhelming bipartisan majorities of Congress and was signed into law by President Clinton.[6] Today, only a minority of states and the District of Columbia have redefined marriage to include two persons of the same sex.[7]

Nor can a right to marry a person of the same sex be shoehorned into a generalized "right to marry." *Jackson*, *supra*, slip op. at 59-63, 2012 WL 3255201 at *23-25, and cases cited therein. For well over a century, this Court has held that marriage is a fundamental right, but those decisions, which expressly reference the link between marriage and procreation, make clear that by "marriage," the Court

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STAT. § 572-1 (2012); 750 ILL. COMP. STAT. 5/212(a)(5) (2011); IND. CODE § 31-11-1-1 (2012); MINN. STAT. § 517.03 (2012); 23 PA. CONS. STAT. § 1704 (2011); W. VA. CODE §§ 48-2-104(c), 48-2-603 (2012).

[6] The vote in the House was 342-67 in favor, and in the Senate 85-14 in favor. 142 Cong. Rec. 17093-94 (1996) (House); *id.* at 22467 (Senate).

[7] Between 2003 and 2009, judicial decisions in three States (Massachusetts, Connecticut, and Iowa) redefined marriage to include same-sex couples. *Varnum* v. *Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Goodridge* v. *Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003). From 2009 to 2012, in the absence of a judicial decision, six States (Maryland, Maine, New Hampshire, New York, Washington State, and Vermont) and the District of Columbia redefined marriage by legislation or ballot initiative. D.C. CODE §46-401 (2010); ME. REV. STAT. ANN. tit. 19-A, § 650-A (approved by voters Nov. 2012); MD. CODE ANN., FAM. LAW, § 2-201 (approved by voters Nov. 2012); N.H. REV. STAT, ANN. § 457:1-a (2010); N.Y. DOM. REL. LAW § 10-a (McKinney 2012); VT. STAT. ANN. tit. 15, § 8 (2009); WASH. REV. CODE § 26.04.010 (approved by voters Nov. 2012).

means the union of one man and one woman. *Zablocki* v. *Redhail*, 434 U.S. 374, 383 (1978) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival"); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (same); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (marriage is "fundamental to the very existence and survival of the race"); *Maynard* v. *Hill*, 125 U.S. 190, 211 (1888) (marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress"); *Murphy* v. *Ramsey*, 114 U.S. 15, 45 (1885) (referring to marriage as "the union for life of one man and one woman"). This Court has been careful to distinguish the claim of a right to marry a person of the same sex, which it has never recognized, from others which it has. *Lawrence*, 539 U.S. at 578 (stating that the case under review, involving a ban on homosexual sodomy, "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"); *id.* at 585 (O'Connor, J., concurring in the judgment) ("reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group").[8]

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[8] *Lawrence* did not decide that homosexual *conduct* is a fundamental right, let alone that government must formally recognize homosexual relationships by equating them with marriage. *Lawrence*, 539 U.S. at 578 (holding that Texas sodomy law "furthers no legitimate state interest"); *id.* at 586 (Scalia, J., dissenting) ("nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right'"). *See Lofton*, 358 F.3d at 815-17 (rejecting a claimed "fundamental right to private sexual intimacy" and concluding that "it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right"), quoted with

Furthermore, the claimed right to marry a person of the same sex as an aspect of a more generalized "right to marry" does not satisfy the requirement for a "careful description" of the asserted right required under *Glucksberg*, 521 U.S. at 721. In *Glucksberg*, proponents of a right to physician-assisted suicide strained to recast it as a right to determine "the time and manner of one's death," "to die," to "choose how to die," to "control ... one's final days," and "to choose a humane, dignified death." *Id.* at 724. This Court rejected all of these rhetorical sleights of hand, insisting instead on a "careful description" of the right at issue. *Id.* at 721. For similar reasons, Windsor cannot plausibly recast her claim as a "right to marry."[9]

B. As Defined by Courts to Date, "Sexual Orientation" Is Not a Classification That Should Trigger Heightened Scrutiny.

This Court has relied upon four criteria to identify the very limited set of classifications that qualify for heightened scrutiny as suspect or quasi-suspect: members of the class have (a) "no ability to attract

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approval in *Seegmiller* v. *LaVerkin City*, 528 F.3d 762, 771 (10th Cir. 2008).

[9] *Loving* v. *Virginia*, 388 U.S. 1 (1967), is distinguishable because it did not involve an attempt to *redefine* marriage as the union of one man and one woman. Instead, it removed a statutory *bar* to such unions, a bar that was rooted in now-discredited and gravely unjust notions of white supremacy. *Id.* at 7-8; *see Jackson*, slip op. at 65-66, 2012 WL 3255201 at *25 (rejecting the *Loving* analogy); *Conaway* v. *Deane*, 932 A.2d 571, 601-02, 619-20 (Md. 2007) (same); *Lewis* v. *Harris*, 908 A.2d 196, 210 (N.J. 2006) (same).

the attention of the lawmakers," (b) a history of unequal treatment, and (c) an obvious, immutable or distinguishing trait (d) bearing no relation to their ability to perform or contribute to society. *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 441, 445 (1985); *Lyng* v. *Castillo*, 477 U.S. 635, 638 (1986); *San Antonio Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973); *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (plurality).

Applying these criteria, this Court has recognized principally three classifications (race, alienage, and national origin) as suspect, and two (sex and illegitimacy) as quasi-suspect for purposes of triggering, respectively, strict or intermediate scrutiny. *Loving*, 388 U.S. at 11 (race); *Graham* v. *Richardson*, 403 U.S. 365, 371-72 (1971) (alienage); *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944) (national origin); *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 723-24 (1982) (sex); *Lalli* v. *Lalli*, 439 U.S. 259, 265 (1978) (illegitimacy). An overarching feature of all five of these established protected classes is that they involve a trait attributable from conception or birth. For several reasons, sexual orientation does not rank as a suspect or quasi-suspect class.

1. In contrast to the classes for which this Court has applied heightened scrutiny,[10] what lower courts have understood to be a homosexual "orientation" is not a *trait* attributable from conception or birth. Rather, particularly as framed by Respondents here,

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[10] *Frontiero*, 411 U.S. at 686 (noting that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth").

it involves a species of *conduct.*[11] *See High Tech Gays* v. *Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) ("Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes."); *Woodward*, 871 F.2d at 1076 ("Homosexuality ... differs fundamentally from those [traits] defining any of the recognized suspect or quasi-suspect classes. Members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature."). Indeed, with this distinction in mind, this Court has recognized that a finding of a suspect or quasi-suspect class for equal protection purposes is simply inappropriate when the distinguishing characteristic is a product of "voluntary action." *Plyler* v. *Doe*, 457 U.S. 202, 219 n.19 (1982).

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[11] Many courts, including this Court recently in *dicta*, have used the legal terms "homosexuality" and "sexual orientation" in a manner that includes conduct. *See, e.g., Christian Legal Soc'y* v. *Martinez*, 139 S. Ct. 2971, 2990 (2010) ("Our decisions have declined to distinguish between status and conduct in this context."). The parties in this case do the same. We note, however, that these same terms do not necessarily bear the same meaning in the Catholic moral tradition, where the distinction between status or inclination and conduct is critical. *See, e.g.*, Congregation for the Doctrine of the Faith, *Some Considerations Concerning the Response to Legislative Proposals on the Non-discrimination of Homosexual Persons*, No. 12 (July 22, 1992); *see also* Brief *Amicus Curiae* of USCCB in *Christian Legal Society* v. *Martinez*, No. 08-1371, at 8-11 (Feb. 4, 2010). For purposes of this brief, we use these two terms exclusively as they are currently understood and applied in the law, not as they might be understood within Catholic teaching.

Disregarding the "voluntary action" limit on "distinguishing traits" would yield absurd results, as it would threaten to expand dramatically the range of legislative categories triggering heightened scrutiny. In particular, any "voluntary action" that is now or has ever been illegal would readily satisfy the factor of having suffered government disfavor or a history of discrimination based on the distinguishing trait. Where the conduct is still illegal, those with the trait could just as readily claim political powerlessness or the inability to attract the attention of lawmakers. Finally, if the current or former illegality of the "voluntary action" can be discounted as reflecting mere disapproval or discrimination, then it is a small step (if any) to conclude that the "voluntary action" bears no relation to the ability to perform or contribute to society.

The example of polygamists—a class that is defined in part by conduct—illustrates the point. One can substitute "polygamists" for "homosexuals" as that term is used in the *Windsor* opinion and arrive at the same conclusion for the former as the Second Circuit did with respect to the latter. *Windsor* v. *United States*, 699 F.3d 169, 181-82 (2d Cir. 2012) ("In this case, all four factors justify heightened scrutiny: A) [polygamists] as a group have historically endured persecution and discrimination; B) [polygamy] has no relation to aptitude or ability to contribute to society; C) [polygamists] are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter [polygamous relationships]; and D) the class remains a politically weakened minority."). Our point, of course, is not that the two are morally equivalent, but simply that the Second Circuit's logic leads to absurd results, and that the absurdity originates with the decision to ignore this Court's "voluntary action" limitation on "distinguishing traits" that may trigger heightened scrutiny.

2. The claim that homosexual persons today have "no ability to attract the attention of the lawmakers," *Cleburne*, 473 U.S., at 445, is frivolous. Indeed, courts rejected claims of political powerlessness on the part of homosexual persons *almost twenty-five years ago*. *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 466 (7th Cir. 1989) ("In these times homosexuals are proving that they are not without growing political power. It cannot be said 'they have no ability to attract the attention of the lawmakers.'"), *cert. denied*, 494 U.S. 1004 (1990); *High Tech Gays*, 895 F.2d at 574 ("homosexuals are not without political power; they have the ability to and do 'attract the attention of the lawmakers,' as evidenced by ... [anti-discrimination] legislation."). Since then, the movement to change the law in a manner favorable to people who have and want to act on homosexual inclinations has gained enormous ground.

As one federal district judge recently observed:

> Today, unlike in 1990, the public media are flooded with editorial, commercial, and artistic messages urging the acceptance of homosexuals.... Homosexuals serve openly in federal and state political offices. The President of the United States has announced his personal acceptance of the concept of same-sex marriage, and the announcement was widely applauded in the national media. Not only has the President expressed his moral

> support, he has directed the Attorney General not to defend against legal challenges to the Defense of Marriage Act.... It is exceedingly rare that a president refuses in his official capacity to defend a democratically enacted federal law in court based upon his personal political disagreements. That the homosexual-rights lobby has achieved this indicates that the group has great political power.

Sevcik v. *Sandoval*, No. 2:12-cv-00578-RCJ-PAL, slip op. at 19, 2012 WL 5989662 at *11 (D. Nev. Nov. 26, 2012).[12] Indeed, just weeks before this decision was handed down, three states by voter referendum recognized same-sex unions as marriage. *See* n.7, *supra*.

3. The distinction that DOMA makes between unions of one man and one woman and other interpersonal relationships is unmistakably "relevant to interests the State has the authority to implement." *City of Cleburne,* 473 U.S. at 441. As set forth in our *amicus* brief (pp. 4-19) in *Hollingsworth* v. *Perry*, No. 12-144, such a classification, when it appears in *state* legislation, is reasonably related to important government interests, such as the recognition of the unique value

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[12] Closely related to a claim of political powerlessness and with the same animating goal of protecting minorities from majoritarian impulses, a claim of "past discrimination" also weighs less in Windsor's favor given the dramatic changes in the social and legal landscape. *Sevcik*, slip op. at 18, 2012 WL 5989662 at *11 ("without a showing of continuing discrimination or lingering effects of past discrimination, the first factor [*i.e.*, historical discrimination] does not tend to support an argument that the group need be protected from majoritarian processes").

to society of procreation, and the unique value to children of being raised by a mother and father together. The classification specially affirms these unique contributions to society, which only opposite-sex couples may make. Likewise, when the *federal* government—for purposes of *federal* programs and *federal* entitlements—defines marriage to mean the union of one man and one woman, that characteristic is just as reasonably related to the aims of those programs and entitlements.

A decision by the federal government to support and encourage marriage, understood as the union of one man and one woman, through the provision of federal benefits to married couples or surviving spouses does not translate into a constitutional duty to provide the same benefits to persons who are not or were not married and who therefore are not similarly situated. *Plyler*, 457 U.S., at 216 ("The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same"), quoting *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940). That Windsor did not marry, as the federal government defines that term, is surely "relevant" to its decision not to provide her with a benefit it has reserved to married couples.

Finally, for all of the reasons above that DOMA is not subject to "intermediate" or "strict" scrutiny, DOMA is also not subject to "intensified" scrutiny under the alternative theory offered by the First Circuit. *Commonwealth of Massachusetts*, 682 F.3d at 10. In its equal protection cases, this Court has only applied one of three levels of judicial review: rational basis review, intermediate scrutiny, or strict scrutiny. There is no authority for a fourth level of review. Moreover, the three Supreme Court cases that the First Circuit cited in favor of "intensified" scrutiny involved rational basis review.[13] It is also unclear what criteria should trigger "intensified" scrutiny or how it would differ from other, established levels of review. For that reason, adoption of "intensified" scrutiny would leave the law in a state of uncertainty and confusion. And perhaps most importantly, the endorsement of a fourth level of review—something more than rational basis but less than heightened scrutiny—would open the door for lower courts to substitute their own policy judgments for those of legislatures on a range of hot-button social issues. Respectfully, that is not the role of the Judiciary.

In sum, for reasons we have discussed, application of either heightened or "intensified" scrutiny to legislative classifications that, like DOMA, touch upon neither a fundamental right nor a suspect or quasi-suspect class would seriously distort this Court's equal protection jurisprudence. Under rational basis review, DOMA should be upheld. All the legitimate reasons for which the government encourages and supports marriage as the union of one man and one woman, set forth in our *amicus* brief (pp. 4-19) in *Hollingsworth* v. *Perry*, No. 12-144, apply to DOMA as well. In addition, the federal government has a legitimate (indeed, a very strong) interest in the uniform administration of its own programs. *See* Bipartisan Legal Advisory Group's Brief on the Merits, at 33-37. That interest is served by a uniform definition of marriage for purposes of eligibility for federal marital benefits and exemptions like the ones at issue in this case. In the administration of federal programs, the federal government is not constitutionally bound by, and should not be held hostage to, redefinitions of marriage that are adopted in some states.[14]

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[13] *Romer*, 517 U.S. at 631-32 (applying "conventional [rational basis] inquiry" to conclude that Colorado's Amendment 2 violated the Equal Protection Clause); *City of Cleburne*, 473 U.S. at 450 (applying rational basis review to strike down a zoning ordinance that "appear[ed] ... to rest on an irrational prejudice against the mentally retarded"); *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 533, 538 (1973) (applying "traditional equal protection analysis" to conclude that a classification that rendered households of unrelated individuals ineligible for food stamps was "wholly without any rational basis"). *See Jackson*, slip op. at 83-84, 2012 WL 3255201 at *32 (concluding that *Romer*, *City of Cleburne*, and *Moreno* "do not support a new level of 'intensified scrutiny'").

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[14] Though rational basis review is the correct standard to apply, DOMA would also survive heightened or "intensified" scrutiny. Endorsing and encouraging the procreation and upbringing of children in households headed by their mother and father are interests of a compelling nature. As we have noted with respect to Proposition 8, no institution other than marriage joins a man and a woman together in a permanent and exclusive way and unites them to any children born of their union. No other institution ensures that children will have at least the opportunity to be raised by both a mother and father. Laws that encourage and promote the union of one man and one woman in marriage are an important remedy for the many problems surrounding the present-day decline of the family. For all of these reasons, it would be a serious misreading of the Constitution, and a grave injustice, to strike down DOMA.

II. Application of Stricter-Than-Rational Scrutiny to Classifications Based on Sexual Orientation Would Have Adverse Consequences in Other Areas of Law.

As we have argued, DOMA satisfies the rational basis test and, indeed, would survive even more rigorous scrutiny. Nevertheless, a decision by this Court to apply any scrutiny stricter than rational to classifications based on sexual orientation, as even the First Circuit recognized, "would have far-reaching implications…." *Commonwealth of Massachusetts*, 682 F.3d at 9.[15]

Three implications are especially noteworthy.

First, elevation of sexual orientation to a quasi-suspect class would immerse federal courts into a quagmire of family law issues reserved to the states, issues for which the Judicial Branch is not institutionally suited.[16]

Second, application of heightened scrutiny would hinder the ability of legislatures to create accommodations for those with religious or moral objections to homosexual conduct.[17] To take one example, through its domestic partnership law the State of Nevada extends many of the rights and benefits of marriage, but not the name "marriage," to persons in same-sex relationships. But "[t]here is at least one notable exception...." *Sevcik, supra,* slip op. at 8, 2012 WL 5989662 at *5. The statute does "not require a public or private employer in [Nevada] to provide health care benefits to or for the domestic partner of an officer or employee...." *Id.*, citing Nev. Rev. Stat. § 122A.210(1) (2011). This protects the religious liberty of those employers with a religious objection to providing such coverage. If, however, classifications based on "sexual orientation" trigger some form of heightened scrutiny, then reasonable legislative accommodations of this sort, in Nevada and everywhere else in the Nation, will be suspect. The ability of legislatures to relieve burdens on religious liberty, in turn, will be severely impeded. And, in the end, federal courts will be called upon time and again to address conflicts between this newly-suspect classification and the more well-established rights of religious liberty, conscience, speech, and association.

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[15] With due respect to the First Circuit, the same could be said of the "intensified" scrutiny that that court applied to DOMA.

[16] This is not an argument against DOMA, of course, because DOMA defines marriage for purposes of *federal* programs only, which is plainly within the *federal* government's power.

[17] The burdens on religious liberty that would arise from invalidation of Proposition 8, as discussed in our *amicus* brief (pp. 21-24) in *Hollingsworth* v. *Perry*, No. 12-144, would arise here as well were the Court to invalidate DOMA.

Third, if this Court were to conclude that the Constitution requires a redefinition of marriage to include persons in same-sex relationships—a requirement that we believe cannot reasonably be inferred from the Constitution—it is unclear where the logical stopping point would be. This Court will ultimately be asked why other interpersonal relationships are not entitled to similar inclusion, and why other "barriers" to marriage (such as those posed by youth, kinship, or multiplicity of parties) should not also have to be struck down as inconsistent with this redefinition.

All of these considerations counsel judicial restraint.

CONCLUSION

For the foregoing reasons, DOMA should be upheld and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Nos. 12-144 & 12-307

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, *et al.*,
Petitioners,
v.
KRISTIN M. PERRY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

AMICI CURIAE BRIEF OF UTAH PRIDE CENTER, CAMPAIGN FOR SOUTHERN EQUALITY, EQUALITY FEDERATION AND TWENTY-FIVE STATE-WIDE EQUALITY ORGANIZATIONS

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QUESTION PRESENTED

Whether systems of *de jure* denigration of gay Americans are permissible under the United States Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. SYSTEMS OF *DE JURE* DENIGRATION OPPRESS GAY AMERICANS IN MANY STATES 4

A. Educational Statutes Force Public Schools to Demean and Endanger Gay Children 6

1. Public School Statutes and Curricula Demean Gay Children 6

2. Gay Teenagers Are Targeted by Regulations Banning Gay-Straight Alliances in Public High Schools 9

3. Educational Statutes that Demean Gay People Harm Students 13

B. Bans on Adoption Harm Same-Sex Couples and Their Children 14

C. Marriage Bans and DOMA Deny Gay Citizens Access to Marriage 19

TABLE OF CONTENTS—Continued

Page

II. HEIGHTENED SCRUTINY IS WARRANTED TO PROTECT GAY CITIZENS FROM DISCRIMINATION ... 22

A. Gay Citizens Were Powerless to Prevent the Establishment of Systems of *De Jure* Denigration In Utah and Other States ... 23

B. Gay Communities in Utah and Other States Remain Politically Powerless .. 26

III. COURT INTERVENTION IS NECESSARY TO END *DE JURE* DENIGRATION OF GAY CITIZENS IN THE UNITED STATES ... 28

CONCLUSION ... 34

TABLE OF AUTHORITIES

CASES

Page(s)

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Page(s)

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	Page(s)
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Or. Const. art. XV, § 5a	20
S.C. Const. art. XVII, § 15	20
S.D. Const. art. XXI, § 9	20
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Tex. Const. art. I, § 32	20
Utah Const. art. I, § 29	20
Va. Const. art. I, § 15-A	20
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U.S. Const. amend. V	3, 30
U.S. Const. amend. XIV	3, 30
U.S. Const. art. IV, § 1	21
STATUTES	
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Page(s)

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STATEMENT OF INTEREST

This brief is submitted by organizations representing people—gay and straight alike—who are diverse in their beliefs and backgrounds but who share the conviction that gay and lesbian Americans—wherever they might live—are entitled to legal equality under the Constitution of the United States.[1] These twenty-eight *amici curiae* are non-governmental organizations from twenty-three states whose laws, to varying degrees, deprive legal equality to gay people from cradle to grave. These states have constructed systems of *de jure* (by law) denigration of gay citizens. Millions of gay citizens live in these states, including many of the states now urging this Court to preserve laws that both offend the Constitution and do harm to the lives of gay Americans. *Amici curiae* urge this Court to affirm the constitutional rights of all gay Americans by protecting their fundamental rights and by adopting heightened scrutiny to review laws discriminating against gays and lesbians.

The Utah Pride Center is a non-profit organization based in Salt Lake City that serves Utah's lesbian, gay, bisexual, and transgender ("LGBT") community. The Utah Pride Center advocates on behalf of gay Utahns and operates programs for the benefit of individuals and families throughout the Intermountain West. The *de jure* denigration in Utah is illustrative of hostile laws that exist in states represented by this brief's other *amici curiae*.

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[1] No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund this brief's preparation or submission. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk.

The Campaign for Southern Equality, an organization based in North Carolina, advocates across the South for the full equality of LGBT people under federal law. Equality Federation supports LGBT organizations engaged in state-level advocacy in 40 states. The other statewide organizations promoting these values and joining as *amici curiae* are Equality Alabama; Arkansas Initiative for Marriage Equality; Equality Arizona; Equality Florida; Georgia Equality; Add the Words, Idaho; Indiana Equality Action; Kansas Equality Coalition; Kentucky Equality Federation; Forum for Equality Louisiana; Equality Michigan; Mississippi Safe Schools Coalition; Montana Human Rights Network; Equality North Carolina; Oklahomans for Equality; The Equality Network (Oklahoma); Equality Ohio; South Carolina Equality; Gender Benders (South Carolina); Tennessee Equality Project; Equality Texas; Equality Virginia; People of Faith for Equality in Virginia; Fair Wisconsin; and Wyoming Youth Proud.

SUMMARY OF THE ARGUMENT

The ultimate question before this Court is whether gay Americans must continue to live as second-class citizens. Millions of Americans reside in states that have constructed systems of *de jure* denigration of their gay citizens. These discriminatory state laws have been amplified at the federal level by the Defense of Marriage Act ("DOMA"). Too many laws throughout the United States say to gay Americans: *You are not equal.*

At every stage of life—from the moment a child has an inkling of being gay, through adolescence, adulthood, and sometimes beyond the grave—gay Americans are haunted by laws that deny the existence of gay people, demean them as lesser human beings, deprive them of fundamental rights, and denigrate their lives and familial relationships. More than two-thirds of gay Americans now live under such discriminatory state laws, and the existence of these laws harms all Americans.

The arc of history is bending towards justice for gay Americans, but paradoxically, the last two decades have also brought intensified discrimination against gay people in some places. The dignity promised to gay Americans in *Lawrence v. Texas* is now being denied in many states. Systems of *de jure* denigration were hastily erected in the years after the prospect of marriage equality first emerged into the public square. The tide of public opinion has turned in favor of fairness and equality, but these systems of legal discrimination remain firmly entrenched.

The Constitution demands that all gay people—and not merely those fortunate to live in certain states—are entitled to the blessings of liberty and the promise of equal treatment under the law. The Judiciary should embrace its responsibility as a co-equal branch of government and enforce the Constitution's guarantees of due process and equal protection of the law for all, including gay Americans.

This Court once helped the nation on its journey to become a more perfect union by using judicial review to dismantle the systems of *de jure* racial segregation that once reigned in many states. This Court has also recognized rights attendant to citizenship for women by applying heightened scrutiny to laws that discriminated on the basis of sex.

Today this Court should affirm the constitutional rights of gay Americans by again adopting the judicial tool of heightened scrutiny, which will ensure that gay Americans will not be second-class citizens or strangers to the law. The promise of America will not be realized until there is legal equality for gay Americans everywhere—not just at Stonewall and in Seneca Falls, but also in Selma, Sacramento, and Salt Lake City.

ARGUMENT

I. SYSTEMS OF *DE JURE* DENIGRATION OPPRESS GAY AMERICANS IN MANY STATES.

This nation has made remarkable progress towards recognizing and achieving legal equality for gay Americans in the last two decades. Nevertheless, there are places in this country where pockets of prejudice have deepened. The cases at bar should not be resolved without deciding whether, by coincidence of birth or residency, some gay Americans must remain subject to *de jure* denigration by their home state.

Since this Court's decision in *Romer v. Evans*, some states have constructed comprehensive systems of *de jure* denigration of gay citizens. The State of Utah is among the jurisdictions that have enacted both statutes and state constitutional provisions that target homosexuality and gay people for disfavored treatment. As explained below, this legal regime negatively impacts gay citizens at every stage of life—undermining the hopes and human potential that liberty seeks to foster.

For example, Utah's educational laws require the inculcation of a negative view towards gay people; the state has waged a campaign over two decades to deter gay teens from joining Gay-Straight Alliances, preventing them from finding safety and support in public schools; the state has adopted both a constitutional amendment and statutes that deny gay couples access to the rights, responsibilities, and benefits of legal marriage; and the state has effectively prohibited gay couples from legally adopting children. The State of Utah has also excluded its gay citizens from any legal recognition or protection from discrimination. Gay Utahns have been made strangers to the state's laws.

Unfortunately, Utah's system of *de jure* denigration is not unique. Of the estimated eight million Americans who publicly identify as lesbian, gay, or bisexual, the majority now live in states that have singled out gay people for overt discrimination and official disparagement. Numerous states, including Utah, have education laws that demean gay students. In addition, many states have abridged the rights of same-sex couples to form and legally protect their families. And more than three dozen states ban marriage equality for same-sex couples by constitutional amendment, statute, or both.

Like all citizens, gay Americans and their families are entitled to respect and legal equality. Instead, these systems of *de jure* denigration inflict unnecessary and undeserved harm on them. It is imperative that this Court confront the reality that the law is being used to denigrate the dignity and humanity of gay Americans.

A. Educational Statutes Force Public Schools to Demean and Endanger Gay Children.

The *de jure* denigration of gay people in many states begins on the first day of school. Whether they are already conscious of their sexual orientation or are not yet aware of their identity, gay children enter schools that by law cannot affirm their identities. Instead, gay children receive a different lesson: *You are not normal. You are not welcome and we cannot protect you.*

1. Public School Statutes and Curricula Demean Gay Children.

Utah and other states, by using legal mandates, have created hostile school climates for both gay teenagers and the children of gay families.[3] Although

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[3] The following states have statutory sex-education requirements discriminatory to homosexual behavior: Alabama (Ala. Code § 16-40A-2(c) (2012)); Arizona (Ariz. Rev. Stat. Ann. § 15-716 (2012) (prohibiting schools from "promot[ing] a homosexual life-style," "portray[ing] homosexuality as a positive alternative life-style," and suggesting that some methods of homosexual sex are safe)); Florida (Fla. Stat. § 1003.46 (2013) (requiring public schools to "[t]each abstinence from sexual activity outside of marriage," as well as the "benefits of monogamous heterosexual marriage")); Louisiana (La. Rev. Stat. Ann. § 17:281 (2012) (prohibiting educational materials that include sexually explicit materials depicting homosexual activity)); Mississippi (Miss. Code Ann. § 37-13-171 (2012) (requiring that "abstinence-only education" teach Mississippi's law prohibiting sodomy)); Oklahoma (Okla. Stat. tit. 70, § 11-103.3 (2012) (requiring HIV/AIDS education to teach that homosexual activity is "primarily" responsible for contact with the AIDS virus)); South Carolina (S.C. Code Ann. § 59-32-30 (2011) (sex education may "not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning

"[a] positive school climate has been associated with decreased depression, suicidal feelings, substance use, and unexcused school absences among LGBT students," sympathetic educators in these states are left unequipped to protect, help or reach out to vulnerable gay youth. CDC, *Youth*, Lesbian, Gay, Bisexual and Transgender Health, http://www.cdc.gov/lgbthealth.htm (last updated May 19, 2011).

Utah has restricted instruction about homosexuality and prohibited the "advocacy of homosexuality" in its schools. Utah Code Ann. § 53A-13-101(1)(c)(iii)(A) (2012). Such statutes warp reality, chill speech and conduct, propagate false views and stereotypes, create a climate of fear about homosexuality, and expose gay children to ignorance, bullying and an "increased risk for experiences with violence." CDC, Lesbian, Gay, Bisexual and Transgender Health, *supra*. Utah's ban against the "advocacy of homosexuality" not only signals social disdain for homosexuality, but burdens gay students and children of gay families with moral disapproval from the State of Utah.[3]

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sexually transmitted diseases.")); Utah (Utah Code Ann. § 53A-13-101(1)(c)(iii)(A) (2012) ("prohibiting instruction in . . . the advocacy of homosexuality")).

[3] Although this Court has flatly rejected efforts to justify discrimination against gay persons based on efforts to differentiate between homosexual conduct and homosexual orientation, Utah and other states have not modified their educational standards to comport with this Court's decisions in *Lawrence* and *Christian Legal Society*. *See Christian Legal Soc'y v. Martinez*, 130 S.Ct. 2971, 2990 (2010) ("Our decisions have declined to distinguish between status and conduct in this context.")

The result is stifling. A teacher in Utah may not be able to provide assurances to a student's question, "Is it okay to be gay?" Indeed, educators may hesitate to show—or even recommend—the video message from the President of the United States encouraging gay students that "It Gets Better." *See* White House, *It Gets Better*, http://www.whitehouse.gov/itgetsbetter (last visited Feb. 24, 2013). Utah's system of laws thus ensures that gay students may never hear a school- or state-sponsored message such as "you are not alone," "you didn't do anything wrong," and you are valued "just the way you are." *Id.* Rather, the official state message is exactly the opposite: *You are not valued. You are lesser than your straight peers.*

Similar school policies in other states, such as South Carolina, invariably expand the law so that teachers fear discipline by mentioning the word "gay" or "homosexual," and risk their livelihood by discussing, for example, Harvey Milk as a history subject. *See, e.g.*, S.C. Code Ann. § 59-32-30(5) (homosexuality may only be discussed in the context of discussing sexually transmitted diseases). Elementary schools have removed picture books that feature same-sex parents. *See, e.g.*, Melinda Rogers, *Davis District Sued Over Flap About Lesbian Mothers Book*, Salt Lake Trib., Nov. 14, 2012. And professional educators fear repercussions even for being perceived as helping gay students. Even this brief—which advocates for the rights of gay citizens under the Constitution—would likely be barred from social studies courses in Utah and other states because of its "advocacy of homosexuality."

Sex education laws are also crafted to denigrate gay students and to exclude any validation of a gay student's sexual orientation. *See, e.g.*, Ala. Code § 16-

40A-2(c) (2012) (requiring all sex education courses in public schools to teach that homosexuality is not an acceptable lifestyle and that homosexual conduct is a criminal offense). Schools cannot provide gay teenagers with life-saving information about safer sexual practices and healthy same-sex relationships. Indeed, Utah's educators are effectively barred from giving gay teens hope of living happy and fulfilling lives with satisfying, committed adult relationships.

Collectively, these statutes demean same-sex families, teach that treatment of individuals as inherently inferior is acceptable under the law, send denigrating messages to children of same-sex parents, and undermine straight parents whose belief systems accept gay people as equal members of society. When state laws require schools to distort or ignore the scientific reality that sexual orientation is an immutable characteristic—and that homosexuality is a normal variation of human sexuality—both students and society suffer. *See* Am. Psychological Assoc., *Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, Aug. 5, 2009, http://www.apa.org/about/policy/sexual-orientation.aspx/. And thus *de jure* denigration taints the next generation.

2. Gay Teenagers Are Targeted by Regulations Banning Gay-Straight Alliances in Public High Schools.

States and communities reinforce the denigration of gay Americans with laws deterring gay teenage students from receiving vital affirmation and support at public high schools. School clubs that provide sanctuary for gay teens, called Gay-Straight Alliances, have been targeted for excessive regulation and prohibition by disapproving communities.[4]

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[4] Lawmakers and school boards in the following states have forbidden, significantly curtailed, or discouraged participation in Gay-Straight Alliances in public schools: California (*Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1138-39 (C.D. Cal. 2000) (school board voted to deny plaintiffs' application to form a Gay-Straight Alliance)); Florida (Letitia Stein, *Teachers Lash Out at Board Meeting*, St. Petersburg Times, Feb. 14, 2007, at 1B (reporting local school board's adoption of parental veto of student membership in school clubs after the formation of a Gay-Straight Alliance at a local high school)); Georgia (Ga. Code Ann. § 20-2-705 (2012) (requiring each local school board to distribute a list of student organizations and their missions, and to provide an opportunity for a parent or legal guardian to decline permission for his or her student to participate in a club or organization designated by him or her)); Idaho (Editorial, *House Ignores Big Issues to Meddle in School Clubs*, Idaho Statesman, Apr. 4, 2006, at 6 (reporting on proposed legislation that required school boards to obtain parental permission for student to join school clubs)); Indiana (*Franklin Cent. Gay/Straight Alliance v. Franklin Twp. Cmty. Sch. Corp.*, No. IP01-1518, 2002 U.S. Dist. LEXIS 24981, at *1-*2 (Dec. 26, 2002 S.D. Ind. 2002) (school board refused to recognize the Gay-Straight Alliance as a legitimate student club)); Kentucky (*Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 676-77 (E.D. Ky. 2003) (board of education denied Gay-Straight Alliance the same access to school facilities given to other student groups)); Minnesota (*Straights & Gays for Equality v. Osseo Area Schs.*, 471 F.3d 908 (8th Cir. 2006) (school board designated student group formed to promote tolerance and respect for the LGBT community as a non-curricular group, thus granting them only limited access to school avenues of communication)); Texas (*Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 556 (N.D. Tex. 2004) (school district and school officials denied requests made from Gay-Straight Alliance to distribute fliers, use the public address system, and be recognized as a student group)); Utah (*East High Sch. Prism Club v. Seidel*, 95 F. Supp. 2d 1239, 1242-43 (D. Utah 2000) (school district denied a club formed to address issues of civil

The State of Utah, for example, has made it more difficult for a gay teenager to start a school club than for a person to form a corporation.[5] Utah has enacted a statutory scheme that designates Gay-Straight Alliances as "noncurricular" and vests school administrators with the power to ban any club "involving human sexuality." Utah Code Ann. § 53A-11-1206(1)(b)(iii) (2012). This statute also restricts any club from "advocating or engaging in sexual activity outside of legally recognized marriage or forbidden by state law." *Id.* § 53A-11-1202. The impact of these provisions is unmistakable: only gay citizens are denied access to "legally recognized marriage" and the phrase "or forbidden by state law" breathes new life into Utah's criminal sodomy statute, *id.* § 76-5-403, which remains on the books even after *Lawrence v. Texas*.

Utah's school clubs statute further requires students to obtain parental consent to join any noncurricular club. *Id.* § 53A-11-1210. This requirement was not inspired by rogue chess clubs; it was aimed at keeping scared, gay teenagers in the closet. *See, e.g.*, Dan Harrie, *Bills Aim to Keep Gay Students in*

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rights, equality, discrimination and diversity access to the limited forum created for curriculum-related student clubs at a high school)); Virginia (*See* Tommy Denton, *Lawmakers Chose Politics Over Substance*, Roanoke Times, Feb. 27, 2007, at B8) (reporting on proposed legislation regarding parental permission for participation in Gay-Straight Alliances)).

[5] *Compare* Utah Code Ann. § 53A-11-1205 (2012) (annual formation of noncurricular school clubs) *with* Utah Code Ann. § 16-10a-120 (2012) (formation of business corporations); *see also* Floor Debate, H.B. 236, 57th Leg. Gen. Sess. (Utah Feb. 21, 2007) ("Look at the effort it takes to organize a noncurricular club. It's more severe than organizing a limited liability company or a corporation.") (statement of Rep. Scott Wyatt).

Closet, Salt Lake Trib., Feb. 13, 1996, at A4. This provision does particular harm to teenagers who are coming to terms with their identity and who fear rejection from their parents, families, and friends. It deprives vulnerable teens of a safe place of affirmation—a safety net that may be their only lifeline—at school.

Utah's crusade against Gay-Straight Alliances illustrates how states committed to *de jure* denigration have reacted sharply and swiftly to dash the hopes of gay teens. In 1996, a few brave students at Salt Lake City's East High School tried to start a Gay-Straight Alliance. Alarmed by this prospect, the Utah State Senate (Republicans and Democrats alike) rushed into a secret—and illegal—meeting to watch an anti-gay video and to plot to ban the fledgling club. *See* Louis Sahagun, *Utah Board Bans All Schools Clubs in Anti-Gay Move*, L.A. Times, Feb. 22, 1996. When asked about the violation of Utah's Open Meetings Act, the state senate president rationalized that the ends justified the means: "There are many of us who disagree with [the gay and lesbian] lifestyle. . . . That doesn't mean we look down at them. But I don't want their lifestyle taught to my children in our schools, and neither do my neighbors." Tony Semerad and Dan Harrie, *Anti-Gay Meet: Secret's Out, Anger Sets In--Unlike the Senate's Anti-Gay Meeting, the Anger of Critics is No Secret*, Salt Lake Trib., Feb. 1, 1996, at A1. Thereafter, in an episode that echoed an era when municipalities closed swimming pools rather than integrate them, the Salt Lake City School District shuttered *all* noncurricular school clubs rather than allow a Gay-Straight Alliance to meet under the federal Equal Access Act (which requires all comers or no clubs at all). *See id.*

The state's message to gay students: *You don't belong in our schools. You are alone.*

3. Educational Statutes that Demean Gay People Harm Students.

Legislative bullying against gay people has seeded the bullying of gay children in classrooms and on playgrounds. The connection between school policies and teen suicide hit home in Taylorsville, Utah on November 29, 2012. After being teased and ridiculed by peers for months—and after being suspended by school officials who had searched him and confronted him about having a condom in his backpack—an embarrassed and bullied gay teenager could take no more. He returned to school with a pistol and a single bullet. He shot himself as classmates watched in horror. Ray Parker, *Family Reveals Details About Utah Teen Who Committed Suicide*, Salt Lake Trib., Dec. 15, 2012 (discussing circumstances of suicide and suicide note).

Sadly, this tragedy is not an isolated incident but exemplar of the joint epidemic of anti-gay bullying and gay teen suicide. At least eight of ten gay middle and high school students have reported verbal harassment; four of ten have been physically harassed; six of ten have felt unsafe at school; and one in five has been the victim of physical assault. CDC, Lesbian, Gay, Bisexual and Transgender Health, *supra*. Longitudinal studies have also shown that the effects of bullying, for kids who survive it *and* for those who perpetrate it, extend into adulthood. William E. Copeland, et al., *Adult Psychiatric Outcomes of Bullying and Being Bullied by Peers in Childhood and Adolescence*, J. Am. Medicine Assoc. Psychiatry, Feb. 20, 2013. Nationally, adolescents in grades 7 through 12 who identify as lesbian, gay, or bisexual are more than twice as likely as their straight counterparts to have attempted suicide. CDC, Lesbian, Gay, Bisexual and Transgender Health, *supra*. It is no coincidence that suicide is the second leading cause of death for Utah youth ages 10-17. For Utah young adults ages 18-24, the suicide rate has been consistently higher than the national rate for more than a decade.[6]

Gay Americans are left wanting the "security of justice." Martin Luther King, Jr., *I Have a Dream*, Address at the March on Washington (Aug. 28, 1963). Any delay in vindicating their constitutional rights will be counted in the lives of gay teenagers. *De jure* discrimination creates a class of disfavored sons and daughters that offends the conscience of our Constitution. The pervasive denigration of gay teens in public schools demeans gay students, denies their dignity, and deprives them of hope for a bright future.

The despair of beaten-down students found voice in the Taylorsville teen's final note: *"I had a great life but I must leave."*

B. Bans on Adoption Harm Same-Sex Couples and Their Children.

Systems of *de jure* denigration of gay Americans extend from school to family life. Many states withhold legal recognition and protection for the families of gay people. These measures seek to exclude gay Americans from helping raise the next generation, while denying them one of the most socially valuable and life-enriching endeavors—raising children. The message to gay couples is brutal: *You can't be trusted to raise children together.*

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[6] *See* Suicide in Utah, 2006-2010: Youth (10-17 years), Utah Dep't of Health, Violence & Injury Prevention Program, http://www.health.utah.gov/vipp/pdf/FactSheets/Youth.pdfl (last updated September 2012); Suicide in Utah, 2006-2010: Young Adults (18-24 years), Utah Dep't of Health, Violence & Injury Prevention Program, http://www.health.utah.gov/vipp/pdf/Fact Sheets/YoungAdultSuicide.pdf (last updated September 2012).

Several states, Utah included, effectively ban adoption by same-sex couples. In Utah, "[a] child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state." *See* Utah Code Ann. § 78B-6-117(3) (2012). Although this statute appears on its face to apply to all "cohabitating" couples, the effect of the law is to preclude gay couples from adopting children. Cohabitating heterosexual couples are able to get married if they wish to adopt, but gay couples are denied this option. The law even allows single persons to adopt. As a result, the only people who are specifically excluded from adopting are those "cohabitating in a relationship that is not a legally valid and binding marriage." *Id.* § 78B-6-117(2)(b), (3). The statute thus impairs same-sex couples by making them ineligible to have legally recognized and protected families.

The legislative history demonstrates that Utah's law was intended to specifically prevent gay couples from adopting children or otherwise having families. During the senate floor debate, Senator Terry Spencer was asked if a blood relative, such as a grandmother, would be allowed to adopt her grandchild under the bill. Senator Spencer replied that a "grandmother would not be prohibited from adopting a grandchild of hers, unless [the] grandmother is gay. That's where the prohibition comes." Floor Debate, S.B. 63, 53rd Leg., Gen. Sess. (Utah Feb. 18, 2000) (statement of Sen. Terry Spencer).

The resulting legislative mandate precludes gay couples in Utah from legally adopting children together. These legal impediments cannot, however, prevent same-sex couples from becoming parents. The human reality is that same-sex couples have children regardless of adoption prohibitions. *See, e.g.*, Rosemary Winters & Lee Davidson, *Census: Gay Couple Households Boom in Utah*, Salt Lake Trib., July 28, 2011 (citing U.S. Census data showing over 1,800 same-sex households in Utah have children under 18 living with them). Gay men and women can and do have their own biological children, and gay individuals can still adopt in Utah and other states. It is a fact that gay couples are raising children in Utah as well as in every other state with an adoption ban. *See, e.g.*, Daphne Lofquist, Same-Sex Couple Households, U.S. Census Bureau, Sept. 2011, http://www.census.gov/prod/2011pubs/acsbr10-03.pdf (reporting that the 2010 nationwide American Community Survey found that "out of the 594,000 same-sex couple households, 115,000 reported having children").

Utah's adoption ban is not an isolated attack on gay American families. Several states around the country have implemented or maintain bans on adoption by gay couples.[7] Adoption bans denigrate the relationship between same-sex partners, both in the eyes of their children and society at large. These bans are also meant to de-legitimize the couple's relationship by forbidding them as a couple from raising children together. Utah's law permits gay people to raise children alone, but the State of Utah will not recognize that gay couples actually raise children together. Their families have been made invisible to the law.

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[7] States with functional bans on adoption by same-sex couples include: Alabama (Ala. Code § 26-10A-27 (2012) (permitting only husband and wife to "jointly" adopt a minor and limiting step-parent adoption to married spouse)); Georgia (*Bates v. Bates*, 730 S.E.2d 482 (Ga. Ct. App. 2012) (explaining step-parent adoption provided for under Georgia law excludes adoption by same-sex partner)); Michigan (Mich. Comp. Laws § 710.24

Bans on adoption by same-sex couples also penalize children because their parents are gay. By design, these laws make these children partially illegitimate—a disfavored outcome under any circumstance. American jurisprudence traditionally features a presumption in favor of legitimacy. After all, this Court has explained that "[t]he presumption of legitimacy was a fundamental principle of the common law," primarily due to the "aversion to declaring children illegitimate, thereby depriving them of rights of inheritance and succession," among other reasons. *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (omitting internal citation).

(2012) (permitting adoption by single person or "married" couple and thereby excluding adoption by same-sex couple); *see also* Op. Atty Gen. No. 7160 (Mich. 2004)); Mississippi (Miss. Code Ann. § 93-17-3 (2012) ("Adoption by couples of the same gender is prohibited.")); Nebraska (*In re Adoption of Luke*, 640 N.W.2d 374, 381-82 (Neb. 2002) (holding a same-sex partner cannot adopt the partner's child without terminating the other partner's parental rights)); Ohio (*In re Adoption of Doe*, 719 N.E.2d 1071, 1073 (Ohio Ct. App. 1998) (prohibiting a woman from adopting her same-sex partner's biological child); Ohio Rev. Code Ann. § 3107.03 (LexisNexis 2013) (step-parent adoption not available to same sex couples)); Utah (Utah Code Ann. § 78B-6-102(4) (2012)).

Children being raised by same-sex couples are thus deprived of the stability and benefits of having two legally recognized parents. This legal deprivation can affect every aspect of a child's life. These children must live with the specter of misfortune looming over their lives, as the death or disability of the legally recognized parent could cause a child to lose not just one but both parents.

Society also suffers when the law fails to recognize child-parent relationships. When only one of a child's parents is acknowledged by state law, doctors, teachers, and even soccer coaches can find their hands tied if an issue arises with the child. For this reason, same-sex parents live constantly in fear of the moment when the unavailability of the legally recognized parent and the legal impotence of the other parent might leave the child's welfare—or even life—in peril.

No child should be made to suffer because of the sexual orientation of the child's parents. And no couple should be denied the blessings and responsibilities of being legal parents simply because of their sexual orientation. Certain states may still wish to deter or prevent gay people from forming legally recognized families, but the reality is that gay Americans have families, spouses, and children. Gary J. Gates, Williams Institute, *LGBT Parenting in the United States*, Feb. 2013, http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf (stating that there are approximately 125,000 same-sex couples raising nearly 220,000 children in the United States).

The question is whether these family relationships are entitled to the same equal protection under the law as other families, or whether certain states may continue, in the name of "protecting children," to legislatively deprive gay couples and their children of the same rights as heterosexual families.

C. Marriage Bans and DOMA Deny Gay Citizens Access to Marriage.

The keystone of existing systems of *de jure* denigration of gay Americans is the denial of the right to marry. It is both the crux of the matter and the root of other forms of legal discrimination against gay citizens. The heartbreaking message to committed, gay couples: *Your love is unworthy of marriage.*[8]

The deprivation of the right to marry harms gay citizens and, as explained above, marks them with a stigma that has been used to justify other deprivations. Thirty-eight states currently prohibit same-sex marriage: at least twenty-nine by constitutional ban,[9] nine solely by statute, and many by both.[10] Nat'l Conference of State Legislatures, *State Laws Limiting Marriage to Opposite-Sex Couples*, http://www.ncsl.org/issues-research/human-services/state-doma-laws.aspx (last updated May 19, 2012). In addition, the Federal Defense of Marriage Act both

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[8] The injustice suffered by gay couples at the moment of denial of a marriage license has been profiled by the Campaign for Southern Equality, *We Do Campaign: Hattiesburg, Mississippi* (January 2, 2013), http://www.youtube.com/watch?v=NHKDZjuUjPU; *We Do Campaign - Across the South* (Jan. 13, 2013), http://www.youtube.com/watch?v=5cEhjUr-Jm0.

[9] Many states constitutionally ban same-sex marriage, including: Alabama (Ala. Const. art. I, §36.03); Alaska (Alaska Const. art. I, § 25); Arizona (Ariz. Const. art. XXX, § 1); Arkansas (Ark. Const. amend. 83, § 1); Colorado (Colo. Const. art. II, § 31); Florida (Fla. Const. art. I, § 27); Georgia (Ga. Const. art. I, §IV, para. I); Idaho (Idaho Const. art. III, § 28); Kansas (Kan. Const. art. XV, § 16); Kentucky (Ky. Const. § 233a); Louisiana (La. Const. art. XII, § 15); Michigan (Mich. Const. art. I, § 25); Mississippi (Miss. Const. art. XIV, § 263A); Missouri (Mo. Const. art. I, § 33); Montana (Mont. Const. art. XIII, § 7); Nebraska (Neb. Const. art. I, § 29); Nevada (Nev. Const. art. I, § 21); North Carolina (N.C. Const. art. XIV, § 6); North Dakota (N.D. Const. art. XI, § 28); Ohio (Ohio Const. art. XV, § 11); Oklahoma

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(Okla. Const. art. II, § 35); Oregon (Or. Const. art. XV, § 5a); South Carolina (S.C. Const. art. XVII, § 15); South Dakota (S.D. Const. art. XXI, § 9); Tennessee (Tenn. Const. art. XI, § 18); Texas (Tex. Const. art. I, § 32); Utah (Utah Const. art. I, § 29); Virginia (Va. Const. art. I, § 15-A); Wisconsin (Wis. Const. art. XIII, § 13).

[10] Alabama (Ala. Code § 30-1-19 (2012)); Alaska (Alaska Stat. §§ 25.05.011 and 25.05.013 (2013)); Arizona (Ariz. Rev. Stat. Ann. § 25-101 (2012)); Arkansas (Ark. Code Ann. § 9-11-109 (2012)); Colorado (Colo. Rev. Stat. Ann. § 14-2-104 (2012)); Delaware (Del. Code Ann. tit. 13, § 101 (2013)); Florida (Fla. Stat. § 741.212 (2013)); Georgia (Ga. Code Ann. § 19-3-3.1 (2012)); Idaho (Idaho Code Ann. §§ 32-202, 32-209 (2012)); Illinois (750 Ill. Comp. Stat. 5/212 (2012) (the pending Religious Freedom and Marriage Fairness Act has passed the state senate and may repeal the statutory ban on same-sex marriage)); Indiana (Ind. Code § 31-11-1-1 (2012)); Kansas (Kan. Stat. Ann. §§ 23-2501, 23-2508 (2011)); Kentucky (Ky. Rev. Stat. Ann. §§ 402.005, 402.020, 402.040, 402.045 (2012)); Michigan (Mich. Comp. Laws §§ 551.1, 551.271 (2012)); Minnesota (Minn. Stat. § 517.03 (2012)); Mississippi (Miss. Code Ann. § 93-1-1 (2012)); Missouri (Mo. Rev. Stat. § 451.022 (2013)); Montana (Mont. Code Ann. §§ 40-1-103, 40-1-401 (2012)); North Carolina (N.C. Gen. Stat. § 51-1.2 (2013)); Ohio (Ohio Rev. Code Ann. § 3101.01 (LexisNexis 2013)); Oklahoma (Okla. Stat. tit. 43, § 3.1 (2012)); Pennsylvania (23 Pa. Cons. Stat. § 1704 (2012)); South Carolina (S.C. Code Ann. § 20-1-15 (2011)); South Dakota (S.D. Codified Laws §§ 25-1-1, 25-1-38 (2012)); Tennessee (Tenn. Code Ann. § 36-3-113 (2012)); Texas (Tex. Fam. Code Ann. §§ 2.001, 6.204 (2012)); Utah (Utah Code Ann. § 30-1-2 (2012)); Virginia (Va. Code Ann. § 20-45.2 (2013)); West Virginia (W. Va. Code § 48-2-603 (2012)); Wisconsin (Wis. Stat. Ann. §§ 765.001(2), 765.01, 765.04, 765.30 (2012)); Wyoming (Wyo. Stat. Ann. § 20-1-101 (2012)).

forbids federal recognition of same-sex marriages and, in violation of the Constitution's Full Faith and Credit Clause, authorizes states like Utah to disregard lawfully performed marriages from other states between same-sex couples.

The combination of Utah's marriage ban and DOMA constitutes a particular threat to members of the U.S. Armed Forces. The State of Utah is home to several large military installations and hosts American service members from around the country. Just as the nation once ordered African-American soldiers to serve in segregated states, today the U.S. military commands gay service members to move into states that will not recognize their lawfully issued marriage licenses from a sister state.

On a daily basis, members of our military—including those who are gay and may have married legally in other states—put their lives on the line for our country. Yet if a married gay service member were to die off-base, the surviving spouse could be treated as a stranger by state law. The surviving spouse could even be denied control over the remains and funeral rites. *See, e.g.*, Utah Code Ann. § 58-9-602 (2012) (excluding same-sex partners from controlling the "disposition of a deceased person" in the absence of a legal designation). These circumstances would cause a gay member of our nation's Armed Forces to suffer from discrimination even beyond death.

The men and women of the United States military deserve to be honored for protecting our nation; they should not be denigrated either by DOMA or states like Utah that would decline to honor their marital vows. It is wrong that Americans can be torn asunder between the love of their lives and their service to our country. This Court should end the *de jure* denigration of gay Americans, and it should affirm that all Americans—whether gay or straight—have the right to marry the person whom they love.

II. HEIGHTENED SCRUTINY IS WARRANTED TO PROTECT GAY CITIZENS FROM DISCRIMINATION.

This Court should apply heightened scrutiny to review laws impacting gay citizens. Although prejudice against gay people is inherently irrational—and thus laws burdening them should not be able to survive even rational basis review—heightened judicial scrutiny is warranted. Gay Americans have long faced discrimination despite their contributions to our nation's public life, and yet they have always lacked the political power to prevent disfavored treatment from both the states and the federal government because of a distinguishing or immutable characteristic—namely, sexual orientation.

The political vulnerability of gay Americans is self-evident from the existence of systems of *de jure* denigration in Utah and other states. Gay Americans were not able to prevent the enactment of laws that demoted them to second-class citizenship, and they now lack both the political power and the realistic prospect of attaining full equality through democratic processes. That is because, after the passage of so many discriminatory state constitutional amendments, gay Americans—already underdogs in the political process—face daunting prospects for rolling back these provisions.

Heightened scrutiny is used as a judicial tool to safeguard the fairness of democratic processes and the constitutional rights of minorities. As explained below, the application of heightened judicial scrutiny is warranted here because gay citizens in Utah and other states have been—and will remain, perhaps indefinitely—unable to vindicate their right to legal equality through democratic processes.

A. Gay Citizens Were Powerless to Prevent the Establishment of Systems of *De Jure* Denigration In Utah and Other States.

Systems of *de jure* denigration are vivid examples of how gay citizens lack sufficient political power to thwart legislative assaults on their rights. For decades, gay communities across the nation have been subjected almost annually to legislation that attacks the dignity of gay citizens and diminishes their access to marriage and parenthood.

Utah's gay community, which comprises less than three percent of the state's population and which is mainly sprinkled around the state's capital city, was subjected to the combined forces of the largest and most powerful political, economic, social, and religious institutions in the Intermountain West. Gary J. Gates and Frank Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, Gallup, (Feb. 15, 2013) http://www.gallup.com/poll/160517/lgbt-percentage-highest-lowest-north-dakota.aspx. At the behest of these determined and motivated forces, the State of Utah constructed a comprehensive system of *de jure* denigration that not only deprives gay Americans of fundamental rights but has left them virtually as strangers to the law.

Gay citizens in Utah are particularly vulnerable to legislative bullying. The state's dominant political party, whose platform has been unremittingly hostile to gay rights, has controlled Utah's legislative and executive branches without interruption for the last quarter century. This political party has controlled both houses of the state's legislature with veto-proof majorities over the same period. *See, e.g.*, Karl N. Snow & David R. Irvine, Op-Ed., *The Fruits of Single-Party Government in Utah*, Salt Lake Trib., Oct. 9, 2010 (noting "25 years of veto-proof legislative majorities"). Meanwhile, more than sixty percent of the state's residents—and nearly ninety percent of the state's lawmakers—belong to a religious denomination that has encouraged its members to support only marriage between a man and a woman. *See, e.g.*, Editorial, *A Helping Hand: LDS Should Support Equal Rights*, Salt Lake Trib., Feb. 17, 2013; Matt Canham, *Census: Share of Utah's Mormon Residents Holds Steady*, Salt Lake Trib., Apr. 17, 2012.

With few allies and virtually no political influence at the statewide level, Utah's small gay community was utterly powerless to prevent its *de jure* denigration by the State of Utah. Each element of Utah's system of *de jure* denigration was adopted with overwhelming and often bipartisan support. For example, in 2000, the Utah legislature, which was then comprised of 72 Republicans and 32 Democrats, passed the state's ban on adoption by non-married, cohabitating couples. Utah State Legislature, Legislators by Session, (1986-current), http://le.utah.gov/asp/roster/roster.asp?year=2000 (last visited Feb. 23, 2013); Amendments to Child Welfare, 2000, Ch. 208, 2000 Utah Laws 208, codified at Utah Code Ann. § 78B-6-117 (2012). The bill cleared the house by a margin of 53 to 17; the senate's vote was even more overpowering: 27 to 1. Utah State Legislature, Bill Status, H.B. 103 Third Substitute Amendments to

Child Welfare, http://le.utah.gov/~2000/status/hbillsta/HB0103S3.txt (last updated Mar. 15, 2012).

The following year, the Utah legislature adopted legislation prohibiting any school instruction in "the advocacy of homosexuality." Public Education Curriculum Amendments, 2001 Ch. 105, § 1, 2001 Utah Laws 105, codified at Utah Code Ann. § 53A-13-101 (2012). This bill passed 49-19 in the house and with nary a dissenting vote in the state senate. Utah State Legislature, Bill Status, S.B. 75 Public Education Curriculum Amendments, http://le.utah.gov/~2001/status/sbillsta/SB0075.txt (last updated Mar. 19, 2012). In 2007, the Utah legislature targeted school clubs that "involve human sexuality." Student Club Act, 2007 Ch. 113, § 2, 2007 Utah Laws 114, codified at Utah Code Ann. §§ 53A-11-1201 to -1214 (2012). The purpose of the legislation was to give school administrators the ability to block school clubs supporting gay students. *See* Matt Canham, *Legislature Passes Anti-Gay Clubs Law*, Salt Lake Trib., Feb. 21, 2007. The bill also passed decisively with votes of 48 to 23 in the house and 16 to 8 in the senate. Utah State Legislature, Bill Status, H.B. 236 Seventh Substitute Student Clubs Amendments, http://le.utah.gov/~2007/status/hbillsta/hb0236s07.htm (last visited Feb. 14, 2013).

Similar margins prevailed in 2004 when the Utah legislature voted to authorize a ballot question limiting marriage to a man and a woman. This amendment, effectively prohibiting gay couples from marrying, passed 58 to 14 in the house and 20 to 7 in the senate. Utah State Legislature, Bill Status, H.J.R. 25 Joint Resolution on Marriage, http://le.utah.gov/~2004/status/hbillsta/hjr025.htm (last visited Feb. 14, 2013). The Utah electorate then passed the amendment overwhelmingly in the next general election by a margin of nearly two to one. *Utah [Election Results]*, Wash. Post, Nov. 24, 2004, http://www.washingtonpost.com/wp-srv/elections/2004/ut/ (last updated Nov. 24, 2004).

B. Gay Communities in Utah and Other States Remain Politically Powerless.

In Utah and other states, gay citizens remain politically powerless to undo what has been done to them by the law. The powerful force of inertia now weighs heavily against equality in many jurisdictions.

Gay citizens in too many states face virtually insurmountable obstacles to achieving legal equality through legislative means. In Utah, for example, the state's legislative and executive branches remain firmly under the control of a political party whose platform offers little if any support to gay rights. *See generally*, Utah Republican Party State Party Platform, "*Family Values*" (as ratified at the 2009 State Convention). The current legislature is one of the most lopsided in a generation. Lee Davidson, *Legislature: Really Republican, Mildly Moderate?* Salt Lake Trib., Jan. 27, 2013. The political environment remains wholly inhospitable to the interests of Utah's gay community, despite a climate of growing public support.

The stalled Common Ground Initiative stands as unfortunate evidence of the limitations of the democratic process for Utah's gay community. First announced in 2008 and since championed by Equality Utah, the Common Ground Initiative has sought to achieve legislative progress for Utah's gay community by focusing on subjects for which polling found majority public support. Equality Utah, Common

Ground Initiative, http://www.equalityutah.org/eu/common-ground-initiative/common-ground-initiative (last visited Feb. 24, 2013). For example, nearly three-fourths of Utahns have indicated in polls that they would support legislation protecting gay individuals from housing and employment discrimination. *See* Rosemary Winters, *Lawmakers Scrap Effort to Ban Anti-Gay Discrimination*, Salt Lake Trib., Feb. 4, 2012; Equality Utah Public Opinion Study, Dan Jones and Assoc., Oct. 11-22, 2011, http://www.equalityutah.org/images/stories/PDFs/Read_the_full_Survey_with_highlights_HERE.pdf (hereinafter "2011 Dan Jones Study"). Likewise, a majority of Utahns are in favor of gay persons having hospital visitation rights, medical decision-making rights, health insurance benefits, tax responsibilities and benefits, inheritance benefits, second-parent adoption, and domestic partnerships. *See* 2011 Dan Jones Study, *supra*.

In hopes of building bridges in these areas, the Common Ground Initiative has eschewed more divisive subjects and instead focused on seeking to translate existing public support into legislation in four seemingly less-controversial areas: (1) fair housing and employment non-discrimination, (2) expanded health care for LGBT families, (3) inheritance and insurance benefits, and (4) relationship recognition. Equality Utah, Common Ground Initiative, *supra*. Although legislation to ban housing and employment discrimination against LGBT persons has been proposed every legislative session for each of the past five years, it has never even been allowed out of a legislative committee. *See* Winters, *Lawmakers Scrap Effort to Ban Anti-Gay Discrimination*, *supra* (stating that the 2012 anti-discrimination bill represented the fifth time such a bill had been brought by Democrats and that it was tabled after a hearing).

Indeed, despite popular support, efforts to pass legislation in any of these areas have been entirely unsuccessful. *See, e.g.*, Rosemary Winters, *All Gay-Rights Bills Fall Short, But Neither Side Is Giving Up*, Salt Lake Trib., Feb. 18, 2009 (explaining Common Ground Initiative bills failed to pass during the legislative session).

Utah's gay community remains politically stymied state-wide. The state offers no recognition or protections for its gay citizens. Utah law provides no recognition for gay relationships, no protection from housing or employment discrimination, and no hospital visitation or probate rights for same-sex couples. In addition, neither Utah's hate-crimes law nor its hazing and bullying statutes recognize sexual orientation as a protected category. Here again, Utah is illustrative. Where there are pockets of prejudice, gay citizens cannot obtain protection from the law.

This Court should bring an end to *de jure* denigration and ensure that gay Americans will not be treated as second-class citizens or foreigners to the law. The adoption of heightened scrutiny will advance the cause of justice by providing courts with both the judicial tools and the clear direction to dismantle the systems of *de jure* denigration burdening gay Americans across the country.

III. COURT INTERVENTION IS NECESSARY TO END *DE JURE* DENIGRATION OF GAY CITIZENS IN THE UNITED STATES.

This Court should embrace its constitutional responsibility as a co-equal branch of government to enforce the rights of gay citizens in every state. This

Court should declare an end to the *de jure* denigration of gay Americans.

Despite growing acceptance of gay people nationwide, the laws of certain states remain hostile to the equality of gay people. Marjorie Connelly, *Support for Gay Americans Growing, but U.S. Remains Divided*, N.Y. Times, Dec. 7, 2012. In a nation as large and diverse as the United States, there will always be pockets of prejudice, places where the rights of minority groups can be vulnerable to the legislative whims of localized majorities. *See* Pew Research Center for the People and the Press, Behind Gay Marriage Momentum, Regional Gap Persist (Nov. 9, 2012), http://www.people-press.org/2012/11/09/behind-gay-marriage-momentum-regional-gaps-persist/ (reporting that comparison of poll data from "different regions of the country [shows] wide disparities in attitudes about same-sex marriage").

Millions of gay Americans now live in states with systems of *de jure* denigration. These systems of discrimination are proving resistant to repeal, even in places where public opinion has shifted decisively in favor of gay rights. Barriers to reversing state constitutional provisions are considerable, and the legislative process defaults to inertia and rewards the avoidance of potentially controversial topics. As a result, systems of *de jure* denigration have proven impervious to dismantlement through legislative means. Judicial action is thus the only available remedy to ensure that gay Americans in every state will have equal access to the privileges and immunities of citizenship and equal treatment under the law.

Fundamental rights and constitutional guarantees should not depend on residency in certain states. This Court has a proud tradition, acquitted by history, of deploying heightened judicial review to protect targeted minority groups from majoritarian abuse. All gay Americans—and not just those fortunate enough to live in certain communities or states—are entitled to equal protection and due process of law.

This Court can also bring healing to the nation by demonstrating that the humanity of gay citizens can be reconciled with respect for religious freedom. The Constitution guarantees both the right of gay people to be treated as equals under civil law and the right of individuals and organizations to hold beliefs about homosexuality in accordance with their own consciences. By treating homosexuality in the secular context with neutrality, and by affirming that all people—whether gay or straight—are entitled to equal treatment under the Constitution, this Court can unify the country around our shared values of liberty and justice for all.

Recognition of legal equality for gay Americans will bring the nation closure, not *Kulturkampf*. Apocalyptic predictions—none realized—have preceded every major milestone in the gay rights movement. To the contrary, the integration of gay Americans into the United States military has "had no overall negative impact on military readiness or its component dimensions, including cohesion, recruitment, retention, assaults, harassment or morale." Aaron Belkin, et al., *One Year Out: An Assessment of DADT Repeal's Impact on Military Readiness*, Palm Center (Sept. 20, 2012), *available at* http://www.palmcenter.org/files/One%20Year%20Out_0.pdf. The availability of marriage equality has supported couples and families around the country without doing any harm to marriages between heterosexual couples. *See, e.g.*, Brief for Respondent at 35 n.6, *Hollingsworth v. Perry*, No. 12-144 (Aug. 24, 2012). Indeed, this Court's previous decisions protecting gay citizens have been accepted and integrated into the fabric of American society.

The nation is now ready to support a decision recognizing the legal equality of its gay citizens. Sixty-three percent of Americans describe discrimination against gays and lesbians as a serious problem in the United States. Jeffrey M. Jones, *Most in U.S. Say Gay/Lesbian Is a Serious Problem*, Gallup, Dec. 6, 2012, http://www.gallup.com/poll/159113/most-say-gay-lesbian-bias-serious-problem.aspx. A majority of Americans believe the country will reach a consensus on gay rights; in fact, a consensus has already emerged among Americans between the ages of 18 and 29, who overwhelmingly support legal equality for gay citizens. *Id.*; Connelly, *Support for Gay Americans Growing, but U.S. Remains Divided*, *supra* ("A strong majority of younger Americans now support same-sex marriage. In a Gallup Poll conducted [in November 2012], 73 percent of people between 18 and 29 years old said they favored it, while only 39 percent of people older than 65 did."). Such acceptance is growing and is not limited to young people in more liberal states. *Id.* Notably, across the country and even in Utah, a higher percentage of people now support marriage equality than supported interracial marriage before the *Loving v. Virginia* decision.[11]

Recent elections have also evidenced the shifting tide of public opinion. In the 2012 elections, for the first time, voters in three states approved marriage equality laws and, in Minnesota, defeated a proposed constitutional amendment to bar same-sex marriage. Ben Brumfield, *Voters Approve Same-Sex Marriage for the First Time*, CNN, Nov. 7, 2012, http://www.cnn.com/2012/11/07/politics/pol-same-sex-marriage. America's first lesbian senator was elected to represent Wisconsin. *Id.* President Obama, the first president to endorse same-sex marriage, was re-elected. *Id.* Even in spheres once thought to be hostile to homosexuality, such as professional team sports and rap music, gay citizens are finding more acceptance. Grant Wahl, SI.com, *Robbie Rogers Coming Out, Soccer's Reaction, Mark Steps Forward*, Feb. 15, 2013, http://sportsillustrated.cnn.com/soccer/news/20130215/robbie-rogers-coming-out-gay-retire/ (noting positive reception received by U.S. Soccer stars Megan Rapinoe, David Testo, and Robbie

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[11] One year after this Court decided *Loving v. Virginia*, 388 U.S. 1 (1967), only twenty percent of Americans approved of marriage between black and whites. Jeffrey M. Jones and Lydia Saad, *Record-High 86% Approve of Black-White Marriages*, Gallup, Sept. 12, 2011, http://www.gallup.com/poll/149390/Record-High-Approve-Black-White-Marriages.aspx. Conversely, in May 2012, "[f]ifty percent of Americans believe[d] same-sex marriages should be recognized by law as valid, ..." Frank Newport, *Half of Americans Support Legal Gay Marriage*, Gallup, May 8, 2012, http://www.gallup.com/poll/154529/Half-Americans-Support-Legal-Gay-Marriage.aspx. And, in Utah "28 percent of those surveyed [in a 2012 poll] support[ed] gay marriage. . . ." Robert Gehrke, *Huntsman Says Equality for Gays and Lesbians a Continuing Journey*, Salt Lake Trib., Sept. 29, 2012.

Rogers); Zack Goldman, *Robbie Rogers and the Personification of E Pluribus Unum: the Reaction to Robbie Rogers Coming Out Shows Much of What Is Best About the US: Tolerance, Dignity and Human Rights*, Guardian, Feb. 18, 2013, http://www.guardian.co.uk/sport/the-shin-guardian-blog/2013/feb/18/robbie-rodgers-coming-out-gay-america (reporting that U.S. soccer fans responded to Robbie Rogers' "coming out" with "overwhelming and unwavering" support); Gerrick D. Kennedy, *Grammy 2013: Frank Ocean Wins for Urban Contemporary Album*, L.A. Times, Feb. 10, 2013 (noting that Ocean's letter revealing he had been in love with a man was "undoubtedly the glass ceiling moment for music. Especially black music, which had long been missing a voice like Ocean's to break the layers of homophobia often found in contemporary hip-hop and R&B.").

It is getting better for gay Americans. But this progress should inspire this Court to action, not silence. Against the certainty of continued harm to gay Americans this Court must not defer to mere hopes of legislative change. "Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds." Letter from Martin Luther King, Jr. to His Fellow Clergymen (Apr. 16, 1963), *available at* http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

This Court should not be silent as gay Americans suffer from *de jure* denigration. To loving gay couples in Sacramento, and to adoptive gay parents in South Bend, as well as to gay teenagers in Taylorsville, Utah, the law of the United States must say: *You are equal.*

CONCLUSION

Because the Constitution neither knows nor tolerates classes among its citizens, gay Americans must be treated equally under the law—everywhere. This Court should affirm the fundamental rights of gay Americans and adopt heightened scrutiny to review laws targeting gay people.

The best way to stop discrimination on the basis of sexual orientation is for this Court to stop *de jure* discrimination against gay Americans.

The judgments from the courts of appeal in *Windsor v. United States* and *Hollingsworth v. Perry* should be affirmed.

Respectfully submitted,

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CURIAE
BRIEF

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No. 12-307

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In The
Supreme Court of the United States

◆

UNITED STATES,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, ET AL.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

◆

BRIEF OF WESTBORO BAPTIST CHURCH AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY SUGGESTING REVERSAL (ON MERITS ISSUE)

◆

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

- I. THE GOVERNMENT HAS A COMPELLING INTEREST IN PROTECTING THE PEOPLE FROM THE DESTRUCTIVE EFFECTS OF SAME-SEX MARRIAGE 4

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Church of the Holy Trinity v. United States, 143 U.S. 457, 12 S. Ct. 511, 36 L. Ed. 226 (1892) 22

Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) 7

Lynch v. Donnelly, 465 U.S. 668, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984) 24

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United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330, 127 S. Ct. 1786, 167 L. Ed. 2d 655 (2007) 4

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TABLE OF AUTHORITIES – Continued

Page

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"Brief Amicus Curiae of Mother Teresa of Calcutta, in Support of Petitioners' Petitions for a Writ of Certiorari," *Human Life Review*, Spring, 2001, Vol. 27, Issue 2 4

Commentary by Adam Clarke on Psalm 9:17 6

Commentary by Charles Haddon Spurgeon on Psalm 82:1 17

Commentary by Dr. John Gill on Psalm 82:1 17

Commentary by Dr. John Gill on Luke 17:32 12

Commentary by Jamieson, Fausset and Brown on Luke 17:32 12

Commentary by Matthew Henry on Nahum 1:1 21

1 Corinthians 7:39, *Holy Bible* 19

TABLE OF AUTHORITIES – Continued

Page

Deuteronomy 11:26-28, *Holy Bible* 28

Deuteronomy 32:35, *Holy Bible* 5

Ephesians 5:23, *Holy Bible* 20

Ephesians 5:31-32, *Holy Bible* 18

Genesis 7:11-23, *Holy Bible*...15

Genesis 18:32, *Holy Bible*..27

Genesis 19:1-28, *Holy Bible* 7

Gallup Values and Beliefs survey, 2008......................19

Hebrews 13:4, *Holy Bible* 20

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Jonah 3:6-9, *Holy Bible* 27

Jonah 3:10, *Holy Bible* 28

TABLE OF AUTHORITIES – Continued

Page

Jude 1:7, *Holy Bible* 11

Judges, chapters 19-21, *Holy Bible* 12

Letter to the editor, *Topeka Capital Journal*, December 15, 2009 2

Leviticus 18:22, *Holy Bible* 12

Leviticus 20:13, *Holy Bible* 12

Luke 17:27, *Holy Bible* 13

Luke 17:32, *Holy Bible* 11

Malachi 2:16, *Holy Bible* 19

Mark 10:11, *Holy Bible* 19

Matthew 7:6, *Holy Bible* 12

Matthew 19:3-8, *Holy Bible* 18

Nahum 1:1, *Holy Bible* 21

2 Peter 2:7-12, *Holy Bible* 13

Philippians 3:2, *Holy Bible* 12

Proverbs 14:34, *Holy Bible* 7

Proverbs 18:22, *Holy Bible* 20

Proverbs 31:10, *Holy Bible* 20

Psalm 9:17, *Holy Bible* 6

Psalm 33:12-15, *Holy Bible* 29

Psalm 82:1, *Holy Bible* 17

Revelation 19:7, *Holy Bible* 20

Revelation 22:15, *Holy Bible* 13

TABLE OF AUTHORITIES – Continued

Page

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Romans 1:21-31, 32 *Holy Bible* 12

Romans 7:2, *Holy Bible* 19

Sanford Hoadley Cobb, *The Rise of Religious Liberty in America* 25

"Sinners in the Hands of an Angry God," sermon by Jonathan Edwards 5

Tracy Fessenden, "The Nineteenth-Century Bible Wars and the Separation of Church and State," *Church History*, Vol. 74, No. 4 (Dec. 2005) 24

The Westboro Baptist Church of Topeka, Kansas, respectfully submits this *amicus curiae* brief in support of no party, but in favor of reversal.

◆

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Westboro Baptist Church (WBC) is a small nondenominational independent Bible-believing flock in Topeka, Kansas (since 1955), which has engaged this nation in a robust debate about its policies of sin and the consequence of such pervasive proud sin to the country and its people. WBC began picketing over 20 years ago, warning that homosexuality was going to be the destruction of America. After the tragic events of September 11, 2001, WBC increased its street and social-media ministry, urging Americans to put away policies of proud sin, mourn, repent, and obey God. Today the number one moral issue facing this nation is same-sex marriage. Westboro has testified to the world about this issue:

> The Westboro Baptists may be on the right track after all, although gay marriage,

---

[1] Pursuant to S. Ct. R. 37.6, the *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

> not just homosexuality, could be the catalyst for the consummation.
>
> With several states ratifying gay marriage and movements afoot to extend it elsewhere, it could become general. The Babylonian Talmud reveals that until now only one society in all of history practiced it, the Antediluvian.
>
> The Babylonian Talmud also says the practice was the reason for Noah's flood. The risk of retribution is real.
>
> Interestingly, Jesus said the time of his coming would resemble those far off days. He even mentioned "marriage and giving in marriage."
>
> We in Australia have just had our first such wedding. It's a worry.
>
> Ken Hood, Clifton, Australia[2]

As this Honorable Court sets out to consider whether to protect same-sex marriage – to give the imprimatur of the government to marriages between same-sex couples – WBC has a vested interest in speaking up. WBC members have toiled in the American vineyard, entreating Americans to get right with God. Like every citizen of this land, WBC members have an everlasting and non-delegable duty to warn our fellow citizens – and especially our leaders – of the consequence of continuing down this path toward same-sex marriage as a permanent fixture in the culture and mores of the United States.

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[2] Letter to the editor, *Topeka Capital Journal*, December 15, 2009, available Online at http://bit.ly/13fPkhi.

◆

SUMMARY OF THE ARGUMENT

The government has responsibility to protect the health, safety and welfare of the people. Of all the harms that a society can face, none are worse than incurring the wrath of God by a blatant policy of defiance of and disobedience to His plain standard. This nation was founded on Bible principles, and the laws of America arose from Scriptural precepts. America has erred in making fornication, adultery, divorce, remarriage, abortion-for-convenience-on-demand and sodomy, standard fare in this country. It is time to reverse that course, and for this Court to squarely hold that the governments of America have a compelling interest in upholding traditional opposite-sex marriage, and further in *protecting the people* from the devastating effects of same-sex marriage. Separation of church and state, while prohibiting government from interfering in issues of doctrine or church governance, does not prohibit the government from promulgating laws that institute the standards of God on moral issues. Just as the government is empowered to outlaw murder, the government is empowered to outlaw same-sex marriage. This nation that God blessed and built into a super power is going to perish if this Court and the governments of this land bless same-sex marriage through government license. WBC pleads for reversal.

◆

ARGUMENT

I. THE GOVERNMENT HAS A COMPELLING INTEREST IN PROTECTING THE PEOPLE FROM THE DESTRUCTIVE EFFECTS OF SAME-SEX MARRIAGE.

"[G]overnment is vested with the responsibility of protecting the health, safety, and welfare of its citizens. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985) ('The States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons' (internal quotation marks omitted))," *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 342-343, 127 S. Ct. 1786, 1795, 167 L. Ed. 2d 655, 667 (2007).

Sister Teresa of Calcutta once addressed this Court, urging it not to make abortion the law of the land, and told the Court: "A nation founded on these principles [of the Declaration of Independence] holds a sacred trust: to stand as an example to the rest of the world . . . " and that "America has kept faith."[3]

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[3] "Brief *Amicus Curiae* of Mother Teresa of Calcutta, in Support of Petitioners' Petitions for a Writ of Certiorari,"

(Continued on following page)

The whole world is now watching to see if the Highest Court in the Land – truly the most powerful court in the world – referred to as the conscience of the nation – is going to set in motion the most ruinous of all sins, to the great harm and detriment of the citizens of this land.

Nothing is more harmful to the health and welfare than sin. In his best known sermon, "Sinners in the Hands of an Angry God," expounding Deuteronomy 32:35, *Holy Bible*, "Their foot shall slide in due time," American theologian Jonathan Edwards said this:

> Sin is the ruin and misery of the soul; it is destructive in its nature; and if God should leave it without restraint, there would need nothing else to make the soul perfectly miserable. The corruption of the heart of man is a thing that is immoderate and boundless in its fury; and while wicked men live here, it is like fire pent up by God's restraints, whereas if it were let loose it would set on fire the course of nature; and as the heart is now a sink of sin, so, if sin was not restrained, it would immediately turn the soul into a fiery oven, or a furnace of fire and brimstone.[4]

Human Life Review, Spring, 2001, Vol. 27, Issue 2, pp. 97-100. found Online at http://bit.ly/W11wHv.

[4] This sermon can be found Online at http://bit.ly/Secdkc. Jonathan Edwards' (1703-1758) biography can also be found Online at http://bit.ly/VEhsIW, as part of a full collection of information and sermons at the Online Jonathan Edwards

(Continued on following page)

Nothing is more destructive to a nation than wholesale rejection of the plain standard of God. "The wicked shall be turned into hell, and all the nations that forget God."[5] Adam Clarke: "They will not live in his fear. There are both *nations* and *individuals* who, though they *know* God, *forget* him, that is, are *unmindful* of him, do not *acknowledge* him in their designs, ways, and works. These are all to be *thrust down into hell*" (emphasis in original).[6]

Center at Yale University. This revivalist, theologian, pastor, philosopher and (briefly before his death) president of the College of New Jersey (later Princeton University), represents the kind of preacher found in this nation over two hundred years ago. Such preaching was observed by Alexis de Tocqueville when he toured America in 1831, and reported back to France.

> [B]ut there is no country in the whole world in which the Christian religion retains a greater influence over the souls of men than in America; and there can be no greater proof of its utility, and of its conformity to human nature, than that its influence is most powerfully felt over the most enlightened and free nation of the earth

Alexis de Tocqueville, *Democracy in America*, 3rd ed., David Campbell Publishers Ltd., 1994, at 303-304. President Dwight D. Eisenhower characterized Tocqueville's words in a campaign address in Boston, Massachusetts on November 3, 1952, thusly: "Not until I went into the churches of America and heard her pulpits flame with righteousness did I understand the secret of [America's] genius and power. America is great because she is good, and if America ever ceases to be good, America will cease to be great." See Online at http://bit.ly/RAyU0r.

[5] Psalm 9:17, *Holy Bible*.

[6] This commentary by British Methodist theologian and biblical scholar Adam Clarke (1762-1832) can be found Online at http://bit.ly/VEndpW.

"Righteousness exalteth a nation: but sin is a reproach to any people."[7] "But in every nation he that feareth him, and worketh righteousness, is accepted with him."[8]

It is no small matter for a nation to accept the sin of sodomy, and the lifestyle or agenda[9] that it entails. The description of the utter annihilation of Sodom and Gomorrah and three nearby cities is stark, and directly tied to homosexuality. This historical event described in Genesis 19:1-28, *Holy Bible*, must be considered at this hour:

> And there came two angels to Sodom at even; and Lot sat in the gate of Sodom: and Lot seeing them rose up to meet them; and he bowed himself with his face toward the ground;

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[7] Proverbs 14:34, *Holy Bible*.

[8] Acts 10:35, *Holy Bible*.

[9] We use the term "agenda" advisedly. Justice Scalia in his dissent in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), said: "Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct," 539 U.S. at 602, 123 S. Ct. at 2496, 156 L. Ed. 2d at 541. An essential part of this agenda is the government's blessing on these unscriptural unions in the form of a marriage license, which as the Ninth Circuit recently noted has unique meaning, see *Perry v. Brown*, 681 F.3d 1065, 1075, 1078 (9th Cir. 2012), *cert. granted*, *Hollingsworth v. Perry*, 2012 U.S. LEXIS 9416 (Dec. 7, 2012).

And he said, Behold now, my lords, turn in, I pray you, into your servant's house, and tarry all night, and wash your feet, and ye shall rise up early, and go on your ways. And they said, Nay; but we will abide in the street all night.

And he pressed upon them greatly; and they turned in unto him, and entered into his house; and he made them a feast, and did bake unleavened bread, and they did eat.

But before they lay down, the men of the city, even the men of Sodom, compassed the house round, both old and young, all the people from every quarter:

And they called unto Lot, and said unto him, Where are the men which came in to thee this night? bring them out unto us, that we may know them.

And Lot went out at the door unto them, and shut the door after him,

And said, I pray you, brethren, do not so wickedly.

Behold now, I have two daughters which have not known man; let me, I pray you, bring them out unto you, and do ye to them as is good in your eyes: only unto these men do nothing; for therefore came they under the shadow of my roof.

And they said, Stand back. And they said again, This one fellow came in to sojourn, and he will needs be a judge: now will we deal worse with thee, than with them. And they pressed sore upon the man, even Lot, and came near to break the door.

But the men put forth their hand, and pulled Lot into the house to them, and shut to the door.

And they smote the men that were at the door of the house with blindness, both small and great: so that they wearied themselves to find the door.

And the men said unto Lot, Hast thou here any besides? son in law, and thy sons, and thy daughters, and whatsoever thou hast in the city, bring them out of this place:

For we will destroy this place, because the cry of them is waxen great before the face of the LORD; and the LORD hath sent us to destroy it.

And Lot went out, and spake unto his sons in law, which married his daughters, and said, Up, get you out of this place; for the LORD will destroy this city. But he seemed as one that mocked unto his sons in law.

And when the morning arose, then the angels hastened Lot, saying, Arise, take thy wife, and thy two daughters, which are here; lest thou be consumed in the iniquity of the city.

And while he lingered, the men laid hold upon his hand, and upon the hand of his wife, and upon the hand of his two daughters; the LORD being merciful unto him: and they brought him forth, and set him without the city.

And it came to pass, when they had brought them forth abroad, that he said, Escape for thy life; look not behind thee, neither stay thou in all the plain; escape to the mountain, lest thou be consumed.

And Lot said unto them, Oh, not so, my Lord:

Behold now, thy servant hath found grace in thy sight, and thou hast magnified thy mercy, which thou hast shewed unto me in saving my life; and I cannot escape to the mountain, lest some evil take me, and I die:

Behold now, this city is near to flee unto, and it is a little one: Oh, let me escape thither, (is it not a little one?) and my soul shall live.

And he said unto him, See, I have accepted thee concerning this thing also, that I will not overthrow this city, for the which thou hast spoken.

Haste thee, escape thither; for I cannot do any thing till thou be come thither. Therefore the name of the city was called Zoar.

The sun was risen upon the earth when Lot entered into Zoar.

> Then the LORD rained upon Sodom and upon Gomorrah brimstone and fire from the LORD out of heaven;
>
> And he overthrew those cities, and all the plain, and all the inhabitants of the cities, and that which grew upon the ground.
>
> But his wife looked back from behind him, and she became a pillar of salt.
>
> And Abraham gat up early in the morning to the place where he stood before the LORD:
>
> And he looked toward Sodom and Gomorrah, and toward all the land of the plain, and beheld, and, lo, the smoke of the country went up as the smoke of a furnace.

Every adult, child, suckling and animal – utterly destroyed. Sodom is held forth as an example in the New Testament, for instance: "Even as Sodom and Gomorrah, and the cities about them in like manner, giving themselves over to fornication, and going after strange flesh, are set forth for an example, suffering the vengeance of eternal fire."[10]

Concerning this event, Christ said, "Remember Lot's wife,"[11] because she looked back on a people God judged to be sinful to the point of destruction, with fondness and longing. Dr. John Gill on this passage:

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[10] Jude 1:7, *Holy Bible*.

[11] Luke 17:32, *Holy Bible*.

"[T]he reason of her looking was either to see what would be the end of her father's house and family; or as others, because her heart yearned after her daughters, and she looked back to see if they followed her."[12] Jamieson, Fausset, Brown: "Her heart was in Sodom still."[13] Space does not permit recounting the horrific historical description of the civil war that erupted in ancient Israel after sodomites of the tribe of Benjamin raped a woman to death, and the men of that tribe fought for that sin. The tribe of Benjamin was nearly wiped out, as you can read in the book of Judges, chapters 19-21, *Holy Bible*. It is not a small thing in God's eyes for a nation to embrace proud sin, let alone the sin of homosexuality.[14]

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[12] This commentary by theologian, English Baptist preacher and biblical scholar Dr. John Gill (1697-1771) can be found Online at http://bit.ly/VTT56Q.

[13] This commentary by theologian, Scotland preacher and biblical scholar Robert Jamieson (1802-1880); theologian, England preacher and biblical scholar A. R. Fausset (1821-1910); and Scotland preacher, professor of theology and biblical scholar David Brown (1803-1897); published in 1871, can be found Online at http://bit.ly/11hJDkp.

[14] Many more passages are found in the Scriptures condemning homosexuality, including the Mosaic code forbidding and calling for the death penalty for homosexuality, Leviticus 18:22 and Leviticus 20:13, *Holy Bible*, reiterated in the New Testament at Romans 1:32, *Holy Bible*, as a crescendo at the end of an exhaustive description of men with men and women with women, calling it "uncleanness" and "vile affections," Romans 1:21-31, *Holy Bible*. The Bible refers to practicing homosexuals as dogs because of their nature, see Philippians 3:2 and Matthew 7:6, *Holy Bible*; and they are described as being "without"

(Continued on following page)

Worse still is same-sex marriage, in its destructive effect on society. The old Jewish writings report that the final offense that brought Noah's Flood was the making of marriage contracts between men. Here it is described in *A Spiritual and Ethical Compendium to the Torah and Talmud* by Rabbi Arthur Segal with Frank Dunne, Jr., 2008, at 46-48:

> [Genesis] Verse 6:11 says that the world was corrupt and filled with robbery. God was going to destroy the world for this corruption and robbery. This seems awfully harsh, especially in today's world where corruption and theft seems commonplace. Rashi (Rabbi Shlomo Yitzhaki, 1040, France) says a better translation of corruption is immorality and idol worship. The Midrash[15] says that adultery, incest and stealing were all part of man's daily schedule. Powerful men would take any

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heaven in the end, Revelation 22:15, *Holy Bible*. The Apostle Peter describes them as "natural brute beasts made to be taken and destroyed," 2 Peter 2:7-12, *Holy Bible*; and Christ describes the conditions in the last days – at the time of his Second Coming to earth in power and glory – as like the days of Lot and Noah, with men marrying "wives" (divorce/remarriage) and men being "given in marriage," Luke 17:27, *Holy Bible* (traditionally the woman is *given* in marriage). The inescapable conclusion is that the Bible condemns and prohibits homosexuality and same-sex marriage.

[15] According to JewishEncyclopedia.com, Midrash means "to study," or "to investigate," and is a term "denoting 'exposition,' 'exegesis,' especially that of the Scriptures." See Online at http://bit.ly/WlrjiK.

> women that they chose. The Midrash also says that a major sin of this generation was sexual relations purely for lascivious gratification. Talmud Tractate Sanhedrin 57A says that the world was immersed in jealousy, greed, theft, violence, lying, impatience, intolerance, deception and fraud. The worst of all the transgressions according to both Rashi and Ibn Ezra was that people exploited each other sexually. Sounds rather familiar, doesn't it? Hold on, there's more.
>
> The Midrash Vayikra Rabbah says: "Everyone and everything became amoral. Even animals became so morally corrupt and decadent that one species mated with another species – dogs with wolves, horses with donkeys, snakes with birds. ***The generation of the Flood was finally wiped away when they started writing songs extolling cohabitation of males with males and males with animals." Another Midrash says that males just didn't sodomize other males, but that they signed ketobot (marriage contracts) legalizing these relationships.*** (Emphasis added.)

Since the Generation of the Flood, all generations have known of Noah's flood. It bears attending to the details briefly here. Noah preached to his generation for 120 years. None attended to his words, and only he, his wife, his three sons, and their wives, boarded the ark. The description of the complete destruction of all mankind – a population as or bigger than today's population[16] – is starkly described in Genesis 7:11-23, *Holy Bible*:

> In the six hundredth year of Noah's life, in the second month, the seventeenth day of the month, the same day were all the fountains of the great deep broken up, and the windows of heaven were opened.
>
> And the rain was upon the earth forty days and forty nights.
>
> In the selfsame day entered Noah, and Shem, and Ham, and Japheth, the sons of Noah, and Noah's wife, and the three wives of his sons with them, into the ark;

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[16] May this suffice on the subject of the physical world before the Flood. Much more could be said. What has been said is sufficient to show that the world of Adam, Methuselah, of Enoch and Noah, was a wondrous world. A world rich in plant and animal life. A world which yielded food of every kind for man and beast without any great effort on the part of either, a world which could therefore support a population many times greater than our present population. * * * It is reasonable to assume that the population was at least equal to the population of the world today.

Alfred M. Rehwinkel, *The Flood in the Light of the Bible, Geology and Archaeology*, Concordia Publishing House, St. Louis, 8th ed., 1962, at pp. 15, 19, available Online at http://bit.ly/109Pt8h. A recent ABC special by Christiane Amanpour, "Back to the Beginning," included a segment, "Noah's Biblical Flood: New Evidence Suggests It Happened," with information about archeological finds by Robert Ballard (founder of the Titanic), in the Black Sea in Turkey that support the account in Genesis, available Online at http://abcn.ws/TYwIyr.

They, and every beast after his kind, and all the cattle after their kind, and every creeping thing that creepeth upon the earth after his kind, and every fowl after his kind, every bird of every sort.

And they went in unto Noah into the ark, two and two of all flesh, wherein is the breath of life.

And they that went in, went in male and female of all flesh, as God had commanded him: and the LORD shut him in.

And the flood was forty days upon the earth; and the waters increased, and bare up the ark, and it was lift up above the earth.

And the waters prevailed, and were increased greatly upon the earth; and the ark went upon the face of the waters.

And the waters prevailed exceedingly upon the earth; and all the high hills, that were under the whole heaven, were covered.

Fifteen cubits upward did the waters prevail; and the mountains were covered.

And all flesh died that moved upon the earth, both of fowl, and of cattle, and of beast, and of every creeping thing that creepeth upon the earth, and every man:

All in whose nostrils was the breath of life, of all that was in the dry land, died.

> ***And every living substance was destroyed which was upon the face of the ground, both man, and cattle, and the creeping things, and the fowl of the heaven; and they were destroyed from the earth: and Noah only remained alive, and they that were with him in the ark.*** (Emphasis added.)

When this Honorable Court sits in judgment on a matter, not only is the whole world watching, but God is watching. "God standeth in the congregation of the mighty; he judgeth among the gods," Psalm 82:1, *Holy Bible*. Dr. John Gill says, " . . . civil magistrates are meant, the rulers and judges of the people, who . . . are so called because they are the powers ordained of God, and representatives of him, are his vicegerents and deputies under him; should act in his name, according to his law, and for his glory, and are clothed with great power and authority from and under him."[17] Charles Spurgeon expounds: "He lends them his name, and this is their authority for acting as judges, but they must take care that they do not misuse the power entrusted to them, for the Judge of judges is in session among them."[18]

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[17] This commentary by Dr. Gill can be found Online at http://bit.ly/UubQxv.

[18] This commentary by Charles Haddon Spurgeon (1934-92), England's best-known preacher for most of the second half of the nineteenth century, pastor of London's New Park Street Church can be found Online at http://bit.ly/UZDkP9.

The standard of God for marriage is one man, one woman, for life. Christ speaking in Matthew 19:3-8, *Holy Bible*:

> The Pharisees also came unto him, tempting him, and saying unto him, Is it lawful for a man to put away his wife for every cause?
>
> And he answered and said unto them, Have ye not read, that he which made them at the beginning made them male and female,
>
> And said, For this cause shall a man leave father and mother, and shall cleave to his wife: and they twain shall be one flesh?
>
> Wherefore they are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder.
>
> They say unto him, Why did Moses then command to give a writing of divorcement, and to put her away?
>
> He saith unto them, Moses because of the hardness of your hearts suffered you to put away your wives: but from the beginning it was not so.

The Apostle Paul in his epistle to the church at Ephesus, in Ephesians 5:31-32, *Holy Bible*:

> For this cause shall a man leave his father and mother, and shall be joined unto his wife, and they two shall be one flesh.

> This is a great mystery: but I speak concerning Christ and the church.

When this nation tampers with marriage as properly defined in the Scriptures, it is tampering with the very symbol of Christ and His Bride, the Church.[19] It is a very serious matter; same-sex marriage is totally contrary to the standard of God.

The parties and *amici* will spend considerable time on the issue of whether or not the government has a legitimate interest in steering procreation into opposite-sex marriages; whether the law at issue here properly carries out such an interest; and all of the legal issues pertaining thereto. Unquestionably it is best for the health, safety and welfare to follow God's standard on marriage, and the benefits of a proper scriptural opposite-sex, one-man-one-woman-for-life marriage are enumerable, that being a lovely symbol of Christ and His Bride,[20] and being a great blessing from God.[21]

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[19] The Bible also says no divorce, and no remarriage. See, e.g., Malachi 2:16, *Holy Bible* (The Lord hates a man putting away his wife); Mark 10:11, *Holy Bible* (whosoever shall put away his wife, and marry another, committeth adultery against her); Romans 7:2 and 1 Corinthians 7:39, *Holy Bible* (the woman is bound to her husband as long as he lives). Divorce rates in America are still above 30%, http://bit.ly/Vvwj60, and a 2008 Gallup Values and Beliefs survey found that 70% of Americans believe divorce is morally acceptable, see poll results Online at http://bit.ly/VKyjHk. That is an unfortunate fact to be faced by some of the parties and *amici* in this and similar legal proceedings. Never mind. The standard of God has not changed, nor has the responsibility of government to protect the health, welfare and safety of the people – first and foremost by upholding the standards of God on critical moral issues.

But of far greater importance is the fact that the government has no greater responsibility than to protect the people from such grievous sin that the inevitable result will be the outpouring of the wrath of God on the land, being great mayhem, carnage and destruction. Nothing is better for the health, safety and welfare of the people than to obey God. When a critical moral issue becomes the centerpiece of the discussion, and is put squarely before this Honorable Court, or before any governmental body, the duty is to follow the standard of God. Not invent a multitude of sociological, pseudo-scientific, historical or any other theory or reasoning that leads to ignoring and disobeying the plain standard of God. The highest interest of government is to follow the standard of God; appeal to the people to follow the standard of God; and establish policies and laws that follow the standard of God. This nation has gone astray, letting fornication, adultery, abortion-for-convenience-on-demand, divorce, remarriage and sodomy become the norm. It may not be too late. The prophet Jonah feared it was too late for the thriving city of Nineveh, whose repentance (starting with the King) turned back God's wrath, and spared that nation for another one hundred years.[22] Homosexuality is destructive in every way, to the individual and to the nation. Government should not put its seal of approval on that unholy union by issuing a marriage license. Government's interest is in doing the opposite, for the good of the people and the nation.

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[20] E.g., "Let us be glad and rejoice, and give honour to him; for the marriage of the Lamb is come, and his wife hath made herself ready," Revelation 19:7, *Holy Bible*. "For the husband is the head of the wife, even as Christ is the head of the church: and he is the savior of the body," Ephesians 5:23, *Holy Bible*.

[21] E.g., "Marriage is honourable in all, and the bed undefiled: but whoremongers and adulterers God will judge," Hebrews 13:4, *Holy Bible*. "Whoso findeth a wife findeth a good thing, and obtaineth favour of the LORD," Proverbs 18:22, *Holy Bible*. "Who can find a virtuous woman? For her price is far above rubies," Proverbs 31:10, *Holy Bible*.

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[22] Compare the book of Jonah to the book of Nahum. Matthew Henry's commentary on Nahum 1:1, *Holy Bible*:

> About 100 years before this Jonah had, in God's name, foretold the speedy overthrow of this great city; but then the Ninevites repented and were spared, and that decree did not *bring forth*. The Ninevites then saw clearly how much it was to their advantage to turn from their evil way; it was the saving of their city; and yet, soon after, they returned to it again; it became worse than ever, *a bloody city*, and *full of lies* and *robbery*. They repented of their repentance, returned with the dog to his vomit, and at length grew worse than ever they had been. Then God sent them not this prophet, as Jonah, but this prophecy, to read them their doom, which was now irreversible. Note, The reprieve will not be continued if the repentance be not continued in. If men turn from the good they began to do, they can expect no other than that God should turn from the favour he began to show, Jer. 18:10.

This commentary by nonconformist puritan preacher and expositor Matthew Henry (1662-1714) can be found Online at http://bit.ly/XeRaMg.

This is a nation that was built on Bible principles.

> [T]his is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. * * * If we examine the constitutions of the various States we find in them a constant recognition of religious obligations. * * * There is a universal language [pervading], having one meaning: they affirm and reaffirm that this is a religious nation.

Church of the Holy Trinity v. United States, 143 U.S. 457, 465-472, 12 S. Ct. 511, 514-517, 36 L. Ed. 226, 230-232 (1892).

> It seems to me rather obvious, when we get back to the early expression of those ideas [which found expression in the Declaration of Independence and the Preamble of the Constitution] and consider the general historical situation out of which the older colonies arose, that one chief source of these ideas was the popular knowledge of the Bible in the Protestant countries of that time.[23]
>
> The Bible was nothing short of the underlying fabric upon which American society was founded. . . The rule of law began, not with the rules of man but with the rules

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[23] Henry Thatcher Fowler, "Influence of the Bible in American Democracy," *Christian Education*, Vol. 3, No. 1, October 1919, pp. 22-25.

> of God. * * * To find [social] sails and helm, [Americans] turned first to the Bible. . . . The emergent collaboration between church and state (even if these two arms remain separate while at the same time working together) has remained a fundamental axiom embedded in the nature of American policy ever since. * * * [T]he influence of biblical law continued to be felt in American jurisprudence well into the twentieth century. * * * To the extent that a modern system is derived from biblical social precepts or even unwittingly presupposes that such precepts are operational in society, the lack of any of the essential elements of that constitutive system may give rise to serious problems in the resultant system. * * * Democracy in America has succeeded because its society has possessed an underlying moral order, and historically that order has been informed largely by basic ideals supplied by the Bible. . . ."[24]

Neither this Court nor all governments in this nation are precluded from making decisions based on the standard of God. "What Baptists and other dissenters wanted, in [Philip] Hamburger's assessment, was a political voice for their own religious views, unconstrained by establishment; *neither they nor the establishment clause of the First Amendment*

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[24] John W. Welch, "Biblical Law in America: Historical Perspectives and Potentials for Reform," 2002 *Brigham Young University Law Review* 611, at 619, 630-631, 636-637, available Online at http://bit.ly/VEBX8j.

ever intended to keep Christian conviction out of American governance, as secularists today insist" (emphasis added).[25] "[T]he separation of church and state has not denied the political realm a religious dimension."[26]

> As we explained in *Lynch v. Donnelly*, 465 U.S. 668, 79 L.Ed.2d 604, 104 S.Ct. 1355 (1984): There is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789. * * * Recognition of the role of God in our Nation's heritage has also been reflected in our decisions.

Van Orden v. Perry, 545 U.S. 677, 686, 687, 125 S. Ct. 2854, 2861, 162 L. Ed. 2d 607, 616, 617 (2005).

> "[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach v. Clauson*, 343 U.S. 306, 313-314, 96 L.Ed. 954, 72 S.Ct. 679 (1952).

Id., 545 U.S. at 684, 125 S. Ct. at 2859, 162 L. Ed. 2d at 615.

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[25] Tracy Fessenden, "The Nineteenth-Century Bible Wars and the Separation of Church and State," *Church History*, Vol. 74, No. 4 (Dec. 2005), pp. 784-811, at 809, available Online at http://bit.ly/UBefrF.

[26] Robert N. Bellah, "Biblical Religion and Civil Religion in America," *Journal of the American Academy of Arts and Sciences*, Winter, 1967, Vol. 96, No. 1, pp. 1-21, Online at http://bit.ly/13cLjuc.

Separation of church and state has become a battle cry for enabling sin. That was never the intention of the forefathers, but rather they intended to let each member of the new union serve God according to his or her conscience, not according to the dictates of an official state church.[27]

> The principle of church-state separation – from the time of Becket, to Blackstone, to Benjamin Franklin, to today – has long meant, among other things, that religious communities and institutions enjoy meaningful autonomy and independence with respect to their governance, teachings, and doctrines. This independence, recognized and vindicated in a long line and wide array of decisions by the Supreme Court, is entirely consistent with the appropriate powers of civil authorities.[28]

> [27] [B]ut it was reserved for the people and governments of this last settled among the lands to announce the religious equality of all men and all creeds before the law, without preference and without distinction or disqualification. Here, among all the benefits to mankind to which this soil has given rise, this pure religious liberty may be justly rated as the great gift of America to civilization and the world, having among principles of governmental policy no equal for moral insight, and for recognition both of the dignity of the human soul and the spiritual majesty of the Church of God.

Sanford Hoadley Cobb, *The Rise of Religious Liberty in America*, p. 2, available Online at http://bit.ly/UCAUaP.

[28] Berg, Colby, Esbeck & Garnett, "Religious Freedom, Church-State Separation, and the Ministerial Exception," 106

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The fact that issues of doctrine and church governance are beyond the jurisdiction of civil government is not the equivalent of civil government abrogating its duty to protect the health, safety and welfare of the people by promulgating laws and policies consistent with the standards of God and the dictates of Holy Scripture.

No form of government will ever survive if it rejects and casts away as rubbish the standards of God. On no issue is this more apparent than the issue of same-sex marriage. Many laws in this nation are based on Bible standards. This Court should not hold that the government is prohibited from setting a proper moral standard in the matter of marriage, any more than it should so hold regarding murder. The fact that polls reflect over half the nation favors same-sex marriage changes nothing. Indeed it *underscores* the need to legislate against such devastating immoral behavior. The Court would eagerly uphold a law that protected the majority from a propensity to abuse mind-altering drugs, in spite of their preference to use such drugs, clearly seeing that such is in favor of the health, safety and welfare of the people. The damage done to the minds, bodies and social welfare of this nation by drugs is *nothing* compared to the damage same-sex marriage will do to this nation and its people.

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Nw. U. L. Rev. Colloquy 175 (2011), available Online at http://bit.ly/XF4X2C.

CONCLUSION

"If the United States wants to continue as a superpower, it should heed the words of the Bible."[29] If there had been ten righteous souls, who would have feared and obeyed God, in Sodom, that city (and four neighboring ones) would have been spared.[30] When the prophet Jonah appeared on the streets of ancient Nineveh – then the largest city in the world[31] – saying, "Yet forty days, and Nineveh shall be overthrown,"[32] the King of Nineveh declared a fast, and told the people to "cry mightily unto God, yeah, let them turn every one from his evil way, and from the violence that is in their hands. Who can tell if God will turn and repent, and turn away from his fierce anger, that we perish not?"[33] That is not to suppose that everyone in the land agreed; but the King set a national policy of obedience to God.[34] And God spared

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[29] Hershey H. Friedman, Ph.D., and James Lynch, J.D., "Preventing the Decline and Fall of America: Messages from the Bible," *Journal of Business Systems, Governance and Ethics*, Vol. 7, No. 1 (August 2012), at 1, available Online at http:// bit.ly/13a4c1G.

[30] Genesis 18:32, *Holy Bible*.

[31] You can read of the grandeur of Nineveh, and its sudden and complete destruction, in these encyclopedic articles Online at http://bit.ly/Sg9lDw and at http://bit.ly/Zhr6zu. Also see Online at http://bit.ly/VGgDPN for a list of the largest cities through history.

[32] Jonah 3:4, *Holy Bible*.

[33] Jonah 3:6-9, *Holy Bible*.

[34] On March 30, 1863, facing the awful destruction of the Civil War on the country, President Abraham Lincoln signed

(Continued on following page)

Nineveh. "And God saw their works, that they turned from their evil way; and God repented of the evil, that

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Proclamation 97 – Appointing a Day of National Humiliation, Fasting, and Prayer.

> Whereas it is the duty of nations as well as of men to own their dependence upon the overruling power of God, to confess their sins and transgressions in humble sorrow, yet with assured hope that genuine repentance will lead to mercy and pardon, and to recognize the sublime truth, announced in the Holy Scriptures and proven by all history, that those nations only are blessed whose God is the Lord. * * * It behooves us, then, to humble ourselves before the offended Power, to confess our national sins, and to pray for clemency and forgiveness.
>
> . . . We have been the recipients of the choicest bounties of Heaven; we have been preserved these many years in peace and prosperity; we have grown in numbers, wealth, and power as no other nation has ever grown. But we have forgotten God. . . .
>
> . . [I] do hereby request all the people to abstain on [the 30th day of April, 1863] from their ordinary secular pursuits, and to unite at their several places of public worship and their respective homes in keeping the day holy to the Lord and devoted to the humble discharge of the religious duties proper to that solemn occasion.
>
> . . [Let] us then rest humbly in the hope . . . that the united cry of the nation will be heard on high and answered with blessings no less than the pardon of our national sins and the restoration of our now divided and suffering country. .

This Proclamation can be found in full Online at http://bit.ly/13BvVbU.

he had said that he would do unto them; and he did it not."[35]

Same-sex marriage will destroy this nation. If the leaders of this country treat what God has called abominable as something to be respected, revered, and blessed with the seal of approval of the government, that will cross a final line with God. The harm that will befall this nation, when the condign destructive wrath of God pours out on a nation that purposefully, in a calculating manner, institutionalizes marriage licenses for same-sex unions, is the ultimate harm to the health, welfare and safety of the people. The government is duty bound – in this Christian nation – to institute the standard of God on marriage, and pass and uphold laws that forbid same-sex marriage.

"Behold, I set before you this day a blessing and a curse; A blessing, if ye obey the commandments of the LORD your God, which I command you this day: And a curse, if ye will not obey the commandments of the LORD your God."[36] What interest could be more compelling for the government than to seek the blessings of God on this nation, by obeying His commandments and following His standards?

> Blessed is the nation whose God is the LORD; and the people whom he hath chosen for his own inheritance.

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[35] Jonah 3:10, *Holy Bible*.

[36] Deuteronomy 11:26-28, *Holy Bible*.

> The LORD looketh from heaven; he beholdeth all the sons of men.
>
> From the place of his habitation he looketh upon all the inhabitants of the earth.
>
> He fashioneth their hearts alike; he considereth all their works.[37]

We respectfully request that this Court find that the government has a compelling interest in fashioning laws by any means that prohibit same-sex marriage, and reverse.

Respectfully submitted,

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[37] Psalm 33:12-15, *Holy Bible*.